**Registration Statement No. 333-**

## UNITED STATES SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549

## FORM S-4

## **REGISTRATION STATEMENT**

UNDER

**THE SECURITIES ACT OF 1933** 

## Dave & Buster's, Inc.

(Exact name of registrant as specified in its charter)

(State or other jurisdiction of incorporation or organization)

Missouri

5812 (Primary Standard Industrial Classification Code Number) 2481 Mañana Drive Dallas, Texas 75220 (214) 357-9588

43-1532756 (I.R.S. Employer Identification No.)

Accelerated filer

Smaller reporting company

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices) \*For additional registrants, please see "Table of Additional Registrants" on the following page.

Jay L. Tobin Senior Vice President and General Counsel Dave & Buster's, Inc. 2481 Mañana Drive Dallas, Texas 75220 (214) 357-9588

(Name, address, including zip code, and telephone number, including area code, of agent for service)

Copies of all communications to: Bruce H. Hallett Hallett & Perrin 2001 Bryan Street, Suite 3900 Dallas, Texas 75201 (214) 922-4120

Approximate date of commencement of proposed sale to the public: As soon as practicable after this registration statement becomes effective.

If the securities being registered on this form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box. If this form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.  $\hfill\square$ 

If this form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

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.

Large accelerated filer

Non-accelerated filer (Do not check if smaller reporting company)

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Cross-Border Issue Tender Offer)

Exchange Act Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)

CALCULATION OF REGISTRATION FEE

Title Of Each Class Of Securities To Be Registered	Amount To Be Registered	Proposed Maximum Offering Price Per Unit	Proposed Maximum Aggregate Offering Price(1)	Amount Of Registration Fee
11% Senior Notes due 2018	\$200,000,000	100%	\$200,000,000	\$14,260(1)
Guarantees of 11% Senior Notes due 2018	\$200,000,000	(2)	(2)	None

(1)Estimated solely for the purpose of calculating the registration fee in accordance with Rule 457(f) promulgated under the Securities Act of 1933, as amended.

Pursuant to Rule 457(n) under the Securities Act of 1933, as amended, no separate consideration will be received for the guarantees. (2)

The Registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the Registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until this registration statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to Section 8(a), may determine.

The following subsidiaries of Dave & Buster's, Inc. are guarantors of \$200,000,000 aggregate principal amount of 11% Senior Notes due 2018 and are additional registrants:

## TABLE OF ADDITIONAL REGISTRANTS\*

Name	State or other jurisdiction of incorporation or organization	Primary Standard Industrial Classifications Code Number	I.R.S. Employer Identification Number
D&B Leasing, Inc.	Texas	5812	75-2955199
D&B Marketing Company, LLC	Virginia	5812	36-4633593
D&B Realty Holding, Inc.	Missouri	5812	43-1532957
DANB Texas, Inc.	Texas	5812	75-2617801
Dave & Buster's I, L.P.	Texas	5812	75-2680048
Dave & Buster's Management Corporation, Inc.	Delaware	5812	20-1574573
Dave & Buster's of California, Inc.	California	5812	33-0733010
Dave & Buster's of Colorado, Inc.	Colorado	5812	84-1420593
Dave & Buster's of Florida, Inc.	Florida	5812	58-2223494
Dave & Buster's of Georgia, Inc.	Georgia	5812	58-1979705
Dave & Buster's of Hawaii, Inc.	Hawaii	5812	75-2915058
Dave & Buster's of Indiana, Inc.	Indiana	5812	26-4313913
Dave & Buster's of Illinois, Inc.	Illinois	5812	43-1693115
Dave & Buster's of Kansas, Inc.	Kansas	5812	20-2089073
Dave & Buster's of Maryland, Inc.	Maryland	5812	52-1962723
Dave & Buster's of Massachusetts, Inc.	Massachusetts	5812	27-1248194
Dave & Buster's of Nebraska, Inc.	Nebraska	5812	20-2089036
Dave & Buster's of New York, Inc.	New York	5812	13-3959054
Dave & Buster's of Oklahoma, Inc.	Oklahoma	5812	26-3194123
Dave & Buster's of Oregon, Inc.	Oregon	5812	27-2570886
Dave & Buster's of Pennsylvania, Inc.	Pennsylvania	5812	36-3919848
Dave & Buster's of Pittsburgh, Inc.	Pennsylvania	5812	74-2932642
Dave & Buster's of Virginia, Inc.	Virginia	5812	26-3839036
Dave & Buster's of Washington, Inc.	Washington	5812	27-2874047
Dave & Buster's of Wisconsin, Inc.	Wisconsin	5812	26-3807832
Sugarloaf Gwinnett Entertainment Company, L.P.	Delaware	5812	61-1397960
Tango Acquisition, Inc.	Delaware	5812	20-1220294
Tango License Corporation	Delaware	5812	20-1657537
Tango of Arizona, Inc.	Delaware	5812	20-1209982
Tango of Arundel, Inc.	Delaware	5812	20-1574690
Tango of Farmingdale, Inc.	Delaware	5812	20-1574594
Tango of Franklin, Inc.	Delaware	5812	20-1574645
Tango of Houston, Inc.	Delaware	5812	20-1574628
Tango of North Carolina, Inc.	Delaware	5812	20-1209953
Tango of Sugarloaf, Inc.	Delaware	5812	20-1657553
Tango of Tennessee, Inc.	Delaware	5812	20-1209923
Tango of Westbury, Inc.	Delaware	5812	20-1574610

\* The address, including zip code, and telephone number, including area code, of each of the above registrants' principal executive offices are the same as those of Dave & Buster's, Inc.

The information in this prospectus is not complete and may be changed. These securities may not be sold until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities, and it is not soliciting an offer to buy, these securities in any state where the offer or sale is not permitted.

Subject to Completion, Dated August 11, 2010

PROSPECTUS



## Dave & Buster's, Inc.

### Offer to Exchange

\$200,000,000 aggregate principal amount of its 11% Senior Notes due 2018, which have been registered under the Securities Act of 1933 (the "Exchange Notes"), for any and all of its outstanding unregistered 11% Senior Notes due 2018 that were issued in a private offering on June 1, 2010 (the "Restricted Notes").

We are conducting the exchange offer in order to provide you with an opportunity to exchange your unregistered notes for freely tradable notes that have been registered under the Securities Act.

Terms of the Exchange Offer:

- The exchange offer expires at 11:59 p.m., New York City time, on , 2010, unless extended. We do not currently intend to extend the expiration date.
- We will exchange all Restricted Notes that are validly tendered and not withdrawn before the expiration of the Exchange Offer.
- · You may withdraw tenders of Restricted Notes at any time before the expiration of the Exchange Offer.
- The exchange of Restricted Notes should not be a taxable event for U.S. federal income tax purposes.
- We will not receive any proceeds from the Exchange Offer.
- The terms of the Exchange Notes are substantially identical to the Restricted Notes, except that the Exchange Notes are registered under the Securities Act of 1933, as amended, and the transfer restrictions and registration rights applicable to the Restricted Notes do not apply to the Exchange Notes.
- Each of our existing and future restricted subsidiaries that guarantees any of our credit facilities (the "Guarantors") will unconditionally guarantee the Exchange Notes. If we do not make payments on the Exchange Notes, the Guarantors must make them instead.
- We do not intend to list the Exchange Notes on any securities exchange or to have them approved for quotation through any automated quotation system.

## Investment in these securities involves risk. See "Risk Factors" beginning on page 15

Neither the Securities and Exchange Commission nor any state securities commission nor any other regulatory body has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The date of this prospectus is , 2010.

This prospectus, the letter of transmittal and the notice of guaranteed delivery are first being mailed to all holders of the original notes on ,2010.

NO DEALER, SALESPERSON OR OTHER PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATIONS OTHER THAN THOSE CONTAINED OR INCORPORATED BY REFERENCE IN THIS PROSPECTUS IN CONNECTION WITH THE OFFER CONTAINED IN THIS PROSPECTUS AND, IF GIVEN OR MADE, SUCH INFORMATION OR REPRESENTATIONS MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY DAVE & BUSTER'S, INC. NEITHER THE DELIVERY OF THIS PROSPECTUS NOR ANY SALE MADE HEREUNDER SHALL CREATE UNDER ANY CIRCUMSTANCES AN IMPLICATION THAT THERE HAS BEEN NO CHANGE IN THE AFFAIRS OF DAVE & BUSTER'S, INC. AND ITS SUBSIDIARIES SINCE THE DATE HEREOF. THIS PROSPECTUS DOES NOT CONSTITUTE AN OFFER TO SELL OR A SOLICITATION OF AN OFFER TO BUY SECURITIES OTHER THAN THOSE SPECIFICALLY OFFERED HEREBY OR AN OFFER TO SELL ANY SECURITIES OFFERED HEREBY IN ANY JURISDICTION WHERE, OR TO ANY PERSON WHOM, IT IS UNLAWFUL TO MAKE SUCH OFFER OR SOLICITATION. THE INFORMATION CONTAINED IN THIS PROSPECTUS SPEAKS ONLY AS OF THE DATE OF THIS PROSPECTUS UNLESS THE INFORMATION SPECIFICALLY INDICATES THAT ANOTHER DATE APPLIES.

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### CAUTIONARY STATEMENT REGARDING FORWARD-LOOKING STATEMENTS

This prospectus includes and incorporates by reference statements that are, or may deemed to be, "forward-looking statements" within the meaning of Section 27A of the Securities Act and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). These forward-looking statements can be identified by the use of forward looking terminology, including the terms "believes," "estimates," "anticipates," "expects," "intends," "may," "will" or "should" or, in each case, their negative or other variations or comparable terminology. These forward-looking statements include all matters that are not historical facts. They appear in a number of places throughout this prospectus and in documents incorporated herein by reference and include statements regarding our intentions, beliefs or current expectations concerning, among other things, our results of operations, financial condition, liquidity, prospects, growth, strategies and the industry in which we operate.

By their nature, forward-looking statements involve risks and uncertainties because they relate to events and depend on circumstances that may or may not occur in the future. We caution you that forward-looking statements are not guarantees of future performance and that our actual results of operations, financial condition and liquidity, and the development of the industry in which we operate may differ materially from those made in or suggested by the forward-looking statements contained in this prospectus or in the documents incorporated herein by reference. In addition, even if our results of operations, financial condition and liquidity, and the development of the industry in which we operate are consistent with the forward-looking statements contained in this prospectus or in the documents incorporated herein by reference, those results or developments may not be indicative of results or developments in subsequent periods. As a result we caution you against relying on any forward-looking statement.

The following listing represents some, but not necessarily all, of the factors that may cause actual results to differ from those anticipated or predicted:

- the impact of the global economic crisis on our business and financial results;
- our ability to open new stores and operate them profitably;
- · changes in consumer preferences, general economic conditions or consumer discretionary spending;
- the effect of competition in our industry;
- potential fluctuations in our quarterly operating results due to seasonality and other factors;
- the impact of potential fluctuations in the availability and cost of food and other supplies;
- the impact of instances of food-borne illness and outbreaks of disease;
- the impact of federal, state or local government regulations relating to our personnel or the sale of food or alcoholic beverages;
- legislative or regulatory changes;
- the continued service of key management personnel;
- our ability to attract, motivate and retain qualified personnel;
- the impact of litigation;
- changes in accounting principles, policies or guidelines;
- changes in general economic conditions or conditions in securities markets or the banking industry;
- a materially adverse change in the financial condition of Dave & Buster's;
- · adverse local conditions, events, terrorist attacks, weather and natural disasters; and
- other economic, competitive, governmental, regulatory, geopolitical and technological factors affecting operations, pricing and services.

You should also read carefully the factors described in the "Risk factors" section of this prospectus to better understand the risks and uncertainties inherent in our business and underlying any forward-looking statements.

Any forward-looking statements which we make in this prospectus speak only as of the date of such statements, and we undertake no obligation to update such statements. Comparisons of results for current and any prior periods are not intended to express any future trends or indications of future performance, unless expressed as such, and should only be viewed as historical data.

#### NON-GAAP FINANCIAL MEASURES

The Securities and Exchange Commission ("SEC") has adopted rules to regulate the use in filings with the SEC and in public disclosures of "non-GAAP financial measures," such as net income (loss) before interest expense (net), provision (benefit) for income taxes and depreciation and amortization expense ("EBITDA"), Adjusted EBITDA and the ratios related thereto. These measures are derived on the basis of methodologies other than in accordance with Generally Accepted Accounting Principles ("GAAP"). These rules govern the manner in which non-GAAP financial measures are publicly presented and prohibit in all filings with the SEC, among other things:

- exclusion of charges or liabilities that require, or will require, cash settlement or would have required cash settlement, absent an ability to settle in another manner, from a non-GAAP liquidity measure; and
- adjustment of a non-GAAP financial measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it has occurred in the past two years or is reasonably likely to recur within the next two years.

The non-GAAP financial measures we have included in this prospectus, EBITDA and Adjusted EBITDA do not comply with the SEC rules governing the presentation of non-GAAP financial measures. In addition, some of the adjustments to EBITDA which comprise Adjusted EBITDA, as presented in this prospectus, would not be allowed under Regulation S-X under the Securities Act. See "Summary—Summary historical and pro forma financial and other data" for a description of the calculation of EBITDA and Adjusted EBITDA. Our measurements of EBITDA and Adjusted EBITDA may not be comparable to those of other companies that use similarly titled measures. For a presentation of income before cumulative effect of a change in accounting principle as calculated under GAAP and a reconciliation to our EBITDA and Adjusted EBITDA, see "Summary—Summary historical and pro forma financial and other data" and "Selected historical consolidated financial and other data" in this prospectus.

## PRESENTATION OF STORE LEVEL AND CUSTOMER INFORMATION

This prospectus contains information regarding our store-level performance, on a per store basis and average store revenues. Except where the context otherwise indicates, this information is presented using results for stores that have been opened for at least one year and excludes information for our one franchised store located in Canada.

Comparable store sales data represents a period-over-period comparison of stores open at least 18 months as of the beginning of each of the relevant fiscal periods. See "Management's discussion and analysis of financial condition and results of operations."

This prospectus also contains information regarding guest feedback, guest satisfaction, guest demographics and other similar items. This information is based upon data collected by us during the periods presented. This

information is reported voluntarily by our guests and thus represents responses from only a portion of the total number of our guests. We have not independently verified any of the demographic information collected from our customers. Over the periods presented, we have also made changes to the questionnaires used to collect this information from customers and to the way in which we encourage customers to respond to them. We use the information collected as one measure of the performance of our stores and use it to assess the success of our initiatives to improve the quality of the product we offer.

## SUMMARY

The following summary highlights information contained elsewhere in this prospectus but does not contain all the information that may be important to you. Before making an investment decision, you should read this entire prospectus, including our consolidated financial statements and the related notes included elsewhere herein. You should also carefully consider the information set forth under "Risk factors." In addition, certain statements include forward-looking information that is subject to risks and uncertainties. See "Cautionary statement regarding forward-looking statements."

## **Company overview**

We are the leading owner and operator of high-volume venues that combine dining and entertainment in North America. We offer our customers a unique opportunity to "*Eat Drink Play*®" all in one location, through a full menu of high-quality food and beverage items combined with an extensive assortment of entertainment attractions, including state-of-the-art video games, interactive simulators and other games of skill. We developed this concept in 1982, and remain the only company offering this customer experience under a single brand and on a national basis. We believe we appeal to a diverse customer base by providing a highly customizable experience in a dynamic and fun setting.

As of August 2, 2010, we owned and operated 57 stores in 24 states and Canada. In addition, there is one franchised store operating in Canada. Our stores range in size between 16,000 and 66,000 square feet, are open seven days a week and our average revenues per store were \$9.8 million in fiscal 2009.

When our founders opened our first location in Dallas in 1982, they sought to create a unique venue providing interactive entertainment options for adults and families, while serving high-quality food and beverages. Since then we have followed the same principle for each new store, and in doing so have developed a distinctive brand based on a differentiated customer value proposition: *Eat Drink Play®*. The interplay between entertainment, dining and full-service bar areas is the defining feature of the Dave & Buster's customer experience, and the layout of each store is designed to maximize crossover between these activities. We believe this creates an experience that cannot be replicated at home or elsewhere without having to visit multiple destinations. Our guests enjoy the flexibility to tailor each visit into a highly customized experience, which we believe further differentiates our brand. Our locations are also designed to be attractive venues for private parties, business functions and other corporate sponsored events.

#### The transactions

On June 1, 2010, Games Acquisition Corp. ("Holdings"), a newly-formed Delaware corporation owned by Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management Partners III, L.P. (collectively, "Oak Hill") acquired all of the outstanding capital stock (the "Acquisition") of Dave & Buster's Holdings, Inc. ("D&B Holdings") from Wellspring Capital Partners III, L.P. ("Wellspring") and HBK Main Street Investors L.P. ("HBK" and, together with Wellspring, the "Sellers"). In connection therewith, Games Merger Corp., a newly-formed Missouri corporation and an indirect wholly-owned subsidiary of Holdings, merged (the "Merger") with and into D&B Holdings' wholly-owned, direct subsidiary, Dave & Buster's, Inc. (with Dave & Buster's, Inc. being the surviving corporation in the Merger). As a result of the Acquisition, Oak Hill indirectly controls approximately 96% and certain members of our Board of Directors and management control approximately 4% of the outstanding capital stock of Holdings. Subsequent to the transactions described above, Holdings changed its name to Dave & Buster's Parent, Inc.

On the closing date of the Acquisition, the following events occurred:

• All outstanding shares of D&B Holdings' common stock, other than shares held by Holdings, were converted into the right to receive the per share acquisition consideration;

- All vested options to acquire D&B Holdings' common stock were converted into the right to receive an amount in cash equal to the difference between the per share exercise price and the per share acquisition consideration without interest;
- · We retired all outstanding debt and accrued interest related to our existing senior credit facility and senior notes;
- We issued \$200,000,000 of the Restricted Notes;
- We entered into a senior secured credit facility which provides for senior secured financing of up to \$200,000,000 consisting of:
  - a \$150,000,000 term loan facility with a maturity on June 1, 2016, and
  - a \$50,000,000 revolving credit facility, including a sub-facility of up to the U.S. dollar equivalent of \$1,000,000 for borrowings in Canadian dollars by our Canadian subsidiary, a letter of credit sub-facility, and a swingline sub-facility, with a maturity on June 1, 2015.

We refer to these events, together with the Merger, in this prospectus as the "Transactions."

### **Oak Hill Capital Partners**

Oak Hill Capital Partners is a private equity firm with more than \$8.4 billion of committed capital from leading entrepreneurs, endowments, foundations, corporations, pension funds and global financial institutions. Over a period of more than 24 years, the professionals at Oak Hill Capital Partners and its predecessors have invested in more than 60 significant private equity transactions. Oak Hill Capital Partners' equity investment in Dave & Buster's will be made primarily out of its current fund, Oak Hill Capital Partners III, L.P., a partnership with \$3.8 billion of committed capital that had its final close in February 2009. Oak Hill Capital Partners invests across the broad segments of the U.S. and global economies with an industry-focused, theme-based approach. Oak Hill Capital Partners is one of several Oak Hill partnerships, each of which has a dedicated and independent management team. These Oak Hill partnerships comprise over \$30 billion of investment capital across multiple asset classes.

## Summary description of the exchange offer

On June 1, 2010, we completed the private offering of \$200,000,000 aggregate principal amount of the Restricted Notes. As part of that offering, we entered into a registration rights agreement with the initial purchasers of those Restricted Notes in which we agreed, among other things, to offer to exchange up to \$200,000,000 aggregate principal amount of Exchange Notes for a like principal amount of Restricted Notes. We sometimes refer to the Restricted Notes and Exchange Notes collectively in this prospectus as the "Notes." Below is a summary of the exchange offer:

Restricted Notes

**Exchange** Notes

\$200,000,000 aggregate principal amount of 11% Senior Notes due 2018 issued on June 1, 2010.

\$200,000,000 aggregate principal amount of 11% Senior Notes due 2018, the issuance of which has been registered under the Securities Act of 1933, as amended (the "Securities Act"). The form and terms of the Exchange Notes are identical in all material respects to those of the Restricted Notes, except that the transfer restrictions, registration rights and additional interest provisions relating to the Restricted Notes do not apply to the Exchange Notes.

Exchange offer	We are offering to issue up to \$200,000,000 principal amount of the Exchange Notes, in exchange for a like principal amount of the Restricted Notes, to satisfy our obligations under the registration rights agreement that we entered into when the Restricted Notes were issued in reliance upon the exemptions from registration provided by Rule 144A and Regulation S of the Securities Act.
Expiration date; tenders	The exchange offer will expire at 5:00 p.m., New York City time, on , 2010, unless the exchange offer is extended in our sole and absolute discretion. By tendering your Restricted Notes in the exchange offer, you represent to us that:
	• you are not our "affiliate," as defined in Rule 405 under the Securities Act;
	<ul> <li>you are not engaged in, and do not intend to engage in, and have no arrangement or understanding with any person to participate in, a distribution of the Exchange Notes;</li> </ul>
	• you are acquiring the Exchange Notes in your ordinary course of business; and
	• if you are a broker-dealer, you will receive the Exchange Notes for your own account in exchange for Restricted Notes that were acquired by you as a result of your market-making or other trading activities and you will deliver a prospectus in connection with any resale of the Exchange Notes you receive. For further information regarding resales of the Exchange Notes by participating broker-dealers, see the discussion under the caption "Plan of distribution."
Withdrawal	You may withdraw any Restricted Notes tendered in the exchange offer at any time prior to 5:00 p.m., New York City time on the applicable expiration date.
Conditions to the exchange offer	The exchange offer is subject to customary conditions, which we may waive. See the discussion below under the caption "The exchange offer—Conditions to the exchange offer" for more information regarding the conditions to the exchange offer.
Procedures for tendering the Restricted Notes	Except as set forth below, a holder of Restricted Notes who wishes to tender notes for exchange must, on or prior to the expiration date of the exchange offer:
	• transmit a properly completed and duly executed letter of transmittal, including all other documents required by the letter of transmittal, to the exchange agent, or
	• if notes are tendered pursuant to the book-entry procedures set forth below, the tendering holder must transmit an agent's message to the exchange agent.

	In addition, either:
	• the exchange agent must receive the certificates for the Restricted Notes and the letter of transmittal;
	• the exchange agent must receive, prior to the expiration date, a timely confirmation of the book-entry transfer of the notes being tendered into the exchange agent's account at The Depository Trust Company ("DTC"), along with the letter of transmittal or an agent's message; or
	• the holder must comply with the guaranteed delivery procedures described in the letter of transmittal.
Special procedures for beneficial owners	If you are a beneficial owner whose Restricted Notes are registered in the name of a broker, dealer, commercial bank, trust company or other nominee, and you wish to tender your Restricted Notes in the exchange offer, you should promptly contact the person in whose name the Restricted Notes are registered and instruct that person to tender on your behalf. Any registered holder that is a participant in DTC's book-entry transfer facility system may make book-entry delivery of the Restricted Notes by causing DTC to transfer the Restricted Notes into the exchange agent's account.
Material federal income tax considerations	The exchange of the Restricted Notes for Exchange Notes in the exchange offer will not be a taxable transaction for United States federal income tax purposes. See the discussion under the caption "Certain United States federal income tax considerations" for more information regarding the tax consequences to you of the exchange offer.
Use of proceeds	We will not receive any proceeds from the exchange offer.
Exchange agent	Wells Fargo Bank, National Association is the exchange agent for the exchange offer. You can find the address and telephone number of the exchange agent below under the caption "The exchange offer—Exchange agent."
Resales	Based on interpretations of the Securities Act by the staff of the SEC, as detailed in a series of no-action letters issued to third parties, we believe that the Exchange Notes issued in the exchange offer may be offered for resale, resold or otherwise transferred by you without compliance with the registration and prospectus delivery requirements of the Securities Act as long as:
	• you are acquiring the Exchange Notes in the ordinary course of your business;
	• you are not participating, do not intend to participate and have no arrangement or understanding with any person to participate, in a distribution of the Exchange Notes; and

• you are not an affiliate of ours.
If you are an affiliate of ours, or are engaged in or intend to engage in, or have any arrangement or understanding with any person to participate in, the distribution of the Exchange Notes:
• you cannot rely on the applicable interpretations of the staff of the SEC;
• you will not be entitled to participate in the exchange offer; and
• you must comply with the registration and prospectus delivery requirements of the Securities Act in connection with any resale transaction.
See the discussion below under the caption "The exchange offer—Consequences of exchanging or failing to exchange Restricted Notes" for more information.
Each broker or dealer that receives Exchange Notes for its own account in exchange for Restricted Notes that were acquired as a result of market-making or other trading activities must acknowledge that it will comply with the registration and prospectus delivery requirements of the Securities Act in connection with any offer to resell or other transfer of the Exchange Notes issued in the exchange offer, including the delivery of a prospectus that contains information with respect to any selling holder required by the Securities Act in connection with any resale of the Exchange Notes.
This prospectus, as it may be amended or supplemented from time to time, may be used by a broker-dealer in connection with resales of Exchange Notes received in exchange for Restricted Notes which were received by such broker-dealer as a result of market making activities or other trading activities. See "Plan of distribution" for more information.
When we issued the Restricted Notes on June 1, 2010, we entered into a registration rights agreement with the initial purchasers of the Restricted Notes. Under the terms of the registration rights agreement, we agreed to file with the SEC, and cause to become effective, a registration statement relating to an exchange of the Restricted Notes for the Exchange Notes.
We also agreed to file a shelf registration statement under certain circumstances. If we fail to satisfy these obligations, we have agreed to pay additional interest to the holders of the Restricted Notes under certain circumstances. See "Description of the Exchange Notes" and "Registration rights."

### **Consequences of not exchanging Restricted Notes**

If you do not exchange your Restricted Notes in the exchange offer, your Restricted Notes will continue to be subject to the restrictions on transfer currently applicable to the Restricted Notes. In general, you may offer or sell your Restricted Notes only:

- if they are registered under the Securities Act and applicable state securities laws;
- if they are offered or sold under an exemption from registration under the Securities Act and applicable state securities laws; or
- if they are offered or sold in a transaction not subject to the Securities Act and applicable state securities laws.

We do not currently intend to register the Restricted Notes under the Securities Act. Under some circumstances, however, holders of the Restricted Notes, including holders who are not permitted to participate in the exchange offer or who may not freely resell Exchange Notes received in the exchange offer, may require us to file, and to cause to become effective, a shelf registration statement covering resales of Restricted Notes by these holders. For more information regarding the consequences of not tendering your Restricted Notes and our obligation to file a shelf registration statement, see "The exchange offer—Consequences of exchanging or failing to exchange Restricted Notes" and "Description of the Exchange Notes—exchange offer, registration rights."

## Summary description of the Exchange Notes

The following summary contains basic information about the Exchange Notes and is not intended to be complete. For a more complete understanding of the Exchange Notes, please refer to the section entitled "Description of the Exchange Notes" in this prospectus.

Issuer	Dave & Buster's, Inc.
Securities	\$200,000,000 aggregate principal amount of 11% Senior Notes due 2018.
Maturity	June 1, 2018.
Interest payment dates	June 1 and December 1, commencing December 1, 2010.
Optional redemption	The Notes will be redeemable at our option, in whole or in part, at any time on or after June 1, 2014, at the redemption prices set forth in this prospectus, together with accrued and unpaid interest, if any, to the date of redemption.
	At any time prior to June 1, 2013, we may redeem up to 40% of the original principal amount of the Notes with the proceeds of one or more equity offerings at a redemption price of 111% of the principal amount of the Notes, together with accrued and unpaid interest, if any, to the date of redemption.
	At any time prior to June 1, 2014, we may also redeem some or all of the Notes at a price equal to 100% of the principal amount of the Notes plus accrued and unpaid interest, plus a make-whole premium.

Mandatory offers to purchase	The occurrence of a change of control will be a triggering event requiring us to offer to purchase from you all or a portion of your Notes at a price equal to 101% of their principal amount, together with accrued and unpaid interest, if any, to the date of purchase.
	Certain asset dispositions will be triggering events which may require us to use the proceeds from those asset dispositions to make an offer to purchase the Notes at 100% of their principal amount, together with accrued and unpaid interest, if any, to the date of purchase, if such proceeds are not otherwise used within the time periods specified herein to, among other things, repay indebtedness of our company or any Restricted Subsidiary, as defined in the section entitled "Description of the Exchange Notes" in this prospectus (other than disqualified stock or any subordinated obligations of our company or any guarantor), to repay indebtedness under our senior secured credit facility (with a corresponding reduction in commitment) or to invest in additional assets related to our business.
Guarantees	The Notes are guaranteed on a senior basis by all our domestic subsidiaries. The Notes are also guaranteed on a senior basis by all of our future restricted subsidiaries, other than our foreign subsidiaries. The guarantees are unsecured senior indebtedness of our subsidiary guarantors and have the same ranking with respect to indebtedness of our subsidiary guarantors as the Notes have with respect to our indebtedness.
Ranking	The Notes:
	• are our general unsecured, unsubordinated obligations;
	• rank equally in right of payment with all future senior debt;
	<ul> <li>are effectively subordinated to our obligations under our existing and future secured indebtedness, including the senior secured credit facility, to the extent of the collateral securing such indebtedness;</li> </ul>
	<ul> <li>are senior in right of payment to all our existing and future indebtedness that is expressly subordinated in right of payment to the Notes; and</li> </ul>
	• are structurally subordinated to all the existing and future liabilities of our subsidiaries that are not guarantors.
	Since the Notes are unsecured, in the event of bankruptcy, liquidation, reorganization or other winding up of our company or the guarantors or upon a default in payment with respect to, or the acceleration of, any indebtedness under the senior secured credit facility or other senior secured indebtedness, the assets of our company and the guarantors that secure other senior secured indebtedness will be available to pay obligations on the Notes and the guarantees only after all indebtedness under such other secured indebtedness has been repaid in full from such assets.
Covenants	We issued the Notes under an indenture with Wells Fargo Bank, National Association, as trustee. The indenture, among other things,

limits our ability and the ability of our restricted subsidiaries (as defined under the heading "Description of the Exchange Notes") to:

- incur, assume or guarantee additional indebtedness;
- · issue redeemable stock and preferred stock;
- repurchase capital stock;
- make other restricted payments, including without limitation, paying dividends and making investments;
- create liens;
- redeem debt that is junior in right of payment to the Notes;
- sell or otherwise dispose of assets, including capital stock of subsidiaries;
- · enter into agreements that restrict dividends from subsidiaries;
- · enter into mergers or consolidations;
- · enter into transactions with affiliates;
- guarantee indebtedness;
- · enter into certain sale/leaseback transactions; and
- enter into new lines of business.

These covenants are subject to a number of important exceptions and qualifications. For more details, see "Description of the Exchange Notes."

#### **Risk factors**

In evaluating an investment in the Exchange Notes, prospective investors should carefully consider, along with the other information in this prospectus, the specific factors set forth under "Risk factors" for risks associated with an investment in the Exchange Notes.

#### Summary consolidated historical and pro forma financial and other data

Set forth below are our summary consolidated historical and pro forma and other data. Accounting principles generally accepted in the United States require operating results for Dave & Buster's, Inc. prior to the Acquisition completed June 1, 2010 to be presented as the results of the "Predecessor" in the historical financial statements. Operating results subsequent to the Merger will be presented as the results of the "Successor" and will include all periods including and subsequent to June 1, 2010.

The statements of operations and cash flows data for each of the three fiscal years in the period ended January 31, 2010 and the balance sheet data as of January 31, 2010 and February 1, 2009 were derived from the Predecessor's audited consolidated financial statements included elsewhere in this prospectus. The statements of operations and cash flows data for each of the thirteen week periods ended May 2, 2010 and May 3, 2009 and the balance sheet data as of May 2, 2010 were derived from the Predecessor's unaudited consolidated financial statements included elsewhere in this prospectus and, in the opinion of management, include all normal recurring adjustments necessary to present fairly the data for such periods and as of such dates. This historical consolidated financial data does not reflect the consummation of the Transactions or our capital structure following the Transactions and is not indicative of results that would have been reported had the Transactions occurred, nor is it indicative of our future financial position or operating results.

Also included is unaudited summary pro forma consolidated financial and other data for the fiscal year ended January 31, 2010 and the thirteen weeks in the period ended May 2, 2010. The unaudited pro forma statement of operations data has been prepared assuming the Transactions occurred as of February 2, 2009, and the unaudited pro forma consolidated balance sheet data reflects the financial position of our business as if the Transactions had occurred on May 2, 2010. The summary pro forma data does not purport to represent what our results of operations or financial position would have been had the Transactions occurred at any such date, nor does this data purport to represent the results of operations for any future period. The pro forma adjustments are based upon available information and certain assumptions as discussed in the notes to the unaudited financial information presented under "Unaudited pro forma consolidated financial information."

The "Summary consolidated historical and pro forma consolidated financial and other data" should be read in conjunction with "Unaudited pro forma consolidated financial information," "Selected historical consolidated financial and other data," "Management's discussion and analysis of financial condition and results of operations" and the historical consolidated financial statements of the Predecessor and the notes related thereto, included elsewhere in this prospectus.

		Thirteen Weeks Ended						Fiscal year ended								
	May 2,         May 2,         May 3,           2010         2010(1)(3)         2009			January 31, January 31, 2010 2010(1)(3)				February 1, 2009		Fe	bruary 3, 2008					
(Dollars in thousands)	(Pr	edecessor)	(P	ro forma)	(Pr	(Predecessor)		edecessor)	(Pi	ro forma)	(Predecessor)		(Predecessor)			
Statement of operations data:																
Revenues:																
Food and beverage revenues	\$	71,357	\$	71,357	\$	71,000	\$	269,973	\$	269,973	\$	284,779	\$	293,097		
Amusement and other revenues		70,218	_	70,218		67,426		250,810		250,810		248,579		243,175		
Total revenues		141,575		141,575		138,426		520,783		520,783		533,358		536,272		
Operating costs:																
Cost of products:																
Cost of food and beverage		17,277		17,277		17,406		65,349		65,349		70,520		72,493		
Cost of amusement and other		10,586		10,586		9,549		38,788		38,788		34,218		34,252		
Total cost of products		27,863	_	27,863		26,955		104,137		104,137		104,738		106,745		
Operating payroll and benefits		33,468		33,468		34,532		132,114		132,114		139,508		144,920		
Other store operating expenses		45,605		45,605		42,604		174,685		174,685		174,179		171,627		
General & administrative expenses		8,617		8,668		7,405		30,437		30,632		34,546		38,999		
Depreciation & amortization expense		12,501		12,501		12,733		53,658		53,658		49,652		51,898		
Preopening costs		1,189		1,189		1,146		3,881		3,881		2,988		1,002		
Total operating costs		129,243		129,294		125,375		498,912		499,107	_	505,611		515,191		
Operating income		12,332		12,281		13,051		21,871		21,676		27,747		21,081		
Interest expense, net		5,348		8,222		5,549		22,122		32,771		26,177		31,183		
Income (loss) before provision (benefit) for income taxes		6,984		4,059		7,502		(251)		(11,095)		1,570		(10,102)		
Provision (benefit) for income taxes		3,073		3,073		2,335		99		99		(45)		(1,261)		
Net income (loss)	\$	3,911	\$	986	\$	5,167	\$	(350)	\$	(11,194)	\$	1,615	\$	(8,841)		
Statement of cash flow data:																
Cash provided by (used in):																
Operating activities	\$	9,445			\$	10,903	\$	59,054			\$	52,197	\$	50,573		
Investing activities		(6,985)				(8,177)		(48,406)				(49,084)		(30,899)		
Financing activities		(125)				(2,125)		(2,500)				(13,625)		(11,000)		
Balance sheet data (as of end of period):																
Cash and cash equivalents	\$	19,017	\$	6,019	\$	9,135	\$	16,682			\$	8,534	\$	19,046		
Working capital (deficit)		(16,908)		(24,856)		(30,494)		(28,019)				(35,196)		(30,666)		
Property & equipment, net		285,732		285,732		292,478		294,151				296,805		296,974		
Total assets		482,571		743,210		476,902		483,640				480,936		496,203		
Total debt		227,125		350,000		227,625		227,250				229,750		243,375		
Stockholders' equity		97,004		238,074		97,224		92,646				92,023		90,756		
Other data:																
Adjusted EBITDA(1)	\$	26,966	\$	26,915	\$	27,537	\$	83,145	\$	82,950	\$	87,378	\$	84,367		
Cash interest expense(2)		5,664		7,705		5,871		22,966		30,728		24,682		26,296		
Capital expenditures		6,988		6,988		8,177		48,423		48,423		49,254		31,355		
Stores open at end of period		57		57		53		56		56		52		49		

(1) "EBITDA" is calculated as net income (loss), plus interest expense (net), provision (benefit) for income taxes and depreciation and amortization expense. "Adjusted EBITDA" represents EBITDA, as defined, excluding loss on asset disposal, gain on acquisition of limited partnership, share-based compensation, currency transaction (gain) loss, preopening costs, reimbursement of affiliate expenses, severance and deferred amusement revenue, ticket liability & other.

Pro forma adjustments related to the unaudited pro forma consolidated statement of operations have been computed assuming the Transactions occurred as of February 2, 2009. See note (3) below and the "Unaudited pro forma consolidated financial information" section and related notes thereto.

EBITDA and Adjusted EBITDA are presented because certain investors use them as measures of a company's historical operating performance and its ability to service and incur debts. We believe Adjusted EBITDA is a more meaningful measure than EBITDA because Adjusted EBITDA excludes certain non-recurring and non-cash items, which are not excluded in the calculation of EBITDA. However, EBITDA and Adjusted EBITDA are not measures prepared in accordance with GAAP. Accordingly, these measures should not be considered in isolation from, as an alternative to or as more meaningful than net income, cash flows or other income data (as calculated in accordance with GAAP) or as a measure of liquidity. EBITDA and Adjusted EBITDA, as presented, may not be comparable to similarly-titled measures reported by other companies.

Our calculation of EBITDA and Adjusted EBITDA for the periods presented is set forth below:

	Thirteen Weeks Ended							Fiscal year ended								
		ay 2, 2010		May 2, 2010(3)		•		May 3, 2009		January 31, 2010		January 31, 2010(3)		February 1, 2009		oruary 3, 2008
(Dollars in thousands)	(Pred	lecessor)	(Pı	o forma)	(Pr	edecessor)	(Pr	edecessor)	(P	ro forma)	(Pr	ed ecessor)	(Pro	edecessor)		
Net income (loss)	\$	3,911	\$	986	\$	5,167	\$	(350)	\$	(11,194)	\$	1,615	\$	(8,841)		
Interest expense, net		5,348		8,222		5,549		22,122		32,771		26,177		31,183		
Provision (benefit) for income taxes		3,073		3,073		2,335		99		99		(45)		(1,261)		
Depreciation and amortization expense		12,501		12,501		12,733		53,658		53,658		49,652		51,898		
EBITDA		24,833		24,782		25,784		75,529		75,334		77,399		72,979		
Loss on asset disposal(a)		200		200		173		1,361		1,361		1,648		1,369		
Gain on acquisition of limited partnership(b)				_		_		(357)		(357)		_				
Share-based compensation(c)		251		251		9		722		722		880		1,514		
Currency transaction (gain) loss(d)		(85)		(85)		(24)		(123)		(123)		124				
Preopening costs(e)		1,189		1,189		1,146		3,881		3,881		2,988		1,002		
Reimbursement of affiliate expenses(f)		188		188		188		905		905		1,735		750		
Severance(g)				_		31		295		295		906		3,337		
Deferred amusement revenue, ticket liability & other(h)		230		230		230		932		932		1,698		3,416		
Transaction costs (i)		160		160					_							
Adjusted EBITDA	\$	26,966	\$	26,915	\$	27,537	\$	83,145	\$	82,950	\$	87,378	\$	84,367		

(a) Represents the net book value of assets disposed of during the year. Primarily relates to assets replaced in ongoing operation of business.

(b) Represents gain recognized in connection with our acquisition of a 49.9% limited partnership interest in a limited partnership that owns a Jillian's store in the Discover Mills Mall near Atlanta, Georgia. See "Notes to Consolidated Financials Statements—Note 3: Acquisition of Limited Partnership."

(c) Represents historical stock compensation expense resulting from grants under the D&B Holdings 2006 Option Plan. Such grants have been converted into the right to receive the per share acquisition consideration in the Transactions.

(d) Represents the effect of foreign currency transaction (gains) or losses related to our stores in Canada.

(e) Represents costs incurred prior to the opening of our new stores or stores that have undergone major conversions.

(f) Represents amounts paid to Wellspring under our historical expense reimbursement agreement and amounts expected to be paid under an expense reimbursement agreement that we expect to enter into with Oak Hill Capital Management, LLC. See "Certain relationships and transactions—Expense reimbursement agreement."

(g) Represents severance costs associated with the departure of key executives and organizational restructuring efforts implemented by the Company.

(h) Primarily represents adjustments to liabilities established for future amusement game play and the fulfillment of tickets won by guests on our redemption games.

(i) Represents costs incurred during the transaction process.

(2) "Cash interest expense" represents interest expense for the period less amortization of debt, original issue discount (if any), and issuance costs, less interest capitalized during the period and adjustments to mark our swap contracts to fair value.

(3) The Transactions will be accounted for as a business combination using the purchase method of accounting. As of the date of this prospectus, the valuation studies necessary to estimate the fair values of the assets and the liabilities we will acquire and to allocate the cost of the Acquisition have not been completed. For purposes of computing pro forma adjustments, we have assumed that historical recorded amounts of the assets and liabilities approximate their respective fair values and the access of the acquisition cost over the historical net assets of Dave & Buster's has been presented as an adjustment of indefinite lived intangible assets, deferred lease liabilities, or other assets or liabilities that may result from the allocation of the acquisition cost based on such valuation studies. The adjustment of the historical recorded amounts of assets and liabilities to their respective fair values may also result in adjustments to depreciation and amontization expense, rent expense and the provision for income taxes which are not reflected in the accompanying pro forma consolidated statements of operations. In addition, the final allocation of the acquisition cost will be based on the actual assets and liabilities of Dave & Buster's that exist as of the date of the Acquisition. Therefore, the actual allocation of the cost of the Acquisition will differ from the allocation assumed in our pro forma consolidated financial statements. The adjustments arising from the valuation studies will not impact our cash flows, including cash interest. However such adjustments could result in material increases or decreases in our EBITDA.

#### **RISK FACTORS**

An investment in the Exchange Notes involves a high degree of risk. You should carefully consider the risks described below as well as other information and data included in this prospectus before making an investment decision. If any of the events described in the risk factors below occur, these could have a material adverse effect on our business, financial condition, operating results and prospects, which in turn could adversely affect our ability to repay the Exchange Notes.

#### Risks related to our business

#### The global economic crisis adversely impacted our business and financial results and a prolonged recession could materially affect us in the future.

Our industry is dependent upon consumer discretionary spending. The global economic crisis has reduced consumer confidence to historic lows impacting the public's ability and/or desire to spend discretionary dollars as a result of job losses, home foreclosures, significantly reduced home values, investment losses in the financial markets, personal bankruptcies, and reduced access to credit, resulting in lower levels of guest traffic in our stores. If this difficult economic situation continues for a prolonged period of time and/or deepens in magnitude, our business, results of operations and ability to comply with the covenants under our senior secured credit facility could be materially affected and may result in a deceleration of the number and timing of new store openings. Continued deterioration in customer traffic and/or a reduction in the average amount guests spend in our stores will negatively impact our revenues. This will result in sales de-leverage, spreading fixed costs a cross a lower level of sales, and will, in turn, cause downward pressure on our profitability. This could result in reductions in staff levels, asset impairment charges and potential closures. There can be no assurance that the government's plans to stimulate the economy will restore consumer confidence, stabilize the financial markets, increase liquidity and the availability of credit, or result in lower unemployment.

## The current economic crisis could have a material adverse impact on our landlords or other tenants in shopping centers in which we are located, which in turn could negatively affect our financial results.

If the recession continues or increases in severity, our landlords may be unable to obtain financing or remain in good standing under their existing financing arrangements, resulting in failures to pay required construction contributions or satisfy other lease covenants to us. In addition, other tenants at shopping centers in which we are located or have executed leases may fail to open or may cease operations. Decreases in total tenant occupancy in shopping centers in which we are located may affect foot traffic at our stores. All of these factors could have a material adverse impact on our operations.

#### Our growth strategy depends on our ability to open new stores and operate them profitably.

As of August 2, 2010, there were 57 company locations in the United States and Canada and one franchise location in Canada. A key element of our growth strategy is to open additional stores in locations that we believe will provide attractive returns on investments. We have identified a number of additional sites for potential future Dave & Buster's stores. Our ability to open new stores on a timely and cost-effective basis is dependent on a number of factors, many of which are beyond our control, including our ability to:

- find quality locations;
- reach acceptable agreements regarding the lease or purchase of locations;
- comply with applicable zoning, land use and environmental regulations;
- raise or have available an adequate amount of money for construction and opening costs;

- timely hire, train and retain the skilled management and other employees necessary to meet staffing needs;
- · obtain, for acceptable cost, required permits and approvals, including liquor licenses; and
- efficiently manage the amount of time and money used to build and open each new store.

If we succeed in opening new stores on a timely and cost-effective basis, we may nonetheless be unable to attract enough customers to new stores because potential customers may be unfamiliar with our stores or atmosphere, or our entertainment and menu options might not appeal to them. Only a small number of our existing stores are the size of our target 35,000 square foot format for our larger stores and as of August 2, 2010, we operate four small format stores. We cannot provide any assurance that our new format stores will meet or exceed the performance of our existing stores or meet or exceed our performance targets, including target sales to net investment ratios and cash-on-cash returns. New stores may even operate at a loss, which could have a significant adverse effect on our overall operating results. Opening a new store in an existing market could reduce the revenue at our existing stores in that market. In addition, historically, new stores experience a drop in revenues after their first year of operation. Typically, this drop has been temporary and has been followed by increases in comparable store revenue in line with the rest of our comparable store base, but there can be no assurance that this will be the case in the future or that a new store will succeed in the long term.

#### Our expansion into new markets may present increased risks due to our unfamiliarity with the area.

Some of our new stores will be located in areas where we have little or no meaningful experience. Those markets may have different competitive conditions, consumer tastes and discretionary spending patterns than our existing markets, which may cause our new stores to be less successful than stores in our existing markets. An additional risk of expanding into new markets is the lack of market awareness of the Dave & Buster's brand. Stores opened in new markets may open at lower average weekly sales volumes than stores opened in existing markets, and may have higher store-level operating expense ratios than stores in existing markets. Sales at stores opened in new markets may take longer to reach average store volumes, if at all, thereby adversely affecting our overall profitability.

## We may not be able to compete favorably in the highly competitive out-of-home and home-based entertainment and restaurant markets, which could have material adverse effect on our business, results of operations or financial condition.

The out-of-home entertainment market is highly competitive. We compete for customers' discretionary entertainment dollars with theme parks, as well as with providers of out-of-home entertainment, including localized attraction facilities such as movie theatres, sporting events, bowling alleys, nightclubs and restaurants. Many of the entities operating these businesses are larger and have significantly greater financial resources, a greater number of stores, have been in business longer, have greater name recognition and are better established in the markets where our stores are located or are planned to be located. As a result, they may be able to invest greater resources than we can in attracting customers and succeed in attracting customers who would otherwise come to our stores. The legalization of casino gambling in geographic areas near any current or future store would create the possibility for entertainment alternatives, which could have a material adverse effect on our business and financial condition. We also face competition from local establishments that offer entertainment experiences similar to ours and restaurants that are highly competitive with respect to price, quality of service, location, ambience and type and quality of food. We also face competition from increasingly sophisticated home-based forms of entertainment and restaurant markets could have a material adverse affect on our busines and financial condition.

### Our quarterly results of operations are subject to fluctuations due to the seasonality of our business and the timing of new openings and other events.

Our operating results fluctuate significantly from quarter to quarter as a result of seasonal factors. Prior to fiscal year 2008 our revenues were substantially higher in the fourth quarter driven in part by the increased number of holiday parties held during that time of year. Our revenues and profitability have been lower during the third quarter with the first and second quarter being somewhat similar in results. We expect similar trends to continue in the future. We expect seasonality will continue to be a factor in our results of operations. As a result, factors affecting peak seasons could have a disproportionate effect on our results. For example, the number of days between Thanksgiving and New Year's Day and the days of the week on which Christmas and New Year's Eve fall affect the volume of business we generate during the December holiday season and can affect our results for the full fiscal year. In addition, adverse weather during the winter holiday season can have a significant impact on our fourth quarter, and therefore our results for the full fiscal year.

Our operating results may also fluctuate significantly because of non-seasonal factors. Due to our relatively limited number of locations, poor results of operations at any single store could significantly affect our overall profitability. Additionally, the timing of new store openings may result in significant fluctuations in quarterly performance. Due to the substantial up-front financial requirements to open new stores, the investment risk related to any single store is much larger than that associated with many other restaurants or entertainment venues. We typically incur most pre-opening costs for a new store within the two months immediately preceding, and the month of, the store's opening. In addition, the labor and operating costs for a newly opened store during the first three to six months of operation are materially greater than what can be expected after that time, both in aggregate dollars and as a percentage of revenues.

## Our operations are susceptible to the availability and cost of food and other supplies, in most cases from a limited number of suppliers, which subject us to possible risks of shortages, interruptions and price fluctuations.

Our profitability depends in part on our ability to anticipate and react to changes in product costs. Cost of food and beverage as a percentage of food and beverage revenue was 24.2% in fiscal 2009, 24.8% in fiscal 2008 and 24.7% in fiscal 2007. Cost of amusement and other costs as a percentage of amusement and other revenue was 15.5% in fiscal 2009, 13.8% in fiscal 2008 and 14.1% in fiscal 2007. If we have to pay higher prices for food or other supplies, our operating costs may increase, and, if we are unable or unwilling to pass such cost increases on to our customers, our operating results could be adversely affected.

We have entered into a long-term contract with U.S. Foodservice, Inc. which provides for the purchasing, warehousing and distributing of a substantial majority of our food, non-alcoholic beverage and chemical supplies. The unplanned loss of this distributor could adversely affect our business by disrupting our operations as we seek out and negotiate a new distribution contract. We also have multiple short-term supply contracts with a limited number of suppliers. If any of these suppliers do not perform adequately or otherwise fail to distribute products or supplies to our stores, we may be unable to replace the suppliers in a short period of time on acceptable terms, which could increase our costs, cause shortages of food and other items at our stores and cause us to remove certain items from our menu. We currently do not engage in futures contracts or other financial risk management strategies with respect to potential price fluctuations in the cost of food and other supplies.

The limited number of amusement suppliers, the availability of new amusement offerings, the cost and availability of redemption items that appeal to guests and the market demand for new games could adversely impact the cost to acquire and operate new amusements. We may not be able to anticipate and react to changing food, beverage and amusement costs by adjusting purchasing practices, menu and game prices, and a failure to do so could have a material adverse effect on our operating results.

## Instances of food-borne illness and outbreaks of disease, as well as negative publicity relating thereto, could result in reduced demand for our menu offerings and reduced traffic in our stores and negatively impact our business.

Our business could be severely impacted by a widespread regional, national or global health epidemic. A widespread health epidemic (such as the avian flu) or food-borne illness (such as aphthous fever, which is also known as hoof and mouth disease, as well as hepatitis A, lysteria, salmonella and e-coli), whether or not traced to one of our stores, may cause customers to avoid public gathering places or otherwise change their eating behaviors. Even the prospects of a health epidemic could change consumer perceptions of food safety, disrupt our supply chain and impact our ability to supply certain menu items or staff our stores. Outbreaks of disease, including severe acute respiratory syndrome, which is also known as SARS, as well as influenza, could reduce traffic in our stores. Any of these events would negatively impact our business. In addition, any negative publicity relating to these and other health-related matters may affect consumers' perceptions of our stores and the food that we offer, reduce guest visits to our stores and negatively impact demand for our menu offerings.

## We may not be able to obtain and maintain licenses and permits necessary to operate our stores in compliance with laws, regulations and other requirements, which could adversely affect our business, results of operations or financial condition.

We are subject to various federal, state and local laws affecting our business. Each store is subject to licensing and regulation by a number of governmental authorities, which may include alcoholic beverage control, amusement, health and safety and fire agencies in the state, county or municipality in which the store is located. Each store is required to obtain a license to sell alcoholic beverages on the premises from a state authority and, in certain locations, county and municipal authorities. Typically, licenses must be renewed annually and may be revoked or suspended for cause at any time. In some states, the loss of a license for cause with respect to one location may lead to the loss of licenses at all locations in that state and could make it more difficult to obtain additional licenses in that state. Alcoholic beverage control regulations relate to numerous aspects of the daily operations of each store, including minimum age of patrons and employees, hours of operation, advertising, wholesale purchasing, inventory control and handling and storage and dispensing of alcoholic beverages. In certain jurisdictions, a notice or application will need to be filed with the relevant jurisdictions for the transfer of our liquor licenses as a result of the Acquisition. The Acquisition is not conditioned upon the receipt of the approval to transfer any of the liquor licenses. The failure to receive or retain a liquor license, or any other required permit or license, in a particular location, or to continue to qualify for, or renew licenses, could have a material adverse effect on operations and our ability to obtain such a license or permit in other locations.

As a result of operating certain entertainment games and attractions, including games that offer redemption prizes, we are subject to amusement licensing and regulation by the states, counties and municipalities in which our stores are located. Certain entertainment attractions are heavily regulated and such regulations vary significantly between communities. Moreover, states and local communities are tending to consider additional regulation regarding redemption games. From time-to-time, existing stores may be required to modify certain games, alter the mix of games, or terminate the use of specific games as a result of the interpretation of regulations by state or local officials, any of which could adversely affect our operations.

### Changes in laws, regulations and other requirements could adversely affect our business, results of operations or financial condition.

We are also subject to federal, state and local environmental laws, regulations and other requirements. More stringent and varied requirements of local and state governmental bodies with respect to zoning, land use and environmental factors could delay or prevent development of new stores in particular locations. Environmental laws and regulations also govern, among other things, discharges of pollutants into the air and water as well as the presence, handling, release and disposal of and exposure to hazardous substances. These laws provide for significant fines and penalties for noncompliance. Third parties may also make personal injury, property damage

or other claims against us associated with actual or alleged release of or exposure to hazardous substances at our properties. We could also be strictly liable, without regard to fault, for certain environmental conditions at properties we formerly owned or operated as well as at our current properties.

In addition, we are subject to the Fair Labor Standards Act, which governs such matters as minimum wages, overtime, and other working conditions, along with the Americans with Disabilities Act and various family-leave mandates. From time-to-time, the U.S. Congress and the states consider increases in the applicable minimum wage. Several states in which we operate have enacted increases in the minimum wage which have taken effect during the last three years and further increases are anticipated in 2010. Although we expect increases in payroll expenses as a result of federal and state mandated increases in the minimum wage, such increases are not expected to be material. However, we are uncertain of the repercussion, if any, of increased minimum wages on other expenses. For example, our suppliers may be more severely impacted by higher minimum wage standards, which could result in increased costs to us. If we are unable to offset these costs through increased costs to our customers, our business, results of operations and financial condition could be adversely affected.

Our sales and results of operations may be adversely affected by the passage of health care reform legislation and climate change and other environmental legislation and regulations. The costs and other effects of new legal requirements cannot be determined with certainty. For example, new legislation or regulations may result in increased costs directly for our compliance or indirectly to the extent that such requirements increase prices charged to us by vendors because of increased compliance costs. At this point, we are unable to determine the impact that health care reform could have on our employer- sponsored medical plans or that climate change and other environmental legislation and regulations could have on our overall business.

#### We face potential liability with our stored value cards under the property laws of some states.

Our Power Cards and gift cards, which may be used for games and to purchase products in our stores, are stored value cards. We recognize income from unredeemed cards when we determine that the likelihood of the cards being redeemed is remote. Certain states include gift cards under their abandoned property laws, and require companies to remit to the state cash in an amount equal to all or a designated portion of the unredeemed balance on the gift cards after a specified period of time. We do not remit any amounts relating to unredeemed gift cards to states based upon our assessment of applicable laws. The analysis of the potential application of the abandoned property laws to our gift cards is complex, involving an analysis of constitutional, statutory provisions and factual issues. In the event that one or more states successfully challenges our position on the application of its abandoned property law to our gift cards, or if the estimates that we use in projecting the likelihood of the cards being redeemed prove to be inaccurate, our liabilities with respect to unredeemed gift cards may be materially higher than the amounts shown in our financial statements. If we are required to materially increase the estimated liability recorded in our financial statements with respect to unredeemed gift cards, our net income could be materially and adversely affected.

## Customer complaints or litigation on behalf of our customers or employees may adversely affect our business, results of operations or financial condition.

Our business may be adversely affected by legal or governmental proceedings brought by or on behalf of our customers or employees. In recent years, a number of restaurant companies, including ours, have been subject to lawsuits, including class action lawsuits, alleging violations of federal and state law regarding workplace and employment matters, discrimination and similar matters, and a number of these lawsuits have resulted in the payment of substantial damages by the defendants. We could also face potential liability if we are found to have misclassified certain employees as exempt from the overtime requirements of the federal Fair Labor Standards Act and state labor laws. In addition, from time-to-time customers file complaints or lawsuits against us alleging that we are responsible for some illness or injury they suffered at or after a visit to a store. We are also subject to a variety of other claims in the ordinary course of business, including personal injury, lease and contract claims. The restaurant industry has also been subject to a growing number of claims that the menus and actions of restaurant chains have led to the obesity of certain of their guests.

We are also subject to "dram shop" statutes in certain states in which our stores are located. These statutes generally provide a person injured by an intoxicated person the right to recover damages from an establishment that wrongfully served alcoholic beverages to the intoxicated individual. We are currently the subject of certain lawsuits that allege violations of these statutes. Recent litigation against restaurant chains has resulted in significant judgments and settlements under dram shop statutes. Because these cases often seek punitive damages, which may not be covered by insurance, such litigation could have an adverse impact on our business, results of operations or financial condition. Regardless of whether any claims against us are valid or whether we are liable, claims may be expensive to defend and may divert time and money away from operations and hurt our financial performance. A judgment significantly in excess of our insurance coverage or not covered by insurance could have a material adverse effect on our business, results of operations or financial condition. As approximately 32% of our food and beverage revenues were derived from the sale of alcoholic beverages during fiscal 2009, adverse publicity resulting from these allegations may materially affect us and our stores.

### We may face labor shortages that could slow our growth and adversely impact our ability to operate our stores.

The successful operation of our business depends upon our ability to attract, motivate and retain a sufficient number of qualified executives, managers and skilled employees. From time-to-time, there may be a shortage of skilled labor in certain of the communities in which our stores are located. Shortages of skilled labor may make it increasingly difficult and expensive to attract, train and retain the services of a satisfactory number of qualified employees and could delay the planned openings of new stores or adversely impact our existing stores. Any such delays, material increases in employee turnover rates in existing stores or widespread employee dissatisfaction could have a material adverse effect on our business and results of operations. Competition for qualified employees could require us to pay higher wages, which could result in higher labor costs and could have a material adverse effect on our results of operations.

## We depend on the services of key executives, the loss of whom could materially harm our business and our strategic direction if we were unable to replace them with executives of equal experience and capabilities.

Our future success significantly depends on the continued service and performance of our key management personnel. We have employment agreements with all members of senior management. However, we cannot prevent members of senior management from terminating their employment with us. Losing the services of members of senior management could materially harm our business until a suitable replacement is found, and such replacement may not have equal experience and capabilities. In addition, we have not purchased key personnel life insurance on any members of our senior management.

#### Local conditions, events, terrorist attacks, adverse weather conditions and natural disasters could adversely affect our business.

Certain of the regions in which our stores are located have been, and may in the future be, subject to adverse local conditions, events, terrorist attacks, adverse weather conditions or natural disasters, such as earthquakes, floods and hurricanes. In particular, seven of our stores are located in California and are subject to earthquake risk, and our three stores in Florida, our two stores in Houston and our one store in Honolulu are subject to hurricane risk. Depending upon its magnitude, adverse weather or a natural disaster could severely damage our stores, which could adversely affect our business, results of operations or financial condition. We currently maintain property and business interruption insurance through the aggregate property policy for each of the stores. However, such coverage may not be sufficient if there is a major disaster. In addition, upon the expiration of our current insurance policies, adequate insurance coverage may not be available at reasonable rates, or at all.

Our Nashville, Tennessee store was extensively damaged by the recent historic flooding in the Nashville area. The store is covered by up to \$25 million in property and business interruption insurance subject to a net

overall deductible of approximately \$1,000. We have initiated property insurance claims, including business interruption, with our insurers. We cannot estimate at this time when the store will be back in operation.

# Unfavorable publicity relating to one or more of our stores may taint public perception of the Dave & Buster's brand, which could reduce sales in one or more of our stores and make our brand less valuable.

The strength of our brand is impacted by public perception of the quality of our food and facilities. Multi-store businesses, such as ours, can be adversely affected by unfavorable publicity resulting from poor food quality, illness or health concerns, or a variety of other operating issues stemming from one or a limited number of stores. Adverse publicity involving any of these factors could make our stores less appealing, reduce our guest traffic and/or impose practical limits on pricing. In the future, some of our stores may be operated by franchisees. Any such franchisees will be independent third parties that we do not control. Although our franchisees will be contractually obligated to operate the store in accordance with our standards, we would not oversee their daily operations. If one or more of our stores were the subject of unfavorable publicity, our overall brand could be adversely affected, which could have a material adverse effect on our business, results of operations and financial condition.

## We may not be able to renew real property leases on favorable terms, or at all, which may require us to close a store or relocate, either of which could have a material adverse effect on our business, results of operations or financial condition.

Of the 57 stores operated by us as of August 2, 2010, 56 stores are operated on leased premises. The leases typically provide for a base rent plus additional rent based on a percentage of the revenue generated by the stores on the leased premises once certain thresholds are met. A lease on one of our stores is scheduled to expire during late fiscal 2010 and the Company is evaluating whether to seek to extend the term of the lease on this store. A decision not to renew a lease for a store could be based on a number of factors, including an assessment of the area in which the store is located. We may choose not to renew, or may not be able to renew, certain of such existing leases if the capital investment then required to maintain the stores at the leased locations is not justified by the return on the required investment. If we are not able to renew the leases at rents that allow such stores to remain profitable as their terms expire, the number of such stores may decrease, resulting in lower revenue from operations, or we may relocate a store, which could subject us to construction and other costs and risks, and, in either case, could have a material adverse effect on our business, results of operations or financial condition.

# Fixed rental payments account for a significant portion of our operating expenses, which increases our vulnerability to general adverse economic and industry conditions and could limit our operating and financial flexibility.

Payments under our operating leases account for a significant portion of our operating expenses. For example, total rental payments, including additional rental payments based on sales at some of our stores, under operating leases were approximately \$44,865,000 or 8.6% of our total revenues, in fiscal 2009. In addition, as of May 2, 2010, we were a party to operating leases requiring future minimum lease payments aggregating approximately \$136,041,000 through fiscal 2012 and approximately \$321,084,000 thereafter. We expect that we will lease any new stores we open under operating leases. Our substantial operating lease obligations could have significant negative consequences, including:

- increasing our vulnerability to general adverse economic and industry conditions;
- limiting our ability to obtain additional financing;
- requiring a substantial portion of our available cash to be applied to pay our rental obligations, thus reducing cash available for other purposes;
- · limiting our flexibility in planning for or reacting to changes in our business or the industry in which we compete; and
- · placing us at a disadvantage with respect to our competitors.

We depend on cash flow from operations to pay our lease obligations and to fulfill our other cash needs. If our business does not generate sufficient cash flow from operating activities and sufficient funds are not otherwise available to us from borrowings under bank loans or from other sources, we may not be able to service our operating lease obligations, grow our business, respond to competitive challenges or fund our other liquidity and capital needs, which would have a material adverse affect on us.

#### If we are unable to adequately protect our brand, our business could be harmed significantly.

Our brand is essential to our success and competitive position. We use a combination of intellectual property rights, such as trademarks and service marks, to protect our brand. The success of our business strategy depends, in part, on our continued ability to use our intellectual property rights to increase brand awareness and further develop our branded products in both existing and new markets. If we fail to protect our intellectual property rights adequately, we may lose an important advantage in the markets in which we compete. If third parties misappropriate or infringe our intellectual property, our image, brand and the goodwill associated therewith may be harmed, our brand may fail to achieve and maintain market recognition, and our competitive position may be harmed, any of which could have a material adverse effect on our business. To protect our intellectual property, we may become involved in litigation, which could result in substantial expenses, divert the attention of management, and adversely affect our revenue, financial condition and results of operations.

There can be no assurance that third parties will not assert that our products and services infringe, or may infringe, their proprietary rights. Any such claims, regardless of merit, could lead to litigation, which could result in substantial expenses, divert the attention of management, cause significant delays, materially disrupt the conduct of our business and have a material adverse effect on our financial condition and results of operations. As a consequence of such claims, we could be required to pay a substantial damage award, take a royalty-bearing license, discontinue the use of third party products used within our operations and/or rebrand our business and products.

# Failure to establish and maintain effective internal control over financial reporting could have a material adverse effect on our business, operating results, and the Notes.

Maintaining effective internal control over financial reporting is necessary for us to produce reliable financial reports and is important in helping to prevent financial fraud. If we are unable to maintain adequate internal controls, our business and operating results could be harmed. Any failure to remediate deficiencies noted by our independent registered public accounting firm or to implement required new or improved controls or difficulties encountered in their implementation could cause us to fail to meet our reporting obligations or result in material misstatements in our financial statements. If our management or our independent registered public accounting firm were to conclude in their reports that our internal control over financial reporting was not effective, investors could lose confidence in our reported financial information and the trading price of the notes could drop significantly.

#### Disruptions in our information technology systems could have an adverse impact on our operations.

Our operations are dependent upon the integrity, security and consistent operation of various systems and data centers, including the point-of-sale, kiosk and amusement operations systems in our stores, data centers that process transactions, communication systems and various other software applications used throughout our operations. Disruptions in these systems could have an adverse impact on our operations. We could encounter difficulties in developing new systems or maintaining and upgrading existing systems. Such difficulty could lead to significant expenses or to losses due to disruption in our business operations. In 2007, there was an external breach of our credit card processing systems which led to fraudulent credit card activity and resulted in the payment of fines and reimbursements for the fraudulent credit card activity. As part of a settlement with the Federal Trade Commission, we have implemented a series of corrective measures in order to ensure that our computer systems are secure and that our customers' personal information is protected. Despite our considerable



efforts and investment in technology to secure our computer network, security could still be compromised, confidential information could be misappropriated or system disruptions could occur in the future. This could lead to a loss of sales or profits or cause us to incur significant costs to reimburse third parties for damages.

# Our current insurance policies may not provide adequate levels of coverage against all claims and we may incur losses that are not covered by our insurance.

We believe we maintain insurance coverage that is customary for businesses of our size and type. However, there are types of losses we may incur that cannot be insured against or that we believe are not commercially reasonable to insure. For example, we maintain business interruption insurance, but there can be no assurance that the coverage for a severe or prolonged business interruption at one or more of our stores would be adequate. Given the limited number of stores we operate, such a loss could have a material adverse effect on our results of operations. In addition, we do not currently carry insurance for breaches of our computer network security. Moreover, we believe that insurance covering liability for violations of wage and hour laws is generally not available. These losses, if they occur, could have a material adverse effect on our business and results of operations.

#### Our board of directors may be controlled by a single stockholder, whose interest may not aligned with yours.

As a result of the Transactions, Oak Hill indirectly controls approximately 96% of our outstanding capital stock. Neither Oak Hill nor its affiliates have any obligation to contribute additional funds (directly or indirectly to) the Company.

Accordingly, Oak Hill indirectly beneficially owns a majority of our outstanding shares of common stock and can determine the outcomes of the elections of members of our board of directors and the outcome of corporate actions requiring stockholder approval, including mergers, consolidations and the sale of all or substantially all of our assets. The interests of Oak Hill could conflict with those of our public debt holders. For example, if we encounter financial difficulties or are unable to pay our debts as they come due, the interests of Oak Hill as an equity holder might conflict with the interests of our noteholders. Oak Hill may have an interest in Dave & Buster's pursuing acquisitions, divestitures or financings or other transactions that, in its judgment could enhance its equity investment, even though such transactions may involve significant risks to our noteholders. In addition, Oak Hill and its affiliates may in the future own interests in businesses that compete with ours.

### Risks related to the exchange offer and holding the Notes

## Our level of indebtedness could adversely affect our ability to raise additional capital to fund operations, limit our ability to react to changes in the economy or our industry and prevent us from meeting our obligations under the Notes.

After giving effect to the Transactions, including this offering and the applications of the proceeds thereof, we will be significantly leveraged and our total indebtedness will be approximately \$350 million based on the amount of debt we will have outstanding on the closing date of the Transactions. The following chart shows our pro forma level of indebtedness and certain other information as of May 2, 2010, after giving effect to the Transactions:

(In thousands)	Pro forma as of May 2, 2010
Senior secured credit facility	
Revolving credit facility	\$ —
Term loan	150,000
Restricted Notes	200,000
Total debt	350,000
Stockholder's equity	\$ 238,074

Our substantial indebtedness could have important consequences, including:

- our ability to obtain additional debt or equity financing for working capital, capital expenditures, debt service requirements, acquisitions and general corporate or other purposes may be limited;
- a portion of our cash flows from operations will be dedicated to the payment of principal and interest on the indebtedness and will not be available for other purposes, including operations, capital expenditures and future business opportunities;
- certain of our borrowings are at variable rates of interest, exposing us to the risk of increased interest rates;
- our ability to adjust to changing market conditions may be limited and may place us at a competitive disadvantage compared to less-leveraged competitors; and
- we may be vulnerable in a downturn in general economic conditions or in business, or may be unable to carry on capital spending that is important to our growth.

## We may be able to incur substantially more indebtedness, including indebtedness ranking equal to the Notes and the guarantees. This could increase the risks associated with the Notes.

Subject to the restrictions in the indenture and in other instruments governing our other outstanding indebtedness (including our senior secured credit facility), we may incur substantial additional indebtedness (including secured indebtedness) in the future. Although the indenture and the senior secured credit facility contain restrictions on the incurrence of additional indebtedness, these restrictions are subject to waiver and a number of significant qualifications and exceptions, and indebtedness incurred in compliance with these restrictions could be substantial.

If we incur any additional indebtedness that ranks equally with the Notes, the holders of that debt will be entitled to share ratably with you in any proceeds distributed in connection with any insolvency, liquidation, reorganization, dissolution or other winding-up of us. This may have the effect of reducing the amount of proceeds paid to you. If debt were added to our existing debt levels, the related risks that we now face would increase. In addition, our senior secured credit facility and the indenture do not prevent us from incurring obligations that do not constitute indebtedness thereunder.

# We may not be able to generate sufficient cash to service all of our indebtedness, including the Notes, and may be forced to take other actions to satisfy our obligations under our indebtedness, which may not be successful.

Our ability to make scheduled payments or to refinance our debt obligations depends on our financial and operating performance, which is subject to prevailing economic and competitive conditions and to certain financial, business and other factors beyond our control. We cannot assure you that our business will generate sufficient cash flows from operating activities to permit us to pay the principal, premium, if any, and interest on our indebtedness, including the Notes and the senior secured credit facility.

If our cash flows and capital resources are insufficient to fund our debt service obligations, we may be forced to reduce or delay capital expenditures, sell assets or operations, seek additional capital or restructure or refinance our indebtedness, including the notes and the senior secured credit facility. Our ability to restructure or refinance our debt will depend on the condition of the capital markets and our financial condition at such time. Any refinancing of our debt could be at higher interest rates and may require us to comply with more onerous borrowing covenants, which could further restrict our business operations. The terms of existing or future debt instruments, including our senior secured credit facility and the indenture, may restrict us from adopting some of these alternatives. In addition, any failure to make payments of interest and principal on our outstanding indebtedness on a timely basis would likely result in a reduction of our credit rating, which could harm our

ability to incur additional indebtedness. These alternative measures may not be successful and may not permit us to meet our scheduled debt service obligations.

#### Restrictive covenants may adversely affect our operations.

Our senior secured credit facility and the indenture will contain various covenants that limit our ability to, among other things:

- incur additional indebtedness or issue certain preferred shares;
- make certain restricted payments;
- make certain investments;
- sell certain assets;
- create liens;
- enter into certain sale and leaseback transactions;
- make capital expenditures above a certain level;
- prepay or defease specified debt;
- · consolidate, merge, sell, or otherwise dispose of all or substantially all of our assets; and
- enter into certain transactions with our affiliates.

In addition, the restrictive covenants in our senior secured credit facility require us to maintain specified financial ratios and satisfy other financial condition tests. Our ability to meet those financial ratios and tests can be affected by events beyond our control, and we cannot assure you that we will meet those tests. A breach of any of these covenants could result in a default under our senior secured credit facility if not waived by the requisite number of lenders. Upon the occurrence of an event of default under our senior secured credit facility, the lenders could elect to declare all amounts then outstanding under our senior secured credit facility could proceed against the collateral granted to them to secure that indebtedness. We have pledged a significant portion of our assets as collateral under our senior secured credit facility. If the lenders under our senior secured credit facility and our other indebtedness, including the notes, or borrow sufficient funds to refinance such indebtedness, if at all. Even if we are able to obtain new financing, it may not be on commercially reasonable terms, or terms that are acceptable to us. See "Description of other indebtedness."

#### Variable-rate indebtedness subjects us to interest rate risk, which could cause our debt service obligations to increase significantly.

Certain of our borrowings, primarily borrowings under our senior secured credit facility, are, and are expected to continue to be, at variable rates of interest and expose us to interest rate risk. If interest rates increase, our debt service obligations on the variable-rate indebtedness would increase even though the amount borrowed remained the same, and our net income would consequently decrease. Borrowings under the senior secured credit facility will bear interest, at our option, based upon either a base rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian cost of funds rate) for one-, two-, three- or six-months (or, if agreed by the applicable lenders, nine or twelve months) interest periods chosen by us or the Canadian Borrower, as applicable in each case, plus an applicable margin percentage. Swingline loans will bear interest at the base rate plus the applicable margin.

## The Notes and guarantees are not secured by any of our assets. Our senior secured credit facility is secured and our bank lenders have a prior claim on substantially all our assets.

The Notes and the guarantees are general unsecured senior obligations ranking effectively junior to all of our existing and future secured indebtedness, including our obligations under our senior secured credit facility, to the extent of the value of the collateral securing the indebtedness. However, our senior secured credit facility will be secured by a perfected first priority security interest in all of our tangible and intangible assets. If we become insolvent or are liquidated, or if payment under any of the instruments governing our secured debt is accelerated, the lenders under those instruments will be entitled to exercise the remedies available to a secured lender under applicable law and pursuant to the instruments governing such debt. Accordingly, the lenders under our senior secured credit facility will have a prior claim on our assets securing the debt owed to them. In that event, because the notes and guarantees will not be secured by any of our assets, it is possible that our remaining assets might be insufficient to satisfy your claims in full.

### The notes are structurally subordinated to all indebtedness of our existing or future subsidiaries that do not become guarantors of the Notes.

You will not have any claim as a creditor against our foreign subsidiary that is not guaranteeing the Notes or against any of our future subsidiaries that do not become guarantors of the notes. Indebtedness and other liabilities, including trade payables, whether secured or unsecured, as well as preferred stock of those subsidiaries will be structurally senior to your claims against those subsidiaries.

#### If we default on our obligations to pay our indebtedness we may not be able to make payments on the Notes.

Any default under the agreements governing our indebtedness, including a default under our senior secured credit facility that is not waived by the required lenders, and the remedies sought by the holders of such indebtedness, could make us unable to pay principal, premium, if any, and interest on the notes and substantially decrease the market value of the notes. If we are unable to generate sufficient cash flow and are otherwise unable to obtain funds necessary to meet required payments of principal, premium (if any) and interest on our indebtedness, or if we otherwise fail to comply with the various covenants, including financial and operating covenants, in the instruments governing our indebtedness (including covenants in our indenture and our senior secured credit facility), we could be in default under the terms of the agreements governing such indebtedness, including our senior secured credit facility and our indenture. In the event of such default, the holders of such indebtedness could elect to declare all the funds borrowed thereunder to be due and payable, together with accrued and unpaid interest, the lenders under our senior secured credit facility could elect to terminate their commitments thereunder and cease making further loans and institute foreclosure proceedings against our assets and we could be forced into bankruptcy or liquidation. If our operating performance declines, we may in the future need to obtain waivers from the required lenders under our senior secured credit facility to avoid being in default. If we breach our covenants under our senior secured credit facility, the lenders could exercise their rights, as described above, and we could be forced into bankruptcy or liquidation. See "Description of other indebtedness" and "Description of the exchange notes."

#### We may not be able to repurchase the Notes upon a change of control.

Upon the occurrence of a change of control event, as defined in the indenture, subject to certain conditions, we will be required to offer to repurchase all outstanding notes at 101% of their principal amount, plus accrued and unpaid interest. The source of funds for that purchase of notes will be our available cash or cash generated from our subsidiaries' operations or other potential sources, including borrowings, sales of assets or sales of equity. We cannot assure you that sufficient funds from such sources will be available at the time of any change of control to make required repurchases of notes tendered. In addition, the terms of our senior secured credit facility will limit our ability to repurchase your notes and will provide that certain change of control events will constitute an event of default thereunder. Our future debt agreements may contain similar restrictions and provisions. If the holders of the notes exercise their right to require us to repurchase all the notes upon a change



of control, the financial effect of this repurchase could cause a default under our other debt, even if the change of control itself would not cause a default. Accordingly, it is possible that we will not have sufficient funds at the time of the change of control to make the required repurchase of our other debt and the notes or those restrictions in our senior secured credit facility and the indenture will not allow such repurchases.

In addition, the change of control provisions in the indenture may not protect you from certain important corporate events, such as a leveraged recapitalization (which would increase the level of our indebtedness), reorganization, restructuring, merger or other similar transaction, unless such transaction constitutes a "Change of Control" under the indenture. Such a transaction may not involve a change in voting power or beneficial ownership or, even if it does, may not involve a change that constitutes a "Change of Control" as defined in the indenture that would trigger our obligation to repurchase the notes. Therefore, if an event occurs that does not constitute a "Change of Control" as defined in the indenture, we will not be required to make an offer to repurchase the notes and you may be required to continue to hold your notes despite the event. See "Description of other indebtedness" and "Description of the exchange of control."

# Federal and state fraudulent transfer laws permit a court to void the Notes and the guarantees, and, if that occurs, you may not receive any payments on the Notes.

The issuance of the Notes and the guarantees may be subject to review under federal and state fraudulent transfer and conveyance statutes. While the relevant laws may vary from state to state, under such laws the payment of consideration will be a fraudulent conveyance if (i) we paid the consideration with the intent of hindering, delaying or defrauding creditors or (ii) we or any of our guarantors, as applicable, received less than reasonably equivalent value or fair consideration in return for issuing either the Notes or a guarantee and, in the case of (ii) only, one of the following is also true:

- we or any of our guarantors were insolvent or rendered insolvent by reason of the incurrence of the indebtedness;
- · payment of the consideration left us or any of our guarantors with an unreasonably small amount of capital to carry on the business; or
- we or any of our guarantors intended to, or believed that we or it would, incur debts beyond our or its ability to pay as they become due.

If a court were to find that the issuance of the Notes or a guarantee was a fraudulent conveyance, the court could void the payment obligations under the Notes or such guarantee or subordinate the Notes or such guarantee to presently existing and future indebtedness of ours or such guarantor, or require the holders of the Notes to repay any amounts received with respect to the Notes or such guarantee. In the event of a finding that a fraudulent conveyance occurred, you may not receive any repayment on the Notes. Further, the voidance of the Notes could result in an event of default with respect to our other debt and that of our guarantors that could result in acceleration of such debt.

Generally, an entity would be considered insolvent if at the time it incurred indebtedness:

- the sum of its debts, including contingent liabilities, was greater than the fair saleable value of all its assets;
- the present fair saleable value of its assets was less than the amount that would be required to pay its probable liability on its existing debts and liabilities, including contingent liabilities, as they become absolute and mature; or
- it could not pay its debts as they become due.

We cannot be certain as to the standards a court would use to determine whether or not we or the guarantors were solvent at the relevant time, or regardless of the standard that a court uses, that the issuance of the notes and the guarantees would not be subordinated to our or any guarantor's other debt.

If the guarantees were legally challenged, any guarantee could also be subject to the claim that, since the guarantee was incurred for our benefit, and only indirectly for the benefit of the guarantor, the obligations of the applicable guarantor were incurred for less than fair consideration. A court could void a guarantor's obligation under its guarantee, subordinate the guarantee to the other indebtedness of a guarantor, direct that holders of the notes return any amounts paid under a guarantee to the relevant guarantor or to a fund for the benefit of its creditors, or take other action detrimental to the holders of the notes. In addition, the liability of each guarantor under the indenture will be limited to the amount that will result in its guarantee not constituting a fraudulent conveyance or improper corporate distribution, and there can be no assurance as to what standard a court would apply in making a determination as to what would be the maximum liability of each guarantor.

## Your ability to transfer the Notes may be limited by the absence of an active trading market, and there is no assurance that any active trading market will develop for the Notes.

The Notes are a new issue of securities for which there is no established public market. We do not intend to have the Notes or any Exchange Notes listed on a national securities exchange or to arrange for quotation on any automated dealer quotation systems. The initial purchasers have advised us that they intend to make a market in the Notes, and the Exchange Notes, if issued, as permitted by applicable laws and regulations; however, the initial purchasers are not obligated to make a market in the Notes or the Exchange Notes and they may discontinue their market-making activities at any time without notice. In addition, such market-making activities may be limited during the exchange offer or while the effectiveness of a shelf registration statement is pending. Therefore, we cannot assure you as to the development or liquidity of any trading market for the notes or the exchange notes. The liquidity of any market for the notes will depend on a number of factors, including:

- the number of holders of Notes;
- our operating performance and financial condition;
- our ability to complete the offer to exchange the Notes for the Exchange Notes;
- the market for similar securities;
- the interest of securities dealers in making a market in the Notes; and
- · prevailing interest rates.

Historically, the market for non-investment grade debt has been subject to disruptions that have caused substantial volatility in the prices of securities similar to the Notes. We cannot assure you that the market, if any, for the Notes or the Exchange Notes will be free from similar disruptions or that any such disruptions may not adversely affect the prices at which you may sell your Notes or Exchange Notes. Therefore, we cannot assure you that you will be able to sell your Notes or Exchange Notes at a particular time or that the price you receive when you sell will be favorable.

### Holders of Restricted Notes who fail to exchange their Restricted Notes in the exchange offer will continue to be subject to restrictions on transfer.

If you do not exchange your Restricted Notes for the Exchange Notes in the exchange offer, you will continue to be subject to the restrictions on transfer applicable to the Restricted Notes. The restrictions on transfer of your Restricted Notes arise because we issued the Restricted Notes under exemptions from, or in transactions not subject to, the registration requirements of the Securities Act and applicable state securities laws. In general, you may only offer or sell the Restricted Notes if they are registered under the Securities Act and applicable state securities laws, or offered and sold under an exemption from these requirements. We do not plan to register the Restricted Notes under the Securities Act. For further information regarding the consequences of tendering your Restricted Notes in the exchange offer, see the discussions below under the captions "The exchange offer—Consequences of exchanging or failing to exchange Restricted Notes" and "Certain United States federal income tax considerations."

#### You must comply with the exchange offer procedures in order to receive new, freely tradable Exchange Notes.

Delivery of the Exchange Notes in exchange for Restricted Notes tendered and accepted for exchange pursuant to the exchange offer will be made in accordance with the procedures described in this prospectus. We are not required to notify you of defects or irregularities in tenders of Restricted Notes for exchange. Restricted Notes that are not tendered or that are tendered but we do not accept for exchange will, following consummation of the exchange offer, continue to be subject to the existing transfer restrictions under the Securities Act and, upon consummation of the exchange offer, certain registration and other rights under the registration rights agreements will terminate. See "The exchange offer—Procedures for tendering Restricted Notes" and "The exchange offer—Consequences of exchanging or failing to exchange Restricted Notes."

## Some holders who exchange their Restricted Notes may be deemed to be underwriters, and these holders will be required to comply with the registration and prospectus delivery requirements in connection with any resale transaction.

If you exchange your Restricted Notes in the exchange offer for the purpose of participating in a distribution of the Exchange Notes, you may be deemed to have received restricted securities and, if so, will be required to comply with the registration and prospectus delivery requirements of the Securities Act in connection with any resale transaction.

### THE EXCHANGE OFFER

#### Purpose of the exchange offer

When we sold the Restricted Notes on June 1, 2010, we and our guarantors entered into a registration rights agreement with the initial purchasers of those Restricted Notes.

Under the registration rights agreement, we and the guarantors agreed for the benefit of the holders of the Restricted Notes that we will use our reasonable best efforts to file with the SEC and cause to become effective a registration statement relating to an offer to exchange the Restricted Notes for an issue of SEC-registered Exchange Notes with the terms identical to the Restricted Notes (except that the Exchange Notes will not be subject to restrictions on transfer or to any increase in annual interest rate as described below).

Pursuant to the registration rights agreement, we and our guarantors agreed, for the benefit of the holders of the Restricted Notes, to:

- use our reasonable best efforts to file with the SEC and cause to become effective a registration statement relating to an offer to exchange the Restricted Notes for the Exchange Notes with the terms identical terms to the Restricted Notes (except that the Exchange Notes will not be subject to restrictions on transfer or to any increase in annual interest rate as described below); and
- use our reasonable best efforts to cause the exchange offer to be consummated within 210 days of the closing of the offering of the Restricted Notes.

We also agreed to file a shelf registration statement under certain circumstances. If we fail to satisfy these obligations, we have agreed to pay additional interest to the holders of the Restricted Notes under certain circumstances. See "Description of the Exchange Notes—Registration rights."

The exchange offer is not being made to holders of Restricted Notes in any jurisdiction in which the exchange would not comply with the securities or blue sky laws of such jurisdiction. A copy of the registration rights agreement is filed as an exhibit to the registration statement of which this prospectus is a part.

#### Terms of the exchange offer

Subject to the terms and the satisfaction or waiver of the conditions detailed in this prospectus, we will accept for exchange Restricted Notes which are properly tendered on or prior to the expiration date and not withdrawn as permitted below. As used herein, the term "expiration date" means 5:00 p.m., New York City time, on \_\_\_\_\_\_, 2010. We may, however, in our sole discretion, extend the period of time during which the exchange offer is open. The term "expiration date" means the latest time and date to which the exchange offer is extended.

As of the date of this prospectus, \$200,000,000 aggregate principal amount of Restricted Notes are outstanding. This prospectus is first being sent on or about the date hereof to all holders of Restricted Notes known to us.

We expressly reserve the right, at any time prior to the expiration of the exchange offer, to extend the period of time during which the exchange offer is open, and delay acceptance for exchange of any Restricted Notes, by giving oral or written notice of such extension to holders as described below. During any such extension, all Restricted Notes previously tendered will remain subject to the exchange offer and may be accepted for exchange by us. Any Restricted Notes not accepted for exchange for any reason will be returned without expense to an account maintained with DTC as promptly as practicable after the expiration or termination of the exchange offer.

We expressly reserve the right to amend or terminate the exchange offer, and not to accept for exchange any Restricted Notes, upon the occurrence of any of the conditions of the exchange offer specified under "—Conditions to the exchange offer." In the event of a material change in the exchange offer, including the

waiver of a material condition, we will extend the exchange offer period if necessary to ensure that at least five business days remain in the exchange offer following notice of the material announcement. We will give oral or written notice of any extension, amendment, non-acceptance or termination to the holders of the Restricted Notes as promptly as practicable. Such notice, in the case of any extension, will be issued by means of a press release or other public announcement no later than 9:00 a.m., New York City time, on the next business day after the previously scheduled expiration date.

#### **Procedures for tendering Restricted Notes**

When a holder of Restricted Notes tenders, and we accept, Restricted Notes for exchange, a binding agreement between us and the tendering holder is created, subject to the terms and conditions described in this prospectus and the letter of transmittal.

Valid Tender. Except as set forth below, a holder of Restricted Notes who wishes to tender notes for exchange must, on or prior to the expiration date:

- transmit a properly completed and duly executed letter of transmittal, including all other documents required by the letter of transmittal, to the exchange agent at the address set forth under the caption "-Exchange Agent;" or
- if Restricted Notes are tendered pursuant to the book-entry procedures set forth below, the tendering holder must transmit an agent's message to the exchange agent at the address set forth under the caption "—Exchange Agent."

In addition, either:

- the exchange agent must receive the certificates for the Restricted Notes and the letter of transmittal;
- the exchange agent must receive, prior to the expiration date, a timely confirmation of the book-entry transfer of the notes being tendered into the exchange agent's account at DTC, along with the letter of transmittal or an agent's message; or
- the holder must comply with the guaranteed delivery procedures described below.

The term "agent's message" means a message, transmitted by DTC and received by the exchange agent and forming a part of a book-entry confirmation, which states that DTC has received an express acknowledgment from the tendering holder that the tendering holder has received and agrees to be bound by the letter of transmittal and that we may enforce the letter of transmittal against that holder. In this prospectus, the term "book-entry confirmation" means a timely confirmation of a book-entry transfer of Restricted Notes into the exchange agent's account at DTC.

If any letter of transmittal, endorsement, bond power, power of attorney or any other document required by the letter of transmittal is signed by a trustee, executor, administrator, guardian, attorney-in-fact, officer of a corporation or other person acting in a fiduciary or representative capacity, that person should so indicate when signing and must submit proper evidence satisfactory to us, in our reasonable judgment, of the person's authority to act.

Any beneficial owner of Restricted Notes that are held by or registered in the name of a broker, dealer, commercial bank, trust company or other nominee or custodian is urged to contact that entity promptly if the beneficial owner wishes to participate in the exchange offer.

The method of delivery of Restricted Notes, the letter of transmittal and all other required documents is at the option and sole risk of the tendering holder, and delivery will be deemed made only when actually received by the exchange agent. Instead of delivery by mail, we recommend that holders use an overnight or hand delivery service. In all cases, holders should allow sufficient time to assure timely delivery to the exchange agent and should obtain proper insurance. No letter of transmittal or Restricted Notes should be sent to us. Holders may request their respective brokers, dealers, commercial banks, trust companies or nominees to effect these

transactions for them. We will not accept any alternative conditional or contingent tenders. Each tendering holder, by execution of the letter of transmittal, waives any right to receive any notice of the acceptance of such tender.

Each broker-dealer that receives Exchange Notes for its own account in exchange for Restricted Notes, where the Restricted Notes were acquired by the broker-dealer as a result of market-making or other trading activities, must acknowledge that it will deliver a prospectus in connection with any resale of the Exchange Notes. See "Plan of Distribution."

*Book-Entry Transfer*. The exchange agent will make a request to establish an account at DTC with respect to Restricted Notes for purposes of the exchange offer within two business days after the date of this prospectus. Subject to the establishment of such accounts, any financial institution that is a participant in DTC's book-entry transfer facility system may make a book-entry delivery of Restricted Notes by causing DTC to transfer those Restricted Notes into the exchange agent's account at DTC in accordance with DTC's procedures for transfers. However, although delivery of Restricted Notes may be effected through book-entry transfer into the exchange agent's account at DTC, an agent's message or a duly executed letter of transmittal, including all other documents required by such letter of transmittal, must in any case, be transmitted to and received by the exchange agent at one of the addresses set forth below under the caption "Exchange Agent" on or before the expiration date or the guaranteed delivery procedures described below must be complied with. Delivery of the agent's message by DTC will satisfy the terms of the exchange offer as to execution and delivery of a letter of transmittal by the participant identified in the agent's message.

#### Delivery of documents to DTC does not constitute delivery to the exchange agent.

*Guaranteed Delivery.* Holders who wish to tender their Restricted Notes and (i) whose Restricted Notes are not immediately available, (ii) who cannot deliver their Restricted Notes, the letter of transmittal or any other required documents to the exchange agent before the expiration date, or (iii) who cannot complete the procedures for delivery by book-entry transfer, may effect a tender if:

(a) the tender is made through an eligible institution;

(b) before the expiration date, the exchange agent receives from an eligible institution a properly completed and duly executed letter of transmittal, or a facsimile of the letter of transmittal, and notice of guaranteed delivery by mail, hand delivery, overnight courier or facsimile transmission setting forth the name and address of the holder of the Restricted Notes, the certificate number or numbers of the Restricted Notes and the amount of Restricted Notes being tendered, stating that the tender is being made and guaranteeing that, within three New York Stock Exchange trading days after the expiration date, the properly completed and duly executed letter of transmittal (or facsimile thereof) together with the certificates for all physically tendered Restricted Notes, in proper form for transfer, or a book-entry confirmation, as the case may be, and any other documents required by the letter of transmittal will be deposited by the eligible institution with the exchange agent; and

(c) a properly completed and executed letter of transmittal (or facsimile thereof), as well as the certificates representing all tendered Restricted Notes in proper form for transfer, or a book-entry confirmation, as the case may be, and all other documents required by the letter of transmittal, are received by the exchange agent within three New York Stock Exchange trading days after the expiration date.

Determination of Validity. All questions as to the form of documents, validity, eligibility, including time of receipt, and acceptance for exchange of any tendered Restricted Notes will be determined by us, in our reasonable judgment, and that determination will be final and binding on all parties. We reserve the right, in our reasonable judgment, to reject any and all tenders that we determine are not in proper form or the acceptance for exchange of which may, in the view of our counsel, be unlawful. We also reserve the right, subject to applicable law, to waive any of the conditions of the exchange offer as set forth under the caption "—Conditions to the Exchange Offer" or any defect or irregularity in any tender of Restricted Notes of any particular holder whether or not we waive similar defects or irregularities in the case of other holders.

Our interpretation of the terms and conditions of the exchange offer, including the letter of transmittal and its instructions, will be final and binding on all parties. No tender of Restricted Notes will be deemed to have been validly made until all defects or irregularities with respect to such tender have been cured or waived. Neither we, any of our affiliates or assigns, the exchange agent or any other person will be under any duty to give any notification of any defects or irregularities in tenders or incur any liability for failure to give any such notification.

#### Acceptance of Restricted Notes for exchange; delivery of the Exchange Notes

Upon satisfaction or waiver of all of the conditions to the exchange offer, we will accept, promptly after the expiration date, all Restricted Notes properly tendered and will issue the Exchange Notes promptly after acceptance of the Restricted Notes. See "—Conditions to the exchange offer." For purposes of the exchange offer, we will be deemed to have accepted properly tendered Restricted Notes for exchange if and when we give oral (confirmed in writing) or written notice to the exchange agent.

The holder of each Restricted Note accepted for exchange will receive an Exchange Note in the amount equal to the surrendered Restricted Note. Holders of the Exchange Notes on the relevant record date for the first interest payment date following the consummation of the exchange offer will receive interest accruing from the most recent date to which interest has been paid on the Restricted Notes. Holders of the Exchange Notes will not receive any payment in respect of accrued interest on Restricted Notes otherwise payable on any interest payment date, the record date for which occurs on or after the consummation of the exchange offer.

If any tendered Restricted Notes are not accepted for any reason set forth in the terms and conditions of the exchange offer or if Restricted Notes are submitted for a greater principal amount than the holder desires to exchange, such unaccepted or non-exchanged Restricted Notes will be returned without expense to an account maintained with DTC promptly after the expiration or termination of the exchange offer.

## Withdrawal rights

Tenders of Restricted Notes may be withdrawn at any time before 5:00 p.m., New York City time, on the expiration date. For a withdrawal to be effective, the exchange agent must receive a written notice of withdrawal at the address, or in the case of eligible institutions, at the facsimile number, set forth below under the caption "-Exchange Agent" before 5:00 p.m., New York City time, on the expiration date. Any notice of withdrawal must specify the name of the person having tendered the Restricted Notes to be withdrawn, identify the Restricted Notes to be withdrawn (including the certificate number or numbers and the principal amount of the original notes), and (where certificates for Restricted Notes have been transmitted) specify the name in which such Restricted Notes are registered, if different from that of the withdrawing holder. If certificates for Restricted Notes have been delivered or otherwise identified to the exchange agent, then, before the release of such certificates, the withdrawing holder must also submit the serial numbers of the particular certificates to be withdrawn and a signed notice of withdrawal with signatures guaranteed by an eligible institution unless such holder is an eligible institution. If Restricted Notes have been tendered pursuant to the procedure for book-entry transfer described above, any notice of withdrawal must specify the name and number of the account at DTC to be credited with the withdrawn Restricted Notes and otherwise comply with the procedures of such facility. All questions as to the validity, form and eligibility (including time of receipt) of such notices will be determined by us, and our determination shall be final and binding on all parties. Any Restricted Notes so withdrawn will be deemed not to have been validly tendered for exchange for purposes of the Exchange Offer. Any Restricted Notes which have been tendered for exchange but which are not exchanged for any reason will be returned to the holder thereof without cost to such holder (or in the case of original notes tendered by book-entry transfer into the exchange agent's account at DTC pursuant to the book-entry transfer procedures described above, such Restricted Notes will be credited to an account maintained with DTC for the Restricted Notes) as soon as practicable after withdrawal, rejection of tender or termination of the Exchange Offer. Properly withdrawn Restricted Notes may be re-tendered by following one of the procedures described above under the caption "-Procedures for Tendering" at any time on or before the expiration date.



# Conditions to the exchange offer

Notwithstanding any other provision of the exchange offer, we are not required to accept for exchange, or to issue the Exchange Notes in exchange for, any Restricted Notes and may terminate or amend the exchange offer, if prior to the expiration date, the exchange offer violates any applicable law or applicable interpretation of the staff of the SEC.

The foregoing condition is for our sole benefit and may be asserted by us regardless of the circumstances giving rise to any condition or may be waived by us in whole or in part at any time in our reasonable discretion, except that we will not waive the condition with respect to an individual holder unless we waive such condition with respect to all holders. Our failure at any time to exercise any of the foregoing rights will not be deemed a waiver of any such right, and each such right will be deemed an ongoing right which may be asserted at any time and from time to time prior to the expiration of the exchange offer. The condition to the exchange offer must be satisfied or waived by us prior to the expiration of the exchange offer.

In addition, we will not accept for exchange any Restricted Notes tendered, and no Exchange Notes will be issued in exchange for any such Restricted Notes, if at such time any stop order is threatened or in effect with respect to the Registration Statement, of which this prospectus constitutes a part, or the qualification of the indentures under the Trust Indenture Act.

# Exchange agent

We have appointed Wells Fargo Bank, National Association, as the exchange agent for the exchange offer. Questions and requests for assistance, requests for additional copies of this prospectus or of other documents should be directed to the exchange agent addressed as follows:

Wells Fargo Bank, National Association, Exchange Agent

By Registered or Certified Mail: WELLS FARGO BANK, N.A. Corporate Trust Operations MAC N9303-121 PO Box 1517 Minneapolis, MN 55480

By Regular Mail or Overnight Courier: WELLS FARGO BANK, N.A. Corporate Trust Operations MAC N9303-121 Sixth & Marquette Avenue Minneapolis, MN 55479

By Facsimile (for Eligible Institutions only): (612) 667-6282

For Information of Confirmation by Telephone: (800) 344-5128 In Person by Hand Only: WELLS FARGO BANK, N.A. 12th Floor-Northstar East Building Corporate Trust Operations 608 Second Avenue South Minneapolis, MN 55479

#### Fees and expenses

The principal solicitation is being made by mail by Wells Fargo Bank, National Association, as exchange agent. We will pay the exchange agent customary fees for its services, reimburse the exchange agent for its reasonable out-of-pocket expenses incurred in connection with the provision of these services and pay other registration expenses, including registration and filing fees, fees and expenses of compliance with federal securities and state blue sky securities laws, printing expenses, messenger and delivery services and telephone, fees and disbursements to our counsel, application and filing fees and any fees and disbursement to our independent certified public accountants. We will not make any payment to brokers, dealers or others soliciting acceptances of the exchange offer.

Additional solicitation may be made by telephone, facsimile or in person by our and our affiliates' officers and regular employees and by persons so engaged by the exchange agent.

# Accounting treatment

We will record the Exchange Notes at the same carrying value as the Restricted Notes, as reflected in our accounting records on the date of the exchange. Accordingly, we will not recognize any gain or loss for accounting purposes. The expenses of the exchange offer will be amortized over the term of the Exchange Notes.

# Transfer taxes

You will not be obligated to pay any transfer taxes in connection with the tender of Restricted Notes in the exchange offer unless you instruct us to register the Exchange Notes in the name of, or request that Restricted Notes not accepted in the exchange offer be returned to, a person other than the registered tendering holder. In those cases, you will be responsible for the payment of any applicable transfer tax.

#### Consequences of exchanging or failing to exchange Restricted Notes

The information below concerning specific interpretations of and positions taken by the staff of the SEC is not intended to constitute legal advice, and prospective purchasers should consult their own legal advisors with respect to those matters.

If you do not exchange your Restricted Notes for Exchange Notes in the exchange offer, your Restricted Notes will continue to be subject to the provisions of the indentures regarding transfer and exchange of the Restricted Notes and the restrictions on transfer of the Restricted Notes imposed by the Securities Act and state securities laws. These transfer restrictions are required because the Restricted Notes were issued under an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act and applicable state securities laws. In general, the Restricted Notes may not be offered or sold unless registered under the Securities Act, except under an exemption from, or in a transaction not subject to, the Securities Act and applicable state securities laws. We do not plan to register the Restricted Notes under the Securities Act.

Based on interpretations by the staff of the SEC, as detailed in a series of no-action letters issued to third parties, we believe that the Exchange Notes issued in the exchange offer may be offered for resale, resold or otherwise transferred by you without compliance with the registration and prospectus delivery requirements of the Securities Act as long as:

- you are acquiring the Exchange Notes in the ordinary course of your business;
- you are not participating, do not intend to participate and have no arrangement or understanding with any person to participate, in a distribution
  of the Exchange Notes; and
- you are not an affiliate of ours.

If you are an affiliate of ours, are engaged in or intend to engage in or have any arrangement or understanding with any person to participate in the distribution of the Exchange Notes:

you cannot rely on the applicable interpretations of the staff of the SEC;

- you will not be entitled to participate in the exchange offer; and
- you must comply with the registration and prospectus delivery requirements of the Securities Act in connection with any resale transaction.

We do not intend to seek our own interpretation regarding the exchange offer, and we cannot assure you that the staff of the SEC would make a similar determination with respect to the Exchange Notes as it has in other interpretations to third parties.

Each holder of Restricted Notes who wishes to exchange such Restricted Notes for the related Exchange Notes in the exchange offer represents that:

- it is not our affiliate;
- it is not engaged in, and does not intend to engage in, and has no arrangement or understanding with any person to participate in, a distribution of the Exchange Notes to be issued in the exchange offer;
- · it is acquiring the Exchange Notes in its ordinary course of business; and
- if it is a broker-dealer, it will receive the Exchange Notes for its own account in exchange for Restricted Notes that were acquired by it as a result
  of its market-making or other trading activities and that it will deliver a prospectus in connection with any resale of the Exchange Notes it
  receives. For further information regarding resales of the Exchange Notes by participating broker-dealers, see the discussion under the caption
  "Plan of distribution."

As discussed above, in connection with resales of the Exchange Notes, any participating broker-dealer must deliver a prospectus meeting the requirements of the Securities Act. The staff of the SEC has taken the position that participating broker-dealers may fulfill their prospectus delivery requirements with respect to the Exchange Notes, other than a resale of an unsold allotment from the original sale of the Restricted Notes, with the prospectus contained in the exchange offer registration statement.

# **USE OF PROCEEDS**

We will not receive any proceeds from the exchange offer. Any Restricted Notes that are properly tendered and exchanged pursuant to the exchange offer will be retired and canceled.

# **RATIO OF EARNINGS TO FIXED CHARGES**

The following table sets forth the Predecessor's ratio of earnings to fixed charges on a historical basis for each of the last five fiscal years ended January 31, 2010, and for the thirteen weeks ended May 2, 2010 and May 3, 2009 and on a pro forma basis for the thirteen week period ended May 2, 2010 and the fiscal year ended January 31, 2010.

Thirteen weeks ended	Fiscal year ended 334-day		37-day				
May 2, May 2, May 3, 2010 2010 2009 (Pro forma)	2010(1)	January 31, 2010(1) (Pro forma)	February 1, 2009	February 3, 2008(1)	period from March 8, 2006 to February 4, 2007(1)	period from January 30, 2006 to March 7, 2006(2)	Fiscal year ended January 29, 2006(2)
1.73x $1.32x$ $1.78x$	—	(110 lonna) —	1.03x	_		1.46x	1.32x

(1) Earnings for the fiscal year ended January 31, 2010, the pro forma fiscal year ended January 31, 2010, the fiscal year ended February 3, 2008, and the 334-day period ended February 4, 2007 were insufficient to cover fixed charges by approximately \$891,000, \$11,834,000, \$10,253,000, and \$20,907,000, respectively.

(2) These periods represent operations of the Predecessor prior to acquisition of the Predecessor by the Sellers. The Sellers purchased all of the Predecessor common stock on March 8, 2006.



# UNAUDITED PRO FORMA CONSOLIDATED FINANCIAL INFORMATION

The following unaudited pro forma consolidated financial statements are based on our historical consolidated financial statements included elsewhere in this prospectus, and adjusted to give effect to the Transactions that occurred on June 1, 2010. The unaudited pro forma consolidated statements of operations for the thirteen week period ended May 2, 2010 and for the year ended January 31, 2010 give effect to the Transactions as if they had occurred as of February 2, 2009. The unaudited pro forma consolidated balance sheet as of May 2, 2010 gives effect to the Transactions as if they had occurred on that date. The pro forma adjustments are based upon available information, preliminary estimates and certain assumptions that we believe are reasonable based on information currently available, and are described in the accompanying notes. The pro forma consolidated financial statements should not be considered indicative of actual balance sheet data or results that would have been achieved had the Transactions been consummated on the dates indicated and do not purport to indicate balance sheet data or results of operations as of any future date or for any future period. The unaudited pro forma consolidated financial information should be read in conjunction with "Summary—The Transactions," "Use of proceeds," "Management's discussion and analysis of financial condition and results of operations" and our historical consolidated financial statements and the notes thereto included elsewhere in this prospectus.

The Transactions will be accounted for in accordance with accounting guidance for business combinations and, accordingly, will result in the recognition of assets acquired and liabilities assumed at fair value. As of the date of this prospectus, the valuation studies necessary to estimate the fair values of the assets and the liabilities and to allocate the cost of the acquisition have not been completed. For purposes of computing pro forma adjustments, we have assumed that historical recorded amounts of the assets and liabilities approximate their respective fair values and the excess of the acquisition cost over the historical net assets of Dave & Buster's has been presented as an adjustment of indefinite-lived intangible assets and goodwill. Accordingly, the accompanying pro forma balance sheet does not include any adjustment of the historical recorded amounts of inventories, property and equipment, finite-lived intangible assets, deferred lease liabilities, other assets or liabilities, or the associated adjustments to deferred taxes that may result from the allocation of the acquisition cost based on such valuation studies. The adjustment of the historical recorded amounts of assets and liabilities to their respective fair values may also result in adjustments to depreciation and amortization expense, rent expense and the provision for income taxes which are not reflected in the accompanying pro forma consolidated statements of operations. In addition, the final allocation of the acquisition cost of the acquisition will differ from the allocation assumed in these pro forma consolidated financial statements. The adjustments arising from the valuation studies will not impact our cash flows, including cash interest and rent. However, such adjustments could result in material increases or decreases in our EBITDA and Adjusted EBITDA.

# Unaudited pro forma consolidated balance sheet as of May 2, 2010

(Dollars in thousands)	Historical	Pro forma adjustments	Pro forma
ASSETS			
Current Assets:			
Cash	\$ 19,017	\$ (12,998)(a)	\$ 6,019
Inventories	13,972		13,972
Prepaid expense	10,516	1,703(b)	12,219
Deferred Income taxes	5,246	—	5,246
Other current assets	5,571		5,571
Total current assets	54,322	(11,295)	43,027
Property and equipment, net	285,732		285,732
Intangible assets and goodwill	128,857	262,759(c)	391,616
Other assets	13,660	9,175(d)	22,835
Total assets	\$ 482,571	\$ 260,639	\$ 743,210
LIABILITIES AND STOCKHOLDERS' EQUITY			
Current Liabilities:			
Current installment of long-term debt	\$ 956	\$ 544(e)	\$ 1,500
Accounts payable	22,559	_ `	22,559
Accrued liabilities	42,005	(3,306)(f)	38,699
Income taxes payable	5,671	(585)(g)	5,086
Deferred Income taxes	39	<u> </u>	39
Total current liabilities	71,230	(3,347)	67,883
Deferred income taxes	9,945	585(g)	10,530
Deferred occupancy costs	66,307	_	66,307
Other liabilities	11,916	—	11,916
Long-term Debt, less current installment	226,169	(77,669)(e)	148,500
Notes offered hereby	_	200,000(e)	200,000
Total stockholders' equity	97,004	141,070(h)	238,074
Total liabilities and stockholders' equity	\$ 482,571	\$ 260,639	\$ 743,210

# Notes to unaudited pro forma consolidated balance sheet

(a) Represents the pro forma adjustments that adjust Dave & Buster's cash in accordance with the Transactions:

(In thousands)	As of May 2, 2010
Cash proceeds from:	
Investment in our common stock by Oak Hill & Management	\$245,498
New senior secured credit facility	150,000
Restricted Notes	200,000
	595,498
Cash transaction costs associated with new debt and completion of Transactions	(21,784)
	573,714
Payment of outstanding Predecessor debt	
Revolving credit facility	
Term loan	(67,125)
Senior Notes	(160,000)
	\$(227,125)
Payment of costs associated with Predecessor debt	
Redemption premium on Senior Notes	\$ (9,000)
Redemption period interest payment	(1,500)
Cancellation of interest rate swap contacts	(1,664)
Payment of accrued interest through May 2, 2010	(2,462)
	\$(14,626)
Payments to existing shareholders including payments made to escrow and payment of Seller's expenses related	
to Transaction	\$(334,156)
Payment of available cash balances to Sellers	(10,805)
	\$ (12,998)

The pro forma financial statements assume that the Successor's transaction costs were approximately \$22,604 and consisted of:

Costs related to new debt financing	\$13,477
Costs related to the Merger	4,424
Bridge loan commitment fees	3,000
Insurance coverage costs	1,703
	\$22,604

Approximately \$21,784 of the above costs were paid upon closing of the Transactions, the remainder of the Successor's transaction costs are reflected as an adjustment of \$820 to accrued liabilities (note f).

No income tax benefit has been provided for the deferred tax assets related to deductible expenses related to the Transactions or the writeoff of historic unamortized debt issuance costs (note d). Such deferred tax assets may be realized as a result of the generation of taxable income in the future.

- (b) Represents the prepaid costs of insurance policies covering Director and Officer liability and Representation and Warranty insurance coverage included in Transaction Costs. The policies obtained provide coverage for insured events over terms that range from one to six years.
- (c) Represents the pro forma adjustments to Dave & Buster's intangible assets and goodwill determined as follows:

	As of May 2, 2010
Total payments to Seller's including payments made to escrow and payments of Predecessor expenses related	
to the Transactions (note a)	\$334,156
Less	
Historical net book value of Predecessor as of May 2, 2010	97,004
Payment of available cash to Sellers (note a)	(10,805)
Elimination of deferred financing costs	(4,302)
Redemption premium and redemption period interest related to Predecessor Senior Notes (note a)	(10,500)
	(71,397)
	\$262,759

At the closing date of the Transactions, the Sellers funded all accrued and unpaid interest related to our credit facility and paid fees associated with the cancellation of the interest rate swap agreements. As of May 2, 2010, the accrued and unpaid interest on our credit facility totaled \$2,462 and the estimated fees for canceling our interest rate swap agreements were \$1,664.

We issued an irrevocable notice of redemption of all of our existing Senior Notes at a redemption price of \$1,056.25 per \$1,000 principal amount of existing Predecessor Senior Notes on the closing date of the Transactions. The amount of the redemption premium was funded from the payments to Seller's.

The accompanying pro forma balance sheet does not include any adjustment of the historical recorded amounts of inventories, property and equipment, finite-lived intangible assets, deferred lease liabilities or other assets or liabilities or the associated adjustments to deferred taxes that my result from the allocation of the acquisition cost based on such appraisals. In addition, the final allocation of the acquisition cost will be based on the actual assets and liabilities of Dave & Buster's that exist as of the date of the Transactions. Therefore, the actual allocations of the purchase price and the related impact, if any, on deferred taxes will differ from the allocation of the purchase price assumed in these pro forma consolidated financial statements and the impact of these differences could be significant.

# (d) Represents the net pro forma adjustment to capitalized debt issuance cost:

Write-off of unamortized debt issuance costs on existing debt	\$ (4,302)
Capitalization of new debt issuance costs	13,477
Incremental debt issuance costs	\$ 9,175

(e) Represents the net pro forma adjustment to debt, assuming the following proceeds from new debt, less payment of Predecessor debt:

	Historical	Pro forma adjustments	Pro forma
Predecessor debt:			
Revolving credit facility	\$ —	\$ —	\$ —
Term loans	67,125	(67,125)	
Senior Notes due 2014	160,000	(160,000)	—
New debt:			
Revolving credit facility	_	—	
Term loans		150,000	150,000
Restricted Notes		200,000	200,000
Total debt	227,125	122,750	350,000
Less: current maturities of long-term debt	956	544	1,500
Total long-term debt	\$226,169	\$ 122,086	\$348,500

The pro forma debt obligations set forth above reflect the debt financing for the Transactions, based on the terms of the new debt realized at the close of the Transactions.

(f) Represents the proforma payment of the following accrued expenses from seller funds and the recognition of certain liabilities for Transaction costs incurred that will be paid by the Successor:

Payment to terminate interest rate swaps	\$(1,664)
Payment of accrued interest	(2,462)
Accrual of transaction costs	820
	\$(3,306)

At May 2, 2010 we held two interest rate swap contracts that expire in 2011. The contracts have not been designated as hedges and adjustments to mark the instruments to their fair value are recorded as interest expense. These contracts were terminated as part of the Transactions.

(g) Represents the impact on deferred taxes as a result of the pro forma adjustments related to the termination of our interest rate swap agreements.
 (h) Represents the following pro forma charges to shareholder's equity:

Elimination of Predecessor equity through purchase price adjustment	\$ (97,004)
Investment in our common stock by Oak Hill & management	245,498
Transaction costs expensed, (note a)	(7,424)
	\$141,070

# Unaudited pro forma consolidated statement of operations for the thirteen weeks ended May 2, 2010

	Pro forma			
(Dollars in thousands)	Historical	adjustments(a)	Pro forma	
Food and beverage revenues	\$ 71,357	\$ —	\$ 71,357	
Amusements and other revenues	70,218		70,218	
Total revenues	141,575		141,575	
Total cost of products	27,863	—	27,863	
Operating payroll and benefits	33,468	_	33,468	
Other store operating expenses	45,605	—	45,605	
General and administrative expenses	8,617	51(b)	8,668	
Depreciation and amortization expense	12,501	—	12,501	
Preopening costs	1,189	—	1,189	
Total Operating Costs	129,243	51	129,294	
Operating income	12,332	(51)	12,281	
Interest expense, net	5,348	2,874(c)	8,222	
Income before provision for income taxes	6,984	(2,925)	4,059	
Provision (Benefit) for income taxes	3,073	<u>     (d)</u>	3,073	
Net income (loss)	\$ 3,911	<u>\$ (2,925)</u>	\$ 986	

# Unaudited pro forma consolidated statement of operations for the year ended January 31, 2010

		Pro forma	
(Dollars in thousands)	Historical	adjustments(a)	Pro forma
Food and beverage revenues	\$269,973	\$ —	\$269,973
Amusements and other revenues	250,810		250,810
Total revenues	520,783	—	520,783
Total cost of products	104,137	—	104,137
Operating payroll and benefits	132,114	_	132,114
Other store operating expenses	174,685	—	174,685
General and administrative expenses	30,437	195(b)	30,632
Depreciation and amortization expense	53,658	_	53,658
Preopening costs	3,881		3,881
Total operating costs	498,912	195	499,107
Operating income	21,871	(195)	21,676
Interest expense, net	22,122	<u>10,649(c)</u>	32,771
Income (loss) before provision for income taxes	(251)	(10,844)	(11,095)
Provision for income taxes	99	<u> </u>	99
Net income (loss)	<u>\$ (350)</u>	<u>\$ (10,844)</u>	<u>\$ (11,194)</u>

# Notes to unaudited pro forma consolidated statements of operations

(a) The Transactions will be accounted for as a purchase in accordance with accounting guidance for business combinations and, accordingly, will result in the recognition of assets acquired and liabilities assumed at their fair values. The adjustments of the historical recorded amount of assets and liabilities to their respective fair value may also result in adjustments to depreciation and amortization expense, rent expense and the provision for income taxes which are not reflected in these pro forma consolidated statements of operations. See note (c) to the pro forma balance sheet above.

As a direct result of the Transactions, the Company will incur certain material, nonrecurring charges during the 12 months succeeding the transaction. These charges include:

(Dollars in thousands)	Thirteen Weeks ended May 2, 2010	Fiscal Year ended January 31, 2010
Professional fees and charges required to complete Transactions	\$ 4,424	\$ 4,424
Bank fees associated with interim financing of Transactions	3,000	3,000
Pro forma transaction expense	\$ 7,424	\$ 7,424

The above costs are not included in the historical statements of operations but are provided for information purposes. Due to the absence of a continuing impact on our operations, these charges have also been excluded from the pro forma adjustments reflected in this presentation.

- (b) Represents the proforma incremental expense resulting from the amortization of prepaid insurance acquired as a result of the Transaction.
- (c) Represents the pro forma incremental interest expense resulting from the new debt. The pro forma adjustment also includes the amortization of debt issuance costs associated with the new debt. The interest expense pro forma adjustment consists of the following:

(Dollars in thousands)	Thirteen Weeks ended May 2, 2010	Fiscal Year ended January 31, 2010		
Estimated interest expense on new debt	\$ 7,762	\$ 30,969		
Adjust for interest expense on retired debt	(5,650)	(22,916)		
Amortization of new debt issuance costs	517	2,068		
Adjust for amortization of debt issuance	(367)	(1,464)		
Pro forma impact of cancelling interest rate swap				
agreement	612	1,992		
Total pro forma adjustments to interest expense	\$ 2,874	\$ 10,649		

The interest expense above is based on the rates and terms in effect at the closing of the Transaction related to our new senior secured credit facility and our new Restricted Notes. On a proforma basis, a .125% increase in the interest rates applicable to our new senior secured credit facility would have resulted in additional interest expense of approximately \$46 in the thirteen weeks ended May 2, 2010 and \$187 in the fiscal year ended January 31, 2010.

(d) No tax benefit has been provided for the incremental pro forma interest expense. Such tax benefit may be realized as a result of the generation of taxable income in the future.

## SELECTED HISTORICAL CONSOLIDATED FINANCIAL AND OTHER DATA

Accounting principles generally accepted in the United States require operating results for Dave & Buster's prior to the Acquisition completed on June 1, 2010 to be presented as Predecessor's results in the historical financial statements. Operating results for Dave & Buster's subsequent to the Acquisition will be presented or referred to as Successor's results in the historical financial statements.

The following table sets forth our selected historical consolidated financial data for each of the five fiscal years in the period ended January 31, 2010 and for the thirteen week periods ended May 2, 2010 and May 3, 2009. The consolidated statement of operations data for each of the three fiscal years in the period ended January 31, 2010 and the consolidated balance sheet data as of January 31, 2010 and February 1, 2009 were derived from the Predecessor's audited consolidated financial statements included elsewhere in this prospectus. The consolidated statement of operations for the thirteen weeks ended May 2, 2010 and May 3, 2009 and the consolidated balance sheet data as of May 2, 2010 were derived from the Predecessor's unaudited consolidated financial statements included elsewhere in this prospectus and, in the opinion of management, includes all normal recurring adjustments necessary to present fairly the data for such periods and as of such dates. This historical consolidated financial data does not reflect the consummation of the Transactions or our capital structure following the Transactions and is not indicative of results that would have been reported had the Transactions occurred, nor is it indicative of our future financial position or operating results.

This table should be read in conjunction with "Management's discussion and analysis of financial condition and results of operations" and the financial statements and related notes included elsewhere in this prospectus. Our historical results are not necessarily indicative of our future results.

	Thirteen weeks ended				Fiscal year ended					334-day		1				
(Dollars in thousands)				May 3, 2009		January 31, 2010		February 1, 2009		February 3, 2008		period         37-day           from         period from           March 8,         January 30,           2006 to         2006 to           February 4,         March 7,           2007         2006(1)		Fiscal year ended January 29, 2006(1)		
Statement of operations data:	(Pro	edecessor)	(Pr	edecessor)	(P1	red ecessor)	(P1	edecessor)	(Pr	redecessor)	(Pi	edecessor)	(Pre	decessor)	(Pre	edecessor)
Revenues:																
Food and beverage revenues	\$	71,357	\$	71,000	\$	269,973	\$	284,779	\$	293,097	\$	256,616	S	27,562	\$	253,996
Amusement and other revenues	-	70,218		67,426		250,810		248,579		243,175		203,176		22,847		209,456
Total revenues		141,575		138,426		520,783	_	533,358		536,272		459,792		50,409		463,452
Operating costs:			_		_		_		_			<u> </u>				
Cost of products:																
Cost of food and beverage		17,277		17,406		65,349		70,520		72,493		64,549		7,111		65,405
Cost of amusement and other		10,586		9,549		38,788		34,218		34,252		28,999		3,268		28,723
Total cost of products		27,863		26,955		104,137	-	104,738		106,745	-	93,548		10,379		94,128
Operating payroll and benefits		33,468		34,532		132,114		139,508		144,920		130,123		14,113		130,367
Other store operating expenses		45,605		42,604		174,685		174,179		171,627		147,295		15,323		144,066
General and administrative expenses		8,617		7,405		30,437		34,546		38,999		35,055		3,829		33,951
Depreciation and amortization expense		12,501		12,733		53,658		49,652		51,898		43,892		4,328		42,616
Preopening costs		1,189		1,146		3,881		2,988		1,002		3,470		880		5,325
Total operating costs		129,243		125,375	_	498,912		505,611	_	515,191		453,383		48,852		450,453
Operating income		12,332		13,051		21,871		27,747		21,081		6,409		1,557		12,999
Interest expense, net		5,348		5,549		22,122		26,177		31,183		27,064		649		6,695
Income (loss) before provision (benefit) for income taxes		6,984		7,502		(251)	_	1,570	_	(10, 102)		(20,655)		908		6,304
Provision (benefit) for income taxes		3,073		2,335		99		(45)		(1,261)		(8,592)		422		2,016
Net income (loss)		3,911		5,167	\$	(350)	\$	1,615	\$	(8,841)	\$	(12,063)	\$	486	\$	4,288
Statement of cash flow data:					-		-		-		_		_			
Cash provided by (used in):																
Operating activities	\$	9,445	\$	10,903	\$	59,054	\$	52,197	\$	50,573	\$	43,678	\$	10,741	\$	65,423
Investing activities		(6,985)		(8,177)		(48,406)		(49,084)		(30,899)		(341,104)		(10,600)		(63,271)
Financing activities		(125)		(2,125)		(2,500)		(13,625)		(11,000)		299,986		89		(5,957)
Balance sheet data (as of end of period):																
Cash and cash equivalents	\$	19,017	\$	9,135	\$	16,682	\$	8,534	\$	19,046	\$	10,372			\$	7,582
Working capital (deficit)		(16,908)		(30,494)		(28,019)		(35,196)		(30,666)		(31,430)				(37,206)
Property and equipment, net		285,732		292,478		294,151		296,805		296,974		316,840				351,883
Total assets		482,571		476,902		483,640		480,936		496,203		506,813				423,062
Total debt		227,125		227,625		227,250		229,750		243,375		254,375				80,175
Stockholders' equity		97,004		97,224		92,646		92,023		90,756		96,705				205,220

(1) These periods represent operations of the Predecessor prior to the acquisition of the Predecessor by the Sellers. The Sellers purchased all of the Predecessor common stock on March 8, 2006.

# MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

The following discussion and analysis of our financial condition and results of operations covers periods prior to the consummation of the Transactions. Accordingly, the discussion and analysis of historical periods does not reflect the significant impact that the Transactions will have on us, including without limitation, increased leverage, the impact of purchase accounting and debt service requirements. You should read the following discussion of our financial condition and results of operations in conjunction with "Unaudited pro forma consolidated financial information," "Selected historical consolidated financial and other data" and the historical consolidated financial statements and related notes included elsewhere in this prospectus. All dollar amounts are presented in thousands. This discussion contains forward-looking statements and actual results may differ materially from those suggested by our forward-looking statements for various reasons, including those discussed in the "Risk factors" and "Cautionary statement regarding forward-looking statements" sections of this prospectus. We do not have any intention or obligation to update forward-looking statements included in this prospectus.

# General

Our fiscal year ends on the Sunday after the Saturday closest to January 31. All references to the first quarter of 2010 and 2009 relate to the thirteen week periods ending May 2, 2010 and May 3, 2009, respectively. All references to fiscal 2009 relate to the 52 week period ending on January 31, 2010. All references to fiscal 2008 relate to the 52 week period ending on February 1, 2009. All references to fiscal 2007 relate to the 52 week period ending on February 3, 2008.

We are the leading owner and operator of high-volume venues that combine dining and entertainment in North America. We offer our customers a unique opportunity to "*Eat Drink Play* ®" all in one location, through a full menu of high-quality food and beverage items combined with an extensive assortment of entertainment attractions, including state-of-the-art video games, interactive simulators and other games of skill. We developed this concept in 1982, and remain the only company offering this customer experience under a single brand and on a national basis. We believe we appeal to a diverse customer base by providing a highly customizable experience in a dynamic and fun setting.

As of August 2, 2010, we owned and operated 57 stores in 24 states and Canada. In addition, there is one franchised store operating in Canada. Our stores range in size between 16,000 and 66,000 square feet, and are open seven days a week. See "—Summary historical and pro forma financial and other data" for a reconciliation of Adjusted EBITDA.

In 1982, David "Dave" Corriveau and James "Buster" Corley founded Dave & Buster's under the belief that there was consumer demand for a combined experience of entertainment, food and drinks. We opened our first two stores in Dallas, Texas in 1982 and 1988 and have subsequently expanded to 57 stores. From 1997 to early 2006, we operated as a public company under the leadership of Dave and Buster. In March 2006, Dave & Buster's was acquired by D&B Holdings, formerly known as WS Midway Holdings, a holding company controlled by Wellspring and HBK.

# Acquisition by Oak Hill Capital Partners

On June 1, 2010, Games Acquisition Corp. ("Holdings"), a newly-formed Delaware corporation owned by Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management Partners III, L.P. (collectively, "Oak Hill") acquired all of the outstanding capital stock of Dave & Buster's Holdings, Inc. ("D&B Holdings") from Wellspring Capital Partners III, L.P. ("Wellspring") and HBK Main Street Investors L.P. ("HBK" and, together with Wellspring, the "Sellers") for a total transaction value of \$570 million, subject to customary working capital and net indebtedness adjustments as well as adjustments to reflect the cost of obtaining certain third party

consents. In connection therewith, Games Merger Corp., a newly-formed Missouri corporation and an indirect wholly-owned subsidiary of Holdings, merged (the "Merger") with and into D&B Holdings' wholly-owned, direct subsidiary, Dave & Buster's, Inc. (with Dave & Buster's, Inc. being the surviving corporation in the Merger). After the Acquisition, Oak Hill indirectly controls approximately 96% and certain members of our Board of Directors and management control approximately 4% of the outstanding capital stock of Holdings. Subsequent to the transactions described above, Holdings changed its name to Dave & Buster's Parent, Inc.

On the closing date of the Acquisition, the following events occurred:

- All outstanding shares of D&B Holdings' common stock, other than shares held by Holdings, were converted into the right to receive the per share acquisition consideration;
- All outstanding options to acquire D&B Holdings' common stock were converted into the right to receive an amount in cash equal to the
  difference between the per share exercise price and the per share acquisition consideration without interest;
- We retired all outstanding debt and accrued interest related to our existing senior credit facility and senior notes;
- We issued \$200,000 of 11% senior notes due 2018 ("Notes");
- We entered into a senior secured credit facility which provides for senior secured financing of up to \$200,000 consisting of:
  - a \$150,000 term loan facility with a maturity on June 1, 2016, and
  - a \$50,000 revolving credit facility, including a sub-facility of up to the U.S. dollar equivalent of \$1,000 for borrowings in Canadian dollars by our Canadian subsidiary, a letter of credit sub-facility, and a swingline sub-facility, with a maturity on June 1, 2015.

The Acquisition will be accounted for in accordance with accounting guidance for business combinations and, accordingly will result in the recognition of assets acquired and liabilities assumed at fair value. As of the date of these financial statements, the valuation studies necessary to estimate the fair value of the assets acquired and liabilities assumed and to allocate the cost of the acquisition have not been completed. Based on the allocation of purchase price, we expect that depreciation of fixed assets and amortization of finite lived intangible assets may change from historical amounts and such changes could be material. Accounting principles generally accepted in the United States require operating results for Dave & Buster's, Inc prior to the Acquisition completed June 1, 2010 to be presented as the Predecessor's results in the historical financial statements. Operating results subsequent to the Merger will be presented as the Successor's results and will include all periods including and subsequent to June 1, 2010.

## Overview

We monitor and analyze a number of key performance measures in order to manage our business and evaluate financial and operating performance. These measures include:

# Revenues

Revenues consist of food and beverage revenues as well as amusement and other revenues. Our revenues are primarily influenced by the number of stores in operation and comparable store revenue. Comparable store revenue growth reflects the change in year-over- year revenue for the comparable store base. We define the comparable store base to include those stores open for a full 18 months as of the beginning of each fiscal year. Percentage changes in the thirteen week periods ended May 2, 2010 and May 3, 2009 and fiscal 2009 and fiscal 2008 have been calculated based on an equivalent number of weeks in both the current and comparison periods. Comparable store sales growth can be generated by an increase in guest traffic counts or by increases in average dollars spent per customer. In first quarter 2010 we derived 34.6% of our total revenue from food sales, 15.8% from beverage sales, 48.8% from amusement sales and 0.8% from other sources. In fiscal 2009, we derived 35.2% of our total revenue from food sales, 16.6% from beverage sales, 47.1% from amusement sales and 1.1% from other sources.

We continually monitor the success of current food and beverage items, the availability of new menu offerings, the menu price structure and our ability to adjust prices where competitively appropriate. With respect to the beverage component, we operate fully-licensed facilities, which means that we offer full beverage service, including alcoholic beverages throughout each store.

Our stores also offer an extensive array of amusements, including state-of-the-art simulators, high-tech video games, traditional pocket billiards and shuffleboard, as well as a variety of redemption games, which dispense coupons that can be redeemed for prizes in the "Winner's Circle." Our redemption games include basic games of skill, such as skee-ball and basketball, as well as competitive racing, and individual electronic games of skill. The prizes in the "Winner's Circle" range from small-ticket novelty items to high-end electronics, such as flatscreen televisions, MP3 players and game systems. We review the amount of game play on existing amusements in an effort to match amusements availability with guest preferences. We intend to continue to invest in new games as they become available and prove to be attractive to guests. Our unique venue allows us to provide our customers with value driven food and amusement combination offerings such as our "Eat & Play Combo." The "Eat & Play Combo," allows customers to purchase a variety of entrée and game card pairings at various fixed price levels. In the fourth quarter of 2008, we introduced "Half-Price Game Play Wednesdays" which allow guests to play virtually all of our games for one-half of the regular price on Wednesdays during targeted periods during the year.

We believe that special events business is a very important component of our revenue because a significant percentage of our guests attending a special event are in a Dave & Buster's for the first time. This is a very advantageous way to introduce the concept to new guests. Accordingly, a considerable emphasis is placed on the special events portion of our business.

#### Cost of products

Cost of products includes the cost of food, beverages and the "Winner's Circle" redemption items. During first quarter 2010, the cost of food products averaged 24.6% of food revenue, the cost of beverage products averaged 23.4% of beverage revenue and our amusement and other cost of products averaged 15.1% of amusement and other revenues. During fiscal 2009, the cost of food products averaged 24.2% of food revenue, the cost of beverage products averaged 24.1% of beverage revenue and our amusement and other revenues. The cost of products is driven by product mix and pricing movements from third-party suppliers. We continually strive to gain efficiencies in both the acquisition and use of products while maintaining high standards of product quality.

# **Operating payroll and benefits**

Operating payroll and benefits consist of wages, employer taxes and benefits for store personnel. We continually review the opportunity for efficiencies principally through scheduling refinements.

# Other store operating expenses

Other store operating expenses consist of store-related occupancy, store expenses, utilities, repair and maintenance and marketing costs.

#### Store-level variability, quarterly fluctuations, seasonality, and inflation

We have historically operated stores varying in size from 29,000 to 66,000 square feet and have experienced significant variability among stores in volumes, operating results and net investment costs. Our new locations typically open with sales volumes in excess of their run-rate levels, which we refer to as a "honeymoon" effect. We expect our new store volumes and margins to be lower in the second full year of operations than in their first full year of operations, and to grow in line with the rest of our comparable store base thereafter. As a result of the

substantial revenues associated with each new store, the timing of new store openings will result in significant fluctuations in quarterly results. We also expect seasonality to be a factor in the operation or results of the business in the future with anticipated lower third quarter revenues and higher fourth quarter revenues associated with the year-end holidays. The historically higher revenues during the fourth quarter will continue to be susceptible to the impact of severe weather on customer traffic and sales during that period.

We expect that volatile economic conditions will continue to exert pressure on both supplier pricing and consumer spending related to entertainment and dining alternatives. Although, there is no assurance that our cost of products will remain stable or that federal or state minimum wage rates will not increase beyond amounts currently legislated, the effects of any supplier price increases or minimum wage rate increases are expected to be partially offset by selected menu price increases where competitively appropriate.

# **Results of operations**

The following table and the period to period comparisons set forth selected data in thousands of dollars and as a percentage of total revenues (unless otherwise noted) for the periods indicated. All information is derived from the consolidated statements of operations included in this prospectus.

		Thirtee	n										
(dollars in thousands)		weeks ended May 2, 2010			Thirteen w nded May 3		Fiscal year ended January 31, 2010			Fiscal year ended February 1, 2009		Fiscal year February 3	
		(Pred eces	sor)	(Predecessor)			(Pred ecessor)		(Predecessor)		(Predecessor)		
Food and beverage revenues	\$	71,357	50.4%	\$	71,000	51.3%	\$2	69,973	51.8%	\$284,779	53.4%	\$ 293,097	54.7%
Amusement and other revenues		70,218	49.6	_	67,426	48.7	2	50,810	48.2	248,579	46.6	243,175	45.3
Total revenues		141,575	100.0		138,426	100.0	5	20,783	100.0	533,358	100.0	536,272	100.0
Cost of food and beverage (as a percentage of food and beverage revenues)		17,277	24.2		17,406	24.5		65,349	24.2	70,520	24.8	72,493	24.7
Cost of amusement and other (as a percentage of amusement and other													
revenues)		10,586	15.1		9,549	14.2		38,788	15.5	34,218	13.8	34,252	14.1
Total cost of products		27,863	19.7		26,955	19.5	1	04,137	20.0	104,738	19.6	106,745	19.9
Operating payroll and benefits		33,468	23.6		34,532	24.9	1	32,114	25.4	139,508	26.2	144,920	27.0
Other store operating expenses		45,605	32.2		42,604	30.8	1	74,685	33.6	174,179	32.6	171,627	32.0
General and administrative expenses		8,617	6.1		7,405	5.4		30,437	5.8	34,546	6.5	38,999	7.3
Depreciation and amortization expense		12,501	8.8		12,733	9.2		53,658	10.3	49,652	9.3	51,898	9.7
Pre-opening costs		1,189	0.8		1,146	0.8		3,881	0.7	2,988	0.6	1,002	0.2
Total operating costs		129,243	91.2		125,375	90.6	4	98,912	95.8	505,611	94.8	515,191	96.1
Operating income		12,332	8.8		13,051	9.4		21,871	4.2	27,747	5.2	21,081	3.9
Interest expense, net		5,348	3.8	_	5,549	4.0		22,122	4.2	26,177	4.9	31,183	5.8
Income (loss) before provisions for income taxes		6,984	5.0		7,502	5.4		(251)	(0.0)	1,570	0.3	(10,102)	(1.9)
Provision (benefit) for income taxes		3,073	2.2		2,335	1.7		99	0.0	(45	(0.0)	(1,261)	(0.2)
Net income (loss)	\$	3,911	2.8%	\$	5,167	3.7%	\$	(350)	(0.0)%	\$ 1,615	0.3%	\$ (8,841)	(1.7)%
Cash provided by (used in):				_									
Operating activities		\$9,44	5		\$10,90	03		\$59,05	54	\$52	,197	\$50,5	73
Investing activities		(6,985	5)		(8,177	7)		(48,40	6)	(49	084)	(30,89	99)
Financing activities		(125)	)		(2,125	5)		(2,500	))	(13	625)	(11,00	00)
Change in comparable store sales(1)		(2.5)%	6		(7.9)%	6		(7.8)%	6	(2.8)%		4.1%	
Stores open at end of period(2)		57			53			56			52	49	
Comparable stores open at end of period		49			47			47		4	6	43	

"Comparable store sales" (year-over-year comparison of stores open at least 18 months as of the beginning of each of the fiscal years) is a key performance indicator used within the industry and is indicative of acceptance of our initiatives as well as local economic and consumer trends. Our new store openings during the last three fiscal years and the first part of the current fiscal year were as follows: (1)

(2)

	ear to date 010	Fiscal year ended January 31, 2010		Fiscal year e February 1,		Fiscal year ended February 3, 2008	
Location	Opening date	Location	Opening date	Location	Opening date	Location	Opening date
Wauwatosa, WI	03/01/2010	Richmond, VA	04/20/2009	Plymouth Meeting, PA	07/21/2008	Tempe, AZ	09/17/2007
Roseville, CA	05/03/2010	Indianapolis, IN	06/15/2009	Arlington, TX	11/24/2008		
		Columbus, OH	10/12/2009	Tulsa, OK	01/12/2009		
		Niagara Falls, ON, Canada(3)	06/25/2009				

(3) Franchise location.

# Thirteen Weeks Ended May 2, 2010 Compared to Thirteen Weeks Ended May 3, 2009

# Revenues

Total revenues increased 2.3%, or \$3,149 for first quarter of 2010 compared to the first quarter of 2009. Comparable store revenue decreased 2.5%, or \$3,356 for first quarter 2010 compared to first quarter 2009. Comparable special events revenues which accounted for 9.6% of consolidated comparable stores revenue for the first quarter of 2010 were flat compared to the first quarter of 2009.

The increased revenues were derived from the following sources:

Comparable stores	\$(3,356)
Non comparable stores	6,768
Other	(263)
Total	\$ 3,149

Comparable store revenues during the first quarter of fiscal year 2010 were adversely impacted by severe February snowstorms on the East Coast. We have estimated that the storms resulted in revenue reductions at our comparable stores of approximately \$1,500.

Comparable store revenues were also significantly impacted by the unfavorable macro economic environment affecting the restaurant/entertainment industry in general, and the effects of the global economic environment impacted our store locations as well.

Food sales at comparable stores decreased by \$759, or 1.7% from \$45,814 in the first quarter of 2009 to \$45,055 in the first quarter of 2010. Sales mix at our comparable stores continued to show a shift away from the beverage component of our business towards our amusement offerings. Beverage sales at comparable stores decreased by \$2,126, or 9.3% from \$22,910 in the first quarter of 2009 to \$20,784 in the first quarter of 2010. Comparable store amusement revenue in the first quarter of 2010 decreased by \$337, or 0.5% from \$63,999 in the first quarter of 2009 to \$63,662 in the first quarter of 2010. Downward pressures on amusement sales were partially mitigated by our Half-Price Wednesday promotions and Power Card up-sell initiative which provides greater value to guest in terms of chips per dollar.

Our revenue mix was 34.6% for food, 15.8% for beverage and 49.6% for amusements and other for the first quarter of 2010. This compares to 34.3%, 17.0% and 48.7%, respectively, for the first quarter of 2009.

#### Cost of products

Cost of food and beverage decreased from \$17,406 in the first quarter of 2009 to \$17,277 in the first quarter of 2010. Cost of food and beverage declined 30 basis points to 24.2% of revenue for the first quarter of 2010 compared to 24.5% for the first quarter of 2009 primarily due to lower liquor and beer costs.

Cost of amusement and other revenues increased from \$9,549 in the first quarter of 2009 to \$10,586 in the first quarter of 2010. The costs of amusements and other, as a percentage of amusements and other revenues increased 90 basis points to 15.1% of amusement and other revenue for the first quarter of 2010 compared to 14.2% for the first quarter of 2009. This increase is primarily a result of increased redemption costs driven, in part, by increased game play as a result of our Half-Price Wednesday promotions.

# Operating payroll and benefits

Operating payroll and benefits decreased by \$1,064, or 3.1%, from \$34,532 in the first quarter of 2009 to \$33,468 in the first quarter of 2010. Operating payroll and benefits declined 130 basis points to 23.6% of revenue

for the first quarter of 2010 compared to 24.9% for the first quarter of 2009. This decrease was primarily driven by initiatives designed to reduce hourly labor costs through improved scheduling as well as lower management costs resulting from an accounting centralization effort.

#### Other store operating expenses

Other store operating expenses increased by \$3,001, or 7.0%, from \$42,604 in the first quarter of 2009 to \$45,605 in the first quarter of 2010. Other store operating expenses as a percentage of revenues increased 140 basis points to 32.2% for the first quarter of 2010 compared to 30.8% for the same period of 2009. This increase is primarily driven by the increase in occupancy expenses related to new stores and the increase in media and production costs related to our new marketing campaign, in the first quarter of 2010 compared to the first quarter of 2009.

# General and administrative expenses

General and administrative expenses consist primarily of personnel, facilities and professional expenses for the various departments of our corporate headquarters. General and administrative expenses increased by \$1,212, or 16.4%, from \$7,405 in the first quarter of 2009 to \$8,617 in the first quarter of 2010, primarily due to increased salary, benefits, stock based compensation expenses, and professional fees.

# Depreciation and amortization expense

Depreciation and amortization expense includes the depreciation of fixed assets and the amortization of trademarks with finite lives. Depreciation and amortization expense decreased by \$232, or 1.8%, from \$12,733 in the first quarter of 2009 to \$12,501 in the first quarter of 2010. Increases in depreciation from new store openings and maintenance capital expenditures was more than offset by depreciation reductions resulting from certain operating assets being fully depreciated subsequent to the first quarter of fiscal 2009.

#### Pre-opening costs

Pre-opening costs include costs associated with the opening and organizing of new stores or conversion of existing stores, including the cost of feasibility studies, pre-opening rent, staff-training and recruiting, and travel costs for employees engaged in such pre-opening activities. Pre-opening costs increased slightly from \$1,146 in the first quarter of 2009 to \$1,189 in the first quarter of 2010.

#### Interest expense

Interest expense includes the cost of our debt obligations including the amortization of loan fees, adjustments to mark the interest rate swap contracts to fair value and any interest income earned. Interest expense decreased by \$201 from \$5,549 in the first quarter of 2009 to \$5,348 in the first quarter of 2010.

# Provision for income taxes

Provision for income taxes consisted of an income tax provision of \$3,073 in the first quarter of 2010, and an income tax provision of \$2,335 in the first quarter of 2009. Our effective tax rate differs from the statutory rate due to changes in the tax valuation allowance, the deduction for FICA tip credits, state income taxes and the impact of certain expenses that are not deductible for income tax purposes.

As a result of our experiencing cumulative losses before income taxes for the three-year period ended May 2, 2010, we have concluded that it is more likely than not that a portion of our federal and state deferred tax assets will not be fully realized. At May 2, 2010, we estimate an increase in our valuation allowance for the year ending January 30, 2011 in the amount of \$606 will be required. This increase in valuation allowance is attributable to deductible temporary differences and carryforwards originating during the year and has been included in our calculation of the annual estimated effective tax rate.

Historically, we have had a partial valuation allowance against all state net operating loss carry forwards. At May 2, 2010, we estimate no change in the valuation allowance for the year ending January 30, 2011 related to state net operating loss carry forwards.

As of May 2, 2010, we have accrued approximately \$2,046 of unrecognized tax benefits, including an additional amount of approximately \$1,049 of penalties and interest. During the thirteen weeks ended May 2, 2010, we decreased our unrecognized tax benefit by \$151 and increased our accrual for interest and penalties by \$49. During the first quarter, the Internal Revenue Service completed its federal income tax audit for years 2006 and 2007 and one state jurisdiction completed its income tax audit for 2005 thru 2007. As a result of these audits being completed, the Company has released the related reserves. We currently anticipate that approximately \$1,020 of unrecognized tax benefits will be recognized as a result of the expiration of the statute of limitations during fiscal 2010. Future recognition of potential interest or penalties, if any, will be recorded as a component of income tax expense. Because of the impact of deferred tax accounting, \$2,318 of unrecognized tax benefits, if recognized, would impact the effective tax rate.

We file income tax returns which are periodically audited by various federal, state and foreign jurisdictions. We are generally no longer subject to federal, state, or foreign income tax examinations for years prior to fiscal 2005.

## Fiscal 2009 compared to fiscal 2008

# Revenues

Total revenues during fiscal 2009 decreased by \$12,575, or 2.4%, from \$533,358 in fiscal 2008 to \$520,783 in fiscal 2009.

The decreased revenues were derived from the following sources:

Comparable stores	\$(40,359)
Non comparable stores	26,907
Other	877
Total	\$(12,575)

Comparable store revenues were significantly impacted by the unfavorable macro economic environment affecting the restaurant/entertainment industry in general, and the effects of the global economic environment impacted our store locations as well.

Comparable stores revenue decreased by \$40,359, or 7.8%, for fiscal 2009 compared to fiscal 2008. Comparable special events revenues which accounted for 12.0% of consolidated comparable stores revenue for fiscal 2009 fell by 24.4% compared to fiscal 2008. The walk-in component of our comparable store sales declined by 5.0% for fiscal 2009.

Food sales at comparable stores decreased by \$16,136, or 8.8% from \$183,568 in fiscal 2008 to \$167,432 in fiscal 2009. Sales at our comparable stores continued to show a shift away from the beverage component of our business towards our amusements offerings. Beverage sales of comparable stores decreased 12.4% or \$11,247 to \$79,621 in fiscal 2009 from \$90,868 in fiscal 2008. Our amusement revenues experienced a somewhat softer 4.7% decline to \$224,410 in fiscal 2009 from \$235,509 in fiscal 2008. Downward pressures on amusement sales were partially mitigated by our Half-Price Wednesday promotions and Power Card up-sell initiatives which provides greater value to guests in term of chips per dollar.

Our revenue mix was 35.2% for food, 16.6% for beverage and 48.2% for amusement and other for fiscal 2009. This compares to 35.7%, 17.7% and 46.6%, respectively, for fiscal 2008.

# Cost of products

Cost of food and beverage revenues decreased from \$70,520 in fiscal 2008 to \$65,349 in fiscal 2009 principally as a result of lower food and beverage revenue levels in 2009. Cost of food and beverage products, as a percentage of food and beverage revenues, decreased by 60 basis points to 24.2% of revenue for fiscal 2009 compared to 24.8% of revenue for fiscal 2008. A slight increase in beverage cost was offset by reduced costs in our produce and dairy products.

Costs of amusement and other revenues increased from \$34,218 in fiscal 2008 to \$38,788 in fiscal 2009. As a percentage of amusement and other revenues, these costs increased by 170 basis points to 15.5% in fiscal 2009 compared to 13.8% of revenues in fiscal 2008 primarily as a result of increased redemption costs driven, in part, by increased game play as a result of our Half-Price Wednesday promotions.

# Operating payroll and benefits

Operating payroll and benefits decreased by \$7,394, or 5.3%, from \$139,508 in fiscal 2008 to \$132,114 in fiscal 2009. Operating payroll and benefits as a percentage of revenues decreased by 80 basis points to 25.4% in fiscal 2009 compared to 26.2% in fiscal 2008. This decrease was primarily driven by initiatives designed to reduce hourly labor costs through improved scheduling as well as lower management costs resulting from an accounting centralization effort.

#### Other store operating expenses

Other store operating expenses increased by \$506, or 0.3%, from \$174,179 in fiscal 2008 to \$174,685 in fiscal 2009. Other store operating expenses as a percentage of revenues increased 100 basis points from 32.6% in fiscal 2008 to 33.6% in fiscal 2009.

#### General and administrative expenses

General and administrative expenses consist primarily of personnel, facilities, and professional expenses for the various departments of our corporate headquarters. General and administrative expenses decreased by \$4,109, or 11.9%, from \$34,546 in fiscal 2008 to \$30,437 in fiscal 2009. General and administrative expenses as a percentage of revenues decreased from 6.5% in fiscal 2008 to 5.8% in fiscal 2009, primarily due to lower labor costs, and the absence of approximately \$2,100 incurred in 2008 related to severance and costs associated with a possible public offering of common stock that was terminated.

## Depreciation and amortization expense

Depreciation and amortization expense includes the depreciation of fixed assets and the amortization of trademarks with finite lives. Depreciation and amortization expense increased by \$4,006, or 8.1%, from \$49,652 in fiscal 2008 to \$53,658 in fiscal 2009. Depreciation expense increased primarily due to the new stores opened in fiscal 2008 and 2009.

# Pre-opening costs

Pre-opening costs include costs associated with the opening and organizing of new stores or conversion of existing stores, including the cost of feasibility studies, pre-opening rent, staff training and recruiting, and travel costs for employees engaged in such pre-opening activities. Pre-opening costs increased from \$2,988 in fiscal 2008 to \$3,881 in fiscal 2009. The increase of opening costs is primarily attributable to the opening of three new stores in fiscal 2009 and approximately \$1,700 of costs incurred related to the opening of two stores in the first half of 2010.

#### Interest expense

Interest expense includes the cost of our debt obligations including the amortization of loan fees, adjustments to mark the interest rate swap agreements to fair value and any interest income earned. Interest expense decreased by \$4,055 from \$26,177 in fiscal 2008 to \$22,122 in fiscal 2009. The decrease in interest expense is primarily attributed to adjustments to mark the interest rate swap agreements to their fair value and reduced interest costs attributable to the early retirement of \$15,000 of our senior notes in September 2008.

#### Provision for income taxes

Provision for income taxes consisted of an income tax provision of \$99 in fiscal 2009 and a tax benefit of \$45 in fiscal 2008. Our effective tax rate differs from the federal corporate statutory rate due to the deduction for FICA tip credits, state income taxes and the impact of certain expenses that are not deductible for income tax purposes.

In fiscal 2009, we recorded an additional net valuation allowance of \$977 against our deferred tax assets. The valuation allowance was recorded in accordance with accounting guidance for income taxes. As a result of our experiencing cumulative losses before income taxes for the three-year period ending January 31, 2010, we could not conclude that it is more likely than not that our deferred tax asset will be fully realized. The ultimate realization of our deferred tax assets is dependent on the generation of future taxable income during periods in which temporary differences become deductible.

We have adopted the accounting guidance for uncertainty in income taxes. This guidance limits the recognition of income tax benefits to those items that meet the "more likely than not" threshold on the effective date. As of January 31, 2010, we had approximately \$2,468 of unrecognized tax benefits, including approximately \$269 in potential interest and penalties, net of related tax benefits. During fiscal 2009, we decreased our unrecognized tax benefit by \$43. This decrease resulted primarily from tax positions taken in prior periods and the expiration of the statute of limitations. During the second quarter, one state jurisdiction completed its income tax audit. The Company settled and has released the related reserve. We currently anticipate that approximately \$1,395 of unrecognized tax benefits will be settled through federal and state audits or is expected to be recognized as a result of the expiration of statute of limitations during fiscal 2010. Future recognition of potential interest or penalties, if any, will be recorded as a component of income tax expense. Because of the impact of deferred tax accounting, \$1,809 of unrecognized tax benefits, if recognized, would affect the effective tax rate.

We file income tax returns which are periodically audited by various federal, state and foreign jurisdictions. We are generally no longer subject to federal, state or foreign income tax examinations for years prior to fiscal 2005.

# Fiscal 2008 compared to fiscal 2007

# Revenues

Total revenues during fiscal 2008 decreased by \$2,914, or 0.5%, from \$536,272 in fiscal 2007 to \$533,358 fiscal 2008.

The decreased revenues were derived from the following sources:

Comparable stores	\$(14,818)
Non comparable stores	12,119
Other	(215)
Total	\$ (2,914)

Comparable stores revenue decreased by \$14,818, or 2.8%, for fiscal 2008 compared to fiscal 2007. Comparable special events revenues accounted for 14.7% of consolidated comparable stores revenue for fiscal 2008 compared to 16.2% for fiscal 2007.

Comparable store revenues were significantly impacted by the unfavorable macro economic environment affecting the restaurant/entertainment industry in general, and the effects of global economic environment impacted our store locations as well. The economic deterioration was most apparent in the latter part of our fiscal year. During the first half of fiscal 2008, our comparable store revenue was 2.5% or \$6,550 above fiscal 2007 revenue levels during the similar period. In the second half of fiscal 2008, our comparable sales fell by \$21,368 or 8.2% from sales levels achieved during the last six months of fiscal 2007.

During fiscal 2008, we maintained advertising on cable television in all of our markets. Food sales at comparable stores decreased by \$7,656, or 4.1% from \$188,278 in fiscal 2007 to \$180,622 in fiscal 2008. Beverage sales at comparable stores decreased by \$7,310, or 7.6% from \$96,560 in fiscal 2007 to \$89,250 in fiscal 2008. Comparable store amusement revenue in fiscal 2008 increased by \$1,118, or 0.5%, from \$230,878 in fiscal 2007 to \$231,996 in fiscal 2008. Amusement revenue continued to reflect the positive impact of increased points of sale available through the installation of sales kiosks throughout the system and an expansion of available predenominated Power Card alternatives.

Our revenue mix was 35.7% for food, 17.7% for beverage and 46.6% for amusement and other for fiscal 2008. This compares to 36.1%, 18.6% and 45.3%, respectively, for fiscal 2007.

# Cost of products

Cost of food and beverage revenues decreased from \$72,493 in fiscal 2007 to \$70,520 in fiscal 2008 principally as a result of lower food and beverage revenue levels in 2008. Cost of food and beverage products, as a percentage of food and beverage revenues, increased by 10 basis points to 24.8% of revenue for fiscal 2008 compared to 24.7% of revenue for fiscal 2007. Increased food costs resulting from the introduction of certain pre-prepared products were partially offset by reduced costs in our meat, dairy, produce and beverage products.

Costs of amusement and other revenues remained relatively flat at approximately \$34,200 year over year. The cost of amusement and other, as a percentage of amusement and other revenues, decreased as a percentage of revenues by 30 basis points to 13.8% in fiscal 2008 compared to 14.1% of revenues in fiscal 2007 primarily as a result of reduced redemption costs.

# Operating payroll and benefits

Operating payroll and benefits decreased by \$5,412, or 3.7%, from \$144,920 in fiscal 2007 to \$139,508 in fiscal 2008. Operating payroll and benefits as a percentage of revenues decreased by 80 basis points to 26.2% in fiscal 2008 compared to 27.0% in fiscal 2007. This decrease was primarily driven by initiatives designed to reduce labor costs as well as lower management and hourly employee turnover at our stores and reduced incentive compensation expenses as a result of lower revenues levels.

# Other store operating expenses

Other store operating expenses increased by \$2,552, or 1.5%, from \$171,627 in fiscal 2007 to \$174,179 in fiscal 2008. Other store operating expenses as a percentage of revenues increased 60 basis points from 32.0% in fiscal 2007 to 32.6% in fiscal 2008. This increase was driven primarily by additional expenditures related to our national marketing program and guest safety initiatives of several locations.

# General and administrative expenses

General and administrative expenses consist primarily of personnel, facilities, and professional expenses for the various departments of our corporate headquarters. General and administrative expenses decreased by \$4,453, or 11.4%, from \$38,999 in fiscal 2007 to \$34,546 in fiscal 2008. General and administrative expenses as a percentage of revenues decreased by 80 basis points from 7.3% in fiscal 2007 to 6.5% in fiscal 2008, primarily due to lower incentive compensation costs, the reduction of severance costs associated with corporate personnel partially offset by increased costs associated with efforts related to the potential sale of Dave & Buster's.

#### Depreciation and amortization expense

Depreciation and amortization expense includes the depreciation of fixed assets and the amortization of trademarks with finite lives. Depreciation and amortization expense decreased by \$2,246, or 4.3%, from \$51,898 in fiscal 2007 to \$49,652 in fiscal 2008. Depreciation and amortization expense decreased primarily due to certain fixed assets reaching the end of their depreciable life partially offset by depreciation expense on new assets added subsequent to fiscal 2007.

#### Pre-opening costs

Pre-opening costs include costs associated with the opening and organizing of new stores or conversion of existing stores, including the cost of feasibility studies, staff training and recruiting, and travel costs for employees engaged in such pre-opening activities. Pre-opening costs increased from \$1,002 in fiscal 2007 to \$2,988 in fiscal 2008. Pre-opening costs as a percentage of revenues increased from 0.2% in fiscal 2007 to 0.6% in fiscal 2008. The increase in pre-opening costs is primarily attributable to the opening of three new stores in fiscal 2008 compared to one new store opening in fiscal 2007.

#### Interest expense

Interest expense includes the cost of our debt obligations including the amortization of loan fees, adjustments to mark the interest rate swap agreements to fair value and any interest income earned. Interest expense decreased by \$5,006 from \$31,183 in fiscal 2007 to \$26,177 in fiscal 2008. The decrease in interest expense is primarily attributed to adjustments to mark the interest rate swap agreements to their fair value and reduced interest costs attributable to the early retirement of \$15,000 of our senior notes in September 2008.

# Provision for income taxes

Provision for income taxes consisted of an income tax benefit of \$45 in fiscal 2008 and a tax benefit of \$1,261 in fiscal 2007. Our effective tax rate differs from the statutory rate due to the deduction for FICA tip credits, state income taxes and the impact of certain expenses that are not deductible for income tax purposes.

In fiscal 2008, we recorded an additional valuation allowance against our deferred tax assets. The valuation allowance was recorded in accordance with accounting guidance for income taxes. As a result of our experiencing cumulative losses before income taxes for the three-year period ending February 1, 2009, we could not conclude that it is more likely than not that our deferred tax asset will be fully realized. The ultimate realization of our deferred tax assets is dependent on the generation of future taxable income during periods in which temporary differences become deductible.

As of February 1, 2009, we had approximately \$2,946 of unrecognized tax benefits, including approximately \$704 of potential interest and penalties, net of related tax benefit. During the fifty-two week period ended February 1, 2009, we decreased our unrecognized tax benefit by \$96. This decrease resulted primarily from an uncertain tax position taken on the 2005, 2006, and 2007 federal income tax returns. We also recorded net additional interest and penalties related to uncertain tax positions taken in prior years. We do not

currently anticipate any additional material changes in fiscal 2009. Future recognition of potential interest or penalties, if any, will be recorded as a component of income tax expense. The entire balance of unrecognized tax benefits, if recognized, would affect the effective tax rate.

We file income tax returns which are periodically audited by various federal, state and foreign jurisdictions. We are generally no longer subject to federal, state or foreign income tax examinations for years prior to fiscal 2005.

# Quarterly results of operations and seasonality

The following table sets forth certain unaudited financial and operating data in each fiscal quarter during fiscal 2009 and fiscal 2008. The unaudited quarterly information includes all normal recurring adjustments that we consider necessary for a fair presentation of the information shown. This information should be read in conjunction with the audited consolidated financial statements and notes thereto appearing elsewhere in this prospectus.

	1st Quarter 2010	Fise	cal 2009—thirteen	week period ended	1	Fisc	al 2008—thirteen	week period ende	d
	May 2, 2010	Jan 31, 2010	Nov 1, 2009	Aug 2, 2009	May 3, 2009	Feb 1, 2009	Nov 2, 2008	Aug 3, 2008	May 4, 2008
Food and beverage									
revenues	\$ 71,357	\$ 71,833	\$ 60,549	\$ 66,591	\$ 71,000	\$ 74,348	\$ 63,910	\$ 71,856	\$ 74,665
Amusement and other	50.010	(1.010		(100)	(5.10)	60 <b>57</b> 0		(1000	
revenues	70,218	61,812	56,636	64,936	67,426	60,570	55,829	64,382	67,798
Total revenues	141,575	133,645	117,185	131,527	138,426	134,918	119,739	136,238	142,463
Cost of food and beverage	17,277	17,024	14,768	16,151	17,406	17,876	16,265	17,908	18,471
Cost of amusement and	10 50 6	10.216	0.070	10.055	0.540	0.546	0.154	0.004	0.624
other	10,586	10,316	8,868	10,055	9,549	8,546	8,154	8,894	8,624
Total costs of									
products	27,863	27,340	23,636	26,206	26,955	26,422	24,419	26,802	27,095
Operating payroll and benefits	22.469	22.502	21.229	22.752	24.522	22.054	22.060	35.613	26.972
Other store operating	33,468	32,502	31,328	33,752	34,532	33,954	33,069	33,013	36,872
expenses	45,605	42,110	44,514	45,457	42,604	41,846	43,787	45,367	43,179
General and administrative	45,005	42,110	44,514	+5,+57	42,004	41,840	45,787	45,507	43,179
expense	8,617	8,158	7,202	7,672	7,405	9,742	7,693	8,629	8,482
Depreciation and	0,017	0,150	7,202	1,012	7,105	,,,12	1,055	0,027	0,102
amortization expense	12,501	13,825	13,932	13,168	12,733	12,866	12,449	11,898	12,439
Pre-opening costs	1,189	700	983	1,052	1,146	1,121	625	960	282
Total operating costs	129,243	124,635	121,595	127,307	125,375	125,951	122,042	129,269	128,349
Operating income (loss)	12,332	9,010	(4,410)	4,220	13,051	8,967	(2,303)	6,969	14,114
Interest expense, net	5,348	5,340	5,598	5,635	5,549	7,224	6,996	5,811	6,146
Income (loss) before				·					
taxes	6,984	3,670	(10,008)	(1,415)	7,502	1,743	(9,299)	1,158	7,968
Income taxes	3,073	3,760	(4,518)	(1,478)	2,335	382	(3,573)	188	2,958
Net income (loss)	\$ 3,911	\$ (90)	\$ (5,490)	\$ 63	\$ 5,167	\$ 1,361	\$ (5,726)	\$ 970	\$ 5,010
Stores open at end of	<u> </u>	<u>`</u>				<u> </u>	<u> </u>		<u> </u>
period	57(1)	56	56	55	53	52	50	50	49
Quarterly total revenues as	57(1)	50	50	55	55	52	50	50	12
a percentage of annual									
total revenues	N/A	25.7%	22.5%	25.2%	26.6%	25.3%	22.5%	25.5%	26.7%
Change in comparable									
store sales	(2.5)%	(5.8)%	(7.4)%	(10.1)%	(7.9)%	(10.2)%	(6.0)%	1.2%	3.8%

(1) The number of stores includes 56 company-owned stores and one franchised store in Canada.

# Liquidity and capital resources

Historically, we have financed our activities through cash flow from operations, our existing senior notes and borrowings under our existing credit facility. As of May 2, 2010, we had cash and cash equivalents of \$19,017, a working capital deficit of \$16,908 and outstanding debt obligations of \$227,125. We also had \$54,359 in borrowing availability under our existing credit facility.

# Historical indebtedness

As more fully described in the Notes to our Consolidated Financial Statements contained herein, on June 1, 2010, our outstanding debt as described below was fully retired in connection with the acquisition of D&B Holdings by Oak Hill.

Senior credit facility. Our debt structure at May 2, 2010 included a senior credit facility providing for a \$100,000 term loan facility with a maturity date of March 8, 2013 and providing for a \$60,000 revolving credit facility with a maturity date of March 8, 2011. The \$60,000 revolving credit facility includes (i) a \$20,000 letter of credit sub-facility, (ii) a \$5,000 swingline sub-facility, and (iii) a sub-facility available to the Canadian subsidiary in the Canadian dollar equivalent to U.S. \$5,000. The revolving credit facility was available to provide financing for working capital and general corporate purposes. As of May 2, 2010, we had no borrowings under the revolving credit facility, \$67,125 of borrowings under the term loan facility and \$5,641 in letters of credit outstanding.

Our senior credit facility was secured by all of our assets and is unconditionally guaranteed by D&B Holdings. Borrowings on our senior credit facility bore interest, at our option, based upon either a base rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian cost of funds rate) for one-, two-, three- or six-month (or, in the case of the Canadian revolving credit facility, 30-, 60-, 90- or 180-day) interest periods chosen by us, in each case, plus an applicable margin percentage. Swingline loans bore interest at the base rate plus the applicable margin. Effective June 30, 2006, we entered into two interest rate swap contracts that expire in 2011, to change a substantial portion of the variable rate debt to fixed rate debt. Pursuant to the swap contracts, the interest rate on notional amounts of \$35,000 was fixed at 5.31% plus applicable margin. The weighted average rate of interest on borrowings under our senior credit facility was 5.20% at May 2, 2010.

Interest rates on borrowings under our senior credit facility varied based on the movement of prescribed indexes and applicable margin percentages. On the last day of each calendar quarter, we were required to pay a commitment fee of 0.5% on any unused commitments under the revolving credit facilities or the term loan facility. Our senior credit facility required scheduled quarterly payments of principal on the term loans at the end of each of the fiscal quarters in aggregate annual amounts equal to 1.0% of the original aggregate principal amount of the term loan with the balance payable ratably over the final four quarters.

Senior notes. Our debt structure at May 2, 2010 also included \$160,000 aggregate principal amount of 11.25% senior notes. The notes were general unsecured, unsubordinated obligations of ours and were scheduled to mature on March 15, 2014. Interest on the notes compounded semi-annually and accrued at the rate of 11.25% per annum. On or after March 15, 2010, we could redeem all, or from time-to-time, a part of the senior notes upon not less than 30 nor more than 60 days notice, at redemption prices (expressed as a percentage of principal amount) plus accrued and unpaid interest on the senior notes.

Our senior credit facility and the indenture governing the senior notes contained restrictive covenants that, among other things, limited our ability and the ability of our subsidiaries to, among other things: incur additional indebtedness, make loans or advances to subsidiaries and other entities, make capital expenditures, declare dividends, acquire other businesses or sell assets. In addition, under our senior credit facility, we were required to meet certain financial covenants, ratios and tests, including a minimum fixed charge coverage ratio and a maximum leverage ratio. The indenture under which the senior notes were issued also contained customary covenants and events of defaults.

## Indebtedness—after Transactions

In connection with the Transactions, we terminated our existing credit facility and enter into a senior secured credit facility that provides for (i) a fiveyear \$50.0 million revolving credit facility that includes a sub-facility of up to the U.S. dollar equivalent of \$1.0 million for borrowings in Canadian dollars by our Canadian subsidiary and (ii) a six-year \$150.0 million term loan. Upon consummation of the Transactions, we had \$5.6 million in letters of credit outstanding under our new revolving credit facility, leaving approximately \$44.4 million available for additional borrowings subject to meeting certain conditions. For a description of our senior secured credit facility, see "Description of other indebtedness—Our senior secured credit facility."

Our senior secured credit facility is secured by all of our assets and is unconditionally guaranteed by each of our direct and indirect, existing and future, domestic subsidiaries (with certain agreed-upon exceptions) and by us and each of the guarantors with respect to the obligations of the Canadian subsidiary. Borrowings under the senior secured credit facility bear interest, at our option, based upon either a base rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian cost of funds rate) for one-, two-, three- or six-months (or, if agreed by the applicable lenders, nine or twelve months) or, in relation to the Canadian revolving credit facility, 30-, 60-, 90- or 180-day interest periods chosen by us or the Canadian Borrower, as applicable in each case, plus an applicable margin percentage. Swingline loans will bear interest at the base rate plus the applicable margin.

Interest rates on borrowings under our senior secured credit facility will vary based on the movement of prescribed indexes and applicable margin percentages. On the last day of each calendar quarter, we will be required to pay a commitment fee on the average daily unused portion of the revolving credit facilities (with swingline loans not deemed, for these purposes, to be a utilization of the revolving credit facility). Our senior secured credit facility requires scheduled quarterly payments of principal on the term loans at the end of each of the fiscal quarters in aggregate annual amounts equal to a percentage of the original aggregate principal amount of the term loan with the balance payable on the maturity date.

Our senior secured credit facility and the indenture governing the notes offered hereby contain restrictive covenants that, among other things, will limit our ability and the ability of our subsidiaries to: incur additional indebtedness, make loans or advances to subsidiaries and other entities, make initial capital expenditures in relation to new stores, declare dividends, acquire other businesses or sell assets. In addition, under our senior secured credit facility, we will be required to meet certain financial covenants, ratios and tests, including a minimum fixed charge coverage ratio and a maximum total leverage ratio. The indenture under which the senior notes have been issued also contain customary covenants and events of defaults.

We believe the cash flow from operations, together with borrowings under the senior secured credit facility, will be sufficient to cover working capital, capital expenditures, and debt service needs in the foreseeable future. Our ability to make scheduled payments of principal or interest on, or to refinance, the indebtedness, or to fund planned capital expenditures, will depend on future performance, which is subject to general economic conditions, competitive environment and other factors as described in the "Risk factors" section of this prospectus.

# Historical cash flows

The following table presents a summary of our net cash provided by (used in) operating, investing and financing activities:

	Thirteen	Thirteen			
	Weeks	Weeks	Fiscal year	Fiscal year	Fiscal year
	Ended	Ended	ended	ended	ended
	May 2,	May 3,	January 31,	February 1,	February 3,
	2010	2009	2010	2009	2008
	(Predecessor)	(Predecessor)	(Predecessor)	(Predecessor)	(Predecessor)
Net cash provided by (used in):					
Operating activities	\$ 9,445	\$ 10,903	\$ 59,054	\$ 52,197	\$ 50,573
Investing activities	(6,985)	(8,177)	(48,406)	(49,084)	(30,899)
Financing activities	(125)	(2,125)	(2,500)	(13,625)	(11,000)

#### Thirteen weeks ended May 2, 2010 compared to thirteen weeks ended May 3, 2009

Cash provided by operating activities was \$9,445 for the thirteen weeks of 2010 compared to cash provided by operating activities of \$10,903 for the thirteen weeks of 2009. The decrease in cash flow from operations is primarily due to an increase in net income offset by a increase in working capital components related to new store developments.

Cash used in investing activities was \$6,985 for the thirteen weeks of 2010 compared to \$8,177 for the thirteen weeks of 2009. The investing activities for the first quarter of 2010 and 2009 consisted of \$6,988 and \$8,177 in capital expenditures, respectively.

We plan on financing future growth through operating cash flows, debt facilities and tenant improvement allowances from landlords. We expect to spend approximately \$48,000 (\$45,000 net of cash contributions from landlords) in capital expenditures during fiscal 2010. The fiscal 2010 expenditures are expected to include approximately \$29,000 (\$26,000 net of cash contributions from landlords) for new store construction and operating improvement initiatives, \$8,000 for games (excluding games for new stores) and \$11,000 in maintenance capital.

On May 2, 2010, flooding occurred in Nashville, Tennessee causing considerable damage to the city and surrounding area. Our Nashville store sustained significant damage, as did the retail mall where our store is located. The store is covered by up to \$25,000 in property and business interruption insurance subject to an overall deductible of one thousand dollars. We have initiated property insurance claims, including business interruption, with our insurers. We cannot estimate at this time when the store will be back in operation.

We anticipate the cost to replace the assets destroyed by the flood will be covered by insurance proceeds, net of the one thousand dollar deductible amount. These costs are not included in the 2010 capital expenditure amounts noted above. We have not recorded any gains or losses resulting from the flood with the exception of the one thousand dollar deductible.

Cash used in financing activities was 125 for the thirteen weeks of 2010 compared to cash used in financing activities of 2,125 in the thirteen weeks of 2009. The financing activities for the first quarter of 2010 include required paydowns under our term loan facility of 125. The financing activities for the first quarter of 2009 include required paydowns under our term loan facility of 125. The financing activities for the first quarter of 2009.

# Fiscal 2009 compared to fiscal 2008

Net cash provided by operating activities was \$59,054 for fiscal 2009 compared to cash provided by operating activities of \$52,197 for fiscal 2008. The increase in cash flow from operations is primarily due to the implementation of cash saving measures such as labor initiatives designed to reduce hourly labor cost and management costs in the stores and reduced labor costs in the corporate headquarters.

Net cash used in investing activities was \$48,406 for fiscal 2009 compared to \$49,084 for fiscal 2008. The investing activities for fiscal 2009 primarily include \$48,423 in capital expenditures. During the 2009 fiscal year, the Company spent approximately \$33,827 (\$25,484 net of cash contributions from landlords) for new store construction and operating improvement initiatives, \$3,894 for games and \$10,702 for maintenance capital. The investing activities for fiscal 2008 primarily include \$49,254 in capital expenditures.

Net cash used in financing activities was \$2,500 for fiscal 2009 compared to \$13,625 in fiscal 2008. The financing activities for fiscal 2009 include required principal payments on the term loan facility of \$500 and net paydowns under our revolving credit facility of \$2,000. The financing activities for fiscal 2008 include required paydowns under our term loan facility of \$625, net borrowings under our revolving credit facility of \$2,000, and retirement of \$15,000 of our senior notes.

#### Fiscal 2008 compared to fiscal 2007

Net cash provided by operating activities was \$52,197 for fiscal 2008 compared to cash provided by operating activities of \$50,573 for fiscal 2007. The increase in cash flow from operations is primarily due to a net income increase of \$10,456 from fiscal 2007 to fiscal 2008 and in the year-over-year changes in the use of accrued liabilities and other working capital of approximately \$9,000 over fiscal 2007. Cash flow from operations in fiscal 2007 was also negatively impacted by the payment of employment agreement costs triggered by the mergers related to our acquisition by Wellspring and HBK in March 2006.

Net cash used in investing activities was \$49,084 for fiscal 2008 compared to \$30,899 for fiscal 2007. The investing activities for fiscal 2008 primarily include \$49,254 in capital expenditures. The investing activities for fiscal 2007 primarily include \$31,355 in capital expenditures. The increase in fiscal 2008 capital expenditures over fiscal 2007 expenditure levels is primarily a result of costs associated with the opening of three new stores in fiscal 2008 compared to one new store opening in fiscal 2007. Additionally, fiscal 2008 capital expenditures reflect progress spending related to a new store scheduled to open in early 2009.

Net cash used in financing activities was \$13,625 for fiscal 2008 compared to \$11,000 in fiscal 2007. The financing activities for fiscal 2008 include required paydowns under our term loan facility of \$625, net borrowings under our revolving credit facility of \$2,000, and retirement of \$15,000 of our senior notes. The financing activities for fiscal 2007 include required paydowns under our term loan facility of \$1,000 and an optional pay down of \$10,000 on one tranche of the term loan facility.

# Contractual obligations and commercial commitments

The following table sets forth the contractual obligations and commercial commitments related to our historical indebtedness as of May 2, 2010:

		1 Year			
Payment due by period	Total	or Less	2-3 Years	4-5 Years	After 5 Years
Senior credit facility(1)	\$ 67,125	\$ 956	\$ 66,169	\$ —	\$ —
Senior notes	160,000	_		160,000	_
Interest requirements(2)	77,762	21,467	38,295	18,000	
Operating leases(3)	457,126	46,068	89,973	87,802	233,283
Total	\$ 762,013	\$ 68,491	\$ 194,437	\$ 265,802	\$ 233,283

(1) Our existing credit facility includes a \$100,000 term loan facility and \$60,000 revolving credit facility, with a \$20,000 letter of credit sub-facility and a \$5,000 revolving sub-facility. As of May 2, 2010, we had no borrowings under the revolving credit facility, borrowings of approximately \$67,125 under the term loan facility and \$5,641 in letters of credit outstanding.

(2) The cash obligations for interest requirements consist of (1) interest requirements on our fixed rate debt obligations at their contractual rates, through original maturity dates (2) interest requirements on variable

rate debt obligations not subject to interest rate swaps at rates in effect at May 2, 2010 and (3) interest requirements on variable rate debt obligations subject to interest rate swaps at the fixed rates provided through the swap agreements.

(3) Our operating leases generally provide for one or more renewal options. These renewal options allow us to extend the term of the lease for a specified time at an established annual lease payment. Future obligations related to lease renewal options that have not been exercised are excluded from the table above.

As described above, in connection with the Transactions, on June 1, 2010, we replaced our Historical Indebtedness with a new \$200,000 senior secured credit facility and \$200,000 in Restricted Notes. The following table sets forth our contractual obligations and commercial commitments on a pro forma basis as of June 1, 2010:

		1 Year			
Payment due by period	Total	or Less	2-3 Years	4-5 Years	After 5 Years
Senior credit facility(1)	\$ 150,000	\$ 1,500	\$ 3,000	\$ 3,000	\$ 142,500
Restricted notes	200,000		_		200,000
Interest requirements(2)	230,394	19,291	61,859	61,495	87,749
Operating leases(3)	453,356	46,046	89,830	87,790	229,690
Pro forma indebtedness	\$ 1,033,750	\$ 66,837	\$ 154,689	\$ 152,285	\$ 659,939

(1) Our new senior credit facility includes a \$150,000 term loan facility and \$50,000 revolving credit facility, including a sub-facility of up to the US dollar equivalent of \$1,000 for borrowings in Canadian dollars by our Canadian subsidiary, a letter of credit sub-facility, and a swingline sub-facility, with a maturity on June 1, 2015. Immediately following the Transactions we had borrowings of \$200,000 under the term loan facility, \$2,000 under the revolving credit facility and \$5,641 in letters of credit outstanding.

(2) The cash obligations for interest requirements consist of (1) interest requirements on our fixed rate debt obligations at their contractual rates and (2) interest requirements on variable rate debt obligations at rates in effect at June 1, 2010.

(3) Our operating leases generally provide for one or more renewal options. These renewal options allow us to extend the term of the lease for a specified time at an established annual lease payment. Future obligations related to lease renewal options that have been exercised are excluded from the table above.

# Critical accounting policies and estimates

The above discussion and analysis of our financial condition and results of operations is based upon our consolidated financial statements. The preparation of these financial statements requires us to make estimates and judgments that affect the reported amounts of assets, liabilities, revenue and expenses, and disclosures of contingent assets and liabilities. Our significant accounting policies are described in Note 1 to the accompanying consolidated financial statements. Critical accounting policies are those that we believe are most important to portraying our financial condition and results of operations and also require the greatest amount of subjective or store judgments by management. Judgments or uncertainties regarding the application of these policies may result in materially different amounts being reported under different conditions or using different assumptions. We consider the following policies to be the most critical in understanding the judgments that are involved in preparing the consolidated financial statements.

# Goodwill and intangible assets

We account for our goodwill and intangible assets in accordance with accounting guidance for business combinations, and accounting guidance for goodwill and other intangible assets. In accordance with accounting guidance for business combinations, goodwill of approximately \$65,857 and intangible assets of \$63,000 representing trade names were recognized in connection with the acquisition of Dave & Buster's by D&B Holdings on March 8, 2006. In accordance with accounting guidance for goodwill and other intangible assets, goodwill and trade names, which have an indefinite useful life, are not being amortized. However, both goodwill and trade names are subject to annual impairment testing.

The evaluation of the carrying amount of other intangible assets with indefinite lives is made at least annually by comparing the carrying amount of these assets to their estimated fair value. The estimated fair value is generally determined on the basis of discounted future cash flows. If the estimated fair value is less than the carrying amount of the other intangible assets with indefinite lives, then an impairment charge is recorded to reduce the asset to its estimated fair value.

The annual impairment tests were most recently performed in fiscal 2009. No impairment of assets was determined as a result of these tests for fiscal 2009, 2008 or 2007. Furthermore, there were no impairment indicators for the period ended May 2, 2010.

The Transactions will be accounted for in accordance with accounting guidance for business combinations and, accordingly, will result in the recognition of assets acquired and liabilities assumed at fair value. As of the date of this prospectus, the valuation studies necessary to estimate the fair values of the assets and the liabilities and to allocate the cost of the acquisition have not been completed.

The adjustment of the historical recorded amounts of assets and liabilities to their respective fair values may also result in adjustments to depreciation and amortization expense, rent expense and the provision for income taxes which are not reflected in the Predecessor's historical statements of operations. In addition, the final allocation of the acquisition cost will be based on the actual assets and liabilities of Dave & Buster's that exist as of the date of the Acquisition.

# Property and equipment

Expenditures that substantially increase the useful lives of the property and equipment are capitalized, whereas costs incurred to maintain the appearance and functionality of such assets are charged to repair and maintenance expense. Interest costs incurred during construction are capitalized and depreciated based on the estimated useful life of the underlying asset. These costs are depreciated over various methods based on an estimate of the depreciable life, resulting in a charge to the operating results. Our actual results may differ from these estimates under different assumptions or conditions.

Reviews are performed regularly to determine whether facts or circumstances exist that indicate the carrying values of property and equipment are impaired. We assess the recoverability of property and equipment by comparing the projected future undiscounted net cash flows associated with these assets to their respective carrying amounts. Impairment, if any, is based on the excess of the carrying amount over the estimated fair market value of the assets. Changes in the estimated future cash flows could have a material impact on the assessment of impairment. We did not recognize any impairment losses related to property and equipment for fiscal 2009, 2008, 2007 or for the period ended May 2, 2010, nor do we presently foresee any such impairment losses.

#### Income taxes

We use the liability method for recording income taxes, which recognizes the amount of current and deferred taxes payable or refundable at the date of the financial statements as a result of all events that are recognized in the financial statements and as measured by the provisions of enacted tax laws. We have adopted accounting guidance for uncertainty in income taxes. This guidance limits the recognition of income tax benefits to those items that meet the "more likely than not" threshold on the effective date.

The calculation of tax liabilities involves significant judgment and evaluation of uncertainties in the interpretation of store tax regulations. As a result, we have established reserves for taxes that may become payable in future years as a result of audits by tax authorities. Tax reserves are reviewed regularly pursuant to accounting guidance for uncertainty in income taxes. Tax reserves are adjusted as events occur that affect the potential liability for additional taxes, such as the expiration of statutes of limitations, conclusion of tax audits, identification of additional exposure based on current calculations, identification of new issues, or the issuance of statutory or administrative guidance or rendering of a court decision affecting a particular issue. Accordingly, we may experience significant changes in tax reserves in the future, if or when such events occur.

# Deferred tax assets

A deferred income tax asset or liability is established for the expected future consequences resulting from temporary differences in the financial reporting and tax bases of assets and liabilities. As of January 31, 2010, we have recorded a valuation allowance against our deferred tax assets. The valuation allowance was established in accordance with accounting guidance for income taxes. If we generate taxable income in future periods or if the facts and circumstances on which our estimates and assumptions are based were to change, thereby impacting the likelihood of realizing the deferred tax assets, judgment would have to be applied in determining the amount of valuation allowance no longer required.

# Accounting for amusement operations

The majority of our amusement revenue is derived from customer purchases of game play credits which allow our guests to play the video and redemption games in our midways. We have recognized a liability for the estimated amount of unused game play credits, which we believe our guests will utilize in the future based on credits remaining on Power Cards, historic utilization patterns and revenue per game credit sold. Certain midway games allow guests to earn coupons, which may be redeemed for prizes. The cost of these prizes is included in the cost of amusement products and is generally recorded when coupons are utilized by the customer by either redeeming the coupons for a prize in our "Winner's Circle" or storing the coupon value on a Power Card for future redemption. We have accrued a liability for the estimated amount of outstanding coupons that will be redeemed in subsequent periods based on tickets outstanding, historic redemption patterns and the estimated redemption cost of products per ticket.

#### Insurance reserves

We use a combination of insurance and self-insurance mechanisms to provide for potential liabilities for workers' compensation, healthcare benefits, general liability, property insurance, director and officers' liability insurance and vehicle liability. Liabilities associated with the risks that are retained by us are estimated, in part, by considering historical claims experience, demographic factors, severity factors and other actuarial assumptions. The estimated accruals for these liabilities, portions of which are calculated by third-party actuarial firms, could be significantly affected if future occurrences and claims differ from these assumptions and historical trends.

# Loss contingencies

We maintain accrued liabilities and reserves relating to the resolution of certain contingent obligations. Significant contingencies include those related to litigation. We account for contingent obligations in accordance with accounting guidance for contingencies. This guidance requires that we assess each contingency to determine estimates of the degree of probability and range of possible settlement. Contingencies which are deemed probable and where the amount of such settlement is reasonably estimable are accrued in our financial statements. If only a range of loss can be determined, we accrue to the best estimate within that range; if none of the estimates within that range is better than another, we accrue to the low end of the range. The assessment of loss contingencies is a highly subjective process that requires judgments about future events. Contingencies may differ significantly from amounts we have accrued in the financial statements.

#### **Recent accounting pronouncements**

In December 2007, the Financial Accounting Standards Board ("FASB") issued new accounting guidance on business combinations which expands the use of the acquisition method of accounting used in business combinations to all transactions and other events in which one entity obtains control over one or more other

businesses or assets. This new accounting guidance requires measurement at the acquisition date of the fair value of assets acquired, liabilities assumed and any non-controlling interest. Additionally, the guidance requires that acquisition-related costs, including restructuring costs, be recognized as expense separately from the acquisition. We adopted the new accounting guidance on February 2, 2009.

In December 2007, the FASB issued new accounting guidance on non-controlling interests in consolidated financial statements. This new guidance applies to the accounting for non-controlling interests (previously referred to as minority interest) in a subsidiary and for the deconsolidation of a subsidiary. We adopted the new accounting guidance on February 2, 2009.

In September 2006, the FASB issued new accounting guidance, which establishes a framework for measuring fair value and requires enhanced disclosures about fair value measurements. The new accounting guidance requires companies to disclose the fair value of their financial instruments according to a three-level fair value hierarchy that prioritizes the inputs used to measure fair value. This guidance requires companies to provide additional disclosures based on that hierarchy. The three-levels of inputs used to measure fair value are as follows: 1) defined as observable inputs such as quoted prices in active markets for identical assets or liabilities as of the reporting date, 2) defined as pricing inputs other than quoted prices in active markets included in level 1, which are either directly or indirectly observable as of the reporting date, 3) defined as pricing inputs that are generally less observable from objective sources. In February 2008, the FASB issued new accounting guidance, which delayed the effective date of previously issued accounting guidance on fair value measurements for all non-financial assets and liabilities, except those that are recognized or disclosed at fair value in the financial statements on a recurring basis, until January 1, 2009. Effective February 2, 2009, we adopted this guidance.

In February 2007, the FASB issued accounting guidance that permits entities to choose to measure many financial instruments and certain other items at fair value. If the fair value option is elected, unrealized gains and losses will be recognized in earnings at each subsequent reporting date. Effective February 4, 2008, we adopted this guidance. We did not elect to measure any additional financial assets or liabilities at fair value that were not already measured at fair value under existing standards. Therefore, the adoption of this standard did not have an impact on our consolidated financial statements or results of operations.

In March 2008, the FASB issued new accounting guidance regarding disclosures about derivative instruments and hedging activities. Entities with instruments subject to this accounting guidance are required to provide qualitative disclosures including (a) how and why derivative instruments are used, (b) how derivative instruments and related hedge items are accounted for under this accounting guidance, and its related interpretations, and (c) how derivative instruments and related hedged items affect an entity's financial position, financial performance, and cash flows. Additionally, under this accounting guidance, entities must disclose the fair values of derivative instruments and heir gains and losses in a tabular format that identifies the location of derivative positions and the effect of their use in an entity's financial statements. Effective February 2, 2009, we adopted the new guidance.

In April 2009, the FASB issued new accounting guidance on interim disclosures about fair value of financial instruments. This new accounting guidance was effective for our reporting periods beginning with our August 2, 2009 interim financial statements. The new accounting guidance expanded the previous disclosure requirements to require disclosure of the fair value of financial instruments in interim reporting periods. We implemented this guidance during the second quarter of fiscal 2009.

In May 2009, the FASB issued new accounting guidance on subsequent events. This new guidance establishes general standards of accounting for, and disclosure of, events that occur after the balance sheet date but before financial statements are issued or are available to be issued. This new accounting guidance is effective for interim or annual periods ending after June 15, 2009 and was implemented by the Company during the second quarter of fiscal 2009.

In June 2009, the FASB issued new accounting guidance on the FASB Accounting Standards Codification ("Codification") and the hierarchy of generally accepted accounting principles, which establishes the Codification as the source of authoritative accounting principles recognized by the FASB to be applied in the preparation of financial statements in conformity with GAAP. This new guidance explicitly recognized rules and interpretive releases of the SEC under federal securities laws as authoritative GAAP for SEC registrants. The new accounting guidance is effective for financial statements issued for interim and annual reporting periods ending after September 15, 2009. The adoption of this new guidance did not have an impact on our consolidated financial statements.

#### BUSINESS

#### **Company overview**

We are the leading owner and operator of high-volume venues that combine dining and entertainment in North America. We offer our customers a unique opportunity to "*Eat Drink Play*®" all in one location, through a full menu of high-quality food and beverage items combined with an extensive assortment of entertainment attractions, including state-of-the-art video games, interactive simulators and other games of skill. We developed this concept in 1982, and remain the only company offering this customer experience under a single brand and on a national basis. We believe we appeal to a diverse customer base by providing a highly customizable experience in a dynamic and fun setting.

As of August 2, 2010, we owned and operated 57 stores in 24 states and Canada. In addition, there is one franchised store operating in Canada. Our stores range in size between 16,000 and 66,000 square feet, are open seven days a week. We had total revenues of \$520.8 million and Adjusted EBITDA of \$83.1 million. See "—*Summary historical and pro forma financial and other data*" for a reconciliation of Adjusted EBITDA.

# Our history

In 1982, David "Dave" Corriveau and James "Buster" Corley founded Dave & Buster's under the belief that there was consumer demand for a combined experience of entertainment, food and drinks. We opened our first two stores in Dallas, Texas in 1982 and 1988 and now operate 57 stores across 24 states and Canada, and one franchised store in Canada. From 1997 to early 2006, we operated as a public company under the leadership of Dave and Buster. In March 2006, Dave & Buster's was acquired by D&B Holdings, formerly known as WS Midway Holdings, a holding company controlled by Wellspring and HBK. Subsequently, on June 1, 2010, Oak Hill, a leading middle market private equity firm, acquired D&B Holdings.

#### Our concept—Eat Drink Play®

When our founders opened our first location in Dallas in 1982, they sought to create a unique venue providing interactive entertainment options for adults and families, while serving high-quality food and beverages. Since then we have followed the same principle for each new store, and in doing so have developed a distinctive brand based on a differentiated customer value proposition: *Eat Drink Play*<sup>®</sup>. The interplay between entertainment, dining and full-service bar areas is the defining feature of the Dave & Buster's customer experience, and the layout of each store is designed to maximize crossover between these activities. We believe this creates an experience that cannot be replicated at home or elsewhere without having to visit multiple destinations. Our guests enjoy the flexibility to tailor each visit into a highly customized experience, which we believe further differentiates our brand. Our locations are also designed to be attractive venues for private parties, business functions and other corporate sponsored events. Special events represented 12% of our revenues in fiscal 2009.

#### Eat Drink...

Our menu emphasizes high-quality meals, including gourmet pastas, steaks, sandwiches, salads and an outstanding selection of desserts. We believe the quality of our food offering compares favorably to that of higher-end casual dining operators. Our regular entrée prices typically range from \$7.59 to \$19.99. Each of our locations offers full bar service throughout the store, including an extensive array of beers and a wide selection of wines, signature cocktails, premium spirits and non-alcoholic beverages. We believe that each location's combination of high-quality food and beverages, and attentive and friendly service, provides us with a competitive advantage compared to alternative entertainment venues. Approximately 52% of our total revenues were derived from food and beverage sales during fiscal 2009.

#### ...Play

Each of our stores has a Midway, an extensive array of amusements and entertainment options, typically including over 150 games with approximately 250 player positions. Our Midways occupy a significant area within our stores and are high-energy social gathering and entertainment areas for our customers. Amusement and other revenues accounted for approximately 48% of our total revenues during fiscal 2009.

**Redemption games.** Redemption games represented 73% of our amusement revenues in fiscal 2009 and offer an opportunity for guests to win tickets that are redeemable at our "Winner's Circle" for prizes ranging from branded novelty items to high-end home electronics. This "opportunity to win" creates a high-energy social experience that is an important aspect of the Dave & Buster's in-store experience and cannot be replicated at home. These games are core to our concept and classic in nature, and generally do not require frequent replacement.

*Video and simulation games.* Video and simulation games represented approximately 22% of our amusement revenues in fiscal 2009. Our video and simulation games can be played by one guest or by multiple guests simultaneously. These games include interactive electronic battlefield games, fantasy games, motion simulation racing games, large screen interactive electronic games and golf simulators. We seek to maintain the most up-to-date and technologically advanced games.

*Traditional games and entertainment.* Traditional games and entertainment represented approximately 5% of our amusement revenues in fiscal 2009. Our traditional amusements include billiards, bowling and shuffleboard tables, as well as multiple televisions and high quality audio systems providing guests with an attractive venue for watching live sports and other televised events.

*Power Cards.* Our games are typically activated with magnetic swipe cards, which we refer to as Power Cards<sup>®</sup>. Power Cards are rechargeable with game play credits, which we refer to as chips, and can be used to accumulate tickets won in redemption games. Power Cards allow our guests to activate games easily and encourage extended play and return visits by guests who have remaining credits and tickets at the end of their visit. Power Cards also facilitate our innovative promotional activity (for example, we bundle our Power Card with our food offerings and offer the Eat and Play Combo), and eliminate the technical difficulties and maintenance issues associated with coin-activated equipment.

## Our company's core strengths

We believe the following strengths differentiate us and are essential to our continued success:

Strong, differentiated brand with broad customer appeal. We believe that the multi-faceted customer experience of Eat Drink Play<sup>®</sup> at Dave & Buster's, supported by our marketing and advertising campaigns as well as our established 27 year history, have helped us to create a strong, differentiated brand that is widely recognized and lacks a direct national competitor. This is evidenced by our brand's strong consumer awareness of over 90% in our existing trade areas. We conduct ongoing research on our customer base, and based on these surveys we have determined that our brand appeals to a broad and diverse customer base, attracting a balanced mix of male and female adults, primarily between the ages of 21 and 44, as well as families and teenagers. Based on survey results, we also believe that the average household income of our customers is \$75,000, which is representative of an attractive demographic.

*Multi-faceted customer experience offers an excellent value proposition.* We believe that our combination of interactive entertainment, high-quality dining and full-service beverage offering, delivered in a high-energy atmosphere that caters to both adults and families, provides a multi-faceted customer experience that cannot be replicated at home, or elsewhere without having to visit multiple destinations. We also believe that the cost of visiting a Dave & Buster's offers an attractive value proposition for our guests relative to pursuing separate dining and entertainment options.



Attractive store economic model that generates stable and diversified cash flows. Our revenue base is diversified, with 48% of our fiscal 2009 revenue generated from amusement and other revenue. This reduces our reliance on revenues driven by dining and bar traffic, as well as our exposure to food costs, relative to other restaurant businesses. In addition, our entertainment offerings have low associated costs (approximately 85% gross margins for fiscal 2009). We believe this provides us with a structural advantage in our store economic model and helps drive our high average store volumes and store level margins. Our overall gross margins were 80% in fiscal 2009.

*History of successful product innovation and marketing activities.* Recent initiatives, including higher Power Card "buy-ins," Eat & Play Combo enhancements, Super Charge up-sell and Half-Price Game Play on Wednesdays have helped increase guest visits while encouraging them to participate in our full range of food and entertainment offerings. Our enhanced marketing efforts and creative promotional activities have yielded walk-in comps that have outpaced casual dining comparable sales as measured by Knapp-Track™, in each of the last four fiscal years.

*Proven, economically aligned management team.* Our seasoned management team has experience leading and operating many of the largest brands in the casual dining and entertainment industries including Carlson Restaurants Worldwide, Brinker International, Pizza Hut and Six Flags. We believe that our management team's prior experience in the restaurant and entertainment industries provides it with strong insights into our customer base and enables us to create the dynamic environment that is core to our brand. We believe our management team has demonstrated its leadership through initiatives it has successfully implemented to increase margins, improve the guest experience, improve the effectiveness of promotions, redesign our store format and revamp the process by which we choose store locations.

Our management team invested approximately \$8 million of cash in the equity of Holdings in connection with the Transactions, in addition to participating in an equity incentive plan. We believe that this highlights the management team's commitment to Dave & Buster's, and effectively aligns the interests of management with those of Dave & Buster's other stakeholders.

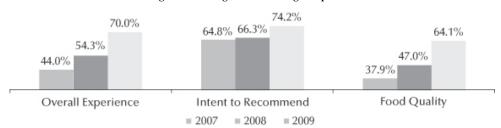
## Our strategy and key accomplishments

*Grow our comparable store sales.* We intend to grow our comparable store sales by continuing to differentiate the Dave & Buster's brand from other food and entertainment alternatives, with emphasis on the following initiatives:

*Maintaining fresh and exciting entertainment options:* Entertainment options are the core differentiating feature of the Dave & Buster's brand, and staying current with the latest offerings helps drive repeat visits. Many of Dave & Buster's games are "evergreen", as they remain highly profitable over long useful lives and do not become obsolete. However, in fiscal 2010 we expect to spend on average approximately \$145,000 in each of our stores on game replenishment and additions, which we believe serves to drive brand relevance and comparable store sales growth.

*Continuously improving the total guest experience:* We believe that continued focus on improving guest experience will help to drive incremental guest traffic, extend guests' length of stay and result in incremental revenue. In early 2007, we implemented a range of guest feedback tools throughout the organization, including an ongoing Guest Satisfaction Survey and Quarterly Brand Health Study, which enable us to collect information from our guests and use these insights to improve our overall guest experience. We believe these surveys identified several key drivers of guest satisfaction, and we have initiated programs to improve food quality, service levels, facility cleanliness and the playing conditions of our games.

Over the past several years, we have significantly improved the quality of the guest experience as measured by our Guest Satisfaction Survey. The percentage of guests rating us "Top Box" or "Excellent" in the category of "Overall Experience" and "Food Quality" has increased significantly in each of the past two years. Likewise, the scores on "Very Likely" in the category of "Intent to Recommend to a Friend, Relative or Colleague" have increased by a significant amount in each of the past two years.



#### Percentage of walk-in guests awarding "Top Box" scores

Our 2010 survey results to date indicate that we continue to be successful in improving these satisfaction measures.

Innovative marketing and promotion: In order to drive traffic, in recent years we have improved food quality, introduced new menu items and developed new marketing innovations, such as bundling food and entertainment through our Eat & Play Combo and other promotions aimed specifically at off-peak hours. We have increased amusement revenues and helped extend average guest stay by introducing higher price point Power Cards and leveraging our investment in automated kiosks to prompt consumers to purchase these Power Cards.

We have also refocused our marketing strategy and increased our mix of television advertising from \$144,000 locally in fiscal 2005 (1% of our total marketing expenditures) to \$14,900,000 on national cable television networks in fiscal 2009 (56% of our total marketing expenditures). We believe that in the current consumer environment such initiatives have been a key component driving walk-in comparable store sales trends, which have exceeded industry averages. We believe that continued enhancements to our marketing initiatives and increased focus on our loyalty program and digital strategies will resonate strongly with guests and help to drive incremental and new guest traffic. We have a substantial database of customer profiles that can be utilized in targeted marketing initiatives in the future.

*Continue to improve margins.* We believe that we have significant additional opportunities to reduce costs and increase margins beyond our accomplishments in these areas to date. Between fiscal 2005 and fiscal 2009, we improved our Adjusted EBITDA margins, which we define to mean Adjusted EBITDA divided by sales, by over 200 basis points despite operating in a recessionary environment for the past two years. We implemented new technology such as self-service Power Card kiosks, kitchen display systems and a new cost of sales tracking system to improve unit-level profitability. We have also adjusted our menu mix to emphasize higher margin items with stronger customer appeal. In addition, we have centralized functions that were previously executed at the store level, including special events planning and accounting, which has translated into a significant reduction in headcount.

In the future, we believe that improved labor scheduling technology will allow us to increase labor productivity. We also believe that continued focus on operating margins at individual locations and the deployment of best practices across our brand will yield incremental margin improvements. Additionally, the operational turnaround at Dave & Buster's has laid the foundation for significant organic growth as the economy

and sales begin to recover as we expect greater than 50% flow through from incremental comparable store sales due to our low cost, high margin operating model.

*New store development.* We plan to selectively open new stores. In the past several years, we have rebuilt our new store pipeline by instituting a systematic site selection process using seven key benchmarks designed to enhance new site selection. We are targeting an annual return on invested capital of approximately 30% to 35% for future new store openings, levels that are consistent with Dave & Buster's store openings in recent years. In addition, we have reduced the target size of large format units to approximately 35,000 square feet and introduced a smaller 16,000 - 22,000 square foot unit format to give us the flexibility to enter new smaller markets and backfill existing markets. We believe our national advertising program generates national brand awareness, which in turn helps facilitate new market development.

We have opened two new stores in fiscal 2010, including one large format and one small format store, and we plan to open three additional stores in fiscal 2011. We believe the Dave & Buster's brand is significantly under-penetrated, with internal studies and third-party research suggesting a total store opportunity in the United States and Canada in excess of 150 stores. We plan to selectively open a limited number of stores each year, focused on the sites we believe offer the greatest potential.

## Site selection

We believe that the location of stores is critical to our long-term success. We devote significant time and resources to strategically analyze each prospective market, trade area and site. We continually identify, evaluate and update our database of potential locations for expansion. To refine our site selection, we recently conducted extensive demographic and market analyses to determine the key drivers of successful new store performance. We now base new site selection on an analytical evaluation of a set of drivers we believe increase the probability of successful, high-volume stores.

During 2010, we opened one store in Wauwatosa, Wisconsin and one store in Roseville, California. During 2009, we opened three new stores in Richmond, Virginia; Indianapolis, Indiana; and Columbus, Ohio. In 2008, we opened three new stores in Plymouth Meeting, Pennsylvania; Arlington, Texas; and Tulsa, Oklahoma. In 2007, we opened one store in Tempe, Arizona.

The store in Wauwatosa (Milwaukee), Wisconsin opened as a large format design on March 1, 2010 and the store in Roseville (Sacramento), California opened as a small format design on May 3, 2010.

### Our store formats

We have historically operated stores varying in size from 29,000 to 66,000 square feet. After significant store-level research and analysis we have found that incremental square footage in excess of 35,000 yields limited incremental sales volumes and lower margins. We have also experienced significant variability among stores in volumes, individual and net investment costs. Further, we have conducted sales per square foot analyses on individual games and improved the mix of the more profitable attractions within the stores. In order to optimize sales per square foot and further enhance our store economics, we have reduced the target size of our future large format stores to 35,000 square feet. We may take advantage of local market and economic conditions to open stores that are larger or smaller than this target size. To accomplish this, we have reduced the back of house space, and optimized the sales area allocated to billiards and other traditional games in favor of space dedicated to more profitable video and redemption games. As a result, we expect to generate significantly higher sales per square foot than the average of our current store base.

To facilitate further growth of our brand, we have developed a small store format specifically designed to backfill existing markets and penetrate less densely populated markets. We opened our initial store using a small

store format in Tulsa, Oklahoma, in January 2009. We also opened small store formats in Richmond, Virginia, Columbus, Ohio and Roseville, California in April 2009, October 2009 and May 2010, respectively. We believe that the small store format will maintain the unique and dynamic guest experience that is the foundation of our brand and allow us flexibility in our site selection process. Moreover, we expect the format to yield higher margins than our current stores by optimizing the ratio of "selling space" to back of the house square footage and improving fixed cost leverage. Finally, we believe that the small store format will allow us to take less capital investment risk per store. As a result, we are targeting these smaller format stores to achieve higher returns, more efficient sales per square foot and reduce pre-opening costs relative to our larger formats, and to enable us to expand into additional markets.

## Marketing, advertising and promotion

Our corporate marketing department manages all consumer-focused initiatives for the Dave & Buster's brand. In order to drive sales and expand our guest base, we focus our efforts in three key areas:

- Marketing: national advertising, media, promotions, in-store merchandising, pricing, local and digital marketing programs
- Food and beverage: menu & product development, in-store execution
- Customer insights: research, brand health & tracking

We spent approximately \$26,588,000 in marketing efforts in fiscal 2009 and \$26,605,000 in fiscal 2008. We have improved marketing effectiveness through a number of initiatives. Over the last three years, we:

- performed extensive research to better understand our guest base and fine-tune the brand positioning;
- refined our marketing strategy to better reach both young adults and families;
- created a new advertising campaign;
- invested in menu research and development to differentiate our food offerings from our competition and improve key product attributes (quality, consistency, value and overall guest satisfaction) and execution;
- developed product/promotional strategies to attract new customers and increase spending/ length of stay;
- leveraged our loyalty database to engage and motivate customers;
- · invested more in digital and social media to create stronger relationships with consumers; and
- defined a consistent brand identity that reflects our quality, heritage and energy.

To drive traffic and increase visit frequency and average check size, the bulk of our marketing budget is allocated to our national cable television media. To enhance that effort, we also develop:

- local marketing plans
- in-store promotions
- digital loyalty programs
- market-wide print
- national and local radio
- emails
- websites

We work with external advertising, digital, media and design agencies in the development and execution of these programs.

## **Special Event Marketing**

Our corporate and group sales programs are managed by our sales department, which provides direction, training, and support to the special events managers and their teams within each location. They are supported by a Special Events Call Center located at our Corporate Office, targeted print and online media plans, as well as promotional incentives at appropriate times across the year.

### Operations

### Management

The management of our store base is divided into seven regions, each of which is overseen by a Regional Operations Director who reports to one of the two Vice Presidents of Operations. Our Regional Operations Directors oversee four to ten company-owned stores each, which we believe enables them to better support the General Managers and achieve sales and profitability targets for each store within their region.

Our typical store team consists of a General Manager supported by an average of eight additional management positions. There is a defined structure of development and progression of job responsibilities from Line Manager through various positions up to the General Manager role. This structure ensures that an adequate succession plan exists within each store. Each Management member handles various departments within the location including responsibility for hourly employees. A typical store employs approximately 150 hourly employees, many of whom work part time. The General Manager and the management team is responsible for the day-to-day operation of that store, including the hiring, training and development of team members, as well as financial and operational performances. Our stores are generally open seven days a week, from 11:30 a.m. to midnight on weekdays and 11:30 a.m. to 2:00 a.m. on weekends.

#### **Operational tools and programs**

We utilize a customized food and beverage analysis program that determines the theoretical food and beverage costs for each store and provides additional tools and reports to help us identify opportunities, including waste management. Our managers perform a weekly complete "test drive" of each game to ensure that our amusement offerings are consistent and operational. Consolidated reporting tools for each key driver of our business exist for our Regional Operations Directors to be able to identify and troubleshoot any systemic issues.

### Management information systems

We utilize a number of proprietary and third party management information systems. These systems are designed to enable our games functionality, improve operating efficiencies, provide us with timely access to financial and marketing data, and reduce store and corporate administrative time and expense. We believe our management information systems are sufficient to support our store expansion plans.

### Training

We strive to maintain quality and consistency in each of our stores through the careful training and supervision of our team members and the establishment of, and adherence to, high standards relating to personnel performance, food and beverage preparation, game playability and maintenance of our stores. We provide all new team members with complete orientation and one-on-one training for their positions to help ensure they are able to meet our high standards. All of our new team members are trained by partnering with a certified trainer to assure that the training and information they receive is complete and accurate. Team members are certified for their positions by passing a series of tests, including alcohol awareness training.

We require our new store managers to complete a 13-week training program that includes front of the house service, kitchen, amusements, and management responsibilities. Newly trained managers are then assigned to their home store where they receive additional training with their General Manager. We place a high priority on our continuing management development programs in order to ensure that qualified managers are available for our future openings. We conduct semi-annual talent reviews with each manager to discuss prior performance and future performance goals. Once a year we hold a general manager conference in which our General Managers share best practices and also receive an update on our business plan.

When we open a new store, we provide varying levels of training to team members in each position to ensure the smooth and efficient operation of the store from the first day it opens to the public. Prior to opening a new store, our dedicated training and opening team travels to the location to prepare for an intensive two week training program for all team members hired for the new store opening. Part of the training teams stay on site during the first week of operation. We believe this additional investment in our new stores is important, because it helps us provide our guests with a quality experience from day one.

After a store has been opened and is operating smoothly, the assistant managers supervise the training of new team members.

#### **Recruiting and retention**

We seek to hire experienced General Managers and team members, and offer competitive wage and benefit programs. Our store managers all participate in a performance based incentive program that is based on sales, profit and employee retention goals. In addition, our salaried and hourly employees are also eligible to participate in a 401(k) plan, medical/dental/vision insurance plans and also receive vacation/paid time off based on tenure.

#### Food preparation, quality control and purchasing

The principal goods we purchase are games, prizes and food and beverage products, which are available from a number of suppliers.

We strive to maintain high food quality standards. To ensure our quality standards are met, we negotiate directly with independent producers of food products. We provide detailed quality and yield specifications to suppliers for our purchases. Our systems are designed to protect the safety and quality of our food supply throughout the procurement and preparation process. Within each store, the Kitchen Manager is primarily responsible for ensuring the timely and correct preparation of food products, per the recipes we specify. We provide each of our stores with various tools and training to facilitate these activities.

#### Foreign operations

We own and operate one store outside of the United States in Toronto, Canada. This store generated revenue of approximately \$9.5 million USD in fiscal year 2009, representing approximately 1.8% of our consolidated revenue. As of January 31, 2010, we have less than 2% of our long-lived assets located outside the United States. Additionally, a franchisee operates a Dave & Buster's store located in Niagara Falls, Ontario, Canada which opened on June 25, 2009.

The foreign activities are subject to various risks of doing business in a foreign country, including currency fluctuations, changes in laws and regulations and economic and political stability. We do not believe there is any material risk associated with the Canadian operations or any dependence by the domestic business upon the Canadian operations.

#### Suppliers

The principal goods used by us are games, prizes and food and beverage products, which are available from a number of suppliers. We have expanded our contacts with amusement merchandise suppliers through the direct

import program. Federal and state health care mandates and mandated increases in the minimum wage could have the repercussion of increasing expenses, as suppliers may be adversely impacted by higher health care costs and increases in the minimum wage.

#### Intellectual property

We have registered the trademarks Dave & Buster's<sup>®</sup>, Power Card<sup>®</sup>, Eat & Play Combo<sup>®</sup>, and Eat Drink Play<sup>®</sup> with the United States Patent and Trademark Office and in various foreign countries. We have also registered and/or applied for certain additional trademarks with the United States Patent and Trademark Office and in various foreign countries. We consider our trade name and our signature "bulls-eye" logo to be important features of our operations and seek to actively monitor and protect our interest in this property in the various jurisdictions where we operate. We also have certain trade secrets, such as our recipes and certain software programs that we protect by requiring all of our employees to sign a code of ethics, which includes an agreement to keep trade secrets confidential.

#### Employees

As of August 3, 2010, we employed 7,521 persons, 197 of whom served at world headquarters, 535 of whom served as management personnel and the remainder of whom were hourly personnel.

None of our employees are covered by collective bargaining agreements and we have never experienced an organized work stoppage, strike or labor dispute. We believe working conditions and compensation packages are competitive with those offered by competitors and consider our relations with our employees to be good.

### Legal proceedings

We have reached an agreement with the Federal Trade Commission ("FTC") on the terms and provisions of a Complaint and Agreement Containing Consent Order (the "Order") that concludes and settles an investigation into our information security practices. The investigation related to a 2007 criminal attack upon our computer system during which approximately 130,000 payment cards used at eleven of our stores were compromised. The terms of the Order provide that we failed to provide reasonable and appropriate security for personal information on our computer networks. Specifically, we failed to (a) employ sufficient measures to detect and prevent unauthorized access to computer networks, (b) adequately restrict third-party access to our networks, (c) monitor and filter outbound traffic from our networks (to identify and block the unauthorized export of sensitive personal information), (d) limit access between in-store networks, and (e) limit access to our computer networks through wireless access points.

Under our settlement with the FTC, we are required to establish, implement, and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. This information security program will contain administrative, technical, and physical safeguards designed to (a) identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, (b) control the identified risks, and (c) ensure that our third-party service providers are capable of appropriately safeguarding personal information they receive from us. As part of the development of the information security program, for a ten-year period, we must obtain initial and biennial assessments and reports from an independent auditor that set out the safeguards implemented and maintained by us, and explain how such safeguards meet or exceed the protections required by the terms of the Order. The Order shall be binding upon us for twenty years.

The Order does not require us to pay any fines or other monetary assessments and we do not believe that the terms of the Order will have a material adverse effect on our business, operations, or financial performance.

## Properties

As of August 2, 2010, we owned or leased 57 stores. There is also one franchised store operating in Canada. The following table sets forth the number of stores that are located in each state/country as of May 3, 2010. Unless otherwise indicated, each of the stores listed below is leased.

State or country	Number of complexes
Arizona	2
California	7
Colorado	2
Florida	3
Georgia	3
Hawaii	1
Illinois	2
Indiana	1
Kansas	1
Maryland	2
Michigan	1
Minnesota	1
Missouri	1
Nebraska	1
New York	6
North Carolina	1
Ohio	4
Oklahoma	1
Pennsylvania	4
Rhode Island	1
Tennessee	1
Texas(a)	8
Virginia	1
Wisconsin	1
Canada(b)	2

(a) One store in the state is owned.

(b) One store is a franchise which operates in Niagara Falls, Ontario.

Our stores generally are located on land leased by our subsidiaries. Our lease terms, including renewal options, range from 20 to 40 years. Our leases typically provide for a minimum annual rent and contingent rent to be determined as a percentage of the applicable store's annual gross revenues, subject to market-based minimum annual rents. We currently pay contingent rent in only a small number of our stores. Generally, leases are "net leases" that require us to pay our pro rata share of taxes, insurance and maintenance costs. Typically, one of our subsidiaries is a party to the lease, and performance is guaranteed by the Company for all or a portion of the lease term.

In addition to our leased stores, we lease a 47,000 square foot office building and 30,000 square foot warehouse facility in Dallas, Texas, for use as our corporate headquarters and distribution center. This lease expires in October 2021, with options to renew until October 2041. We also lease a 22,900 square foot warehouse facility in Dallas, Texas, for use as additional warehouse space. This lease expires in January 2011.

### MANAGEMENT

#### Directors, executive officers and other key employees

The following table provides certain information regarding the directors of Holdings, and our executive officers and key employees. Each director and officer holds office until a successor is elected or qualified or until his earlier death, resignation or removal. Pursuant to a stockholders' agreement among Holdings, Oak Hill and certain members of management, Oak Hill has the right to designate all of the directors of Holdings. In addition, Oak Hill has the right to remove any or all of the directors of Holdings that it appoints. See "Certain relationships and transactions—Stockholders' agreement."

Name	Age	Position
Stephen M. King	52	Chief Executive Officer and Director
Starlette B. Johnson	47	President, Chief Operating Officer and Director
Brian A. Jenkins	48	Senior Vice President and Chief Financial Officer
Sean Gleason	45	Senior Vice President and Chief Marketing Officer
Margo L. Manning	45	Senior Vice President of Training and Special Events
Michael J. Metzinger	53	Vice President—Accounting and Controller
J. Michael Plunkett	59	Senior Vice President of Purchasing and International Operations
Jay L. Tobin	52	Senior Vice President, General Counsel and Secretary
Jeffrey C. Wood	48	Senior Vice President and Chief Development Officer
Tyler J. Wolfram	43	Chairman of the Board of Directors
Michael S. Green	37	Director
Kevin M. Mailender	32	Director
Alan J. Lacy	56	Director
David A. Jones	60	Director

Set forth below is biographical information regarding the directors of Holdings and our executive officers:

Stephen M. King, has served as our Chief Executive Officer and director since September 2006. From March 2006 until September 2006, Mr. King served as our Senior Vice President and Chief Financial Officer. From 1984 to 2006, he served in various capacities for Carlson Restaurants Worldwide, a company that owns and operates casual dining restaurants worldwide, including Chief Financial Officer, Chief Administrative Officer, Chief Operating Officer and, most recently, as President and Chief Operating Officer of International.

Starlette B. Johnson, has served as our President, Chief Operating Officer and director since April 2007. Since May 2008, Ms. Johnson has served as a director of the Tuesday Morning Corporation and is a member of its Audit Committee. From June 2006 until April 2007, Ms. Johnson served as our Senior Vice President and Chief Strategic Officer. From 2004 until June 2006, she was an independent consultant to restaurant, retail and retail services companies. From 1995 to 2004, she served in various capacities (most recently as Executive Vice President and Chief Strategic Officer) of Brinker International, Inc., a company that owns and operates casual dining restaurants worldwide.

Brian A. Jenkins, joined us as our Senior Vice President and Chief Financial Officer in December 2006. From 1996 until August 2006, he served in various capacities (most recently as Senior Vice President—Finance) of Six Flags, Inc., an amusement park operator.

*Sean Gleason*, has served as our Senior Vice President and Chief Marketing Officer since August 2009. From June 2005 until October 2008, Mr. Gleason was the Senior Vice President of Marketing Communications at Cadbury Schweppes where he led initiatives for brands such as Dr Pepper, 7UP and Snapple. From May 1995 until May 2005, he served in various capacities (most recently as Vice President, Advertising/Media/Brand Identity) at Pizza Hut for Yum! Brands, the world's largest restaurant company.

*Margo L. Manning*, has served as our Senior Vice President of Training and Special Events since September 2006. Prior to that, she served as our Vice President of Training and Sales from June 2005 until September 2006 and as Vice President of Management Development from September 2001 until June 2005. From December 1999 until September 2001, she served as our Assistant Vice President of Team Development and from 1991 until December 1999 she served in various positions of increasing responsibility for us and our predecessors.

Michael J. Metzinger, has served as our Vice President—Accounting and Controller since January 2005. From 1986 until January 2005, Mr. Metzinger served in various capacities (most recently as Executive Director—Financial Reporting) of Carlson Restaurants Worldwide, Inc.

*J. Michael Plunkett*, has served as our Senior Vice President of Purchasing and International Operations since September 2006. Previously, he served as our Senior Vice President—Food, Beverage and Purchasing/Operations Strategy from June 2003 until June 2004 and from January 2006 until September 2006. Mr. Plunkett also served as Senior Vice President of Operations for Jillian's from June 2004 to January 2006, as Vice President of Kitchen Operations from November 2000 until June 2003, as Vice President of Information Systems from November 1996 until November 2000 and as Vice President and Director of Training from November 1994 until November 1996. From 1982 until November 1994, he served in operating positions of increasing responsibility for us and our predecessors.

Jay L. Tobin, has served as our Senior Vice President, General Counsel and Secretary since May 2006. From 1988 to 2005, he served in various capacities (most recently as Senior Vice President and Deputy General Counsel) of Brinker International, Inc.

*Jeffrey C. Wood*, has served as our Senior Vice President and Chief Development Officer since June 2006. Mr. Wood previously served as Vice President of Restaurant Leasing for Simon Property Group, a shopping mall owner and real estate company, from April 2005 until June 2006 and in various capacities (including Vice President of Development—Emerging Concepts and Vice President of Real Estate and Property Development) with Brinker International, Inc. from 1993 until November 2004.

*Tyler J. Wolfram* is a Partner of Oak Hill Capital Management, LLC and has been with the firm since 2001. He is responsible for originating, structuring, and managing investments in the Consumer, Retail & Distribution industry group. He currently serves as a director of NSA International, LLC and The Hillman Companies, Inc.

*Michael S. Green* is a Partner of Oak Hill Capital Management, LLC and has been with the firm since 2000. He is responsible for originating, structuring, and managing investments in the Consumer, Retail & Distribution industry group. Mr. Green currently serves as a director of NSA International, LLC, Alibris Inc. and The Hillman Companies, Inc.

*Kevin M. Mailender* is a Principal of Oak Hill Capital Management, LLC and has been with the firm since 2002. Mr. Mailender is responsible for investments in the Consumer, Retail & Distribution industry group. He currently serves as a director of The Hillman Companies, Inc.

*Alan J. Lacy* is a Senior Advisor to Oak Hill Capital Management, LLC's Consumer, Retail and Distribution industry group and has been with the Firm since 2007. Prior to advising Oak Hill Capital Management, LLC, he was Vice Chairman and Chief Executive Officer of Sears Holdings Corporation and Chairman and Chief Executive Officer of Sears Roebuck and Co. During Mr. Lacy's tenure as CEO of Sears, the company created significant value for shareholders by executing major restructuring and growth initiatives, including the merger of Sears and Kmart, the acquisition of Lands' End and the sale of Sears' credit business. Prior to that, Mr. Lacy was employed in a number of executive level positions at major retail and consumer products companies, including Sears, Kraft, Philip Morris and Minnetonka Corporation. Mr. Lacy currently serves as a director of Bristol-Myers Squibb Company, The Western Union Company, and The Hillman Companies, Inc. and is a Trustee of Fidelity Funds.

*David A. Jones* is a Senior Advisor to Oak Hill Capital Management, LLC's Consumer, Retail and Distribution industry group and has been with the Firm since 2008. Prior to advising Oak Hill Capital Management, LLC, he was the Chairman and Chief Executive Officer of Spectrum Brands, Inc., a \$2.7 billion publicly traded consumer products company with operations in 120 countries worldwide and whose brand names include Rayovac, Varta, Remington, Cutter and Tetra. Prior to that, Mr. Jones was the Chairman and Chief Executive Officer of Rayovac Corporation (the predecessor to Spectrum Brands), a \$1.4 billion publicly traded global consumer products company with major product offerings in batteries, portable lighting and shaving and grooming categories. In aggregate, Mr. Jones has over 35 years of experience in senior leadership roles at several leading public and private global consumer products companies, including Spectrum Brands, Rayovac, Thermoscan, Regina, Electrolux, Sara Lee, and General Electric. He currently serves as a director of Pentair, Inc. and The Hillman Companies, Inc.

## **Compensation of Officers**

The following table sets forth information concerning the salary and non-equity incentive plan compensation paid or accrued by the Company during fiscal 2009 to or for those persons serving as our NEOs at the end of 2009.

	Annual compensation			
Name and principal position	Year	Salary	Non-equity incentive plan compensation	
Stephen M. King	2009	\$ 600,000	\$	223,050
(Chief Executive Officer)	2008	\$ 600,000	\$	146,250
	2007	\$ 600,000	\$	422,250
Brian A. Jenkins (Senior Vice President and Chief Financial Officer)	2009 2008 2007	\$ 300,000 \$ 300,000 \$ 278,777	\$ \$ \$	111,525 73,125 196,190
Starlette B. Johnson (President and Chief Operating Officer)	2009 2008 2007	\$ 400,000 \$ 400,000 \$ 396,154	\$ \$ \$	148,700 97,500 281,500
Jay L. Tobin (Senior Vice President, General Counsel and Secretary)	2009 2008 2007	\$ 309,000 \$ 306,819 \$ 292,308	\$ \$ \$	114,871 75,319 211,125
Sean Gleason(1) (Senior Vice President and Chief Marketing Officer)	2009	\$ 130,000	\$	44,554

(1) Mr. Gleason joined Dave & Buster's on August 3, 2009 and received a stock option grant upon the commencement of his employment.

#### **Compensation of directors**

The members of our board of directors other than Alan Lacy and David Jones are not be separately compensated for their services as directors, other than reimbursement for out-of-pocket expenses incurred in connection with rendering such services. Mr. Jones and Mr. Lacy will receive an annual cash stipend for serving as members of our board of directors and will also participate in a contemplated equity incentive plan in consideration of their service on our board.

## **Employment agreements**

We have entered into new amended and restated employment agreements, effective as of the closing of the Transactions, with Steve King, Starlette Johnson, Brian Jenkins, Sean Gleason, Jeff Wood and Jay Tobin (the "Management Members") to reflect the then current compensation arrangements of each of the Management

Members and to include additional restrictive covenants, including a one-year non-compete provision and a two-year non-solicitation and non-hire provision. The employment agreement for each Management Member provide for an initial term of two years, subject to automatic one-year renewals unless terminated earlier by the Management Member or us. Under the terms of the employment agreements, each Management Member will be entitled to a minimum base salary and may receive an annual salary increase commensurate with such officer's performance during the year, as determined by the Board of Directors of Dave & Busters Management Corporation, Inc. Our Management Members are also be entitled to participate in Holdings' 2010 Management Incentive Plan and in any profit sharing, qualified and nonqualified retirement plans and any health, life, accident, disability insurance, sick leave, supplemental medical reimbursement insurance, or benefit plans or programs as we may choose to make available now or in the future. Management Members will be entitled to receive an annual automobile allowance, an allowance for club membership and paid vacation. In addition, the employment agreements contain provisions providing for severance payments and continuation of benefits under certain circumstances including termination by us without cause, upon execution of a general release of claims in favor of us. Each employment agreement contains a confidentiality covenant.

# Holdings' 2010 management incentive plan and option grant agreements

We anticipate that pursuant to the Holdings' 2010 management incentive plan and the contemplated applicable option grant agreement, each Management Member shall receive (i) time vesting options, which shall vest ratably on the first through fifth anniversary of the date of the grant, (ii) EBITDA vesting options, which shall vest over a five year period based on Holdings meeting certain EBITDA targets for each fiscal year and (iii) IRR vesting options, which shall vest upon a change of control of Holdings if Oak Hill's internal rate of return is greater than or equal to certain percentages set forth in the applicable option grant agreement, in each case subject to the Management Member's continued employment with Holdings or its Subsidiaries (unless the Management Member's termination is without cause or for good reason within 180 days preceding the change of control).

### PRINCIPAL STOCKHOLDERS

Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management Partners III, L.P. own approximately 93% and 3%, respectively, of the outstanding common stock of Holdings, the indirect parent of Dave & Buster's, Inc. Certain members of our Board of Directors and management own approximately 4% of the outstanding common stock of Holdings, the indirect parent of Dave & Buster's, Inc.

#### CERTAIN RELATIONSHIPS AND TRANSACTIONS

### **Relationship with Oak Hill**

Our directors, Tyler J. Wolfram and Michael S. Green, are both Partners of Oak Hill Capital Management, LLC. Our director, Kevin M. Mailender, is a Principal of Oak Hill Capital Management, LLC and our directors, Alan J. Lacy and David A. Jones are both Senior Advisors to Oak Hill Capital Management, LLC's Consumer, Retail and Distribution industry group.

### Expense reimbursement agreement

We have entered into an expense reimbursement agreement with Oak Hill Capital Management, LLC, concurrently with the consummation of the Transactions. Pursuant to this Agreement, Oak Hill Capital Management, LLC provides general advice to us in connection with our long-term strategic plans, financial management, strategic transactions and other business matters. The expense reimbursement agreement provides for the reimbursement of certain expenses of Oak Hill Capital Management, LLC. The initial term of the expense reimbursement agreement expires in June 2015 and after that date such agreement will renew automatically on a year-to-year basis unless one party gives at least 30 days' prior notice of its intention not to renew.

## Stockholders' agreement

Holdings, certain members of management and Oak Hill entered into a stockholders' agreement as of June 1, 2010. The stockholders' agreement contains, among other things, certain restrictions on the ability of the parties thereto to freely transfer the securities of Holdings held by such parties. In addition, the stockholders' agreement provides that Oak Hill may compel a sale of all or a portion of the equity in Holdings to a third party (commonly known as drag-along rights) and, alternatively, that stockholders of Holdings may participate in certain sales of stock by Oak Hill to third parties (commonly known as tag-along rights). The stockholders' agreement also contains certain corporate governance provisions regarding the nomination of directors and officers of Holdings by the parties thereto. The stockholders' agreement also provides that Holdings' stockholders, under certain circumstances, will have the ability to cause Holdings to register common equity securities of Holdings under the Securities Act, and provide for procedures by which certain of the equity holders of Holdings may participate in such registrations.

### DESCRIPTION OF OTHER INDEBTEDNESS

### Our senior secured credit facility

## General

In connection with the Transactions, we entered into a senior secured credit facility with a syndicate of financial institutions and institutional lenders. Set forth below is a summary of the terms of our senior secured credit facility.

Our senior secured credit facility provides for senior secured financing of up to \$200.0 million consisting of:

- a \$150.0 million term loan facility with a maturity of six years from the closing date of the Transactions; and
- a \$50.0 million revolving credit facility, including a sub-facility of up to the U.S. dollar equivalent of \$1 million for borrowings in Canadian dollars by our Canadian subsidiary, a letter of credit sub-facility and a swingline sub-facility, with a maturity of five years from the closing date of the Transactions.

All borrowings under our senior secured credit facility are subject to the satisfaction of customary conditions, including absence of a default and accuracy of representations and warranties.

### Interest and fees

The interest rates per annum applicable to loans, other than swingline loans, under our senior secured credit facility are, at our option, equal to either a base rate (or, in relation to the Eurodollar rate and in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian cost of funds rate) for one-, two-, three- or six-month (or, if agreed by the applicable lenders, nine or twelve months) or, in relation to the Canadian revolving credit facility, 30-, 60-, 90- or 180- day interest periods chosen by us or the Canadian Borrower, as applicable in each case, plus an applicable margin percentage. Swingline loans bear interest at the base rate plus the applicable margin.

The base rate will be, subject to adjustment, the greater of: (i) the JPMorgan Chase Bank, N.A. prime rate; (ii) the federal funds effective rate from time to time plus 50 basis points; and (iii) the Eurodollar rate applicable for an interest period of one month plus 100 basis points provided that the base rate will not be less than 2.75%. The Eurodollar rate means the rate (adjusted for statutory reserve requirements for Eurocurrency liabilities) for Eurodollar deposits for a period equal to one, two, three, six, and, if agreed to by the applicable lenders, nine and twelve months (as selected by us or the Canadian Borrower, as applicable) appearing on LIBOR01 Page published by Reuters; provided, however, that with respect to the term loan facility, at no time will the Eurodollar rate be deemed to be less than 1.75%.

The Canadian prime rate will be, subject to adjustment, the greater of: (i) the JPMorgan Chase Bank, N.A., Toronto Branch prime rate C\$ denominated commercial loans to borrowers in Canada and (ii) the sum of (A) the CDOR rate and (B) 1.00% per annum. The Canadian cost of funds rate will be the fixed rate of interest determined by JPMorgan Chase Bank, N.A., Toronto Branch as being sufficient to compensate JPMorgan Chase Bank, N.A., Toronto Branch for its cost of funds for funding a Canadian cost of funds loan with a comparable maturity.

The applicable margin with respect to loans under the revolving credit facility will be, subject to adjustment, a percentage per annum equal to (i) 3.00% for base rate loans and Canadian prime rate loans and (ii) 4.00% for Eurodollar loans and Canadian cost of funds loans. The applicable margin with respect to loans under the term loan facility will be a percentage per annum equal to (i) 3.25% for base rate loans and (ii) 4.25% for Eurodollar loans and will be subject to adjustment based on performance goals.

On the last day of each calendar quarter we are required to pay each lender a commitment fee in respect to any unused commitments under the revolving credit facilities (and for these purposes swingline loans will not be deemed to be a utilization of the revolving credit facility).

## Prepayments

Subject to exceptions, our senior secured credit facility requires mandatory prepayments of the term loan based on certain percentages of excess cash flows and net cash proceeds from asset sales and recovery events or the issuance of certain debt securities not otherwise permitted under the senior secured credit facility.

## Amortization of principal

Our senior secured credit facility requires scheduled quarterly payments of principal on the term loan at the end of each of our fiscal quarters in aggregate annual amounts equal to a percentage of the original aggregate principal amount of the term loan with the balance payable on the maturity date.

## Collateral and guarantors

Indebtedness under our senior secured credit facility is unconditionally guaranteed by each of our direct and indirect, existing and future, domestic subsidiaries (with certain agreed-upon exceptions) and by us and each of the guarantors with respect to the obligations of the Canadian subsidiary. Indebtedness under our senior secured credit facility is also be secured by a first priority security interest in all of our tangible and intangible assets (subject to exceptions to be agreed upon) including, intellectual property, real property and all of our capital stock and the capital stock of each of our direct and indirect subsidiaries (limited, in the case of foreign subsidiaries, to 66% of the voting capital stock of first tier foreign subsidiaries).

## Restrictive covenants and other matters

Our senior secured credit facility requires that we comply with the following financial covenants: a minimum fixed charge coverage ratio test and a maximum total leverage ratio test. In addition, our senior secured credit facility includes negative covenants restricting or limiting our, D&B Holdings' and our subsidiaries' ability to, among other things:

- incur, assume or permit to exist additional indebtedness or guarantees;
- incur liens and engage in sale-leaseback transactions;
- make loans and investments;
- make initial capital expenditures in relation to new stores;
- declare dividends, make payments on or redeem or repurchase capital stock;
- engage in mergers, acquisitions and other business combinations;
- prepay, redeem or purchase certain indebtedness;
- amend or otherwise materially alter terms of our material indebtedness and other material agreements;
- sell assets;
- transact with affiliates; and
- alter the business that we conduct.

### Such negative covenants are subject to certain exceptions.

Our senior secured credit facility contains certain customary representations and warranties, affirmative covenants and events of default, including payment defaults, breaches of representations and warranties, covenant defaults, cross-defaults and cross-acceleration to certain indebtedness, certain events of bankruptcy, certain events under ERISA, material judgments, actual or asserted failures of any guarantee or security document supporting our senior secured credit facility to be in full force and effect and a change of control. If an event of default occurs, the lenders under our senior secured credit facility and all actions permitted to be taken by a secured creditor.

### DESCRIPTION OF THE EXCHANGE NOTES

Dave & Buster's, Inc. (the "Company") will issue the Exchange Notes under the Indenture (the "Indenture") among itself, the Guarantors and Wells Fargo Bank, National Association, as trustee (the "Trustee"). This is the same indenture under which the Restricted Notes were issued. The terms of the Exchange Notes include those expressly set forth in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act of 1939, as amended (the "Trust Indenture Act"). The Indenture is unlimited in aggregate principal amount, although the issuance of notes pursuant to the Exchange Offer will be limited to \$200,000,000. We may issue an unlimited principal amount of additional notes having identical terms and conditions as the Notes other than the issue date, issue price and the first interest payment date (the "Additional Notes"). We will only be permitted to issue such Additional Notes if at the time of such issuance, we were in compliance with the covenants contained in the Indenture. Any Additional Notes will be part of the same issue as the Notes that we are currently offering and will vote on all matters with the holders of the Notes.

The following is a summary of the material provisions of the Indenture but does not restate the Indenture in its entirety. You can find the definitions of certain capitalized terms used in the following summary under the subheading "—Certain definitions." Certain defined terms used in this description but not defined herein have the meanings assigned to them in the Indenture. The definitions used in this "Description of the Exchange Notes" may differ from definitions used elsewhere in this prospectus. We urge you to read the Indenture because it, and not this description, defines your rights as holders of the Exchange Notes. A copy of the Indenture is available upon request from the Company. For purposes of this description, references to "the Company," "we," "our" and "us" refer only to Dave & Buster's, Inc. and not to the Company's subsidiaries. You will find the definitions of other capitalized terms used in this description under the heading "—Certain defined terms used in this description but not defined herein have the meanings assigned to them in the Indenture.

As of the Issue Date, all of our domestic subsidiaries were "Restricted Subsidiaries." Under the circumstances described under the caption "—Certain covenants—Limitation on restricted payments" and the definition of "Unrestricted Subsidiary," we will be permitted to designate certain of our subsidiaries as Unrestricted Subsidiaries. Unrestricted Subsidiaries will not be subject to the restrictive covenants of the Indenture and will not guarantee these Notes.

### **Exchange Notes versus Restricted Notes**

The terms of the Exchange Notes are substantially identical to those of the outstanding Restricted Notes, except that the transfer restrictions, registration rights and additional interest provisions relating to the Restricted Notes do not apply to the Exchange Notes.

### General

The notes. The Notes:

- are general unsecured, unsubordinated obligations of the Company;
- rank equally in right of payment to any future unsubordinated Indebtedness of the Company;
- are effectively subordinated to our obligations under our existing and future secured Indebtedness, including the Senior Secured Credit Agreement, to the extent of the collateral securing such Indebtedness;
- are structurally subordinated to all existing and future liabilities of our Subsidiaries that are not Guarantors;
- are unconditionally guaranteed on an unsubordinated basis by each of the Company's current and future Restricted Subsidiaries, other than its Foreign Subsidiaries;
- are limited to an aggregate principal amount of \$200.0 million, subject to our ability to issue Additional Notes;

- mature on June 1, 2018; and
- will be issued in denominations of \$2,000 and integral multiples of \$1,000 in excess thereof.

The Note Guarantees. The Guarantees of the Notes (the "Guarantees"):

- are general unsecured, unsubordinated obligations of the Guarantors;
- rank equally in right of payment with all existing and future unsubordinated Indebtedness of the Guarantors and senior in right of payment to any existing and future subordinated Indebtedness of the Guarantors;
- are effectively subordinated to the Guarantors' obligations under their existing and future secured Indebtedness, including the Senior Secured Credit Agreement, to the extent of the value of the collateral that secures such obligations; and
- are structurally subordinated to obligations of any Subsidiaries of such Guarantor that are not Guarantors.

Interest. Interest on the Notes will compound semi-annually and:

- accrue at the rate of 11% per annum;
- · accrue from the date of original issuance or, if interest has already been paid, from the most recent interest payment date;
- be payable in cash semi-annually in arrears on June 1 and December 1, commencing on December 1, 2010;
- be payable to the holders of record on the May 15 and November 15 immediately preceding the related interest payment dates; and
- be computed on the basis of a 360-day year comprised of twelve 30-day months.

#### Payments on the notes; paying agent and registrar

We will pay principal of, premium, if any, and interest on the Notes at the office or agency designated by the Company in the Borough of Manhattan, The City of New York, except that we may, at our option, pay interest on the Notes by check mailed to holders of the Notes at their registered address as it appears in the Registrar's books. We have initially designated the corporate trust office of the Trustee in New York, New York to act as our Paying Agent and Registrar. We may, however, change the Paying Agent or Registrar without prior notice to the holders of the Notes, and the Company or any of its Restricted Subsidiaries may act as Paying Agent or Registrar.

We will pay principal of, premium, if any, and interest on, Notes in global form registered in the name of or held by The Depository Trust Company ("DTC") or its nominee in immediately available funds to the DTC or its nominee, as the case may be, as the registered holder of such global Note.

### Transfer and exchange

A holder may transfer or exchange Notes in accordance with the Indenture. The Registrar and the Trustee may require a holder, among other things, to furnish appropriate endorsements and transfer documents. No service charge will be imposed by the Company, the Trustee or the Registrar for any registration of transfer or exchange of Notes, but the Company may require a holder to pay a sum sufficient to cover any transfer tax or other governmental taxes and fees required by law or permitted by the Indenture. The Company is not required to transfer or exchange any Note for a period of 15 days before a selection of Notes to be redeemed.

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The registered holder of a Note will be treated as the owner of it for all purposes.

## **Optional redemption**

Except as described below, the Notes are not redeemable until June 1, 2014. On and after June 1, 2014, the Company may redeem all or, from time to time, a part of the Notes (including any Additional Notes, if any) upon not less than 30 nor more than 60 days' notice, at the following redemption prices (expressed as a percentage of principal amount) plus accrued and unpaid interest on the Notes, if any, to the applicable redemption date (subject to the right of holders of record on the relevant record date to receive interest due on the relevant interest payment date), if redeemed during the twelve-month period beginning on June 1, of the years indicated below:

Year	Percentage
<u>Year</u> 2014	105.500%
2015	102.750%
2016 and thereafter	100.000%

Prior to June 1, 2013, the Company may on any one or more occasions redeem up to 40% of the original principal amount of the Notes (calculated after giving effect to any issuance of Additional Notes) with the Net Cash Proceeds of one or more Equity Offerings at a redemption price of 111.000% of the principal amount thereof, plus accrued and unpaid interest, if any, to the redemption date (subject to the right of holders of record on the relevant record date to receive interest due on the relevant interest payment date); *provided* that

- (1) at least 60% of the original principal amount of the Notes (calculated after giving effect to any issuance of Additional Notes) remains outstanding after each such redemption; and
- (2) the redemption occurs within 90 days after the closing of such Equity Offering.

In addition, at any time prior to June 1, 2014, upon not less than 30 nor more than 60 days' prior notice mailed by first-class mail to each holder's registered address, the Company may redeem the Notes, in whole but not in part, at a redemption price equal to 100% of the principal amount thereof plus the Applicable Premium plus accrued and unpaid interest, if any, to the redemption date (subject to the right of holders of record on the relevant record date to receive interest due on the relevant interest payment date).

If the optional redemption date is on or after an interest record date and on or before the related interest payment date, the accrued and unpaid interest, if any, will be paid to the Person in whose name the Note is registered at the close of business, on such record date, and no additional interest will be payable to holders whose Notes will be subject to redemption by the Company.

In the case of any partial redemption, selection of the Notes for redemption will be made by the Trustee in compliance with the requirements of the principal national securities exchange, if any, on which the Notes are listed or, if the Notes are not listed, then on a pro rata basis, by lot or by such other method as may be required by the applicable depositary, although no Note of \$2,000 in original principal amount or less will be redeemed in part. If any Note is to be redeemed in part only, the notice of redemption relating to such Note will state the portion of the principal amount thereof to be redeemed. A new Note in principal amount equal to the unredeemed portion thereof will be issued in the name of the holder thereof upon cancellation of the original Note.

## Mandatory redemptions; offers to purchase; open market purchases

The Company is not required to make mandatory redemption payments or sinking fund payments with respect to the Notes. However, under certain circumstances, the Company may be required to offer to purchase the Notes as described under "Change of control" and "Certain covenants—Limitation on sales of assets and subsidiary stock."

The Company may acquire Notes by means other than a redemption, whether by tender offer, open market purchases, negotiated transactions or otherwise, in accordance with applicable securities laws, so long as such acquisition does not otherwise violate the terms of the Indenture.

### Ranking

The Notes are general unsecured obligations of the Company that rank senior in right of payment to all existing and future Indebtedness of the Company that is expressly subordinated in right of payment to the Notes. The Notes rank equally in right of payment with all existing and future liabilities of the Company that are not so subordinated. The Notes are effectively subordinated to all of the Company's and the Guarantors' obligations under the Senior Secured Credit Agreement to the extent of the collateral securing such indebtedness. The Notes are structurally subordinated to all existing and future liabilities of our Subsidiaries that are not Guarantors. On the Issue Date, each of the Company's Subsidiaries, other than 6131646 Canada, Inc. will be a Guarantor.

Since the Notes are unsecured, in the event of bankruptcy, liquidation, reorganization or other winding up of the Company or the Guarantors or upon a default in payment with respect to, or the acceleration of, any Indebtedness under the Senior Secured Credit Agreement or other senior secured Indebtedness, the assets of the Company and the Guarantors that secure other senior secured Indebtedness will be available to pay obligations on the Notes and the Guarantees only after all Indebtedness under such Senior Secured Credit Agreement and other senior secured Indebtedness has been repaid in full from such assets. We advise you that there may not be sufficient assets remaining to pay amounts due on any or all the Notes and the Guarantees then outstanding.

#### **Note Guarantees**

The Guarantors, jointly and severally, have unconditionally guaranteed on a senior unsecured basis the Company's obligations under the Notes and all obligations under the Indenture. Such Guarantors have agreed to pay, in addition to the amount stated above, any and all costs and expenses (including reasonable counsel fees and expenses) Incurred by the Trustee or the holders in enforcing any rights under the Note Guarantees. The obligations of the Guarantors under the Note Guarantees rank equally in right of payment with other Indebtedness of such Guarantors, except to the extent such other Indebtedness is expressly subordinated to the obligations arising under the Note Guarantees. Since the Note Guarantees are unsecured obligations of each Guarantor, in the event of a bankruptcy or insolvency, such Guarantor's secured lenders will have a prior secured claim to any collateral securing the debt owed to them, including the collateral securing the Guarantees of Indebtedness under the Senior Secured Credit Agreement.

Although the Indenture will limit the amount of indebtedness that Restricted Subsidiaries may Incur, such indebtedness may be substantial.

The obligations of each Guarantor under its Note Guarantee will be limited as necessary to prevent that Note Guarantee from constituting a fraudulent conveyance or fraudulent transfer under applicable law. If a Note Guarantee were rendered voidable, it could be subordinated by a court to all other Indebtedness (including Guarantees and other contingent liabilities) of the Guarantor, and, depending on the amount of such Indebtedness, a Guarantor's liability on its Note Guarantee could be reduced to zero. See "Risk factors—Risks related to the notes—Federal and state fraudulent transfer laws permit a court to void the notes and the guarantees, and, if that occurs, you may not receive any payments on the notes."

In the event a Guarantor is sold or disposed of (whether by merger, consolidation, the sale, exchange or transfer (whether by merger, consolidation or otherwise) of its Capital Stock or the sale of all or substantially all of its assets (other than by lease) and whether or not the Guarantor is the surviving corporation in such transaction) to a Person which is not the Company or a Restricted Subsidiary of the Company, such Guarantor will be released from all its obligations under its Note Guarantee if:

(1) the sale or other disposition is in compliance with the Indenture, including the covenants "—Certain covenants—Limitation on sales of assets and subsidiary stock" (it being understood that only such portion of the Net Available Cash as is required to be applied on or before the date of such release in accordance with the terms of the Indenture needs to be applied in accordance therewith at such time) and "Certain covenants— Merger and consolidation"; and



(2) all the obligations of such Guarantor under all Credit Facilities and related documentation and any other agreements relating to any other Indebtedness of the Company or its Restricted Subsidiaries terminate upon consummation of such transaction.

In addition, a Guarantor will be released from its obligations under the Indenture, its Note Guarantee and the Registration Rights Agreement if the Company designates such Subsidiary as an Unrestricted Subsidiary and such designation complies with the other applicable provisions of the Indenture. Finally, a Guarantor will be released from its obligations under the Indenture, its Note Guarantee and the Registration Rights Agreement in connection with any legal or covenant defeasance of the Notes in accordance with the terms of the Indenture or upon satisfaction and discharge of the Indenture.

#### Change of control

If a Change of Control occurs, unless the Company has exercised its right to redeem all of the Notes as described under "—Optional redemption", each holder will have the right to require the Company to repurchase all or any part (equal to \$2,000 or larger integral multiples of \$1,000 in excess thereof) of such holder's Notes at a purchase price in cash equal to 101% of the principal amount of the Notes plus accrued and unpaid interest, if any, to the date of purchase (subject to the right of holders of record on the relevant record date to receive interest due on the relevant interest payment date).

Within 30 days following any Change of Control, unless the Company has exercised its right to redeem all of the Notes as described under "—Optional redemption", the Company will mail a notice (the "Change of Control Offer") to each holder, with a copy to the Trustee, stating:

- (1) that a Change of Control has occurred and that such holder has the right to require the Company to purchase such holder's Notes at a purchase price in cash equal to 101% of the principal amount of such Notes plus accrued and unpaid interest, if any, to the date of purchase (subject to the right of holders of record on a record date to receive interest on the relevant interest payment date) (the "Change of Control Payment");
- (2) the repurchase date (which shall be no earlier than 30 days nor later than 60 days from the date such notice is mailed) (the "Change of Control Payment Date"); and
- (3) the procedures determined by the Company, consistent with the Indenture, that a holder must follow in order to have its Notes repurchased.

On the Change of Control Payment Date, the Company will, to the extent lawful:

- (1) accept for payment all Notes or portions of Notes (of \$2,000 or larger integral multiples of \$1,000 in excess thereof) properly tendered pursuant to the Change of Control Offer;
- (2) deposit with the paying agent an amount equal to the Change of Control Payment in respect of all Notes or portions of Notes so tendered; and
- (3) deliver or cause to be delivered to the Trustee the Notes so accepted together with an Officers' Certificate stating the aggregate principal amount of Notes or portions of Notes being purchased by the Company.

A Change of Control Offer may be made in advance of a Change of Control, conditioned upon consummation of the Change of Control, if a definitive agreement is in effect at the time of making such Change of Control offer that, when consummated in accordance with its terms, will result in a Change of Control, *provided* that such Change of Control Offer complies with all applicable securities laws or regulations.

The paying agent will promptly mail to each holder of Notes so tendered the Change of Control Payment for such Notes, and the Trustee will promptly authenticate and mail (or cause to be transferred by book entry) to

each holder a new Note equal in principal amount to any unpurchased portion of the Notes surrendered, if any; *provided* that each such new Note will be in a principal amount of \$2,000 or larger integral multiples of \$1,000 in excess thereof.

If the Change of Control Payment Date is on or after an interest record date and on or before the related interest payment date, any accrued and unpaid interest, if any, will be paid to the Person in whose name a Note is registered at the close of business on such record date, and no additional interest will be payable to holders who tender pursuant to the Change of Control Offer.

The Change of Control provisions described above will be applicable whether or not any other provisions of the Indenture are applicable. Except as described above with respect to a Change of Control, the Indenture does not contain provisions that permit the holders to require that the Company repurchase or redeem the Notes in the event of a takeover, recapitalization or similar transaction.

The Company will not be required to make a Change of Control Offer upon a Change of Control if (i) a third party makes the Change of Control Offer in the manner, at the times and otherwise in compliance with the requirements set forth in the Indenture applicable to a Change of Control Offer made by the Company and purchases all Notes validly tendered and not withdrawn under such Change of Control Offer; or (ii) notice of redemption has been given pursuant to the Indenture as described under the caption "—Optional redemption", unless and until there is a default of the applicable redemption price.

The Company will comply, to the extent applicable, with the requirements of Rule 14e-1 under the Exchange Act and any other securities laws or regulations in connection with the repurchase of Notes pursuant to this covenant. To the extent that the provisions of any securities laws or regulations conflict with provisions of the Indenture, the Company will comply with the applicable securities laws and regulations and will not be deemed to have breached its obligations described in the Indenture by virtue of the conflict.

The Company's ability to repurchase Notes pursuant to a Change of Control Offer may be limited by a number of factors. The occurrence of certain of the events that constitute a Change of Control would constitute a default under the Senior Secured Credit Agreement. In addition, certain events that may constitute a change of control under the Senior Secured Credit Agreement and cause a default under that agreement may not constitute a Change of Control under the Indenture. Future Indebtedness of the Company and its Subsidiaries may also contain prohibitions of certain events that would constitute a Change of Control or require such Indebtedness to be repurchased upon a Change of Control. Moreover, the exercise by the holders of their right to require the Company to repurchase the Notes could cause a default under such Indebtedness, even if the Change of Control itself does not, due to the financial effect of such repurchase on the Company. Finally, the Company's ability to pay cash to the holders upon a repurchase may be limited by the Company's then existing financial resources. There can be no assurance that sufficient funds will be available when necessary to make any required repurchases.

Even if sufficient funds were otherwise available, the terms of the Senior Secured Credit Agreement will, and future Indebtedness may, prohibit the Company's prepayment of Notes before their scheduled maturity. Consequently, if the Company is not able to prepay the Senior Secured Credit Agreement Indebtedness and any such other Indebtedness containing similar restrictions or obtain requisite consents, as described above, the Company will be unable to fulfill its repurchase obligations if holders of Notes exercise their repurchase rights following a Change of Control, resulting in a default under the Indenture. A default under the Indenture may result in a cross-default under the Senior Secured Credit Agreement.

The Change of Control provisions described above may deter certain mergers, tender offers and other takeover attempts involving the Company by increasing the capital required to effectuate such transactions. The definition of "Change of Control" includes a disposition of all or substantially all of the property and assets of the Company and its Restricted Subsidiaries taken as a whole to any Person other than a Permitted Holder or its

Related Persons. Although there is a limited body of case law interpreting the phrase "substantially all," there is no precise established definition of the phrase under applicable law. Accordingly, in certain circumstances there may be a degree of uncertainty as to whether a particular transaction would involve a disposition of "all or substantially all" of the property or assets of a Person. As a result, it may be unclear as to whether a Change of Control has occurred and whether a holder of Notes may require the Company to make an offer to repurchase the Notes as described above.

The provisions under the Indenture relative to the Company's obligation to make an offer to repurchase the Notes as a result of a Change of Control may be waived or modified with the written consent of the holders of a majority in principal amount of the Notes.

### **Certain covenants**

Effectiveness of covenants

Following the first day:

- (a) the Notes have an Investment Grade Rating from both of the Ratings Agencies; and
- (b) no Default has occurred and is continuing under the Indenture,

the Company and its Restricted Subsidiaries will not be subject to the provisions of the Indenture summarized under the headings below:

- "—Limitation on indebtedness,"
- "-Limitation on restricted payments,"
- "—Limitation on restrictions on distributions from restricted subsidiaries,"
- "—Limitation on sales of assets and subsidiary stock,"
- "—Limitation on affiliate transactions" and
- Clause (3) of "—Merger and consolidation"

(collectively, the "Suspended Covenants"). If at any time the Notes' credit rating is downgraded from an Investment Grade Rating by any Rating Agency or if a Default or Event of Default occurs and is continuing, then the Suspended Covenants will thereafter be reinstated as if such covenants had never been suspended (the "Reinstatement Date") and be applicable pursuant to the terms of the Indenture (including in connection with performing any calculation or assessment to determine compliance with the terms of the Indenture), unless and until the Notes subsequently attain an Investment Grade Rating and no Default or Event of Default is in existence (in which event the Suspended Covenants shall no longer be in effect for such time that the Notes maintain an Investment Grade Rating and no Default or Event of Default is in existence); *provided, however*, that no Default, Event of Default or breach of any kind shall be deemed to exist under the Indenture, the Notes or the Guarantees with respect to the Suspended Covenants based on, and none of the Company or any of its Subsidiaries shall bear any liability for, any actions taken or events occurring during the Suspension Period (as defined below), regardless of whether such actions or events would have been permitted if the applicable Suspended Covenants remained in effect during such period. The period of time between the date of suspension of the covenants and the Reinstatement Date is referred to as the "Suspension Period."

On the Reinstatement Date, all Indebtedness Incurred during the Suspension Period will be classified to have been Incurred pursuant to the first paragraph of "—Limitation on indebtedness" or one of the clauses set forth in the second paragraph of "—Limitation on indebtedness" (to the extent such Indebtedness would be permitted to be Incurred thereunder as of the Reinstatement Date and after giving effect to Indebtedness Incurred pursuant to the Suspension Period and outstanding on the Reinstatement Date). To the extent such Indebtedness would not be so permitted to be Incurred pursuant to the first or second paragraph of "—Limitation on

indebtedness," such Indebtedness will be deemed to have been outstanding on the Issue Date, so that it is classified under clause (4) of the second paragraph of "—Limitation on indebtedness." Calculations made after the Reinstatement Date of the amount available to be made as Restricted Payments under "— Limitation on restricted payments" will be made as though the covenants described under "—Limitation on restricted payments" had been in effect since the Issue Date and throughout the Suspension Period. Accordingly, Restricted Payments made during the Suspension Period will reduce the amount available to be made as Restricted Payments under the first paragraph of "—Limitation on restricted payments."

During any period when the Suspended Covenants are suspended, the Board of Directors of the Company may not designate any of the Company's Subsidiaries as Unrestricted Subsidiaries pursuant to the Indenture.

#### Limitation on indebtedness

The Company will not, and will not permit any of its Restricted Subsidiaries to, directly or indirectly, Incur any Indebtedness (including Acquired Indebtedness); provided, however, that the Company and the Guarantors may Incur Indebtedness (including Acquired Indebtedness) if on the date thereof:

- (1) the Consolidated Coverage Ratio for the Company and its Restricted Subsidiaries is at least 2.00 to 1.00; and
- (2) no Default or Event of Default will have occurred or be continuing or would occur as a consequence of Incurring the Indebtedness or transactions relating to such Incurrence.

The first paragraph of this covenant will not prohibit the Incurrence of the following Indebtedness:

- (1) Indebtedness of the Company or any Guarantor Incurred under a Credit Facility in an aggregate amount up to \$250.0 million less the aggregate principal amount of all principal repayments with the proceeds from Asset Dispositions utilized in accordance with clause 3(a) of "—Limitations on sales of assets and subsidiary stock" that permanently reduce the commitments thereunder;
- (2) (x) Guarantees by the Company or Guarantors of Indebtedness Incurred by the Company or a Guarantor in accordance with the provisions of the Indenture; *provided* that in the event such Indebtedness that is being Guaranteed is a Subordinated Obligation or a Guarantor Subordinated Obligation, then the related Guarantee shall be subordinated in right of payment to the Notes or the Subsidiary's Note Guarantee, as the case may be; and (y) Guarantees by Non-Guarantor Restricted Subsidiaries of Indebtedness Incurred by Non-Guarantor Restricted Subsidiaries in accordance with the provisions of the Indenture;
- (3) Indebtedness of the Company owing to and held by any Restricted Subsidiary or Indebtedness of a Restricted Subsidiary owing to and held by the Company or any other Restricted Subsidiary; *provided, however,* 
  - (a) if the Company is the obligor on such Indebtedness, such Indebtedness is expressly subordinated to the prior payment in full in cash of all obligations with respect to the Notes;
  - (b) if a Guarantor is the obligor on such Indebtedness and the Company or a Guarantor is not the obligee, such Indebtedness is subordinated in right of payment to the Note Guarantees of such Guarantor; and
  - (c) (i) any subsequent issuance or transfer of Capital Stock or any other event which results in any such Indebtedness being beneficially held by a Person other than the Company or a Restricted Subsidiary of the Company and (ii) any sale or other transfer of any such Indebtedness to a Person other than the Company or a Restricted Subsidiary of the Company shall be deemed, in each case, to constitute an Incurrence of such Indebtedness by the Company or such Subsidiary, as the case may be, not permitted by this clause (3);

- (4) Indebtedness represented by (a) the Notes issued on the Issue Date, the Note Guarantees of the Guarantors and the related exchange notes and exchange guarantees issued in a registered exchange offer pursuant to the Registration Rights Agreement, (b) any Indebtedness (other than the Indebtedness described in clauses (1), (2), (3), (6), (8), (9) and (10)) outstanding on the Issue Date and (c) any Refinancing Indebtedness Incurred in respect of any Indebtedness (including Refinancing Indebtedness) described in this clause (4) or clause (5) or Incurred pursuant to the first paragraph of this covenant;
- (5) Indebtedness of a Restricted Subsidiary Incurred and outstanding on the date on which such Restricted Subsidiary was acquired by, or merged into, the Company or any Restricted Subsidiary (other than Indebtedness Incurred (a) to provide all or any portion of the funds utilized to consummate the transaction or series of related transactions pursuant to which such Restricted Subsidiary became a Restricted Subsidiary or was otherwise acquired by the Company or (b) otherwise in connection with, or in contemplation of, such acquisition); *provided, however*, that at the time such Restricted Subsidiary is acquired by the Company, either (a) the Company would have been able to Incur \$1.00 of additional Indebtedness pursuant to the first paragraph of this covenant after giving effect to the Incurrence of such Indebtedness pursuant to this clause (5) or (b) the Consolidated Coverage Ratio of the Company and its Restricted Subsidiaries is higher than such ratio immediately prior to such acquisition or merger;
- (6) Indebtedness under Hedging Obligations that are Incurred in the ordinary course of business (and not for speculative purposes);
- (7) the Incurrence by the Company or any of its Restricted Subsidiaries of Indebtedness (including Capitalized Lease Obligations) of the Company or a Restricted Subsidiary Incurred to finance or refinance the purchase, lease, construction or improvements of real or personal property, plant or equipment used in the business of the Company or such Restricted Subsidiary, and Attributable Indebtedness, and any Indebtedness of the Company or a Restricted Subsidiary which serves to refund or refinance any Indebtedness Incurred pursuant to this clause (7), in an aggregate outstanding principal amount which, when taken together with the principal amount of all other Indebtedness Incurred pursuant to this clause (7) and then outstanding, will not exceed the greater of (x) 3% of Consolidated Net Tangible Assets and (y) \$10.0 million at any time outstanding;
- (8) Indebtedness Incurred in respect of workers' compensation claims, health, disability or other employee benefits or property, casualty or liability insurance and premiums related thereto, self-insurance obligations, performance, bid surety and similar bonds and completion guarantees (not for borrowed money) provided by the Company or a Restricted Subsidiary in the ordinary course of business;
- (9) Indebtedness arising from agreements of the Company or a Restricted Subsidiary providing for indemnification, adjustment of purchase price or similar obligations, in each case, Incurred or assumed in connection with the disposition of any business or assets of the Company or any business, assets or Capital Stock of a Restricted Subsidiary, *provided* that
  - (a) the maximum aggregate liability in respect of all such Indebtedness shall at no time exceed the gross proceeds including non-cash proceeds (the fair market value of such non-cash proceeds being measured at the time received and without giving effect to subsequent changes in value) actually received by the Company and its Restricted Subsidiaries in connection with such disposition; and
  - (b) such Indebtedness is not reflected on the balance sheet of the Company or any of its Restricted Subsidiaries (contingent obligations referred to in a footnote to financial statements and not otherwise reflected on the balance sheet will not be deemed to be reflected on such balance sheet for purposes of this clause (9));
- (10) Indebtedness arising from the honoring by a bank or other financial institution of a check, draft or similar instrument (except in the case of daylight overdrafts) drawn against insufficient funds in the ordinary course of business, *provided*, *however*, that such Indebtedness is extinguished within five Business Days of Incurrence; and

(11) in addition to the items referred to in clauses (1) through (10) above, Indebtedness of the Company and its Guarantors in an aggregate outstanding principal amount which, when taken together with the principal amount of all other Indebtedness Incurred pursuant to this clause (11) and then outstanding, will not exceed \$25.0 million at any time outstanding, including all Refinancing Indebtedness Incurred to renew, refund, refinance, replace, defease or discharge any Indebtedness Incurred pursuant to this clause (11); provided that a Foreign Subsidiary that is not a Guarantor can Incur Indebtedness under this clause (11) of up to \$10.0 million at any one time outstanding.

For purposes of determining compliance with, and the outstanding principal amount of any particular Indebtedness Incurred pursuant to and in compliance with, this covenant:

- in the event that Indebtedness meets the criteria of more than one of the types of Indebtedness described in the first and second paragraphs of this covenant, the Company, in its sole discretion, will classify such item of Indebtedness on the date of Incurrence and, with the exception of clause (1) of the second paragraph, may later classify such item of Indebtedness in any manner that complies with this covenant and only be required to include the amount and type of such Indebtedness in one of such clauses;
- (2) all Indebtedness outstanding on the date of the Indenture under the Senior Secured Credit Agreement shall be deemed Incurred under clause (1) of the second paragraph of this covenant and not the first paragraph or clause (4) of the second paragraph of this covenant;
- (3) Guarantees of, or obligations in respect of letters of credit relating to, Indebtedness which is otherwise included in the determination of a particular amount of Indebtedness shall not be included;
- (4) if obligations in respect of letters of credit are Incurred pursuant to a Credit Facility and are being treated as Incurred pursuant to clause (1) of the second paragraph above and the letters of credit relate to other Indebtedness, then such other Indebtedness shall not be included;
- (5) the principal amount of any Disqualified Stock of the Company or a Restricted Subsidiary, or Preferred Stock of a Restricted Subsidiary that is not a Guarantor, will be equal to the greater of the maximum mandatory redemption or repurchase price (not including, in either case, any redemption or repurchase premium) or the liquidation preference thereof;
- (6) Indebtedness permitted by this covenant need not be permitted solely by reference to one provision permitting such Indebtedness but may be permitted in part by one such provision and in part by one or more other provisions of this covenant permitting such Indebtedness; and
- (7) the amount of Indebtedness issued at a price that is less than the principal amount thereof will be equal to the amount of the liability in respect thereof determined in accordance with GAAP.

Accrual of interest, accrual of dividends, the accretion of accreted value or the amortization of debt discount, the payment of interest in the form of additional Indebtedness and the payment of dividends in the form of additional shares of Preferred Stock or Disqualified Stock will not be deemed to be an Incurrence of Indebtedness for purposes of this covenant. The amount of any Indebtedness outstanding as of any date shall be (i) the accreted value thereof in the case of any Indebtedness issued with original issue discount or the aggregate principal amount outstanding in the case of Indebtedness issued with interest payable in kind and (ii) the principal amount or liquidation preference thereof, together with any interest thereon that is more than 30 days past due, in the case of any other Indebtedness.

In addition, the Company will not permit any of its Unrestricted Subsidiaries to Incur any Indebtedness or issue any shares of Disqualified Stock, other than Non-Recourse Debt. If at any time an Unrestricted Subsidiary becomes a Restricted Subsidiary, any Indebtedness of such Subsidiary shall be deemed to be Incurred by a Restricted Subsidiary as of such date (and, if such Indebtedness is not permitted to be Incurred as of such date under this "—Limitation on indebtedness" covenant, the Company shall be in Default of this covenant).

For purposes of determining compliance with any U.S. dollar-denominated restriction on the Incurrence of Indebtedness, the U.S. dollar-equivalent principal amount of Indebtedness denominated in a foreign currency shall be calculated based on the relevant currency exchange rate in effect on the date such Indebtedness was Incurred, in the case of term Indebtedness, or first committed, in the case of revolving credit Indebtedness; *provided* that if such Indebtedness is Incurred to refinance other Indebtedness denominated in a foreign currency, and such refinancing would cause the applicable U.S. dollar-denominated restriction to be exceeded if calculated at the relevant currency exchange rate in effect on the date of such refinancing, such U.S. dollar-denominated restriction shall be deemed not to have been exceeded so long as the principal amount of such refinancing Indebtedness being refinanced (plus related fees and expenses). Notwithstanding any other provision of this covenant, the maximum amount of Indebtedness that the Company may Incur pursuant to this covenant shall not be deemed to be exceeded solely as a result of fluctuations in the exchange rate of currencies. The principal amount of any Indebtedness Incurred to refinance other Indebtedness, if Incurred in a different currency from the Indebtedness being refinanced, shall be calculated based on the currency exchange rate applicable to the currencies in which such Refinancing Indebtedness is denominated that is in effect on the date of such refinancing.

### Limitation on restricted payments

The Company will not, and will not permit any of its Restricted Subsidiaries, directly or indirectly, to:

- declare or pay any dividend or make any distribution (whether made in cash, securities or other property) on or in respect of its Capital Stock (including any payment in connection with any merger or consolidation involving the Company or any of its Restricted Subsidiaries) except:
  - (a) dividends or distributions payable in Equity Interests (other than Disqualified Stock) of the Company; and
  - (b) dividends or distributions payable to the Company or a Restricted Subsidiary (and if such Restricted Subsidiary is not a Wholly Owned Subsidiary, to its other holders of Capital Stock on a pro rata basis, taking into account the relative preferences, if any, of the various classes of Capital Stock in such Restricted Subsidiaries);
- (2) purchase, redeem, retire or otherwise acquire for value any Capital Stock of the Company or any direct or indirect parent of the Company held by Persons other than the Company or a Restricted Subsidiary (other than in exchange for Equity Interests of the Company (other than Disqualified Stock));
- (3) purchase, repurchase, redeem, defease or otherwise acquire or retire for value, prior to scheduled maturity, scheduled repayment or scheduled sinking fund payment, any Subordinated Obligations or Guarantor Subordinated Obligations (other than (x) Indebtedness of the Company owing to and held by any Guarantor or Indebtedness of a Guarantor owing to and held by the Company or any other Guarantor permitted under clause (3) of the second paragraph of the covenant "—Limitation on indebtedness" or (y) the purchase, repurchase, redemption, defeasance or other acquisition or retirement of Subordinated Obligations or Guarantor Subordinated Obligations purchased in anticipation of satisfying a sinking fund obligation, principal installment or final maturity, in each case due within one year of the date of purchase, repurchase, redemption, defeasance or other acquisition or retirement); or
- (4) make any Restricted Investment in any Person;

(any such dividend, distribution, purchase, redemption, repurchase, defeasance, other acquisition, retirement or Restricted Investment referred to in clauses (1) through (4) shall be referred to herein as a "Restricted Payment"), if at the time the Company or such Restricted Subsidiary makes such Restricted Payment:

- (a) a Default shall have occurred and be continuing (or would result therefrom); or
- (b) the Company is not able to Incur an additional \$1.00 of Indebtedness pursuant to the first paragraph under the "—Limitation on indebtedness" covenant after giving effect, on a pro forma basis, to such Restricted Payment; or

- (c) the aggregate amount of such Restricted Payment and all other Restricted Payments declared or made subsequent to the Issue Date (excluding clauses (1) through (4) and (6) through (14)) would exceed the sum of:
  - (i) 50% of (i) Consolidated Net Income for the period (treated as one accounting period) from the beginning of the Company's last completed fiscal quarter preceding the Issue Date to the end of the most recent fiscal quarter ending prior to the date of such Restricted Payment for which financial statements are in existence (or, in case such Consolidated Net Income) is a deficit, minus 100% of such deficit and (ii) any dividends received by the Company or a Wholly Owned Subsidiary of the Company that is a Guarantor after the Issue Date from an Unrestricted Subsidiary of the Company, to the extent that such dividends were not otherwise included in Consolidated Net Income for such periods or otherwise included in clause (v) below;
  - (ii) 100% of the aggregate Net Cash Proceeds and the fair market value of the assets (as determined conclusively by the Board of Directors of the Company) received by the Company from the issue or sale of its Equity Interests (other than Disqualified Stock) or other capital contributions subsequent to the Issue Date (other than Net Cash Proceeds received from an issuance or sale of such Capital Stock to a Subsidiary of the Company or an employee stock ownership plan, option plan or similar trust to the extent such sale to an employee stock ownership plan or similar trust is financed by loans from or Guaranteed by the Company or any Restricted Subsidiary unless such loans have been repaid with cash on or prior to the date of determination) excluding in any event Excluded Contributions or Net Cash Proceeds received by the Company from the issue and sale of its Capital Stock or capital contributions to the extent applied to redeem Notes in compliance with the provisions set forth under the second paragraph of the caption "—Optional redemption", *provided*, that this clause (ii) shall not apply to Net Cash Proceeds received in connection with the Transactions, as contemplated in this prospectus;
  - (iii) the amount by which Indebtedness of the Company or its Restricted Subsidiaries is reduced on the Company's balance sheet upon the conversion or exchange (other than debt held by a Subsidiary of the Company) subsequent to the Issue Date of any Indebtedness of the Company or its Restricted Subsidiaries convertible or exchangeable for Capital Stock (other than Disqualified Stock) of the Company (less the amount of any cash, or the fair market value of any other property, distributed by the Company upon such conversion or exchange);
  - (iv) to the extent that any Unrestricted Subsidiary designated as such after the Issue Date (A) is redesignated as a Restricted Subsidiary, (B) is merged or consolidated into the Company or any of its Restricted Subsidiaries or (C) transfers all or substantially all of its assets to the Company or any of its Restricted Subsidiaries after the Issue Date, the fair market value (as determined conclusively by the Board of Directors of the Company) of (x) in the case of clause (A) or (B) above, the Company's Investment in such Subsidiary as of the date of such redesignation, merger or consolidation and (y) in the case of clause (C) above, such assets (other than to the extent the Investment in such Unrestricted Subsidiary was made pursuant to clause (15) of the next succeeding paragraph or pursuant to clause (11) of the definition of Permitted Investment); and
  - (v) to the extent that any Restricted Investment that was made after the Issue Date of the Indenture is sold for cash or otherwise liquidated, repaid, repurchased or redeemed for cash, the lesser of (i) the cash return of capital with respect to such Restricted Investment (less the cost of disposition, if any), and (ii) the initial amount of such Restricted Investment to the extent such amount was not already included in Consolidated Net Income.

The provisions of the preceding paragraph will not prohibit:

- (1) any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Capital Stock, Disqualified Stock or Subordinated Obligations of the Company or Guarantor Subordinated Obligations of any Guarantor made by exchange for, or out of the proceeds of (i) the substantially contemporaneous contribution of common equity capital to the Company or (ii) the substantially concurrent sale of, Capital Stock of the Company (other than Disqualified Stock and other than Capital Stock issued or sold to a Subsidiary or an employee stock ownership plan or similar trust to the extent such sale to an employee stock ownership plan or similar trust is financed by loans from or Guaranteed by the Company or any Restricted Subsidiary unless such loans have been repaid with cash on or prior to the date of determination); provided, however, that the Net Cash Proceeds from such sale of Capital Stock will be excluded from clause (c)(ii) of the preceding paragraph;
- (2) any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Subordinated Obligations of the Company or Guarantor Subordinated Obligations of any Guarantor made by exchange for, or out of the proceeds of the substantially concurrent sale of, Subordinated Obligations of the Company or any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Guarantor Subordinated Obligations made by exchange for or out of the proceeds of the substantially concurrent sale of Guarantor Subordinated Obligations made by exchange for or out of the proceeds of the substantially concurrent sale of Guarantor Subordinated Obligations that, in each case, is permitted to be Incurred pursuant to the covenant described under "—Limitation on indebtedness" and that in each case constitutes Refinancing Indebtedness;
- (3) any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Disqualified Stock of the Company or a Restricted Subsidiary made by exchange for or out of the proceeds of the substantially concurrent sale of Disqualified Stock of the Company or such Restricted Subsidiary, as the case may be, that, in each case, is permitted to be Incurred pursuant to the covenant described under "—Limitation on indebtedness" and that in each case constitutes Refinancing Indebtedness;
- (4) so long as no Default or Event of Default has occurred and is continuing, any purchase or redemption of Subordinated Obligations or Guarantor Subordinated Obligations of a Guarantor from Net Available Cash to the extent permitted under "—Limitation on sales of assets and subsidiary stock" below;
- (5) dividends paid within 60 days after the date of declaration if at such date of declaration such dividend would have complied with this provision and the consummation of any irrevocable redemption within 60 days after the giving of the redemption notice if at the date of such notice the redemption payment would have complied with this provision;
- (6) so long as no Default or Event of Default has occurred and is continuing, the purchase, redemption or other acquisition, cancellation or retirement for value of Equity Interests of the Company or any Restricted Subsidiary or any parent of the Company held by any existing or former employees or management or directors of the Company or Holdings or any Subsidiary of the Company or their assigns, estates or heirs, in each case in connection with (x) the death or disability of such employee, manager or director or (y) the repurchase provisions under employee stock option or stock purchase agreements or other agreements to compensate management employees or directors; provided that in the case of clause (y) such redemptions or repurchases pursuant to such clause will not exceed \$2.5 million in the aggregate during any twelve-month period plus the aggregate Net Cash Proceeds received by the Company after the Issue Date from the issuance of such Capital Stock or equity appreciation rights to, or the exercise of options, warrants or other rights to purchase, redemption, acquisition or retirement will be excluded from clause (c)(ii) of the preceding paragraph) and provided, further, that unused amounts available pursuant to this clause (6) to be utilized for Restricted Payments during any twelve-month period;

- (7) so long as no Default or Event of Default has occurred and is continuing, the declaration and payment of dividends to holders of any class or series of Disqualified Stock of the Company or Preferred Stock of any Guarantor issued in accordance with the terms of the Indenture to the extent such dividends are included in the definition of "Consolidated Interest Expense";
- (8) repurchases of Capital Stock deemed to occur upon the exercise of stock options, warrants or other convertible securities if such Capital Stock represents (i) a portion of the exercise price thereof or (ii) withholding incurred in connection with such exercise, provided that the amount of such withholding taxes shall reduce the amount set forth in clause (6) above;
- (9) cash dividends or loans to Holdings (which for purposes of this clause (9) shall include any direct or indirect parent of the Company) ("Permitted Holdings Payments") in amounts equal to:
  - (a) the amounts required for Holdings to pay any Federal, state or local income taxes to the extent that such income taxes are directly attributable to the income of the Company and its Restricted Subsidiaries and, to the extent of amounts actually received from Unrestricted Subsidiaries, in amounts required to pay such taxes to the extent directly attributable to the income of the Unrestricted Subsidiaries.
  - (b) the amounts required for Holdings to pay franchise taxes and other fees required to maintain its legal existence;
  - (c) an amount not to exceed \$1.0 million (or \$2.0 million following an initial public offering) in any fiscal year to permit Holdings to pay its corporate overhead expenses Incurred in the ordinary course of business, and to pay salaries or other compensation of employees who perform services for both Holdings and the Company;
  - (d) dividends or distributions to Holdings to permit Holdings to satisfy its payment obligations, if any under the Expense Reimbursement Agreement as in effect on the Issue Date, or as later amended, provided that any such amendment is not more disadvantageous to the Company in any material respect that the Expense Reimbursement Agreement as in effect on the Issue Date; and
  - (e) any fees and expenses related to any equity offering or other financing of any direct or indirect parent of the Company to the extent the proceeds of such offering or financing are contributed to the Company.
- (10) any payments made in connection with the Transactions pursuant to the Stock Purchase Agreement and any other agreements or documents related to the Transactions and in effect on the closing date of the Transactions (without giving effect to subsequent amendments, waivers or other modifications to such agreements or documents) or as otherwise described in the May 19, 2010 offering memorandum relating to the initial offering of the Restricted Notes;
- (11) the purchase, repurchase, redemption, defeasance or other acquisition or retirement for value of any Subordinated Obligation (i) at a purchase price not greater than 101% of the principal amount of such Subordinated Obligation in the event of a Change of Control in accordance with provisions similar to the "—Change of control" covenant or (ii) at a purchase price not greater than 100% of the principal amount thereof in accordance with provisions similar to the "—Limitation on sales of assets and subsidiary stock" covenant; provided that, prior to or simultaneously with such purchase, repurchase, redemption, defeasance or other acquisition or retirement, the Company has made the Change of Control Offer or Asset Disposition Offer, as applicable, as provided in such covenant with respect to the Notes and has completed the repurchase or redemption of all Notes validly tendered for payment in connection with such Change of Control Offer or Asset Disposition Offer;
- (12) any payment on intercompany Indebtedness permitted to be Incurred under clause (3) of the second paragraph of "-Limitation on indebtedness;"
- (13) Restricted Payments that are made with Excluded Contributions;

- (14) the distribution, by dividend or otherwise, of shares of Capital Stock of Unrestricted Subsidiaries (other than Unrestricted Subsidiaries the primary assets of which are cash and/or Cash Equivalents); and
- (15) so long as no Default or Event of Default has occurred and is continuing, Restricted Payments in an amount not to exceed \$7.5 million.

The amount of all Restricted Payments (other than cash) shall be the fair market value on the date of such Restricted Payment of the asset(s) or securities proposed to be paid, transferred or issued by the Company or such Restricted Subsidiary, as the case may be, pursuant to such Restricted Payment. The fair market value of any cash Restricted Payment shall be its face amount and the fair market value of any non cash Restricted Payment shall be determined conclusively by the Board of Directors of the Company acting in good faith whose resolution with respect thereto shall be delivered to the Trustee, such determination to be based upon an opinion or appraisal issued by an accounting, appraisal or investment banking firm of national standing if such fair market value is estimated in good faith by the Board of Directors of the Company to exceed \$20.0 million.

As of the Issue Date, all of the Company's Subsidiaries will be Restricted Subsidiaries. The Company will not permit any Unrestricted Subsidiary to become a Restricted Subsidiary except pursuant to the last sentence of the definition of "Unrestricted Subsidiary." For purposes of designating any Restricted Subsidiary as an Unrestricted Subsidiary, all outstanding Investments by the Company and its Restricted Subsidiaries (except to the extent repaid) in the Subsidiary so designated will be deemed to be Restricted Payments in an amount determined as set forth in the definition of "Investment." Such designation will be permitted only if a Restricted Subsidiaries will not be subject to any of the restrictive covenants set forth in the Indenture.

### Limitation on liens

The Company will not, and will not permit any of its Restricted Subsidiaries to, directly or indirectly, create, Incur or suffer to exist any Lien (other than Permitted Liens) upon any of its property or assets (including Capital Stock of Restricted Subsidiaries), whether owned on the date of the Indenture or acquired after that date, which Lien is securing any Indebtedness, unless contemporaneously with the Incurrence of such Liens effective provision is made to secure the Indebtedness due under the Indenture and the Notes or, in respect of Liens on any Restricted Subsidiary's property or assets, any Note Guarantee of such Restricted Subsidiary, equally and ratably with (or senior in priority to in the case of Liens with respect to Subordinated Obligations or Guarantor Subordinated Obligations) the Indebtedness secured by such Lien for so long as such Indebtedness is so secured.

### Limitation on sale/leaseback transactions

The Company will not, and will not permit any of its Restricted Subsidiaries to, enter into any Sale/Leaseback Transaction unless:

- the Company or such Restricted Subsidiary, as the case may be, receives consideration at the time of such Sale/Leaseback Transaction at least equal to the fair market value (as evidenced by a resolution of the Board of Directors of the Company) of the property subject to such transaction;
- (2) the Company or such Restricted Subsidiary could have Incurred Indebtedness in an amount equal to the Attributable Indebtedness in respect of such Sale/Leaseback Transaction pursuant to the covenant described under "—Limitation on indebtedness;"
- (3) the Company or such Restricted Subsidiary would be permitted to create a Lien on the property subject to such Sale/Leaseback Transaction without securing the Notes by the covenant described under "—Limitation on liens"; and
- (4) the Sale/Leaseback Transaction is treated as an Asset Disposition and all of the conditions of the Indenture described under "—Limitation on sales of assets and subsidiary stock" (including the

provisions concerning the application of Net Available Cash) are satisfied with respect to such Sale/Leaseback Transaction, treating all of the consideration received in such Sale/Leaseback Transaction as Net Available Cash for purposes of such covenant.

### Limitation on restrictions on distributions from restricted subsidiaries

The Company will not, and will not permit any Restricted Subsidiary to create or otherwise cause or permit to exist or become effective any consensual encumbrance or consensual restriction on the ability of any Restricted Subsidiary to:

- pay dividends or make any other distributions on its Capital Stock to the Company or any of its Restricted Subsidiaries or pay any Indebtedness or other obligations owed to the Company or any Restricted Subsidiary (it being understood that the priority of any Preferred Stock in receiving dividends or liquidating distributions prior to dividends or liquidating distributions being paid on Common Stock shall not be deemed a restriction on the ability to make distributions on Capital Stock);
- (2) make any loans or advances to the Company or any Restricted Subsidiary (it being understood that the subordination of loans or advances made to the Company or any Restricted Subsidiary to other Indebtedness Incurred by the Company or any Restricted Subsidiary shall not be deemed a restriction on the ability to make loans or advances); or
- (3) sell, lease or transfer any of its property or assets to the Company or any Restricted Subsidiary (it being understood that such transfers shall not include any type of transfer described in clause (1) or (2) above).

The preceding provisions will not prohibit:

- (a) any encumbrance or restriction pursuant to an agreement in effect at or entered into on the Issue Date, including, without limitation, the Indenture, the Notes, the Exchange Notes, the Note Guarantees, and the Senior Secured Credit Agreement (and related documentation) in effect on such date;
- (b) any encumbrance or restriction with respect to a Restricted Subsidiary pursuant to an agreement relating to any Equity Interests or Indebtedness Incurred by a Restricted Subsidiary on or before the date on which such Restricted Subsidiary was acquired by the Company or a Restricted Subsidiary (other than Equity Interests or Indebtedness Incurred as consideration in, or to provide all or any portion of the funds utilized to consummate, the transaction or series of related transactions pursuant to which such Restricted Subsidiary became a Restricted Subsidiary or was acquired by the Company or in contemplation of the transaction) and outstanding on such date provided, that any such encumbrance or restriction shall not extend to any assets or property of the Company or any other Restricted Subsidiary other than the assets and property so acquired, and, that in the case of Indebtedness, such Indebtedness was permitted by the terms of the Indenture to be Incurred;
- (c) any encumbrance or restriction (i) with respect to a Restricted Subsidiary pursuant to an agreement effecting a refunding, replacement or refinancing of Indebtedness Incurred pursuant to an agreement referred to in clause (a) or (b) of this paragraph or this clause (c) or (ii) contained in any amendment, restatement, modification, renewal, supplement, refunding, replacement or refinancing of an agreement referred to in clause (a) or (b) of this paragraph or this clause (c); *provided, however*, that the encumbrances and restrictions with respect to such Restricted Subsidiary contained in any such agreement, amendment, restatement, modification, renewal, supplement, refunding, replacement or refinancing are not materially less favorable, taken as a whole, in the good faith determination of the Company, to the holders of the Notes than the encumbrances and restrictions contained in such agreements referred to in clauses (a) or (b) of this paragraph on the Issue Date or the date such Restricted Subsidiary became a Restricted Subsidiary or was merged into a Restricted Subsidiary, whichever is applicable;

- (d) in the case of clause (3) of the first paragraph of this covenant, any encumbrance or restriction:
  - that restricts in a customary manner the subletting, assignment or transfer of any property or asset that is subject to a lease, license or similar contract, or the assignment or transfer of any such lease, license or other similar contract;
  - (ii) contained in mortgages, pledges or other security agreements permitted under the Indenture securing Indebtedness of the Company or a Restricted Subsidiary to the extent such encumbrances or restrictions restrict the transfer of the property subject to such mortgages, pledges or other security agreements; or
  - (iii) pursuant to customary provisions restricting dispositions of real property interests set forth in any reciprocal easement agreements of the Company or any Restricted Subsidiary;
- (e) (i) purchase money obligations for property acquired in the ordinary course of business and (ii) Capitalized Lease Obligations permitted under the Indenture, in each case, that impose encumbrances or restrictions of the nature described in clause (3) of the first paragraph of this covenant on the property so acquired;
- (f) any restriction with respect to a Restricted Subsidiary (or any of its property or assets) imposed pursuant to an agreement entered into for the direct or indirect sale or disposition of the Equity Interests or assets of such Restricted Subsidiary (or the property or assets that are subject to such restriction) pending the closing of such sale or disposition;
- (g) any customary provisions in joint venture agreements relating to joint ventures and other similar agreements entered into in the ordinary course of business; any customary encumbrances or restrictions on any Foreign Subsidiary pursuant to Indebtedness Incurred by such Foreign Subsidiary;
- (h) restrictions on cash and other deposits or net worth provisions in leases and other agreements entered into by the Company or any Restricted Subsidiary in the ordinary course of business;
- (i) encumbrances or restrictions arising or existing by reason of applicable law or any applicable rule, regulation or order;
- (j) encumbrances or restrictions contained in indentures or debt instruments or other debt arrangements Incurred or Preferred Stock issued by Guarantors in accordance with "—Limitation on indebtedness" that are not materially more restrictive, taken as a whole, in the good faith determination of the Company, than those applicable to the Company in either the Indenture or the Senior Secured Credit Agreement on the Issue Date (which results in encumbrances or restrictions comparable to those applicable to the Company at a Restricted Subsidiary level);
- (k) encumbrances or restrictions contained in indentures or other debt instruments or debt arrangements Incurred or Preferred Stock issued subsequent to the Issue Date by Restricted Subsidiaries that are not Guarantors pursuant to clause (5) of the second paragraph of the covenant "—Limitation on indebtedness" by Restricted Subsidiaries; and
- (l) in the case of clause (3) of the first paragraph of this covenant, Liens permitted to be Incurred under the provisions of the covenant described under "—Limitation on liens" that limit the right of the debtor to dispose of assets securing such Indebtedness.

## Limitation on sales of assets and subsidiary stock

The Company will not, and will not permit any of its Restricted Subsidiaries to, make any Asset Disposition unless:

(1) the Company or such Restricted Subsidiary, as the case may be, receives consideration at least equal to the fair market value (such fair market value to be determined on the date of contractually agreeing to such Asset Disposition), as determined in good faith by the Board of Directors (including as to the value of all non-cash consideration), of the shares and assets subject to such Asset Disposition;

- (2) at least 75% of the consideration from such Asset Disposition received by the Company or such Restricted Subsidiary, as the case may be, is in the form of cash or Cash Equivalents; *provided* that for the purposes of this covenant, the following will be deemed to be cash:
  - (a) the assumption by the transferee of Indebtedness (other than Subordinated Obligations or Disqualified Stock) of the Company or Indebtedness of a Restricted Subsidiary (other than Guarantor Subordinated Obligations or Disqualified Stock of any Guarantor) and the release of the Company or such Restricted Subsidiary from all liability on such Indebtedness in connection with such Asset Disposition (in which case the Company will, without further action, be deemed to have applied such deemed cash to Indebtedness); and
  - (b) securities, notes or other obligations received by the Company or any Restricted Subsidiary from the transferee that are converted by the Company or such Restricted Subsidiary into cash within 180 days after receipt; and
- (3) an amount equal to 100% of the Net Available Cash from such Asset Disposition is applied by the Company or such Restricted Subsidiary, as the case may be:
  - (a) to repay Indebtedness of the Company (other than any Disqualified Stock or Subordinated Obligations) or Indebtedness of a Restricted Subsidiary (other than any Disqualified Stock or Guarantor Subordinated Obligations of a Guarantor) (in each case other than Indebtedness owed to the Company or an Affiliate of the Company) and, if the Indebtedness repaid is revolving credit Indebtedness, to correspondingly reduce commitments with respect thereto within 365 days after the later of the date of such Asset Disposition or the receipt of such Net Available Cash; or
  - (b) to invest in Additional Assets within 365 days from the later of the date of such Asset Disposition or the receipt of such Net Available Cash (or enter into a definitive agreement with respect thereto that is consummated within 545 days after the days after the receipt of any such Net Available Cash).

*provided* that pending the final application of any such Net Available Cash in accordance with clause (a) or clause (b) above, the Company and its Restricted Subsidiaries may temporarily reduce Indebtedness or otherwise invest such Net Available Cash in any manner not prohibited by the Indenture.

Any Net Available Cash from Asset Dispositions that are not applied or invested as provided in the preceding paragraph will be deemed to constitute "Excess Proceeds." On the 366<sup>th</sup> day after an Asset Disposition (or such later date as permitted in 3(b) of the immediately preceding paragraph), if the aggregate amount of Excess Proceeds exceeds \$15.0 million, the Company will be required to make an offer ("Asset Disposition Offer") to all holders of Notes and to the extent required by the terms of other Pari Passu Indebtedness, to all holders of other Pari Passu Indebtedness outstanding with similar provisions requiring the Company to make an offer to purchase such Pari Passu Indebtedness with the proceeds from any Asset Disposition ("Pari Passu Notes"), to purchase the maximum principal amount of Notes and any such Pari Passu Notes to which the Asset Disposition Offer applies that may be purchased out of the Excess Proceeds, at an offer price in cash in an amount equal to 100% of the principal amount of the Notes and Pari Passu Notes plus accrued and unpaid interest to the date of purchase, in accordance with the procedures set forth in the Indenture or the agreements governing the Pari Passu Notes, as applicable, in the case of the Notes in denominations of \$2,000 and integral multiples of \$1,000 in excess thereof. To the extent that the aggregate amount of Notes and Pari Passu Notes so validly tendered and not properly withdrawn pursuant to an Asset Disposition Offer is less than the Excess Proceeds, the Company may use any remaining Excess Proceeds for general corporate purposes, subject to other covenants contained in the Indenture. If the aggregate principal amount of Notes surrendered by holders thereof and other Pari Passu Notes surrendered by holders or lenders, collectively, exceeds the amount of tendered Notes and Pari Passu Notes. Upon completion of such Asset Disposition Offer, the amount of Excess Proceeds shall be reset at zero. Notwithstanding anything to the contrary

in the foregoing, the Company may commence an Asset Disposition Offer prior to the expiration of 365 days after the occurrence of an Asset Disposition (or such later date after giving effect to the proviso in 3(b) of the immediately preceding paragraph, provided that such Asset Disposition Offer complies with all applicable securities laws and regulations).

The Asset Disposition Offer will remain open for a period of 20 Business Days following its commencement, except to the extent that a longer period is required by applicable law (the "Asset Disposition Offer Period"). No later than five Business Days after the termination of the Asset Disposition Offer Period (the "Asset Disposition Purchase Date"), the Company will purchase the principal amount of Notes and Pari Passu Notes required to be purchased pursuant to this covenant (the "Asset Disposition Offer Amount") or, if less than the Asset Disposition Offer Amount has been so validly tendered, all Notes and Pari Passu Notes validly tendered in response to the Asset Disposition Offer.

If the Asset Disposition Purchase Date is on or after an interest record date and on or before the related interest payment date, any accrued and unpaid interest will be paid to the Person in whose name a Note is registered at the close of business on such record date, and no additional interest will be payable to holders who tender Notes pursuant to the Asset Disposition Offer.

Pending the final application of any Net Available Cash pursuant to this covenant, the holder of such Net Available Cash may apply such Net Available Cash temporarily to reduce Indebtedness outstanding under a revolving Credit Facility or otherwise invest such Net Available Cash in any manner not prohibited by the Indenture.

On or before the Asset Disposition Purchase Date, the Company will, to the extent lawful, accept for payment, on a pro rata basis to the extent necessary, the Asset Disposition Offer Amount of Notes and Pari Passu Notes or portions of Notes and Pari Passu Notes so validly tendered and not properly withdrawn pursuant to the Asset Disposition Offer, or if less than the Asset Disposition Offer Amount has been validly tendered and not properly withdrawn, all Notes and Pari Passu Notes so validly tendered and not properly withdrawn, all Notes and Pari Passu Notes so validly tendered and not properly withdrawn, in the case of the Notes in denominations of \$2,000 and larger integral multiples of \$1,000 in excess thereof. The Company will deliver to the Trustee an Officers' Certificate stating that such Notes or portions thereof were accepted for payment by the Company in accordance with the terms of this covenant and, in addition, the Company will deliver all certificates and notes required, if any, by the agreements governing the Pari Passu Notes. The Company or the Paying Agent, as the case may be, will promptly (but in any case not later than five Business Days after termination of the Asset Disposition Offer Period) mail or deliver to each tendering holder of Notes or holder or lender of Pari Passu Notes, as the case may be, an amount equal to the purchase price of the Notes or Pari Passu Notes so validly tendered and not properly withdrawn by such holder or lender, as the case may be, and accepted by the Company for purchase, and the Company will promptly issue a new Note, and the Trustee, upon delivery of an Officers' Certificate from the Company, will authenticate and mail or deliver such new Note to such holder, in a principal amount equal to any unpurchased portion of the Note surrendered; *provided* that each such new Note will be in a principal amount of \$2,000 or an integral multiple of \$1,000 in excess thereof. In addition, the Company will authenticate and mail or deliver such new Note to such holder, in

The Company will not, and will not permit any Restricted Subsidiary to, engage in any Asset Swaps, unless:

- (1) at the time of entering into such Asset Swap and immediately after giving effect to such Asset Swap, no Default or Event of Default shall have occurred and be continuing or would occur as a consequence thereof; and
- (2) the Board of Directors has determined that the aggregate fair market value of the property or assets being transferred by the Company or such Restricted Subsidiary is not greater than the aggregate fair market value of the property or assets being received by the Company or such Restricted Subsidiary and has approved the terms of such Asset Swap.

The Company will comply, to the extent applicable, with the requirements of Rule 14e-1 under the Exchange Act and any other securities laws or regulations in connection with the repurchase of Notes pursuant to the Indenture. To the extent that the provisions of any securities laws or regulations conflict with provisions of this covenant, the Company will comply with the applicable securities laws and regulations and will not be deemed to have breached its obligations under the Indenture by virtue of any conflict.

### Limitation on affiliate transactions

The Company will not, and will not permit any of its Restricted Subsidiaries to, directly or indirectly, enter into or conduct any transaction (including the purchase, sale, lease or exchange of any property or the rendering of any service) with any Affiliate of the Company (an "Affiliate Transaction") *unless*:

- (1) the terms of such Affiliate Transaction are no less favorable to the Company or such Restricted Subsidiary, as the case may be, than those that could be obtained in a comparable transaction at the time of such transaction in arm's-length dealings with a Person who is not such an Affiliate;
- (2) in the event such Affiliate Transaction involves an aggregate consideration in excess of \$5.0 million, the terms of such transaction have been approved by a majority of the members of the Board of Directors of the Company and either (x) a further resolution by a majority of the members of such Board having no personal stake in such transaction, if any (and such majority or majorities, as the case may be, determines that such Affiliate Transaction satisfies the criteria in clause (1) above); or (y) the Company shall have received a written opinion from an independent investment banking, accounting or appraisal firm of nationally recognized standing that such Affiliate Transaction is not materially less favorable than those that might reasonably have been obtained in a comparable transaction at such time on an arm's-length basis from a Person that is not an Affiliate; and
- (3) in the event such Affiliate Transaction involves an aggregate consideration in excess of \$20.0 million, the Company has received a written opinion from an independent investment banking, accounting or appraisal firm of nationally recognized standing that such Affiliate Transaction is not materially less favorable than those that might reasonably have been obtained in a comparable transaction at such time on an arm's-length basis from a Person that is not an Affiliate.

The preceding paragraph will not apply to:

- any Restricted Payment permitted to be made pursuant to the covenant described under "—Limitation on restricted payments" or any Permitted Investment (other than Permitted Investments set forth under clauses (1)(b), (2), (11), (13) and (14) of the definition of Permitted Investments);
- (2) any issuance of securities, or other payments, awards or grants in cash, securities or otherwise pursuant to, or the funding of, employment agreements and other compensation arrangements, options to purchase Capital Stock of the Company, restricted stock plans, long-term incentive plans, stock appreciation rights plans, participation plans or similar employee benefits plans and/or indemnity provided on behalf of directors, officers and employees approved by the Board of Directors of the Company;
- (3) to the extent permitted by applicable law, loans or advances to employees, officers or directors in the ordinary course of business of the Company or any of its Restricted Subsidiaries but in any event not to exceed \$2.5 million in the aggregate outstanding at any one time (without giving effect to the forgiveness of any such loan) with respect to all loans or advances made since the Issue Date;
- (4) any transaction between the Company and a Restricted Subsidiary or between Restricted Subsidiaries and Guarantees issued by the Company or a Restricted Subsidiary for the benefit of the Company or a Restricted Subsidiary, as the case may be, in accordance with "—Limitation on indebtedness;"
- (5) the payment of reasonable and customary fees paid to, and indemnity provided on behalf of, directors of the Company or any Restricted Subsidiary;

- (6) the existence of, and the performance of obligations of the Company or any of its Restricted Subsidiaries under the terms of any agreement to which the Company or any of its Restricted Subsidiaries is a party as of or on the Issue Date, as these agreements may be amended, modified, supplemented, extended or renewed from time to time; provided, however, that any future amendment, modification, supplement, extension or renewal entered into after the Issue Date will be permitted to the extent that its terms are not more disadvantageous to the holders of the Notes in any material respect in the good faith judgment of the Board of Directors of the Company when taken as a whole than the terms of the agreements in effect on the Issue Date;
- (7) transactions with customers, clients, suppliers or purchasers or sellers of goods or services, in each case in the ordinary course of the business of the Company and its Restricted Subsidiaries and otherwise in compliance with the terms of the Indenture; *provided* that in the reasonable determination of the members of the Board of Directors or senior management of the Company, such transactions are on terms that are no less favorable to the Company or the relevant Restricted Subsidiary than those that would have been obtained in a comparable transaction by the Company or such Restricted Subsidiary with an unrelated Person;
- (8) any issuance or sale of Equity Interests (other than Disqualified Stock) to Affiliates of the Company and the granting of registration and other customary rights in connection therewith;
- (9) Permitted Holdings Payments;
- (10) any transaction on arm's length terms with non-affiliates that become Affiliates as a result of such transaction; and
- (11) transactions in which the Company or any Restricted Subsidiary delivers to the Trustee an opinion or appraisal issued by an accounting, appraisal or investment banking firm of national standing stating that such transaction is fair to the Company or such Restricted Subsidiary from a financial point of view or stating that the terms are not materially less favorable than those that might reasonably have been obtained by the Company or such Restricted Subsidiary in a comparable transaction at such time on an arms-length basis from a Person that is not an Affiliate.

## SEC reports

Notwithstanding that the Company may not be subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, to the extent permitted by the Exchange Act, the Company will file with the SEC, and make available to the Trustee and the registered holders of the Notes, the annual reports and the information, documents and other reports (or copies of such portions of any of the foregoing as the SEC may by rules and regulations prescribe) that are specified in Sections 13 and 15(d) of the Exchange Act within the time periods specified therein; *provided* that the quarterly report with respect to the first quarter ending following the Transactions may be furnished up to 75 days following the end of such quarter. In the event that the Company is not permitted to file such reports, documents and information with the SEC pursuant to the Exchange Act, the Company will nevertheless make available such Exchange Act information (as well as the details regarding the conference call described below) to the Trustee and the holders of the Notes as if the Company were subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act within the time periods specified therein or in the relevant forms (except as provided above). Unless the Company is subject to the reporting requirements of the Exchange Act, the Company will also hold a quarterly conference call for the holders of the Notes to discuss such financial information. The conference call will not be later than three business days from the time that the Company distributes the financial information as set forth above. No fewer than one Business Day prior to the date of the conference call required to be held in accordance with the preceding sentence the Company shall issue a press release to the appropriate U.S. wire services announcing the time and the date of such conference call and directing the beneficial owners of, and prospective investors in, the Notes and securities analysts to contact an individual at the Company agrees that it will



Substantially concurrently with the furnishing or making such information available to the Trustee pursuant to the immediately preceding paragraph, unless the Company has publicly furnished such information to the SEC, the Company shall also post copies of such information required by the immediately preceding paragraph on a website (which may be nonpublic and may be maintained by the Company or a third party) to which access will be given to holders, prospective investors in the Notes (which prospective investors shall be limited to "qualified institutional buyers" within the meaning of Rule 144A of the Securities Act or non-U.S. persons (as defined in Regulation S under the Securities Act) that certify their status as such to the reasonable satisfaction of the Company), and securities analysts and market making financial institutions that are reasonably satisfactory to the Company.

If the Company has designated any of its Subsidiaries as Unrestricted Subsidiaries and the Consolidated EBITDA of the Unrestricted Subsidiaries taken together exceeds 10% of the Consolidated EBITDA of the Company, then the quarterly and annual financial information required by the preceding paragraph shall include a reasonably detailed presentation, either on the face of the financial statements or in the footnotes to the financial statements and in "Management's Discussion and Analysis of Results of Operations and Financial Condition," of the financial condition and results of operations of the Company and its Restricted Subsidiaries.

In addition, the Company and the Guarantors have agreed that they will make available to the holders and to securities analysts, prospective investors, upon the request of such holders, the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act so long as the Notes are not freely transferable under the Securities Act. For purposes of this covenant, the Company and the Guarantors will be deemed to have furnished the reports to the Trustee and the holders of Notes as required by this covenant if it has filed or furnished such reports with the SEC via the EDGAR filing system and such reports are publicly available.

The filing requirements set forth above for the applicable period may be satisfied by the Company prior to the commencement of the exchange offer or the effectiveness of the shelf registration statement (each as described under "Exchange offer, registration rights") by the filing with the SEC of the exchange offer registration statement and/or shelf registration statement, and any amendments thereto, with such financial information that satisfies Regulation S-X of the Securities Act; *provided* that this paragraph shall not supersede or in any manner suspend or delay the Company's reporting obligations set forth in the first three paragraphs of this covenant, *provided*, *further* that at such time the Company is not required to pay any additional interest pursuant to the Registration Rights Agreement.

In the event that (1) the rules and regulations of the SEC permit the Company and any direct or indirect parent company of the Company to report at such parent entity's level on a consolidated basis and (2) such parent entity of the Company is not engaged in any business in any material respect other than incidental to its ownership, directly or indirectly of the Capital Stock of the Company, the information and reports required by the covenant may be those of such parent company on a consolidated basis.

### Merger and consolidation

The Company will not consolidate with or merge with or into, or convey, transfer or lease all or substantially all its assets to, any Person, unless:

(1) the resulting, surviving or transferee Person (the "Successor Company") will be a corporation or a limited liability company, *provided* that in the case of a merger with a limited liability company there shall be a corporate co-issuer, in each case organized and existing under the laws of the United States of America, any State of the United States or the District of Columbia and the Successor Company (if not the Company) will expressly assume, by supplemental indenture, executed and delivered to the Trustee, in form satisfactory to the Trustee, all the obligations of the Company under the Notes, the Indenture and the Registration Rights Agreement;

- (2) immediately after giving effect to such transaction (and treating any Indebtedness that becomes an obligation of the Successor Company or any Subsidiary of the Successor Company as a result of such transaction as having been Incurred by the Successor Company or such Subsidiary at the time of such transaction), no Default or Event of Default shall have occurred and be continuing;
- (3) immediately after giving effect to such transaction, the Successor Company would be able to Incur at least an additional \$1.00 of Indebtedness pursuant to the first paragraph of the "—Limitation on indebtedness" covenant;
- (4) each Guarantor (unless it is the other party to the transactions above, in which case clause (1) shall apply) shall have by supplemental indenture confirmed that its Note Guarantee shall apply to such Person's obligations in respect of the Indenture and the Notes and its obligations under the Registration Rights Agreement shall continue to be in effect; and
- (5) the Company shall have delivered to the Trustee an Officers' Certificate and an Opinion of Counsel, each stating that such consolidation, merger or transfer and such supplemental indenture (if any) comply with the Indenture.

For purposes of this covenant, the sale, lease, conveyance, assignment, transfer, or other disposition of all or substantially all of the properties and assets of one or more Subsidiaries of the Company, which properties and assets, if held by the Company instead of such Subsidiaries, would constitute all or substantially all of the properties and assets of the Company on a consolidated basis, shall be deemed to be the transfer of all or substantially all of the properties and assets of the Company.

The predecessor Company will be released from its obligations under the Indenture and the Successor Company will succeed to, and be substituted for, and may exercise every right and power of, the Company under the Indenture, but, in the case of a lease of all or substantially all its assets, the predecessor Company will not be released from the obligation to pay the principal of and interest on the Notes.

Although there is a limited body of case law interpreting the phrase "substantially all," there is no precise established definition of the phrase under applicable law. Accordingly, in certain circumstances there may be a degree of uncertainty as to whether a particular transaction would involve "all or substantially all" of the property or assets of a Person.

Notwithstanding the preceding clause (3), (x) any Restricted Subsidiary may consolidate with, merge into or transfer all or part of its properties and assets to the Company and (y) the Company may merge with an Affiliate incorporated solely for the purpose of reincorporating the Company in another jurisdiction to realize tax benefits, so long as the amount of Indebtedness of the Company and its Restricted Subsidiary is not increased thereby; *provided* that, in the case of a Restricted Subsidiary that merges into the Company, the Company will not be required to comply with the preceding clause (5).

In addition, the Company will not permit any Guarantor to consolidate with, merge with or into any Person (other than another Guarantor) and will not permit the conveyance, transfer or lease of all or substantially all of the assets of any Guarantor to any person (other than to another Guarantor) *unless*:

(1) (a) if such entity remains a Guarantor, the resulting, surviving or transferee Person (the "Successor Guarantor") will be a corporation, partnership, trust or limited liability company organized and existing under the laws of the United States of America, any State of the United States or the District of Columbia; (b) the Successor Guarantor (if other than such Guarantor), expressly assumes, by supplemental indenture or other documentation or instruments, executed and delivered to the Trustee, all the obligations of such Guarantor under the Guarantee, the Indenture and the Registration Rights Agreement; (c) immediately after giving effect to such transaction (and treating any Indebtedness that becomes an obligation of the Successor Guarantor or any Restricted Subsidiary as a result of such transaction as having been Incurred by such Successor Guarantor or such Restricted Subsidiary at the

time of such transaction), no Default of Event of Default shall have occurred and be continuing; and (d) the Company will have delivered to the Trustee an Officers' Certificate and an Opinion of Counsel, each stating that such consolidation, merger or transfer and such supplemental indenture (if any) comply with the Indenture; and

(2) the transaction is made in compliance with the covenant described under "—Limitation on sales of assets and subsidiary stock" (it being understood that only such portion of the Net Available Cash as is required to be applied on the date of such transaction in accordance with the terms of the Indenture needs to be applied in accordance therewith at such time) and this "—Merger and consolidation" covenant.

Notwithstanding the foregoing, any Guarantor may merge with or into or transfer all or part of its properties and assets to another Guarantor or the Company or merge with a Restricted Subsidiary of the Company solely for the purpose of reincorporating the Guarantor in a State of the United States, the District of Columbia or any territory thereof, as long as the amount of Indebtedness of such Guarantor and the Restricted Subsidiaries is not increased thereby.

#### Future guarantors

After the Issue Date, the Company will cause each Restricted Subsidiary, other than a Foreign Subsidiary, created or acquired by the Company or one or more of its Restricted Subsidiaries to execute and deliver to the Trustee a Note Guarantee within 10 Business Days of the date on which it was acquired or created pursuant to which such Guarantor will unconditionally Guarantee, on a joint and several basis, the full and prompt payment of the principal of, premium, if any and interest (including additional interest, if any) on the Notes on a senior basis.

The obligations of each Guarantor will be limited to the maximum amount as will, after giving effect to all other contingent and fixed liabilities of such Guarantor (including, without limitation, any guarantees under the Credit Facility) and after giving effect to any collections from or payments made by or on behalf of any other Guarantor in respect of the obligations of such other Guarantor under its Note Guarantee or pursuant to its contribution obligations under the Indenture, result in the obligations of such Guarantor under its Note Guarantee not constituting a fraudulent conveyance or fraudulent transfer under federal or state law.

Each Note Guarantee shall be released in accordance with the provisions of the Indenture described under "-The Note Guarantees."

#### Limitation on lines of business

The Company will not, and will not permit any Restricted Subsidiary to, engage in any business other than a Related Business, except to such extent as would not be material to the Company as a whole.

### Payments for consent

Neither the Company nor any of the Company's Restricted Subsidiaries will, directly or indirectly, pay or cause to be paid any consideration, whether by way of interest, fees or otherwise, to any holder of any Notes for or as an inducement to any consent, waiver or amendment of any of the terms or provisions of the Indenture or the Notes unless such consideration is offered to be paid or is paid to all holders of the Notes that consent, waive or agree to amend in the time frame set forth in the solicitation documents relating to such consent, waiver or amendment.

#### **Events of default**

Each of the following is an Event of Default:

(1) default in any payment of interest or additional interest (as required by the Registration Rights Agreement) on any Note when due, that continues for 30 days;

- (2) default in the payment of principal of or premium, if any, on any Note when due at its Stated Maturity, upon optional redemption, upon required repurchase, upon declaration or otherwise;
- (3) failure by the Company or any Guarantor to comply with its obligations under "-Certain covenants-Merger and consolidation;"
- (4) failure by the Company to comply for 30 days after notice as provided below with any of its obligations under the covenants described under "—Change of control" above or under the covenants described under "—Certain covenants—Limitation on sales of assets and subsidiary stock" above (in each case, other than a failure to purchase Notes which will constitute an Event of Default under clause (2) above);
- (5) failure by the Company or any Restricted Subsidiary to comply for 60 days after notice as provided below with its other agreements contained in the Indenture;
- (6) default under any mortgage, indenture or instrument under which there may be issued or by which there may be secured or evidenced any Indebtedness for money borrowed by the Company or any of its Restricted Subsidiaries (or the payment of which is guaranteed by the Company or any of its Restricted Subsidiaries), other than Indebtedness owed to the Company or a Restricted Subsidiary, whether such Indebtedness or guarantee now exists, or is created after the date of the Indenture, which default:
  - (a) is caused by a failure to pay principal of, or interest or premium, if any, on such Indebtedness prior to the expiration of the grace period provided in such Indebtedness ("payment default"); or
  - (b) results in the acceleration of such Indebtedness prior to its maturity (the "cross acceleration provision");

and, in each case, the principal amount of any such Indebtedness, together with the principal amount of any other such Indebtedness under which there has been a payment default or the maturity of which has been so accelerated, aggregates \$20.0 million or more;

- (7) certain events of bankruptcy, insolvency or reorganization of the Company or a Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary (the "bankruptcy provisions");
- (8) failure by the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary to pay final judgments aggregating in excess of \$20.0 million (net of any amounts that a reputable and creditworthy insurance company has acknowledged liability for in writing), which judgments are not paid, discharged or stayed for a period of 60 days (the "judgment default provision"); or
- (9) any Note Guarantee ceases to be in full force and effect (except as contemplated by the terms of the Indenture) or is declared null and void in a judicial proceeding or any Guarantor denies or disaffirms its obligations under the Indenture or its Note Guarantee.

However, a default under clauses (4) and (5) of this paragraph will not constitute an Event of Default until the Trustee or the holders of 25% in principal amount of the outstanding Notes notify the Company of the default and the Company does not cure such default within the time specified in clauses (4) and (5) of this paragraph after receipt of such notice.

If an Event of Default (other than an Event of Default described in clause (7) above) occurs and is continuing, the Trustee by notice to the Company, or the holders of at least 25% in principal amount of the outstanding Notes by notice to the Company and the Trustee, may, and the Trustee at the request of such holders shall, declare the principal of, premium, if any, and accrued and unpaid interest, if any, on all the Notes to be due and payable. Upon such a declaration, such principal, premium and accrued and unpaid interest will be due and

payable immediately. In the event of a declaration of acceleration of the Notes because an Event of Default described in clause (6) under "Events of default" has occurred and is continuing, the declaration of acceleration of the Notes shall be automatically annulled if the event of default or payment default triggering such Event of Default pursuant to clause (6) shall be remedied or cured by the Company or a Restricted Subsidiary or waived by the holders of the relevant Indebtedness within 30 days after the declaration of acceleration with respect thereto and if (1) the annulment of the acceleration of the Notes would not conflict with any judgment or decree of a court of competent jurisdiction and (2) all existing Events of Default, except nonpayment of principal, premium or interest on the Notes that became due solely because of the acceleration of the Notes, have been cured or waived. If an Event of Default described in clause (7) above occurs and is continuing, the principal of, premium, if any, and accrued and unpaid interest on all the Notes will become and be immediately due and payable without any declaration or other act on the part of the Trustee or any holders. The holders of a majority in principal amount of the outstanding Notes may waive all past defaults (except with respect to nonpayment of principal, premium or interest) and rescind any such acceleration with respect to the Notes and its consequences if (1) rescission would not conflict with any judgment or decree of a court of competent jurisdiction and (2) all existing Events of a majority in principal amount of the principal of, premium, if any, and interest on the Notes that have become due solely by such declaration of acceleration of principal, premium or interest) and rescind any such acceleration with respect to the Notes and its consequences if (1) rescission would not conflict with any judgment or decree of a court of competent jurisdiction and (2) all existing Events of Default, other than the nonpayment of the principal of, premium

Subject to the provisions of the Indenture relating to the duties of the Trustee, if an Event of Default occurs and is continuing, the Trustee will be under no obligation to exercise any of the rights or powers under the Indenture at the request or direction of any of the holders unless such holders have offered to the Trustee indemnity or security satisfactory to it against any loss, liability or expense. Except to enforce the right to receive payment of principal, premium, if any, or interest when due, no holder may pursue any remedy with respect to the Indenture or the Notes *unless*:

- (1) such holder has previously given the Trustee notice that an Event of Default is continuing;
- (2) holders of at least 25% in principal amount of the outstanding Notes have requested the Trustee to pursue the remedy;
- (3) such holders have offered the Trustee security or indemnity satisfactory to it against any loss, liability or expense;
- (4) the Trustee has not complied with such request within 60 days after the receipt of the request and the offer of security or indemnity; and
- (5) the holders of a majority in principal amount of the outstanding Notes have not given the Trustee a direction that, in the opinion of the Trustee, is inconsistent with such request within such 60-day period.

Subject to certain restrictions, the holders of a majority in principal amount of the outstanding Notes are given the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or of exercising any trust or power conferred on the Trustee. The Indenture provides that in the event an Event of Default has occurred and is continuing, the Trustee will be required in the exercise of its powers to use the degree of care that a prudent person would use in the conduct of its own affairs. The Trustee, however, may refuse to follow any direction that conflicts with law or the Indenture or that the Trustee determines is unduly prejudicial to the rights of any other holder or that would involve the Trustee in personal liability. Prior to taking any action under the Indenture, the Trustee will be entitled to indemnification satisfactory to it in its sole discretion against all losses and expenses caused by taking or not taking such action.

The Indenture provides that if a Default or Event of Default occurs and is continuing and is known to the Trustee, the Trustee must mail to each holder notice of the Default or Event of Default within 90 days after it occurs. Except in the case of a Default or Event of Default in the payment of principal of, premium, if any, or interest on any Note, the Trustee may withhold notice if and so long as a committee of trust officers of the Trustee in good faith determines that withholding notice is in the interests of the holders. In addition, the

Company is required to deliver to the Trustee, within 120 days after the end of each fiscal year, a certificate indicating whether the signers thereof know of any Default or Event of Default that occurred during the previous year. The Company also is required to deliver to the Trustee, within 30 days after the occurrence thereof, written notice of any events which would constitute certain Defaults, their status and what action the Company is taking or proposing to take in respect thereof.

#### Amendments and waivers

Subject to certain exceptions, the Indenture, the Notes and the Guarantees may be amended or supplemented with the consent of the holders of a majority in principal amount of the Notes then outstanding (including without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes) and, subject to certain exceptions, any past default or compliance with any provisions may be waived with the consent of the holders of a majority in principal amount of the Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes). However, without the consent of each holder of an outstanding Note affected, no amendment, supplement or waiver may, among other things (with respect to any Notes held by a non-consenting holder):

- (1) reduce the amount of Notes whose holders must consent to an amendment;
- (2) reduce the stated rate of interest or extend the stated time for payment of interest on any Note;
- (3) reduce the principal of or extend the Stated Maturity of any Note;
- (4) reduce the premium payable upon the redemption of any Note or change the time at which any Note may be redeemed as described above under "—Optional redemption," or "—Certain covenants—Limitation on sales of assets and subsidiary stock," whether through an amendment or waiver of provisions in the covenants, definitions or otherwise;
- (5) make any Note payable in money other than that stated in the Note;
- (6) impair the right of any holder to receive payment of principal, premium, if any, and interest on such holder's Notes on or after the due dates therefore or to institute suit for the enforcement of any payment on or with respect to such holder's Notes;
- (7) make any change in the amendment provisions which require each holder's consent or in the waiver provisions; or
- (8) modify the Note Guarantees in any manner adverse to the holders of the Notes.

Notwithstanding the foregoing, without the consent of any holder, the Company, the Guarantors and the Trustee may amend the Indenture and the Notes to:

- (1) cure any ambiguity, omission, defect, mistake or inconsistency;
- (2) provide for the assumption by a successor entity of the obligations of the Company or any Guarantor under the Indenture, the Notes and the Note Guarantees;
- (3) provide for uncertificated Notes in addition to or in place of certificated Notes (*provided* that the uncertificated Notes are issued in registered form for purposes of Section 163(f) of the Code);
- (4) add Guarantees with respect to the Notes or release a Guarantor upon its designation as an Unrestricted Subsidiary; *provided, however*, that the designation is in accord with the applicable provisions of the Indenture;
- (5) secure the Notes;
- (6) add to the covenants of the Company for the benefit of the holders or surrender any right or power conferred upon the Company;
- (7) provide additional rights or benefits of the Holders of the Notes or make any change that does not adversely affect the rights of any holder;

- (8) comply with any requirement of the SEC in connection with the qualification of the Indenture under the Trust Indenture Act;
- (9) release a Guarantor from its obligations under its Note Guarantee or the Indenture in accordance with the applicable provisions of the Indenture;
- (10) provide for the appointment of a successor trustee; provided that the successor trustee is otherwise qualified and eligible to act as such under the terms of the Indenture;
- (11) provide for the issuance of exchange securities which shall have terms substantially identical in all respects to the Notes (except that the transfer restrictions contained in the Notes shall be modified or eliminated as appropriate) and which shall be treated, together with any outstanding Notes, as a single class of securities; or
- (12) to conform the text of the Indenture, the Notes or the Note Guarantees to any provision of this "Description of the exchange notes" to the extent that such provision in this "Description of the exchange notes" was intended to be a verbatim recitation of a provision of the Indenture, the Notes or the Note Guarantees.

The consent of the holders is not necessary under the Indenture to approve the particular form of any proposed amendment or supplement. It is sufficient if such consent approves the substance of the proposed amendment or supplement. A consent to any amendment, supplement or waiver under the Indenture by any holder of Notes given in connection with a tender of such holder's Notes will not be rendered invalid by such tender. After an amendment or supplement under the Indenture becomes effective, the Company is required to mail to the holders a notice briefly describing such amendment or supplement. However, the failure to give such notice to all the holders, or any defect in the notice will not impair or affect the validity of the amendment or supplement.

### Defeasance

The Company at any time may terminate all its obligations under the Notes and the Indenture ("legal defeasance"), except for certain obligations, including those respecting the defeasance trust and obligations to register the transfer or exchange of the Notes, to replace mutilated, destroyed, lost or stolen Notes and to maintain a registrar and paying agent in respect of the Notes. If the Company exercises its legal defeasance option, the Note Guarantees in effect at such time will terminate.

The Company at any time may terminate its obligations described under "—Change of control" and under the covenants described under "—Certain covenants" (other than "—Certain covenants—Merger and consolidation"), the operation of the cross-default upon a payment default, cross acceleration provisions, the bankruptcy provisions with respect to Significant Subsidiaries, the judgment default provision and the Note Guarantee provision described under "—Certain covenants" (other than "be coven and the limitations contained in clause (3) under "—Certain covenants—Merger and consolidation" above ("covenant defeasance").

The Company may exercise its legal defeasance option notwithstanding its prior exercise of its covenant defeasance option. If the Company exercises its legal defeasance option, payment of the Notes may not be accelerated because of an Event of Default with respect to the Notes. If the Company exercises its covenant defeasance option, payment of the Notes may not be accelerated because of an Event of Default specified in clause (4), (5), (6), (7) (with respect only to Significant Subsidiaries), (8) or (9) under "—Events of default" above or because of the failure of the Company to comply with clause (3) and clause (4) under "—Certain covenants—Merger and consolidation" above.

In order to exercise either defeasance option, the Company must irrevocably deposit in trust (the "defeasance trust") with the Trustee money or U.S. Government Obligations for the payment of principal, premium, if any, and interest on the Notes to redemption or maturity, as the case may be, and must comply with certain other conditions, including delivery to the Trustee of an Opinion of Counsel (subject to customary

exceptions and exclusions) to the effect that holders of the Notes will not recognize income, gain or loss for federal income tax purposes as a result of such deposit and defeasance and will be subject to federal income tax on the same amount and in the same manner and at the same times as would have been the case if such deposit and defeasance had not occurred. In the case of legal defeasance only, such Opinion of Counsel must be based on a ruling of the Internal Revenue Service or other change in applicable federal income tax law. Further, no Default or Event of Default must have occurred or be continuing on the date of the deposit (other than a Default or Event of Default resulting from the borrowing of funds applied to such deposit).

# No personal liability of directors, officers, employees and stockholders

No director, officer, employee, incorporator or stockholder of the Company or any Guarantor, as such, shall have any liability for any obligations of the Company under the Notes, or the Indenture or the Note Guarantees or for any claim based on, in respect of, or by reason of, such obligations or their creation. Each holder by accepting a Note waives and releases all such liability. The waiver and release are part of the consideration for issuance of the Notes. Such waiver may not be effective to waive liabilities under the federal securities laws.

### **Concerning the Trustee**

Wells Fargo Bank, National Association is the Trustee under the Indenture and has been appointed by the Company as Registrar and Paying Agent with regard to the Notes.

#### Governing law

The Indenture provides that it and the Notes will be governed by, and construed in accordance with, the laws of the State of New York.

## **Certain definitions**

"Acquired Indebtedness" means Indebtedness (i) of a Person or any of its Subsidiaries existing at the time such Person becomes a Restricted Subsidiary or (ii) assumed in connection with the acquisition of assets from such Person, in each case whether or not Incurred by such Person in connection with, or in anticipation or contemplation of, such Person becoming a Restricted Subsidiary or such acquisition. Acquired Indebtedness shall be deemed to have been Incurred, with respect to clause (i) of the preceding sentence, on the date such Person becomes a Restricted Subsidiary and, with respect to clause (ii) of the preceding sentence, on the date such Person becomes a Restricted Subsidiary and, with respect to clause (ii) of the preceding sentence, on the date of consummation of such acquisition of assets; *provided*, however, that Indebtedness of such acquired Person or assumed in connection with such acquisition of assets that is redeemed, defeased, retired or otherwise repaid at the time of or immediately upon consummation of the transactions by which such Person merges with or into or becomes a Restricted Subsidiary of such Person or such assets are acquired shall not be Acquired Indebtedness.

#### "Additional Assets" means:

- (1) any assets (other than assets that are qualified as current assets under GAAP), property, plant or equipment (excluding working capital for the avoidance of doubt) to be used by the Company or a Restricted Subsidiary in a Related Business;
- (2) assets (other than assets that are qualified as current assets under GAAP), property and/or the Capital Stock of a Person that becomes a Restricted Subsidiary as a result of the acquisition of such Capital Stock by the Company or a Restricted Subsidiary;
- (3) Capital Stock constituting a minority interest in any Person that at such time is a Restricted Subsidiary; or
- (4) capital expenditures used or useful in a Related Business.

provided, however, that, in the case of clauses (2) and (3), such Restricted Subsidiary is primarily engaged in a Related Business.

"Affiliate" of any specified Person means any other Person, directly or indirectly, controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, "control" when used with respect to any Person means the power to direct the management and 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.

"Applicable Premium" means, with respect to a note on any date of redemption, the greater of:

- (1) 1.0% of the principal amount of such note and
- (2) the excess, if any, of (a) the present value as of such date of redemption of (i) the redemption price of such note on June 1, 2014, (each such redemption price being described under "—Optional Redemption") plus (ii) all required interest payments due on such note through June 1, 2014 (excluding accrued but unpaid interest to the date of redemption), computed using a discount rate equal to the Treasury Rate as of such date of redemption price junction price of such note.

"Asset Disposition" means any direct or indirect sale, lease (other than an operating lease entered into in the ordinary course of business), transfer, issuance or other disposition, or a series of related sales, leases, transfers, issuances or dispositions that are part of a common plan, of shares of Capital Stock of a Subsidiary (other than directors' qualifying shares), property or other assets (each referred to for the purposes of this definition as a "disposition") by the Company or any of its Restricted Subsidiaries, including any disposition by means of a merger, consolidation or similar transaction.

Notwithstanding the preceding, the following items shall not be deemed to be Asset Dispositions:

- (1) a disposition of assets by a Restricted Subsidiary to the Company or by the Company or a Restricted Subsidiary to a Restricted Subsidiary;
- (2) the sale or other disposition of cash or Cash Equivalents in the ordinary course of business;
- (3) the sale, lease, discount of products, services or accounts receivable in the ordinary course of business, including a disposition of inventory in the ordinary course of business;
- a disposition of damaged, obsolete or worn out equipment or equipment that is no longer useful in the conduct of the business of the Company and its Restricted Subsidiaries and that is disposed of in each case in the ordinary course of business;
- (5) transactions permitted under "-Certain covenants-Merger and consolidation" or any disposition that constitutes a Change of Control;
- (6) an issuance of Equity Interests by a Restricted Subsidiary to the Company or to a Wholly Owned Subsidiary;
- (7) for purposes of "—Certain covenants—Limitation on sales of assets and subsidiary stock" only, (a) the making of a Permitted Investment (provided that any cash or Cash Equivalents received in such Asset Disposition shall be treated as Net Available Cash) or (b) a disposition subject to "Certain covenants—Limitation on restricted payments;"
- (8) an Asset Swap effected in compliance with "-Certain covenants-Limitation on sales of assets and subsidiary stock;"
- (9) dispositions of assets in a single transaction or series of related transactions with an aggregate fair market value of less than \$1.0 million;
- (10) the creation of a Permitted Lien and dispositions in connection with Permitted Liens;
- dispositions of Investments or receivables, in each case in connection with the compromise, settlement or collection thereof in the ordinary course of business or in bankruptcy or similar proceedings and exclusive of factoring or similar arrangements;

- (12) the issuance by a Restricted Subsidiary of Preferred Stock that is permitted by the covenant described under the caption "—Certain covenants— Limitation on indebtedness;"
- (13) the licensing or sublicensing of intellectual property or other general intangibles and licenses, leases or subleases of other property in the ordinary course of business which do not materially interfere with the business of the Company and its Restricted Subsidiaries;
- (14) the unwinding of any Hedging Obligations;
- (15) the sale of Permitted Investments (other than sales of Equity Interests of any of the Company's Restricted Subsidiaries) made by the Company or any Restricted Subsidiary after the Issue Date, if such Permitted Investments were (a) received in exchange for, or purchased out of the Net Cash Proceeds of the substantially concurrent sale (other than to a Subsidiary of the Company) of, Equity Interests of the Company (other than Disqualified Stock) or (b) received in the form of, or were purchased from the proceeds of, a substantially concurrent contribution of common equity capital to the Company; *provided* that any such proceeds or contributions in clauses (a) and (b) will be excluded from clause (c)(ii) of the first paragraph under "—Certain covenants—Limitation on restricted payments;"
- (16) foreclosure on assets; and
- (17) the sale or other Investment of Equity Interests of, or any Investment in, any Unrestricted Subsidiary.

"Asset Swap" means a concurrent purchase and sale or exchange of Related Business Assets between the Company or any of its Restricted Subsidiaries and another Person; provided that any cash received must be applied in accordance with "—Certain covenants—Limitation on sales of assets and subsidiary stock."

*"Attributable Indebtedness"* in respect of a Sale/Leaseback Transaction means, as at the time of determination, the present value (discounted at the interest rate implicit in the transaction) of the total obligations of the lessee for rental payments during the remaining term of the lease included in such Sale/Leaseback Transaction (including any period for which such lease has been extended), determined in accordance with GAAP; *provided, however*, that if such Sale/Leaseback Transaction results in a Capitalized Lease Obligation, the amount of Indebtedness represented thereby will be determined in accordance with the definition of "Capitalized Lease Obligations."

"Average Life" means, as of the date of determination, with respect to any Indebtedness or Preferred Stock, the quotient obtained by dividing (1) the sum of the products of the numbers of years from the date of determination to the dates of each successive scheduled principal payment of such Indebtedness or redemption or similar payment with respect to such Preferred Stock multiplied by the amount of such payment by (2) the sum of all such payments.

"Board of Directors" means, as to any Person, the board of directors or managers, as applicable, of such Person (or, if such Person is a partnership, the board of directors or other governing body of the general partner or such Person) or any duly authorized committee thereof.

"Business Day" means each day that is not a Saturday, Sunday or other day on which banking institutions in New York, New York are authorized or required by law to close.

"Capital Stock" of any Person means:

- (1) in the case of a corporation, corporate stock;
- (2) in the case of an association or business entity, any and all shares, interests, participations, rights or other equivalents (however designated) of corporate stock;
- (3) in the case of a partnership or limited liability company, partnership interests (whether general or limited) or membership interests; and

(4) any other interest or participation that confers on a Person the right to receive a share of the profits and losses of, or distributions of assets of, the issuing Person, but excluding from all of the foregoing any debt securities convertible or exchangeable into Capital Stock, whether or not such debt securities include any right of participation with Capital Stock, including, in each case, Preferred Stock.

"*Capitalized Lease Obligations*" means an obligation that is required to be classified and accounted for as a capitalized lease for financial reporting purposes in accordance with GAAP, and the amount of Indebtedness represented by such obligation will be the capitalized amount of such obligation at the time any determination thereof is to be made as determined in accordance with GAAP, and the Stated Maturity thereof will be the date of the last payment of rent or any other amount due under such lease prior to the first date such lease may be terminated without penalty.

"Cash Equivalents" means:

- (1) U.S. dollars, or in the case of any Foreign Subsidiary, such local currencies held by it from time to time in the ordinary course of business;
- (2) securities issued or directly and fully guaranteed or insured by the United States Government or any agency or instrumentality of the United States (*provided* that the full faith and credit of the United States is pledged in support thereof), having maturities of not more than one year from the date of acquisition;
- (3) marketable general obligations issued by any state of the United States of America or any political subdivision of any such state or any public instrumentality thereof maturing within one year from the date of acquisition and, at the time of acquisition, having a credit rating of "A" or better from either Standard & Poor's Ratings Group, Inc. or Moody's Investors Service, Inc.;
- (4) certificates of deposit, time deposits, Eurodollar time deposits, overnight bank deposits or bankers' acceptances having maturities of not more than one year from the date of acquisition thereof issued by any commercial bank the long term debt of which is rated at the time of acquisition thereof at least "A" or the equivalent thereof by Standard & Poor's Ratings Group, Inc., or "A" or the equivalent thereof by Moody's Investors Service, Inc., and having combined capital and surplus in excess of \$500.0 million;
- (5) repurchase obligations with a term of not more than seven days for underlying securities of the types described in clauses (2), (3) and (4) entered into with any bank meeting the qualifications specified in clause (4) above;
- (6) commercial paper rated at the time of acquisition thereof at least "A 2" or the equivalent thereof by Standard & Poor's Ratings Group, Inc. or "P 2" or the equivalent thereof by Moody's Investors Service, Inc., or carrying an equivalent rating by a nationally recognized rating agency, if both of the two named rating agencies cease publishing ratings of investments, and in any case maturing within one year after the date of acquisition thereof; and
- (7) interests in any investment company or money market fund which invests 95% or more of its assets in instruments of the type specified in clauses
   (2) through (6) above.

"Change of Control" means the occurrence of any of the following:

(1) the Company becomes aware that any "person" or "group" of related persons (as such terms are used in Sections 13(d) and 14(d) of the Exchange Act), other than one or more Permitted Holders has become the beneficial owner (as defined in Rules 13d-3 and 13d-5 under the Exchange Act, except that such person or group shall be deemed to have "beneficial ownership" of all shares that any such person or group has the right to acquire, whether such right is exercisable immediately or only after the passage of time), directly or indirectly, of more than 50% of the total voting power of the Voting Stock of the Company or Holdings (or its successor by merger, consolidation or purchase of all or substantially all of its assets) (for the purposes of this clause, such person or group shall be deemed to beneficially own

any Voting Stock of the Company or Holdings held by a parent entity, if such person or group "beneficially owns" (as defined above), directly or indirectly, more than 50% of the voting power of the Voting Stock of such parent entity); or

- (2) the first day on which a majority of the members of the Board of Directors of the Company or Holdings are not Continuing Directors; or
- (3) the sale, lease, transfer, conveyance or other disposition (other than by way of merger or consolidation), in one or a series of related transactions, of all or substantially all of the assets of Holdings' or the Company's and its Restricted Subsidiaries taken as a whole to any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act) other than a Permitted Holder; or
- (4) the adoption by the stockholders of the Company or Holdings of a plan or proposal for the liquidation or dissolution of the Company or Holdings.

"Code" means the Internal Revenue Code of 1986, as amended.

"Commodity Agreement" means any commodity futures contract, commodity option or other similar agreement or arrangement entered into by the Company or any Restricted Subsidiary designed to protect the Company or any Restricted Subsidiaries against fluctuations in the price of commodities actually used in the ordinary course of business of the Company and its Restricted Subsidiaries.

"Common Stock" means with respect to any Person, any and all shares, interest or other participations in, and other equivalents (however designated and whether voting or nonvoting) of such Person's common stock whether or not outstanding on the Issue Date, and includes, without limitation, all series and classes of such common stock.

"*Consolidated Coverage Ratio*" means as of any date of determination, with respect to any Person, the ratio of (x) the aggregate amount of Consolidated EBITDA of such Person for the period of the most recent four consecutive fiscal quarters ending prior to the date of such determination for which financial statements prepared on a consolidated basis in accordance with GAAP are available to (y) Consolidated Interest Expense for such four fiscal quarters, *provided*, *however*, that:

- (1) if the Company or any Restricted Subsidiary:
  - (a) has Incurred any Indebtedness since the beginning of such period that remains outstanding on such date of determination or if the transaction giving rise to the need to calculate the Consolidated Coverage Ratio is an Incurrence of Indebtedness, Consolidated EBITDA and Consolidated Interest Expense for such period will be calculated after giving effect on a proforma basis to such Indebtedness as if such Indebtedness had been Incurred on the first day of such period (except that in making such computation, the amount of Indebtedness under any revolving credit facility outstanding on the date of such calculation will be deemed to be (i) the average daily balance of such Indebtedness during such four fiscal quarters or such shorter period for which such facility was outstanding or (ii) if such facility was created after the end of such four fiscal quarters, the average daily balance of such Indebtedness during the period from the date of creation of such facility to the date of such calculation) and the discharge of any other Indebtedness repaid, repurchased, defeased or otherwise discharged with the proceeds of such new Indebtedness as if such discharge had occurred on the first day of such period; or
  - (b) has repaid, repurchased, defeased or otherwise discharged any Indebtedness since the beginning of the period that is no longer outstanding on such date of determination or if the transaction giving rise to the need to calculate the Consolidated Coverage Ratio involves a discharge of Indebtedness (in each case other than Indebtedness Incurred under any revolving credit facility unless such Indebtedness has been permanently repaid and the related commitment terminated), Consolidated EBITDA and Consolidated Interest Expense for such period will be calculated after giving effect

on a pro forma basis to such repayment, repurchase, defeasance or other discharge of such Indebtedness, including with the proceeds of such new Indebtedness, as if such discharge had occurred on the first day of such period;

- (2) if since the beginning of such period the Company or any Restricted Subsidiary will have made any Asset Disposition or disposed of any company, division, operating unit, segment, business, group of related assets or line of business or if the transaction giving rise to the need to calculate the Consolidated Coverage Ratio is such an Asset Disposition:
  - (a) the Consolidated EBITDA for such period will be reduced by an amount equal to the Consolidated EBITDA (if positive) directly attributable to the assets which are the subject of such disposition for such period or increased by an amount equal to the Consolidated EBITDA (if negative) directly attributable thereto for such period; and
  - (b) Consolidated Interest Expense for such period will be reduced by an amount equal to the Consolidated Interest Expense directly attributable to any Indebtedness of the Company or any Restricted Subsidiary repaid, repurchased, defeased or otherwise discharged (including, but not limited, to through the assumption of such Indebtedness by another Person if the Company and its Restricted Subsidiaries are no longer liable for such Indebtedness after the assumption thereof) with respect to the Company and its continuing Restricted Subsidiaries in connection with such disposition for such period (or, if the Capital Stock of any Restricted Subsidiary is sold, the Consolidated Interest Expense for such period directly attributable to the Indebtedness of such Restricted Subsidiary to the extent the Company and its continuing Restricted Subsidiaries are no longer liable for such period directly attributable to the Indebtedness after such sale);
- (3) if since the beginning of such period the Company or any Restricted Subsidiary (by merger or otherwise) will have made an Investment in any Restricted Subsidiary (or any Person which becomes a Restricted Subsidiary or is merged with or into the Company) or an acquisition of assets, including any acquisition of assets occurring in connection with a transaction causing a calculation to be made hereunder, which constitutes all or substantially all of a company, division, operating unit, segment, business, group of related assets or line of business, Consolidated EBITDA (plus adjustments which will only include annualized cost savings achievable within 180 days and which shall be itemized in an Officer's Certificate delivered to the Trustee by the chief financial officer of the Company) and Consolidated Interest Expense for such period will be calculated after giving pro forma effect thereto (including the Incurrence of any Indebtedness) as if such Investment or acquisition occurred on the first day of such period; and
- (4) if since the beginning of such period any Person (that subsequently became a Restricted Subsidiary or was merged with or into the Company or any Restricted Subsidiary since the beginning of such period) will have Incurred any Indebtedness or discharged any Indebtedness, made any Asset Disposition or any Investment or acquisition of assets that would have required an adjustment pursuant to clauses (2) or (3) above if made by the Company or a Restricted Subsidiary during such period, Consolidated EBITDA and Consolidated Interest Expense for such period will be calculated after giving pro forma effect thereto as if such transaction occurred on the first day of such period.

For purposes of this definition, whenever pro forma effect is to be given to any calculation under this definition, the pro forma calculations will be determined in good faith by a responsible financial or accounting officer of the Company (including pro forma expense and cost reductions calculated on a basis consistent with Regulation S-X under the Securities Act). If any Indebtedness bears a floating rate of interest and is being given pro forma effect, the interest expense on such Indebtedness will be calculated as if the rate in effect on the date of determination had been the applicable rate for the entire period (taking into account any Interest Rate Agreement applicable to such Indebtedness if such Interest Rate Agreement has a remaining term in excess of 12 months). If any Indebtedness that is being given pro forma effect bears an interest rate at the option of the Company or any Restricted Subsidiary, the interest rate shall be calculated by applying such optional rate chosen by the Company or such Restricted Subsidiary.

"Consolidated EBITDA" for any period means, without duplication, the Consolidated Net Income for such period, plus the following to the extent deducted in calculating such Consolidated Net Income:

- (1) Consolidated Interest Expense; plus
- (2) Consolidated Income Taxes; plus
- (3) consolidated depreciation expense; plus
- (4) consolidated amortization expense or impairment charges recorded in connection with the application of Financial Accounting Standard No. 142 "Goodwill and Other Intangibles" and Financial Accounting Standard No. 144 "Accounting for the Impairment or Disposal of Long Lived Assets;" plus
- (5) other non-cash charges reducing Consolidated Net Income (including any net change in deferred amusement revenue and ticket liability reserves, but excluding any other non-cash charge to the extent it represents an accrual of or reserve for cash charges in any future period or amortization of a prepaid cash expense that was paid in a prior period not included in the calculation); plus
- (6) any non-recurring, extraordinary or unusual loss; plus
- (7) fees, expenses and charges resulting from the Transactions described in this prospectus; plus
- (8) the aggregate amount of cash Preopening Costs incurred during such period in an aggregate amount not to exceed \$5.0 million in any period; plus
- (9) payments made pursuant to the Expense Reimbursement Agreement as in effect on the Issue Date; less
- (10) noncash items increasing Consolidated Net Income of such Person for such period (excluding any items which represent the reversal of any accrual of, or reserve for, anticipated cash charges made in any prior period).

Notwithstanding the preceding sentence, clauses (2) through (6), (8) and (10) relating to amounts of a Restricted Subsidiary of a Person will be added to Consolidated Net Income to compute Consolidated EBITDA of such Person only to the extent (and in the same proportion) that the net income (loss) of such Restricted Subsidiary was included in calculating the Consolidated Net Income of such Person and, to the extent the amounts set forth in clauses (2) through (6), (8) and (10) are in excess of those necessary to offset a net loss of such Restricted Subsidiary or if such Restricted Subsidiary has net income for such period included in Consolidated Net Income, only if a corresponding amount would be permitted at the date of determination to be dividended or distributed to the Company by such Restricted Subsidiary without prior approval (that has not been obtained), pursuant to the terms of its charter and all agreements, instruments, judgments, decrees, orders, statutes, rules and governmental regulations applicable to that Restricted Subsidiary or its stockholders.

"Consolidated Income Taxes" means, with respect to any Person for any period, taxes imposed upon such Person or other payments required to be made by such Person by any governmental authority which taxes or other payments are calculated by reference to the income or profits of such Person or such Person and its Restricted Subsidiaries (to the extent such income or profits were included in computing Consolidated Net Income for such period), regardless of whether such taxes or payments are required to be remitted to any governmental authority.

"Consolidated Interest Expense" means, for any period, the total interest expense of the Company and its consolidated Restricted Subsidiaries, whether paid or accrued, plus, to the extent not included in such interest expense:

- interest expense attributable to Capitalized Lease Obligations and the interest portion of rent expense associated with Attributable Indebtedness in respect of the relevant lease giving rise thereto, determined as if such lease were a capitalized lease in accordance with GAAP and the interest component of any deferred payment obligations;
  - 120

- (2) amortization of debt discount and debt issuance cost (*provided* that any amortization of bond premium will be credited to reduce Consolidated Interest Expense unless, pursuant to GAAP, such amortization of bond premium has otherwise reduced Consolidated Interest Expense);
- (3) non-cash interest expense;
- (4) commissions, discounts and other fees and charges owed with respect to letters of credit and bankers' acceptance financing;
- (5) the interest expense on Indebtedness of another Person that is Guaranteed by such Person or one of its Restricted Subsidiaries or secured by a Lien on assets of such Person or one of its Restricted Subsidiaries, whether or not such Guarantee or Lien is called upon;
- (6) costs associated with Hedging Obligations (including amortization of fees) *provided, however*, that if Hedging Obligations result in net benefits rather than costs, such benefits shall be credited to reduce Consolidated Interest Expense unless, pursuant to GAAP, such net benefits are otherwise reflected in Consolidated Net Income;
- (7) the consolidated interest expense of such Person and its Restricted Subsidiaries that was capitalized during such period;
- (8) the product of (a) all dividends paid or payable, in cash, Cash Equivalents or Indebtedness or accrued during such period on any series of Disqualified Stock of such Person or on Preferred Stock of its Restricted Subsidiaries that are not Guarantors payable to a party other than the Company or a Wholly Owned Subsidiary, times (b) a fraction, the numerator of which is one and the denominator of which is one minus the then current combined federal, state, provincial and local statutory tax rate of such Person, expressed as a decimal, in each case, on a consolidated basis and in accordance with GAAP;
- (9) Receivables Fees; and
- (10) the cash contributions to any employee stock ownership plan or similar trust to the extent such contributions are used by such plan or trust to pay interest or fees to any Person (other than the Company and its Restricted Subsidiaries) in connection with Indebtedness Incurred by such plan or trust.

For the purpose of calculating the Consolidated Coverage Ratio in connection with the Incurrence of any Indebtedness described in the final paragraph of the definition of "Indebtedness," the calculation of Consolidated Interest Expense shall include all interest expense (including any amounts described in clauses (1) through (10) above) relating to any Indebtedness of the Company or any Restricted Subsidiary described in the final paragraph of the definition of "Indebtedness."

For purposes of the foregoing, total interest expense will be determined (i) after giving effect to any net payments made or received by the Company and its Subsidiaries with respect to Interest Rate Agreements and (ii) exclusive of amounts classified as other comprehensive income in the balance sheet of the Company. Notwithstanding anything to the contrary contained herein, commissions, discounts, yield and other fees and charges Incurred in connection with any transaction pursuant to which the Company or its Restricted Subsidiaries may sell, convey or otherwise transfer or grant a security interest in any accounts receivable or related assets shall be included in Consolidated Interest Expense.

"Consolidated Net Income" means, for any period, the net income (loss) of the Company and its consolidated Restricted Subsidiaries determined on a consolidated basis in accordance with GAAP; provided, however, that there will not be included in such Consolidated Net Income:

- (1) any net income (loss) of any Person if such Person is not a Restricted Subsidiary, except that:
  - (a) subject to the limitations contained in clauses (3), (4) and (5) below, the Company's equity in the net income of any such Person for such period will be included in such Consolidated Net Income

up to the aggregate amount of cash actually distributed by such Person during such period to the Company or a Restricted Subsidiary as a dividend or other distribution (subject, in the case of a dividend or other distribution to a Restricted Subsidiary, to the limitations contained in clause (2) below); and

- (b) the Company's equity in a net loss of any such Person (other than an Unrestricted Subsidiary) for such period will be included in determining such Consolidated Net Income to the extent such loss has been funded with cash from the Company or a Restricted Subsidiary;
- (2) any net income (but not loss) of any Restricted Subsidiary if such Subsidiary is subject to restrictions, directly or indirectly, on the payment of dividends or the making of distributions by such Restricted Subsidiary, directly or indirectly, to the Company, except that:
  - (a) subject to the limitations contained in clauses (3), (4) and (5) below, the Company's equity in the net income of any such Restricted Subsidiary for such period will be included in such Consolidated Net Income up to the aggregate amount of cash that could have been distributed by such Restricted Subsidiary during such period to the Company or another Restricted Subsidiary as a dividend (subject, in the case of a dividend to another Restricted Subsidiary, to the limitation contained in this clause); and
  - (b) the Company's equity in a net loss of any such Restricted Subsidiary for such period will be included in determining such Consolidated Net Income;
- (3) any gain (loss) realized upon the sale or other disposition of any property, plant or equipment of the Company or its consolidated Restricted Subsidiaries (including pursuant to any Sale/Leaseback Transaction) which is not sold or otherwise disposed of in the ordinary course of business and any gain (loss) realized upon the sale or other disposition of any Capital Stock of any Person;
- (4) any extraordinary gain or loss;
- (5) the cumulative effect of a change in accounting principles;
- (6) any after-tax effect of income (loss) from the early extinguishment of Indebtedness or Hedging Obligations or other derivative instruments; and
- (7) any non-cash compensation expense recorded from grants of stock appreciation or similar rights, stock options, restricted stock or other rights to officers, directors or employees shall be excluded.

Corporate overhead expenses payable by Holdings described in clause (9) of the second paragraph of the covenant described under "—Certain covenants—Limitation on restricted payments," the funds for which are provided by the Company and/or its Restricted Subsidiaries, shall be deducted in calculating the Consolidated Net Income of the Company and its Restricted Subsidiaries. In no event will the proceeds of business interruption insurance (if otherwise included in the net income (loss) of the Company and its consolidated Restricted Subsidiaries determined on a consolidated basis in accordance with GAAP) be excluded from Consolidated Net Income by the foregoing adjustments.

"Consolidated Net Tangible Assets" means Consolidated Total Assets after deducting:

- (1) all current liabilities;
- (2) any item representing investments in Unrestricted Subsidiaries; and
- (3) all goodwill, trade names, trademarks, patents, unamortized debt discount and expense and other intangibles.

"Consolidated Secured Debt Leverage Ratio" means, as of any date, the ratio of (x) Consolidated Secured Indebtedness as of such date to (y) Consolidated EBITDA for the period of four consecutive fiscal quarters ending prior to the date of such determination for which financial statements prepared on a consolidated basis in

accordance with GAAP are available, *provided* that for purposes of calculating the Consolidated Secured Debt Leverage Ratio, Consolidated EBITDA and Consolidated Secured Indebtedness shall be calculated on a pro forma basis (and with respect to Consolidated EBITDA, consistent with the adjustments in the definition of "Consolidated Coverage Ratio") to give effect, as appropriate, to any Incurrence or discharge of Indebtedness or Asset Disposition, Investment or acquisition since the beginning of the applicable period and as if each such Incurrence, discharge, Asset Disposition, Investment or acquisition had been effected on the first day of such period.

"Consolidated Secured Indebtedness" means, as of any date, the total Secured Indebtedness of the Company and its Restricted Subsidiaries determined on a consolidated basis in accordance with GAAP.

"Consolidated Total Assets" as of any date of determination, means the total amount of assets which would appear on a consolidated balance sheet of the Company and its Restricted Subsidiaries, determined on a consolidated basis in accordance with GAAP.

"Continuing Directors" means, as of any date of determination, any member of the Board of Directors of the Company or Holdings, as the case may be, who: (1) was a member of such Board of Directors on the date of the Indenture; or (2) was nominated for election or elected to such Board of Directors with the approval of a majority of the Continuing Directors who were members of the relevant Board at the time of such nomination or election.

"Credit Facility" means, one or more debt facilities (which may be outstanding at the same time and including, without limitation, the Senior Secured Credit Agreement) or commercial paper facilities, in each case, with banks or other lenders or investors or indentures or other agreements providing for revolving credit loans, term loans, debt securities, receivables financing (including through the sale of receivables to such lenders or to special purpose entities formed to borrow from such lenders against such receivables) or letters of credit or other indebtedness, in each case, as amended, restated, supplemented, modified, renewed, refunded, replaced in any manner (whether upon or after termination or otherwise) or refinanced (including by means of sales of debt securities to investors) in whole or in part, in one or more instances, from time to time (including successive renewals, extensions, substitutions, refinancings, restructurings, replacements, supplementations or other modifications of the foregoing, including into one or more debt facilities, commercial paper facilities or other debt instruments, indentures or agreements (including by means of sales of debt securities (including additional notes) to investors), providing for revolving credit loans, term loans, letters of credit, debt securities or other debt obligations, from time to time.

"Currency Agreement" means in respect of a Person any foreign exchange contract, currency swap agreement, futures contract, option contract or other similar agreement as to which such Person is a party or a beneficiary.

"Default" means any event which is, or after notice or passage of time or both would be, an Event of Default.

"Disqualified Stock" means, with respect to any Person, any Capital Stock of such Person which by its terms (or by the terms of any security into which it is convertible or for which it is exchangeable) or upon the happening of any event:

- (1) matures or is mandatorily redeemable pursuant to a sinking fund obligation or otherwise;
- (2) is convertible into or exchangeable for Indebtedness or Disqualified Stock (excluding Capital Stock which is convertible or exchangeable solely at the option of the Company or a Restricted Subsidiary (it being understood that upon such conversion or exchange it shall be an Incurrence of such Indebtedness or Disqualified Stock)); or
- (3) is redeemable at the option of the holder of the Capital Stock in whole or in part;

in each case on or prior to the date that is 91 days after the earlier of the date (a) of the Stated Maturity of the Notes or (b) on which there are no Notes outstanding, *provided* that only the portion of Capital Stock which so matures or is mandatorily redeemable, is so convertible or exchangeable or is so redeemable at the option of the holder thereof prior to such date will be deemed to be Disqualified Stock; *provided*, *further* that any Capital Stock that would constitute Disqualified Stock solely because the holders thereof have the right to require the Company to repurchase such Capital Stock upon the occurrence of a change of control or asset sale (each defined in a substantially identical manner to the corresponding definitions in the Indenture) shall not constitute Disqualified Stock if the terms of such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company and to such provision prior to compliance by the Company with the provisions of the Indenture described under the captions "—Change of control" and "—Certain covenants—Limitation on sales of assets and sub

"Equity Interests" means Capital Stock and all warrants, options, profits, interests, equity appreciation rights or other rights to acquire or purchase Capital Stock (but excluding any debt security that is convertible into, or exchangeable for, Capital Stock).

*"Equity Offering"* means (i) an offering for cash by the Company or Holdings, as the case may be, of its Common Stock, or options, warrants or rights with respect to its Common Stock, or (ii) a cash capital contribution to the Company or any of its Restricted Subsidiaries, in each case other than (x) public offerings with respect to the Company's or Holdings', as the case may be, Common Stock, or options, warrants or rights, registered on Form S-4 or S-8, (y) an issuance to any Subsidiary or (z) any offering of Common Stock issued in connection with a transaction that constitutes a Change of Control.

"Exchange Act" means the Securities Exchange Act of 1934, as amended, and the rules and regulations of the SEC promulgated thereunder.

"Excluded Contributions" means the Net Cash Proceeds and the fair market value of the assets (as determined conclusively by the Board of Directors of the Company) received by the Company after the Issue Date from:

- (1) capital contributions to its common equity capital, and
- (2) the sale (other than to a Subsidiary of the Company or an employee stock ownership plan, option plan or similar trust to the extent such sale to an employee stock ownership plan or similar trust is financed by loans from or Guaranteed by the Company or any Restricted Subsidiary unless such loans have been repaid with cash on or prior to the date of determination) of Capital Stock (other than Disqualified Stock) of the Company,

in each case designated as Excluded Contributions pursuant to an Officers' Certificate on or promptly after the date such capital contributions are made or the date such Capital Stock is sold, as the case may be.

"Expense Reimbursement Agreement" means the Expense Reimbursement Agreement between the Company and Oak Hill Capital Management, LLC (and their permitted successors and assigns thereunder) as in effect on the Issue Date.

*"Foreign Subsidiary*" means any Restricted Subsidiary that is not organized under the laws of the United States of America or any state thereof or the District of Columbia and any Subsidiary of such Restricted Subsidiary.

"GAAP" means generally accepted accounting principles in the United States of America as in effect as of the date of the Indenture, including those set forth in the opinions and pronouncements of the Accounting

Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as approved by a significant segment of the accounting profession. All ratios and computations based on GAAP contained in the Indenture will be computed in conformity with GAAP.

"Guarantee" means any obligation, contingent or otherwise, of any Person directly or indirectly guaranteeing any Indebtedness of any other Person and any obligation, direct or indirect, contingent or otherwise, of such Person:

- (1) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness of such other Person (whether arising by virtue of partnership arrangements, or by agreement to keep-well, to purchase assets, goods, securities or services, to take or pay, or to maintain financial statement conditions or otherwise); or
- (2) entered into for purposes of assuring in any other manner the obligee of such Indebtedness of the payment thereof or to protect such obligee against loss in respect thereof (in whole or in part); *provided, however*, that the term "Guarantee" will not include endorsements for collection or deposit in the ordinary course of business. The term "Guarantee" used as a verb has a corresponding meaning.

"Guarantor" means each Restricted Subsidiary (other than Foreign Subsidiaries) in existence on the Issue Date that provides a Note Guarantee on the Issue Date (and any other Restricted Subsidiary that provides a Note Guarantee in accordance with the Indenture); provided that upon release or discharge of such Restricted Subsidiary from its Note Guarantee in accordance with the Indenture, such Restricted Subsidiary shall cease to be a Guaranter.

"Guarantor Pari Passu Indebtedness" means Indebtedness of a Guarantor that ranks equally in right of payment to its Note Guarantee.

"Guarantor Subordinated Obligation" means, with respect to a Guarantor, any Indebtedness of such Guarantor (whether outstanding on the Issue Date or thereafter Incurred) which is expressly subordinated in right of payment to the obligations of such Guarantor under its Note Guarantee pursuant to a written agreement.

"Hedging Obligations" of any Person means the obligations of such Person pursuant to any Interest Rate Agreement, Currency Agreement or Commodity Agreement.

"holder" means a Person in whose name a Note is registered on the Registrar's books.

"Holdings" means Dave & Buster's Holdings, Inc., a Delaware corporation.

"Incur" means issue, create, assume, Guarantee, incur or otherwise become liable for; provided, however, that any Indebtedness or Capital Stock of a Person existing at the time such Person becomes a Restricted Subsidiary (whether by merger, consolidation, acquisition or otherwise) will be deemed to be Incurred by such Restricted Subsidiary at the time it becomes a Restricted Subsidiary; and the terms "Incurred" and "Incurrence" have meanings correlative to the foregoing.

"Indebtedness" means, with respect to any Person on any date of determination (without duplication):

- (1) the principal of and premium (if any) in respect of indebtedness of such Person for borrowed money;
- (2) the principal of and premium (if any) in respect of obligations of such Person evidenced by bonds, debentures, notes or other similar instruments;
- (3) the principal component of all obligations of such Person in respect of letters of credit, bankers' acceptances or other similar instruments (including reimbursement obligations with respect thereto except to the extent such reimbursement obligation relates to a trade payable and such obligation is satisfied within 30 days of Incurrence);

- (4) the principal component of all obligations of such Person to pay the deferred and unpaid purchase price of property (except trade payables), which purchase price is due more than six months after the date of placing such property in service or taking delivery and title thereto;
- (5) Capitalized Lease Obligations and all Attributable Indebtedness of such Person;
- (6) the principal component or liquidation preference of all obligations of such Person with respect to the redemption, repayment or other repurchase of any Disqualified Stock or, with respect to any Subsidiary that is not a Guarantor, any Preferred Stock;
- (7) the principal component of all Indebtedness of other Persons secured by a Lien on any asset of such Person, whether or not such Indebtedness is assumed by such Person; *provided, however*, that the amount of such Indebtedness will be the lesser of (a) the fair market value of such asset at such date of determination and (b) the amount of such Indebtedness of such other Persons;
- (8) the principal component of Indebtedness of other Persons to the extent Guaranteed by such Person; and
- (9) to the extent not otherwise included in this definition, net obligations of such Person under Hedging Obligations (the amount of any such obligations to be equal at any time to the termination value of such agreement or arrangement giving rise to such obligation that would be payable by such Person at such time).

The amount of Indebtedness of any Person at any date will be the outstanding balance at such date of all unconditional obligations as described above and the maximum liability, upon the occurrence of the contingency giving rise to the obligation, of any contingent obligations at such date. Notwithstanding the foregoing, money borrowed and set aside at the time of the Incurrence of any Indebtedness in order to pre-fund the payment of interest on such Indebtedness shall not be deemed to be "Indebtedness" provided that such money is held to secure the payment of such interest.

In addition, "Indebtedness" of any Person shall include Indebtedness described in the preceding paragraph that would not appear as a liability on the balance sheet of such Person if:

- (1) such Indebtedness is the obligation of a partnership or joint venture that is not a Restricted Subsidiary (a "Joint Venture");
- (2) such Person or a Restricted Subsidiary of such Person is a general partner of the Joint Venture (a "General Partner"); and
- (3) there is recourse, by contract or operation of law, with respect to the payment of such Indebtedness to property or assets of such Person or a Restricted Subsidiary of such Person; and then such Indebtedness shall be included in an amount not to exceed:
  - (a) the lesser of (i) the net assets of the General Partner and (ii) the amount of such obligations to the extent that there is recourse, by contract or operation of law, to the property or assets of such Person or a Restricted Subsidiary of such Person; or
  - (b) if less than the amount determined pursuant to clause (a) immediately above, the actual amount of such Indebtedness that is recourse to such Person or a Restricted Subsidiary of such Person, if the Indebtedness is evidenced by a writing and is for a determinable amount.

"Interest Rate Agreement" means with respect to any Person any interest rate protection agreement, interest rate future agreement, interest rate option agreement, interest rate swap agreement, interest rate cap agreement, interest rate collar agreement, interest rate hedge agreement or other similar agreement or arrangement as to which such Person is party or a beneficiary.

"Investment" means, with respect to any Person, all investments by such Person in other Persons (including Affiliates) in the form of any direct or indirect advance, loan (other than advances or extensions of credit to customers in the ordinary course of business) or other extensions of credit (including by way of Guarantee or

similar arrangement, but excluding any debt or extension of credit represented by a bank deposit other than a time deposit) or capital contribution to (by means of any transfer of cash or other property to others or any payment for property or services for the account or use of others), or any purchase or acquisition of Capital Stock, Indebtedness or other similar instruments issued by, such Person and all other items that are or would be classified as investments on a balance sheet prepared in accordance with GAAP; *provided* that none of the following will be deemed to be an Investment:

- (1) Hedging Obligations entered into in the ordinary course of business and in compliance with the Indenture;
- (2) endorsements of negotiable instruments and documents in the ordinary course of business; and
- (3) an acquisition of assets, Capital Stock or other securities by the Company or a Subsidiary for consideration to the extent such consideration consists of Common Stock of the Company.

For purposes of "---Certain covenants---Limitation on restricted payments,"

- (1) "Investment" will include the portion (proportionate to the Company's equity interest in a Restricted Subsidiary to be designated as an Unrestricted Subsidiary) of the fair market value of the net assets of such Restricted Subsidiary at the time that such Restricted Subsidiary is designated an Unrestricted Subsidiary; provided, however, that upon a redesignation of such Subsidiary as a Restricted Subsidiary, the Company will be deemed to continue to have a permanent "Investment" in an Unrestricted Subsidiary in an amount (if positive) equal to (a) the Company's "Investment" in such Subsidiary at the time of such redesignation less (b) the portion (proportionate to the Company's equity interest in such Subsidiary) of the fair market value of the net assets (as conclusively determined by the Board of Directors of the Company in good faith) of such Subsidiary at the time that such Subsidiary is so redesignated a Restricted Subsidiary;
- (2) any property transferred to or from an Unrestricted Subsidiary will be valued at its fair market value at the time of such transfer, in each case as determined in good faith by the Board of Directors of the Company; and
- (3) if the Company or any Restricted Subsidiary sells or otherwise disposes of any Voting Stock of any Restricted Subsidiary such that, after giving effect to any such sale or disposition, such entity is no longer a Subsidiary of the Company, the Company shall be deemed to have made an Investment on the date of any such sale or disposition equal to the fair market value (as conclusively determined by the Board of Directors of the Company in good faith) of the Capital Stock of such Subsidiary not sold or disposed of.

*"Investment Grade Rating"* means a rating equal to or higher than Baa3 (or the equivalent) by Moody's Investors Service, Inc. and BBB- (or the equivalent) by Standard & Poor's Ratings Group, Inc., or any equivalent rating by any Rating Agency, in each case, with a stable or better outlook.

### "Issue Date" means June 1, 2010.

"Lien" means any mortgage, pledge, security interest, encumbrance, lien or charge of any kind (including any conditional sale or other title retention agreement or lease in the nature thereof).

"*Net Available Cash*" from an Asset Disposition means cash payments received (including any cash payments received by way of deferred payment of principal pursuant to a note or installment receivable or otherwise and net proceeds from the sale or other disposition of any securities received as consideration, but only as and when received, but excluding any other consideration received in the form of assumption by the acquiring person of Indebtedness or other obligations relating to the properties or assets that are the subject of such Asset Disposition or received in any other non-cash form) therefrom, in each case net of:

 all legal, accounting, investment banking, title and recording tax expenses, commissions and other fees and expenses Incurred, and all Federal, state, provincial, foreign and local taxes required to be paid or accrued as a liability under GAAP (after taking into account any available tax credits or deductions and any tax sharing agreements), as a consequence of such Asset Disposition;

- (2) all payments made on any Indebtedness which is secured by any assets subject to such Asset Disposition, in accordance with the terms of any Lien upon such assets, or which must by its terms, or in order to obtain a necessary consent to such Asset Disposition, or by applicable law is required be repaid out of the proceeds from such Asset Disposition;
- (3) all distributions and other payments required to be made to minority interest holders in Subsidiaries or joint ventures as a result of such Asset Disposition; and
- (4) the deduction of appropriate amounts to be provided by the seller as a reserve, in accordance with GAAP, against any liabilities associated with the assets disposed of in such Asset Disposition and retained by the Company or any Restricted Subsidiary after such Asset Disposition.

"Net Cash Proceeds," with respect to any issuance or sale of Capital Stock, means the cash proceeds of such issuance or sale net of attorneys' fees, accountants' fees, underwriters' or placement agents' fees, listing fees, discounts or commissions and brokerage, consultant and other fees and charges actually Incurred in connection with such issuance or sale and net of taxes paid or payable as a result of such issuance or sale (after taking into account any available tax credit or deductions and any tax sharing arrangements); provided that the cash proceeds of an Equity Offering by Holdings shall not be deemed Net Cash Proceeds, except to the extent such cash proceeds are contributed to the Company.

"Non-Guarantor Restricted Subsidiary" means any Restricted Subsidiary that is not a Guarantor.

"Non-Recourse Debt" means Indebtedness of a Person:

- as to which neither the Company nor any Restricted Subsidiary (a) provides any Guarantee or credit support of any kind (including any undertaking, guarantee, indemnity, agreement or instrument that would constitute Indebtedness) or (b) is directly or indirectly liable (as a guarantor or otherwise);
- (2) no default with respect to which (including any rights that the holders thereof may have to take enforcement action against an Unrestricted Subsidiary) would permit (upon notice, lapse of time or both) any holder of any other Indebtedness of the Company or any Restricted Subsidiary to declare a default under such other Indebtedness or cause the payment thereof to be accelerated or payable prior to its stated maturity; and
- (3) the explicit terms of which provide there is no recourse against any of the assets of the Company or its Restricted Subsidiaries.

"Note Guarantee" means, individually, any Guarantee of payment of the Notes and exchange notes issued in a registered exchange offer pursuant to the Registration Rights Agreement by a Guarantor pursuant to the terms of the Indenture and any supplemental indenture thereto, and, collectively, all such Guarantees. Each such Guarantee will be in the form prescribed by the Indenture.

"Officer" means the Chairman of the Board, the Chief Executive Officer, the President, the Chief Financial Officer, any Vice President, the Treasurer or the Secretary of the Company. Officer of any Guarantor has a correlative meaning.

"Officers' Certificate" means a certificate signed by two Officers or by an Officer and either an Assistant Treasurer or an Assistant Secretary of the Company.

"Opinion of Counsel" means a written opinion from legal counsel who is acceptable to the Trustee. The counsel may be an employee of or counsel to the Company or the Trustee.

"Pari Passu Indebtedness" means Indebtedness that ranks equally in right of payment to the Notes.

"Permitted Holders" means Oak Hill Capital Partners III L.P., Oak Hill Capital Management Partners III, L.P., and Oak Hill Capital Management, LLC (collectively, "Oak Hill"), investment funds managed or advised by Oak Hill, partners of Oak Hill and any Affiliates or Related Persons thereof.

"Permitted Investment" means an Investment by the Company or any Restricted Subsidiary in:

- (a) a Restricted Subsidiary that is a Guarantor or (b) a Person which will, upon the making of such Investment, become a Restricted Subsidiary that is a Guarantor; provided, however, that the primary business of such Restricted Subsidiary is a Related Business;
- (2) or held by another Person if such other Person is merged or consolidated with or into, or transfers or conveys all or substantially all its assets to, the Company or a Restricted Subsidiary that is a Guarantor; provided, however, that such Person's primary business is a Related Business; provided further, that in the case of Investments held by such other Person, such Investment was not acquired by such Person in contemplation of such acquisition, merger, consolidation or transfer;
- (3) cash and Cash Equivalents;
- (4) receivables owing to the Company or any Restricted Subsidiary created or acquired in the ordinary course of business and payable or dischargeable in accordance with customary trade terms; provided, however, that such trade terms may include such concessionary trade terms as the Company or any such Restricted Subsidiary deems reasonable under the circumstances;
- (5) payroll, travel and similar advances to cover matters that are expected at the time of such advances ultimately to be treated as expenses for accounting purposes and that are made in the ordinary course of business;
- (6) to the extent permitted by applicable law, loans or advances to employees (other than executive officers) of the Company and its Restricted Subsidiaries made in the ordinary course of business consistent with past practices of the Company or such Restricted Subsidiary in an aggregate amount at any one time outstanding not to exceed \$2.5 million (loans or advances that are forgiven shall continue to be deemed outstanding);
- (7) Equity Interests, obligations or securities received in settlement of debts created in the ordinary course of business and owing to the Company or any Restricted Subsidiary or in satisfaction of judgments or pursuant to any plan of reorganization or similar arrangement upon the bankruptcy or insolvency of a debtor;
- (8) Investments made as a result of the receipt of non-cash consideration from an Asset Disposition that was made pursuant to and in compliance with "—Certain covenants—Limitation on sales of assets and subsidiary stock;"
- (9) Investments in existence on the Issue Date;
- (10) Currency Agreements, Interest Rate Agreements, Commodity Agreements and related Hedging Obligations, which transactions or obligations are Incurred in compliance with "—Certain covenants—Limitation on indebtedness;"
- (11) Investments by the Company or any of its Restricted Subsidiaries, together with all other Investments pursuant to this clause (11), in an aggregate amount at the time of such Investment not to exceed \$15.0 million outstanding at any one time (with the fair market value of such Investment being measured at the time made and without giving effect to subsequent changes in value);
- (12) Guarantees issued in accordance with "-Certain covenants-Limitation on indebtedness;"
- (13) any Asset Swap made in accordance with "-Certain covenants-Limitation on sales of assets and subsidiary stock;"
- (14) any acquisition of assets or Equity Interests solely in exchange for, or out of the Net Cash Proceeds received from, the substantially contemporaneous issuance of Equity Interests (other than Disqualified Stock) of the Company; provided that the amount of any such Net Cash Proceeds that are utilized for any such Investment pursuant to this clause (14) will be excluded from clause (c)(ii) of the first paragraph of the covenant described above under the caption "—Certain covenants—Limitation on restricted payments;"

- (15) endorsements of negotiable instruments and documents in the ordinary course of business;
- (16) pledges or deposits permitted under clause (2) of the definition of Permitted Liens;
- (17) Investments made in connection with the funding of contributions under any non-qualified retirement plan or similar employee compensation plan in an amount not to exceed the amount of compensation expense recognized by the Company and its Restricted Subsidiaries in connection with such plans; and
- (18) Investments in or by any Foreign Subsidiary in an aggregate amount at the time of such Investments not to exceed \$10.0 million outstanding at any one time (with the fair market value of such Investment being measured at the time made and without giving effect to subsequent changes in value).

"Permitted Liens" means, with respect to any Person:

- (1) Liens securing Indebtedness and other obligations under the Senior Secured Credit Agreement and related Hedging Obligations and liens on assets of Restricted Subsidiaries securing Guarantees of Indebtedness and other obligations of the Company under the Senior Secured Credit Agreement permitted to be Incurred under the Indenture in an aggregate principal amount at any one time outstanding not to exceed \$250.0 million;
- (2) pledges or deposits by such Person under workers' compensation laws, unemployment insurance laws or similar legislation, or good faith deposits in connection with bids, tenders, contracts (other than for the payment of Indebtedness) or leases to which such Person is a party, or deposits to secure public or statutory obligations of such Person or deposits of cash or United States government bonds to secure surety or appeal bonds to which such Person is a party, or deposits as security for contested taxes or import or customs duties or for the payment of rent, in each case Incurred in the ordinary course of business;
- (3) Liens imposed by law, including carriers', warehousemen's, mechanics', materialmen's and repairmen's Liens Incurred in the ordinary course of business;
- (4) Liens for taxes, assessments or other governmental charges not yet subject to penalties for non-payment or which are being contested in good faith by appropriate proceedings provided appropriate reserves required pursuant to GAAP have been made in respect thereof;
- (5) Liens in favor of issuers of surety or performance bonds or letters of credit or bankers' acceptances issued pursuant to the request of and for the account of such Person in the ordinary course of its business; provided, however, that such letters of credit do not constitute Indebtedness;
- (6) encumbrances, ground leases, easements or reservations of, or rights of others for, licenses, rights of way, sewers, electric lines, telegraph and telephone lines and other similar purposes, or zoning, building codes or other restrictions (including, without limitation, minor defects or irregularities in title and similar encumbrances) as to the use of real properties or Liens incidental to the conduct of the business of such Person or to the ownership of its properties which do not in the aggregate materially adversely affect the value of said properties or materially impair their use in the operation of the business of such Person;
- (7) Liens securing Hedging Obligations so long as the related Indebtedness is, and is permitted to be under the Indenture, secured by a Lien on the same property securing such Hedging Obligation;
- (8) leases, licenses, subleases and sublicenses of assets (including, without limitation, real property and intellectual property rights) which do not materially interfere with the ordinary conduct of the business of the Company or any of its Restricted Subsidiaries;
- (9) judgment Liens not giving rise to an Event of Default so long as such Lien is adequately bonded and any appropriate legal proceedings which may have been duly initiated for the review of such judgment have not been finally terminated or the period within which such proceedings may be initiated has not expired;

- (10) Liens for the purpose of securing the payment of all or a part of the purchase price of, or Capitalized Lease Obligations, purchase money obligations or other payments Incurred to finance the acquisition, lease, improvement or construction of, assets or property acquired or constructed in the ordinary course of business *provided* that:
  - (a) the aggregate principal amount of Indebtedness secured by such Liens is otherwise permitted to be Incurred under the Indenture and does not exceed the cost of the assets or property so acquired or constructed; and
  - (b) such Liens are created within 180 days of construction or acquisition of such assets or property and do not encumber any other assets or property of the Company or any Restricted Subsidiary other than such assets or property and assets affixed or appurtenant thereto;
- (11) Liens arising solely by virtue of any statutory or common law provisions relating to banker's Liens, rights of set-off or similar rights and remedies as to deposit accounts or other funds maintained with a depositary institution; *provided* that:
  - (a) such deposit account is not a dedicated cash collateral account and is not subject to restrictions against access by the Company in excess of those set forth by regulations promulgated by the Federal Reserve Board; and
  - (b) such deposit account is not intended by the Company or any Restricted Subsidiary to provide collateral to the depository institution;
- (12) Liens arising from Uniform Commercial Code financing statement filings regarding operating leases entered into by the Company and its Restricted Subsidiaries in the ordinary course of business;
- (13) Liens existing on the Issue Date, other than Liens Incurred pursuant to clause (1) of this definition;
- (14) Liens on property or Capital Stock of a Person at the time such Person becomes a Restricted Subsidiary; provided, however, that such Liens are not created, Incurred or assumed in connection with, or in contemplation of, such other Person becoming a Restricted Subsidiary; provided, further, however, that any such Lien may not extend to any other property owned by the Company or any Restricted Subsidiary;
- (15) Liens on property at the time the Company or a Restricted Subsidiary acquired the property, including any acquisition by means of a merger or consolidation with or into the Company or any Restricted Subsidiary; provided, however, that such Liens are not created, Incurred or assumed in connection with, or in contemplation of, such acquisition; provided further, however, that such Liens may not extend to any other property owned by the Company or any Restricted Subsidiary;
- (16) Liens securing Indebtedness or other obligations of a Restricted Subsidiary owing to the Company or another Restricted Subsidiary;
- (17) Liens securing the Notes and the Note Guarantees;
- (18) Liens securing Refinancing Indebtedness Incurred to refinance, refund, replace, amend, extend or modify, as a whole or in part, Indebtedness that was previously so secured pursuant to clauses (10), (13), (14), (15), (17), (20) and (22), provided that any such Lien is limited to all or part of the same property or assets (plus improvements, accessions, proceeds or dividends or distributions in respect thereof) that secured (or, under the written arrangements under which the original Lien arose, could secure) the Indebtedness being refinanced or is in respect of property that is the security for a Permitted Lien hereunder;
- (19) any interest or title of a lessor under any Capitalized Lease Obligation or operating lease;
- (20) Liens under industrial revenue, municipal or similar bonds;

- (21) Liens securing Indebtedness (other than Subordinated Obligations and Guarantor Subordinated Obligations) in an aggregate principal amount outstanding at any one time not to exceed \$25.0 million which may include Liens securing Indebtedness and other obligations of Foreign Subsidiaries that are incurred in accordance with "—Certain covenants—Limitation on indebtedness" in an aggregate principal amount outstanding at any one time not to exceed \$10.0 million; and
- (22) Liens securing Indebtedness of the Company or any of its Restricted Subsidiaries Incurred pursuant to the first paragraph under "—Certain covenants—Limitation on indebtedness," provided that on the date thereof the Consolidated Secured Debt Leverage Ratio for the Company and its Restricted Subsidiaries is less than or equal to 1.50 to 1.00.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, limited liability company, government or any agency or political subdivision thereof or any other entity.

"Preferred Stock," as applied to the Capital Stock of any corporation, means Capital Stock of any class or classes (however designated) which is preferred as to the payment of dividends, or as to the distribution of assets upon any voluntary or involuntary liquidation or dissolution of such corporation, over shares of Capital Stock of any other class of such corporation.

"Preopening Costs" means "start-up costs" (such term used herein as defined in SOP 98-5 published by the American Institute of Certified Public Accountants) related to the acquisition, opening and organizing of new restaurants, including, without limitation, the cost of feasibility studies, staff training and recruiting and travel costs for employees engaged in such start-up activities.

*"Rating Agency"* means each of Standard & Poor's Ratings Group, Inc. and Moody's Investors Service, Inc. or if Standard & Poor's Ratings Group, Inc. or Moody's Investors Service, Inc. or both shall not make a rating on the Notes publicly available, a nationally recognized statistical Rating Agency or agencies, as the case may be, selected by the Company (as certified by a resolution of the Board of Directors delivered to the Trustee) which shall be substituted for Standard & Poor's Ratings Group, Inc. or Moody's Investors Service, Inc. or both, as the case may be.

*"Receivable"* means a right to receive payment arising from a sale or lease of goods or the performance of services by a Person pursuant to an arrangement with another Person pursuant to which such other Person is obligated to pay for goods or services under terms that permit the purchase of such goods and services on credit and shall include, in any event, any items of property that would be classified as an "account," "chattel paper," "payment intangible" or "instrument" under the Uniform Commercial Code as in effect in the State of New York and any "supporting obligations" as so defined.

*"Receivables Fees"* means any fees or interest paid to purchasers or lenders providing the financing in connection with a factoring agreement or other similar agreement, including any such amounts paid by discounting the face amount of Receivables or participations therein transferred in connection with a factoring agreement or other similar arrangement, regardless of whether any such transaction is structured as on-balance sheet or off- balance sheet or through a Restricted Subsidiary or an Unrestricted Subsidiary.

*"Refinancing Indebtedness"* means Indebtedness that is Incurred to refund, refinance, replace, exchange, renew, repay or extend (including pursuant to any defeasance or discharge mechanism) (collectively, "refinance," and "refinanced" shall have a correlative meaning) any Indebtedness existing on the date of the Indenture or Incurred in compliance with the Indenture (including Indebtedness of the Company that refinances Indebtedness of any Restricted Subsidiary and Indebtedness of any Restricted Subsidiary that refinances Indebtedness of another Restricted Subsidiary or the Company) including Indebtedness that refinances Refinancing Indebtedness, *provided, however*, that:

(1) (a) if the Stated Maturity of the Indebtedness being refinanced is earlier than the Stated Maturity of the Notes, the Refinancing Indebtedness has a Stated Maturity no earlier than the Stated Maturity of the

Indebtedness being refinanced or (b) if the Stated Maturity of the Indebtedness being refinanced is later than the Stated Maturity of the Notes, the Refinancing Indebtedness has a Stated Maturity at least 91 days later than the Stated Maturity of the Notes;

- (2) the Refinancing Indebtedness has an Average Life at the time such Refinancing Indebtedness is Incurred that is equal to or greater than the Average Life of the Indebtedness being refinanced;
- (3) such Refinancing Indebtedness is Incurred in an aggregate principal amount that is equal to or less than the sum of the aggregate principal amount then outstanding of the Indebtedness being refinanced (plus, without duplication, any additional Indebtedness Incurred to pay interest or premiums required by the instruments governing such existing Indebtedness and fees Incurred in connection therewith);
- (4) if the Indebtedness being refinanced is subordinated in right of payment to the Notes or a Subsidiary's Note Guarantee, such Refinancing Indebtedness is subordinated in right of payment to the Notes or a Subsidiary's Note Guarantee on terms at least as favorable to the holders as those contained in the documentation governing the Indebtedness being extended, refinanced, renewed, replaced, defeased or refunded; and
- (5) no Restricted Subsidiary (other than a Guarantor) may Incur any Indebtedness if the proceeds are used to refinance Indebtedness of the Company or a Guarantor.

*"Registration Rights Agreement"* means that certain registration rights agreement dated as of the date of the Indenture by and among the Company, the Guarantors and the initial purchasers set forth therein and, with respect to any Additional Notes, one or more substantially similar registration rights agreements among the Company and the other parties thereto, as such agreements may be amended from time to time.

*"Related Business"* means (x) any business which is the same as or related, ancillary or complementary to, or a reasonable extension or expansion of, any of the businesses of the Company and its Restricted Subsidiaries on the date of the Indenture and (y) any unrelated business to the extent it is not material to the Company.

"Related Business Assets" means assets used or useful in a Related Business.

"Related Person" with respect to any Permitted Holder means:

- (1) any controlling stockholder or a majority (or more) owned Subsidiary of such Permitted Holder or, in the case of an individual, any spouse or immediate family member of such Permitted Holder, any trust created for the benefit of such individual or such individual's estate, executor, administrator, committee or beneficiaries; or
- (2) any trust, corporation, partnership or other entity, the beneficiaries, stockholders, partners, owners or Persons beneficially holding a majority (or more) controlling interest of which consist of such Permitted Holder and/or such other Persons referred to in the immediately preceding clause (1).

"Restricted Investment" means any Investment other than a Permitted Investment.

"Restricted Subsidiary" means any Subsidiary of the Company other than an Unrestricted Subsidiary.

"Sale/Leaseback Transaction" with respect to any Person means an arrangement relating to property now owned or hereafter acquired whereby the Company or a Restricted Subsidiary transfers such property to a Person and the Company or a Restricted Subsidiary leases it from such Person.

"SEC" means the United States Securities and Exchange Commission.

"Secured Indebtedness" means, with respect to any Person on any date of determination, any Indebtedness of such Person secured by any Lien.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations of the SEC promulgated thereunder.

"Senior Secured Credit Agreement" means the Credit Agreement to be entered into among the Company, as Borrower, 6131646 Canada Inc., as Canadian Borrower, JPMorgan Chase Bank N.A., as Administrative Agent, and the lenders parties thereto from time to time, as the same may be amended, restated, modified, renewed, refunded, replaced or refinanced in whole or in part from time to time (including increasing the amount loaned thereunder provided that such additional Indebtedness is Incurred in accordance with the covenant described under "—Certain covenants—Limitation on indebtedness"); provided that a Senior Secured Credit Agreement shall not (x) include Indebtedness issued, created or Incurred pursuant to a registered offering of securities under the Securities Act or a private placement of securities (including under Rule 144A or Regulation S) pursuant to an exemption from the registration requirements of the Securities Act or (y) relate to Indebtedness that does not consist exclusively of Pari Passu Indebtedness or Guarantor Pari Passu Indebtedness.

*"Significant Subsidiary"* means any Restricted Subsidiary that would be a "Significant Subsidiary" of the Company within the meaning of Rule 1-02 under Regulation S-X promulgated by the SEC.

*"Stated Maturity"* means, with respect to any security, the date specified in such security as the fixed date on which the payment of principal of such security is due and payable, including pursuant to any mandatory redemption provision, but shall not include any contingent obligations to repay, redeem or repurchase any such principal prior to the date originally scheduled for the payment thereof.

"Stock Purchase Agreement" means the Stock Purchase Agreement by and among Holdings, the sellers party thereto, each option holder of Holdings party thereto and Games Acquisition Corp., a Delaware corporation, as Buyer, dated as of May 2, 2010.

"Subordinated Obligation" means any Indebtedness of the Company (whether outstanding on the Issue Date or thereafter Incurred) which is subordinated or junior in right of payment to the Notes pursuant to a written agreement.

"Subsidiary" of any Person means (a) any corporation, association or other business entity (other than a partnership, joint venture, limited liability company or similar entity) of which more than 50% of the total ordinary voting power of shares of Capital Stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof (or persons performing similar functions) or (b) any partnership, joint venture limited liability company or similar entity of which more than 50% of the capital accounts, distribution rights, total equity and voting interests or general or limited partnership interests, as applicable, is, in the case of clauses (a) and (b), at the time owned or controlled, directly or indirectly, by (1) such Person, (2) such Person and one or more Subsidiaries of such Person or (3) one or more Subsidiaries of such Person. Unless otherwise specified herein, each reference to a Subsidiary will refer to a Subsidiary of the Company.

"*Transactions*" means the transactions contemplated by the Stock Purchase Agreement, the initial borrowings under the Senior Secured Credit Agreement, the issuance of the Notes, the application of the proceeds therefrom and the payment of related fees and expenses.

*"Treasury Rate"* means the yield to maturity at the time of computation of United States Treasury securities with a constant maturity (as compiled and published in the most recent Federal Reserve Statistical Release H.15 (519) that has become publicly available at least two Business Days prior to the redemption date (or, if such Statistical Release is no longer published, any publicly available source of similar market data)) most nearly equal to the period from the redemption date to June 1, 2014; provided, however, that if the period from the redemption date to June 1, 2014 is not equal to the constant maturity of a United States Treasury security for which a weekly average yield is given, the Treasury Rate shall be obtained by linear interpolation (calculated to the nearest one-twelfth of a year) from the weekly average yields of United States Treasury securities for which such yields are given, except that if the period from the redemption date to June 1, 2014 is less than one year, the weekly average yield on actually traded United States Treasury securities adjusted to a constant maturity of one year will be used.

"Unrestricted Subsidiary" means:

- (1) any Subsidiary of the Company that at the time of determination shall be designated an Unrestricted Subsidiary by the Board of Directors of the Company in the manner provided below; and
- (2) any Subsidiary of an Unrestricted Subsidiary.

The Board of Directors of the Company may designate any Subsidiary of the Company (including any newly acquired or newly-formed Subsidiary or a Person becoming a Subsidiary through merger or consolidation or Investment therein) to be an Unrestricted Subsidiary only if:

- such Subsidiary or any of its Subsidiaries does not own any Capital Stock or Indebtedness of or have any Investment in, or own or hold any Lien on any property of, any other Subsidiary of the Company which is not a Subsidiary of the Subsidiary to be so designated or otherwise an Unrestricted Subsidiary;
- all the Indebtedness of such Subsidiary and its Subsidiaries shall, at the date of designation, and will at all times thereafter, consist of Non-Recourse Debt;
- (3) such designation and the Investment of the Company in such Subsidiary complies with "—Certain covenants—Limitation on restricted payments";
- such Subsidiary, either alone or in the aggregate with all other Unrestricted Subsidiaries, does not operate, directly or indirectly, all or substantially all of the business of the Company and its Subsidiaries;
- (5) such Subsidiary is a Person with respect to which neither the Company nor any of its Restricted Subsidiaries has any direct or indirect obligation:
  - (a) to subscribe for additional Capital Stock of such Person; or
  - (b) to maintain or preserve such Person's financial condition or to cause such Person to achieve any specified levels of operating results; and
- (6) on the date such Subsidiary is designated an Unrestricted Subsidiary, such Subsidiary is not a party to any agreement, contract, arrangement or understanding with the Company or any Restricted Subsidiary with terms substantially less favorable to the Company than those that might have been obtained from Persons who are not Affiliates of the Company.

Any such designation by the Board of Directors of the Company shall be evidenced to the Trustee by filing with the Trustee a resolution of the Board of Directors of the Company giving effect to such designation and an Officers' Certificate certifying that such designation complies with the foregoing conditions. If, at any time, any Unrestricted Subsidiary would fail to meet the foregoing requirements as an Unrestricted Subsidiary, it shall thereafter cease to be an Unrestricted Subsidiary for purposes of the Indenture and any Indebtedness of such Subsidiary shall be deemed to be Incurred as of such date.

The Board of Directors of the Company may designate any Unrestricted Subsidiary to be a Restricted Subsidiary; *provided* that immediately after giving effect to such designation, no Default or Event of Default shall have occurred and be continuing or would occur as a consequence thereof and the Company could Incur at least \$1.00 of additional Indebtedness under the first paragraph of the "—Certain covenants—Limitation on indebtedness" covenant on a pro forma basis taking into account such designation.

*"U.S. Government Obligations"* means securities that are (a) direct obligations of the United States of America for the timely payment of which its full faith and credit is pledged or (b) obligations of a Person controlled or supervised by and acting as an agency or instrumentality of the United States of America the timely payment of which is unconditionally guaranteed as a full faith and credit obligation of the United States of America, which, in either case, are not callable or redeemable at the option of the issuer thereof, and shall also include a depositary receipt issued by a bank (as defined in Section 3(a)(2) of the Securities Act), as custodian

with respect to any such U.S. Government Obligations or a specific payment of principal of or interest on any such U.S. Government Obligations held by such custodian for the account of the holder of such depositary receipt; *provided* that (except as required by law) such custodian is not authorized to make any deduction from the amount payable to the holder of such depositary receipt from any amount received by the custodian in respect of the U.S. Government Obligations or the specific payment of principal of or interest on the U.S. Government Obligations evidenced by such depositary receipt.

"Voting Stock" of a Person means all classes of Capital Stock of such Person then outstanding and normally entitled to vote in the election of directors, managers or trustees, as applicable.

"Wholly Owned Subsidiary" means a Restricted Subsidiary, all of the Capital Stock of which (other than directors' qualifying shares) is owned by the Company or another Wholly Owned Subsidiary.

### Exchange offer; registration rights

We and our guarantors entered into a registration rights agreement with the initial purchasers on June 1, 2010. In that agreement, we and the guarantors agreed for the benefit of the holders of the Restricted Notes that we will use our reasonable best efforts to file with the SEC and cause to become effective a registration statement relating to an offer to exchange the Restricted Notes for an issue of SEC-registered Exchange Notes with terms identical to the Restricted Notes (except that the Exchange Notes will not be subject to restrictions on transfer or to any increase in annual interest rate as described below).

Upon the effectiveness of the registration statement of which this prospectus forms a part, we will offer the Exchange Notes in return for the Restricted Notes. The exchange offer will remain open for at least 20 business days after the date we mail notice of the exchange offer to holders of the Restricted Notes. For each note surrendered to us under the exchange offer, the holder will receive an Exchange Note of equal principal amount. Interest on each Exchange Note will accrue from the last interest payment date on which interest was paid on the Restricted Notes or, if no interest has been paid on the Restricted Notes, from June 1, 2010. We and the guarantors will use our reasonable best efforts to complete the exchange offer not later than 45 days after the registration statement of which this prospectus forms a part becomes effective. Under current SEC interpretations, the Exchange Notes will generally be freely transferable after the exchange offer, except that any broker-dealer that participates in the exchange must deliver a prospectus meeting the requirements of the Securities Act when it resells the Exchange Notes.

In the event that we determine that a registered exchange offer is not available under applicable law or if applicable interpretations of the staff of the SEC do not permit us to effect the exchange offer, or, if for any reason, we and the guarantors do not consummate the exchange offer by 210 days after June 1, 2010, or upon receipt of a written request from the initial purchasers representing that they hold notes that are ineligible to be exchanged in the exchange offer of notes, we will use our reasonable best efforts to cause to become effective a shelf registration statement relating to resales of the notes and to keep that shelf registration statement effective until all notes covered by the shelf registration statement have been sold. We and the guarantors will, in the event of such a shelf registration, provide to each noteholder copies of a prospectus, notify each noteholder when the shelf registration statement has become effective and take certain other actions to permit resales of the notes. A noteholder that sells notes under the shelf registration statement generally will be required to make certain representations to us (as described in the registration rights agreement), to be named as a selling security holder in the related prospectus and to deliver a prospectus to purchasers, will be subject to certain of the civil liability provisions under the Securities Act in connection with those sales and will be bound by the provisions of the registration rights agreement that are applicable to such a noteholder (including certain indemnification obligations). Holders of notes will also be required to suspend their use of the prospectus included in the shelf registration statement under specified circumstances upon receipt of notice from us. Under applicable interpretations of the staff of the SEC, our affiliates will not be permitted to exchange their notes for registered notes in the exchange offer.

If the exchange offer is not completed (or, if required, the shelf registration statement is not declared effective) on or before the date that is 210 days after June 1, 2010, interest on the notes will be increased by 0.25% per annum (which rate will be increased by an additional 0.25% per annum for the subsequent 90-day period that such additional interest continues to accrue, provided that the rate at which such additional interest accrues may in no event exceed 0.5% per annum) until the exchange offer is completed or the shelf registration statement is declared effective. If a shelf registration statement is required to be filed due to an unsold allotment of notes held by an initial purchasers, the notes held by the initial purchasers will accrue additional interest if the shelf registration is not declared effective.

If we effect the exchange offer, we will be entitled to close the exchange offer 20 business days after its commencement, provided that we have accepted all notes validly surrendered in accordance with the terms of the exchange offer. Notes not tendered in the exchange offer shall bear interest at the rate set forth on the cover page of this prospectus and be subject to all the terms and conditions specified in the indenture, including transfer restrictions.

This summary of the provisions of the registration rights agreement does not purport to be complete and is subject to, and is qualified in its entirety by reference to, all the provisions of the registration rights agreement, a copy of which is available from us upon request.

## BOOK-ENTRY SETTLEMENT AND CLEARANCE

# **Book-Entry**, Delivery and Form

The Exchange Notes will initially be represented by one or more registered notes in global form, without interest coupons (the "global notes"). The global notes will be deposited with the trustee as custodian for the DTC and registered in the name of Cede & Co., as nominee of DTC. Ownership of beneficial interests in each global note will be limited to persons who have accounts with DTC ("DTC participants") or persons who hold interests through DTC participants.

Except as set forth below, the global notes may be transferred, in whole and not in part, only to another nominee of DTC or to a successor of DTC or its nominee. Beneficial interests in the global notes may not be exchanged for definitive Exchange Notes in registered certificated form (the "Certificated Exchange Notes") except in the limited circumstances described below. Except in the limited circumstances described below, owners of beneficial interests in the global notes will not be entitled to receive physical delivery of exchange notes in certificated form.

Transfers of beneficial interests in the global notes will be subject to the applicable rules and procedures of DTC and its direct or indirect participants (including, if applicable, those of Euroclear Bank S.A./N.V. ("Euroclear") and Clearstream Banking, société anonyme ("Clearstream")).

#### **Depository Procedures**

All interests in the global notes will be subject to the operations and procedures of DTC, Euroclear and Clearstream. We provide the following summaries of those operations and procedures solely for the convenience of investors. The operations and procedures of each settlement system are controlled by that settlement system and may be changed at any time.

DTC has advised us that it is:

- a limited purpose trust company organized under the laws of the State of New York;
- a "banking organization" within the meaning of the New York State Banking Law;
- a member of the Federal Reserve System;

- a "clearing corporation" within the meaning of the New York Uniform Commercial Code; and
- a "clearing agency" registered under Section 17A of the Exchange Act.

DTC was created to hold securities for its participants and to facilitate the clearance and settlement of securities transactions between its participants through electronic book-entry changes to the accounts of its participants. DTC's participants include securities brokers and dealers, including the initial purchasers; banks and trust companies; clearing corporations and other organizations. Indirect access to DTC's system is also available to others such as banks, brokers, dealers and trust companies; these indirect participants clear through or maintain a custodial relationship with a DTC participant, either directly or indirectly. Investors who are not DTC participants may beneficially own securities held by or on behalf of DTC only through DTC participants or indirect participants in DTC.

So long as DTC's nominee is the registered owner of a global note, that nominee will be considered the sole owner or holder of the notes represented by that global note for all purposes under the indenture. Except as provided below, owners of beneficial interests in a global note:

- will not be entitled to have notes represented by the global note registered in their names;
- will not receive or be entitled to receive physical, certificated notes; and
- will not be considered the owners or holders of the notes under the indenture for any purpose, including with respect to the giving of any direction, instruction or approval to the trustee under the indenture.

As a result, each investor who owns a beneficial interest in a global note must rely on the procedures of DTC to exercise any rights of a holder of notes under the indenture (and, if the investor is not a participant or an indirect participant in DTC, on the procedures of the DTC participant through which the investor owns its interest).

Payments of principal, premium, if any, and interest with respect to the notes represented by a global note will be made by the trustee to DTC's nominee as the registered holder of the global note. Neither we nor the trustee will have any responsibility or liability for the payment of amounts to owners of beneficial interests in a global note, for any aspect of the records relating to or payments made on account of those interests by DTC, or for maintaining, supervising or reviewing any records of DTC relating to those interests.

Payments by participants and indirect participants in DTC to the owners of beneficial interests in a global note will be governed by standing instructions and customary industry practice and will be the responsibility of those participants or indirect participants and DTC.

Transfers between participants in DTC will be effected under DTC's procedures and will be settled in same-day funds. Transfers between participants in Euroclear or Clearstream will be effected in the ordinary way under the rules and operating procedures of those systems.

Cross-market transfers between DTC participants, on the one hand, and Euroclear or Clearstream participants, on the other hand, will be effected within DTC through the DTC participants that are acting as depositaries for Euroclear and Clearstream. To deliver or receive an interest in a global note held in a Euroclear or Clearstream account, an investor must send transfer instructions to Euroclear or Clearstream, as the case may be, under the rules and procedures of that system and within the established deadlines of that system. If the transaction meets its settlement requirements, Euroclear or Clearstream, as the case may be, will send instructions to its DTC depositary to take action to effect final settlement by delivering or receiving interests in the relevant global notes in DTC, and making or receiving payment under normal procedures for same-day funds settlement applicable to DTC. Euroclear and Clearstream participants may not deliver instructions directly to the DTC depositaries that are acting for Euroclear or Clearstream.

Because of time zone differences, the securities account of a Euroclear or Clearstream participant that purchases an interest in a global note from a DTC participant will be credited on the business day for Euroclear or Clearstream immediately following the DTC settlement date. Cash received in Euroclear or Clearstream from the sale of an interest in a global note to a DTC participant will be received with value on the DTC settlement date but will be available in the relevant Euroclear or Clearstream cash account as of the business day for Euroclear or Clearstream following the DTC settlement date.

DTC, Euroclear and Clearstream have agreed to the above procedures to facilitate transfers of interests in the global notes among participants in those settlement systems. However, the settlement systems are not obligated to perform these procedures and may discontinue or change these procedures at any time. Neither we nor the trustee will have any responsibility for the performance by DTC, Euroclear or Clearstream or their participants or indirect participants of their obligations under the rules and procedures governing their operations.

### **Certificated notes**

Notes in physical, certificated form will be issued and delivered to each person that DTC identifies as a beneficial owner of the related notes only if:

- DTC notifies us at any time that it is unwilling or unable to continue as depositary for the global notes and a successor depositary is not appointed within 90 days;
- DTC ceases to be registered as a clearing agency under the Exchange Act and a successor depositary is not appointed within 90 days;
- we, at our option, notify the trustee that we elect to cause the issuance of certificated notes; or
- certain other events provided in the indenture should occur.

### CERTAIN UNITED STATES FEDERAL INCOME TAX CONSIDERATIONS

The following discussion is a summary of the United States federal income tax consequences of the exchange offer to a holder of Restricted Notes. This discussion is based upon current United States federal income tax law, which is subject to change, possibly with retroactive effect. This discussion does not address any state, local or foreign tax laws. Holders of Restricted Notes are urged to consult their tax advisors regarding the United States federal, state, local and foreign income and other tax consequences of the exchange offer.

The exchange of Restricted Notes for Exchange Notes pursuant to the exchange offer will not constitute a "significant modification" of the Restricted Notes for United States federal income tax purposes and, accordingly, the Exchange Notes received will be treated as a continuation of the Restricted Notes in the hands of such holder. As a result, there will be no U.S. federal income tax consequences to a holder who exchanges Restricted Notes for Exchange Notes pursuant to the exchange offer, and any such holder will not recognize gain or loss and will have the same adjusted tax basis and holding period in the Exchange Notes as it had in the Restricted Notes immediately before the exchange. A holder that does not exchange its Restricted Notes for Exchange Notes pursuant to the exchange offer will not recognize any gain or loss for United States federal income tax purposes upon consummation of the exchange offer.

To ensure compliance with Treasury Department Circular 230, holders of the Restricted Notes are hereby notified that (A) any discussion of U.S. Federal tax issues in this prospectus is not intended or written to be used, and cannot be used, by holders of the Restricted Notes for the purpose of avoiding penalties that may be imposed on such holders under the Internal Revenue Code, (B) any discussion of U.S. Federal tax issues in this prospectus is written to support the promotion or marketing of the transactions or matters addressed herein, and (C) holders of the Restricted Notes should seek advice based on their particular circumstances from an independent tax advisor.

### CERTAIN ERISA CONSIDERATIONS

The following is a summary of certain considerations associated with the purchase of the notes and exchange notes by employee benefit plans that are subject to Title I of the U.S. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), plans, individual retirement accounts and other arrangements that are subject to Section 4975 of the Code or provisions under any federal, state, local, non-U.S. or other laws or regulations that are similar to such provisions of ERISA or the Code (collectively, "Similar Laws"), and entities whose underlying assets are considered to include "plan assets" of any such plan, account or arrangement (each, a "Plan").

### **General fiduciary matters**

ERISA and the Code impose certain duties on persons who are fiduciaries of a Plan subject to Title I of ERISA or Section 4975 of the Code (an "ERISA Plan") and prohibit certain transactions involving the assets of an ERISA Plan and its fiduciaries or other interested parties. Under ERISA and the Code, any person who exercises any discretionary authority or control over the administration of such an ERISA Plan or the management or disposition of the assets of such an ERISA Plan, or who renders investment advice for a fee or other compensation to such an ERISA Plan, is generally considered to be a fiduciary of the ERISA Plan.

In considering an investment in the Exchange Notes of a portion of the assets of any Plan, a fiduciary should determine whether the investment is in accordance with the documents and instruments governing the Plan and the applicable provisions of ERISA, the Code or any Similar Laws relating to a fiduciary's duties to the Plan including, without limitation, the prudence, diversification, delegation of control and prohibited transaction provisions of ERISA, the Code and any other applicable Similar Laws.

#### **Prohibited transaction issues**

Section 406 of ERISA and Section 4975 of the Code prohibit ERISA Plans from engaging in specified transactions involving plan assets with persons or entities who are "parties in interest," within the meaning of ERISA, or "disqualified persons," within the meaning of Section 4975 of the Code, unless an exemption is available. A party in interest or disqualified person who engaged in a non-exempt prohibited transaction may be subject to excise taxes and other penalties and liabilities under ERISA and the Code. In addition, the fiduciary of the ERISA Plan that engaged in such a non-exempt prohibited transaction may be subject to penalties and liabilities under ERISA and the Code. The acquisition and/or holding of the notes and the exchange notes by an ERISA Plan with respect to which we, the initial purchasers, or the guarantors are considered a party in interest or a disqualified person may constitute or result in a direct or indirect prohibited transaction under Section 406 of ERISA and/or Section 4975 of the Code, unless the investment is acquired and is held in accordance with an applicable statutory, class or individual prohibited transaction exemption. In this regard, the U.S. Department of Labor has issued prohibited transaction class exemptions, or "PTCEs," that may apply to the acquisition and holding of the notes and the exchange notes. These class exemptions include, without limitation, PTCE 84-14 respecting transactions determined by independent qualified professional asset managers, PTCE 90-1 respecting insurance company pooled separate accounts, PTCE 91-38 respecting bank collective investment funds, PTCE 95-60 respecting life insurance company general accounts and PTCE 96-23 respecting transactions as determined by in-house asset managers. In addition, Section 408(b)(17) of ERISA and Section 4975(d)(20) of the Code provide relief from the prohibited transaction provisions of ERISA and Section 4975 of the Code for certain transactions, provided that neither the issuer of the securities nor any of its affiliates (directly or indirectly) have or exercise any discretionary authority or control or render any investment advice with respect to the assets of any ERISA Plan involved in the transaction and provided further that the ERISA Plan pays no more than adequate consideration in connection with the transaction. There can be no assurance that all of the conditions of any such exemptions will be satisfied.

Because of the foregoing, the Exchange Notes should not be purchased or held by any person investing "plan assets" of any Plan, unless such purchase and holding (and the exchange of Restricted Notes for Exchange Notes pursuant to the Exchange Offer) will not constitute a non-exempt prohibited transaction under ERISA and the Code or similar violation of any applicable Similar Laws.

#### Representation

Accordingly, by acceptance an Exchange Note, each purchaser and subsequent transferee of an Exchange Note will be deemed to have represented and warranted that either (i) no portion of the assets used by such purchaser or transferee to acquire or hold any Exchange Notes constitutes assets of any Plan or (ii) the holding of the Restricted Notes (and the exchange of the Restricted Notes for the Exchange Notes) by such purchaser or transferee will not constitute a non-exempt prohibited transaction under Section 406 of ERISA or Section 4975 of the Code or similar violation under any applicable Similar Laws.

The foregoing discussion is general in nature and is not intended to be all-inclusive. Due to the complexity of these rules and the penalties that may be imposed upon persons involved in non-exempt prohibited transactions, it is particularly important that fiduciaries, or other persons considering purchasing the Exchange Notes on behalf of, or with the assets of, any Plan, consult with their counsel regarding the potential applicability of ERISA, Section 4975 of the Code and any Similar Laws to such investment and whether an exemption would be applicable to the purchase and holding of the Exchange Notes.

#### PLAN OF DISTRIBUTION

Each broker-dealer that receives Exchange Notes for its own account pursuant to the Exchange Offer must acknowledge that it will deliver a prospectus in connection with the resale of the Exchange Notes. This prospectus, as it may be amended or supplemented from time to time, may be used by a broker-dealer in connection with resales of Exchange Notes received in exchange for Restricted Notes where such Restricted Notes were acquired as a result of market-making activities or other trading activities. We have agreed that we will make this prospectus, as amended or supplemented, available to any broker-dealer for use in connection with any such resale for a period after the expiration date ending on the earlier of (i) 210 days after the last date on which Restricted Notes are accepted for exchange or (ii) the date on which participating broker-dealers are no longer required to deliver a prospectus in connection with market making or other trading activities. In addition, until \_\_\_\_\_\_, 2010 (90 days after the date of delivery of this prospectus), all broker-dealers effecting transactions in the Exchange Notes may be required to deliver a prospectus.

We will not receive any proceeds from any sale of Exchange Notes by broker-dealers. Exchange Notes received by broker-dealers for their own account pursuant to the Exchange Offer may be sold from time to time in one or more transactions in the over-the-counter market, in negotiated transactions, through the writing of options on the Exchange Notes or a combination of such methods of resale. These resales may be made at market prices prevailing at the time of resale, at prices related to such prevailing market prices or negotiated prices. Any resale may be made directly to purchasers or to or through brokers or dealers who may receive compensation in the form of commissions or concessions from any such broker-dealer or the purchasers of any of the Exchange Notes that were received by it for its own account pursuant to the Exchange Offer and any broker or dealer that participates in a distribution of the Exchange Notes may be deemed to be an underwriter within the meaning of the Securities Act, and any profit on any such presons may be deemed to be underwriting compensation under the Securities Act. The letter of transmittal states that, by acknowledging that it will deliver and by delivering a prospectus, a broker-dealer will not be deemed to admit that it is an underwriter within the meaning of the Securities Act.

For a period of 90 days after the expiration date, we will promptly send additional copies of this prospectus and any amendment or supplement to this prospectus to any broker-dealer that requests these documents in the letter of transmittal. We have agreed to pay all expenses incident to the performance of our obligations in connection with the Exchange Offer. We will indemnify the holders of the notes (including any broker-dealer) against certain liabilities, including liabilities under the Securities Act.

## LEGAL MATTERS

Certain legal matters in connection with the Exchange Notes have been passed upon for us and the guarantors by Hallett & Perrin, Dallas, Texas.

#### INDEPENDENT ACCOUNTANTS

The consolidated financial statements of Dave & Buster's, Inc and its subsidiaries at January 31, 2010 and February 1, 2009 and for each of the three fiscal years in the period ended January 31, 2010, included in this Prospectus and Registration Statement, have been audited by Ernst & Young LLP, independent registered public accounting firm, as set forth in their report appearing elsewhere herein, and are included in reliance upon such report given on the authority of such firms as experts in accounting and auditing.

#### AVAILABLE INFORMATION

We file annual, quarterly and current reports, proxy statements and other information with the SEC. You may read and copy any reports, proxy statements or other information that we file with the SEC at the following location of the SEC:

Public Reference Room 100 F Street, N.E. Washington, D.C. 20549

Please call the SEC at 1-800-SEC-0330 for further information on the Public Reference Room. You may also obtain copies of this information by mail from the Public Reference Section of the SEC, 100 F Street, N.E., Washington, D.C. 20549, at prescribed rates. Our SEC filings are also available to the public from document retrieval services and the Internet website maintained by the SEC at <u>http://www.sec.gov</u>.

All documents filed by us pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act after the date of this prospectus and before the end of the offering pursuant to this prospectus shall also be deemed to be incorporated herein by reference. We do not incorporate by reference any information furnished pursuant to Items 2.02 or 7.01 of Form 8-K in any past or future filings, unless specifically stated otherwise. Any statement contained in any document incorporated or deemed to be incorporated by reference herein shall be deemed to be modified or superseded for purposes of this prospectus to the extent that a statement contained in this prospectus or in any other subsequently filed document which also is or is deemed to be incorporated by reference in this prospectus modifies or supersedes such statement. Any statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this prospectus.

You may request copies of our SEC filings and forms of documents pertaining to the securities offered hereby referred to in this prospectus without charge, by written or telephonic request directed to us at Dave & Buster's, Inc., 2481 Mañana Drive, Dallas, Texas 75220, Attention: Investor Relations, Telephone: (214) 357-9588, Website: <u>www.daveandbusters.com</u>.

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#### REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

The Board of Directors of Dave & Buster's, Inc.

We have audited the accompanying consolidated balance sheets of Dave & Buster's, Inc. and subsidiaries (Predecessor) as of January 31, 2010 and February 1, 2009, and the related consolidated statements of operations, shareholders' equity, and cash flows for each of the three fiscal years in the period ended January 31, 2010. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. We were not engaged to perform an audit of the Company's internal control over financial reporting. Our audits included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the consolidated financial position of Dave & Buster's, Inc. and subsidiaries (Predecessor) at January 31, 2010 and February 1, 2009, and the consolidated results of their operations and their cash flows for each of the three fiscal years in the period ended January 31, 2010, in conformity with U.S. generally accepted accounting principles.

/s/ Ernst & Young LLP

Dallas Texas April 15, 2010

# DAVE & BUSTER'S, INC. CONSOLIDATED BALANCE SHEETS (Predecessor)

(in thousands, except share amounts)	January 31, 2010	February 1, 2009
Assets		
Current assets:		
Cash and cash equivalents	\$ 16,682	\$ 8,534
Inventories	13,782	15,105
Prepaid expenses	8,347	7,750
Deferred income taxes	5,308	5,304
Income tax receivable	51	2,254
Other current assets	2,616	206
Total current assets	46,786	39,153
Property and equipment, net	294,151	296,805
Tradename	63,000	63,000
Goodwill	65,857	65,857
Other assets and deferred charges	13,846	16,121
Total assets	\$483,640	\$480,936
Liabilities and stockholders' equity		
Current liabilities:		
Current installments of long-term debt (Note 6)	\$ 836	\$ 500
Accounts payable	21,414	18,886
Accrued liabilities	51,239	54,497
Income taxes payable	1,136	466
Deferred income taxes	180	
Total current liabilities	74,805	74,349
Deferred income taxes	11,493	17,915
Deferred occupancy costs	66,615	56,572
Other liabilities	11,667	10,827
Long-term debt, less current installments (Note 6)	226,414	229,250
Commitment and contingencies (Note 11)		
Stockholders' equity (Note 1):		
Common stock, \$0.01 par value, 1,000 authorized; 100 issued and outstanding as of January 31, 2010 and February 1, 2009	_	_
Preferred stock, 10,000,000 authorized; none issued	_	
Paid-in capital	112.069	111,346
Accumulated comprehensive income (loss)	216	(34)
Retained earnings (deficit)	(19,639)	(19,289)
Total stockholders' equity	92,646	92,023
	\$483,640	\$480.936
Total liabilities and stockholders' equity	\$483,640	\$480,936

See accompanying notes to consolidated financial statements.

# DAVE & BUSTER'S, INC. CONSOLIDATED STATEMENTS OF OPERATIONS (Predecessor)

(in thousands)	Fiscal Year Ended January 31, 2010	Fiscal Year Ended February 1, 2009	Fiscal Year Ended February 3, 2008
Food and beverage revenues	\$269,973	\$284,779	\$293,097
Amusement and other revenues	250,810	248,579	243,175
Total revenues	520,783	533,358	536,272
Cost of food and beverage	65,349	70,520	72,493
Cost of amusement and other	38,788	34,218	34,252
Total cost of products	104,137	104,738	106,745
Operating payroll and benefits	132,114	139,508	144,920
Other store operating expenses	174,685	174,179	171,627
General and administrative expenses	30,437	34,546	38,999
Depreciation and amortization expense	53,658	49,652	51,898
Pre-opening costs	3,881	2,988	1,002
Total operating costs	498,912	505,611	515,191
Operating income	21,871	27,747	21,081
Interest expense, net	22,122	26,177	31,183
Income (loss) before provision for income taxes	(251)	1,570	(10,102)
(Benefit) provision for income taxes	99	(45)	(1,261)
Net income (loss)	<u>\$ (350)</u>	\$ 1,615	\$ (8,841)

See accompanying notes to consolidated financial statements.

# DAVE & BUSTER'S, INC. CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY (Predecessor)

	Commo	on Stock			umulated		
(in thousands, except share amounts)	Shares	Amount	Paid-In Capital	Com	Other prehensive Income	Retained Earnings (Deficit)	Total
Balance, February 4, 2007	100		\$108,952	\$	(184)	\$(12,063)	\$96,705
Net loss		_	_			(8,841)	(8,841)
Unrealized foreign currency translation gain (net of tax)	—	—	—		1,378	—	1,378
Comprehensive loss	_	_					(7,463)
Stock-based compensation			1,514				1,514
Balance, February 3, 2008	100	_	110,466		1,194	(20,904)	90,756
Net earnings		_	_			1,615	1,615
Unrealized foreign currency translation loss (net of tax)	_	_	_		(1,228)	_	(1,228)
Comprehensive income	—	—			—		387
Stock-based compensation			880				880
Balance, February 1, 2009	100		111,346		(34)	(19,289)	92,023
Net loss	_	_	—			(350)	(350)
Unrealized foreign currency Translation gain (net of tax)	_	_			250	—	250
Comprehensive loss	_	_	_		_	_	(100)
Stock-based compensation			723				723
Balance, January 31, 2010	100		\$112,069	\$	216	<u>\$(19,639)</u>	\$92,646

See accompanying notes to consolidated financial statements.

# DAVE & BUSTER'S, INC. CONSOLIDATED STATEMENTS OF CASH FLOWS (Predecessor)

(in thousands)	Fiscal Year Ended January 31, 2010	Fiscal Year Ended February 1, 2009	Fiscal Year Ended February 3, 2008
Cash flows from operating activities:			
Net income (loss)	\$ (350)	\$ 1,615	\$ (8,841)
Adjustments to reconcile net income (loss) to net cash provided by operating activities:			
Depreciation and amortization expense	53,658	49,652	51,898
Deferred income tax	(6,246)	(3,344)	(5,996)
Stock-based compensation charges	723	880	1,514
Other, net	1,646	1,180	1,847
Changes in assets and liabilities:			
Inventories	1,486	(103)	(1,854)
Prepaid expenses	(570)	333	(1,277)
Income tax receivable	2,203	(2,254)	—
Other current assets	(2,167)	5,949	230
Other assets and deferred charges	675	2,111	974
Accounts payable	2,524	(3,103)	2,823
Accrued liabilities	(3,620)	(769)	8,136
Income taxes payable	671	(3,692)	107
Deferred occupancy costs	7,683	2,569	502
Acquisition of minority interest	(102)	_	
Other liabilities	840	1,173	510
Net cash provided by operating activities	59,054	52,197	50,573
Cash flows from investing activities:			
Capital expenditures	(48,423)	(49,254)	(31,355)
Proceeds from sales of property and equipment	17	170	456
Net cash used in investing activities	(48,406)	(49,084)	(30,899)
Cash flows from financing activities:	(,)	(.,,)	(**,***)
Borrowings under senior credit facility	36,600	24,000	13,000
Repayments under senior credit facility	(39,100)	(22,625)	(24,000)
Repayments under senior notes		(15,000)	
Net cash used in financing activities	(2,500)	(13,625)	(11,000)
Increase (decrease) in cash and cash equivalents	8,148	(10,512)	8,674
Beginning cash and cash equivalents	8,534	19,046	10,372
			\$ 19,046
Ending cash and cash equivalents	\$ 16,682	\$ 8,534	\$ 19,046
Supplemental disclosures of cash flow information:			
Cash paid for income taxes, net of refunds	3,599	\$ 9,005	\$ 4,388
Cash paid for interest, net of amounts capitalized	22,932	\$ 25,650	\$ 26,399

See accompanying notes to consolidated financial statements.

## Note 1: Summary of significant accounting policies

*Basis of presentation*—Dave & Buster's, Inc., a Missouri corporation, was acquired on March 8, 2006, by Dave & Buster's Holdings, Inc. ("D&B Holdings"), formerly known as WS Midway Holdings, Inc., a newly-formed Delaware corporation, through the merger (the "WS Merger") of WS Midway Acquisition Sub, Inc., a newly-formed Missouri corporation and a direct, wholly-owned subsidiary of D&B Holdings, with and into Dave & Buster's, Inc. with Dave & Buster's, Inc. as the surviving corporation. Affiliates of Wellspring Capital Management LLC ("Wellspring") and HBK Investments L.P. ("HBK") control approximately 82 percent and 18 percent, respectively, of the outstanding capital stock of D&B Holdings. D&B Holdings owns no other significant assets or operations other than all of the common stock of Dave & Buster's, Inc. Dave & Buster's, Inc. continues as the same legal entity after the Merger. The accompanying consolidated statements of operations and cash flows present the results of operations and cash flows of Dave & Buster's, Inc., and all wholly-owned subsidiaries. The WS Merger transactions resulted in a change in ownership of 100 percent of Dave & Buster's, Inc. outstanding common stock and have been accounted for in accordance with accounting guidance for business combinations. References to "Dave & Buster's," the "Company," "we," "us," and "our" are references to Dave & Buster's, Inc. and its subsidiaries. All material intercompany accounts and transactions have been eliminated in consolidation. (See Note 2 and Note 14)

Our one industry segment is the ownership, operation and licensing of high-volume entertainment and dining venues under the names "Dave & Buster's," and "Dave & Buster's Grand Sports Café." As of January 31, 2010, there were 55 company-owned locations in the United States and Canada and one franchise location in Canada.

Our fiscal year ends on the Sunday after the Saturday closest to January 31. All references to Fiscal 2009 relate to the 52-week period ending on January 31, 2010. All references to Fiscal 2008 relate to the 52-week period ending on February 1, 2009. All references to Fiscal 2007 relate to the 52-week period ending on February 3, 2008. In the opinion of management, these financial statements contain all adjustments (consisting of normal recurring entries) necessary to present fairly the financial position, results of operations and cash flows for the periods indicated. All dollar amounts are presented in thousands, unless otherwise noted, except share amounts.

Use of estimates—The preparation of financial statements in conformity with generally accepted accounting principles requires us to make certain estimates and assumptions that affect the amounts reported in the financial statements and accompanying notes. Actual results could differ from those estimates.

*Cash and cash equivalents*—We consider amounts receivable from credit card companies and all highly liquid temporary investments with original maturities of three months or less to be cash equivalents.

*Inventories*—Inventories are reported at the lower of cost or market determined on a first-in, first-out method. Amusement inventory includes electronic equipment, stuffed animals and small novelty items used as redemption prizes for certain midway games, as well as supplies needed for midway operations. Inventories consist of the following:

	January 31, 2010	February 1, 2009
Operating store—food and beverage	\$ 2,793	\$ 2,877
Operating store—amusement	6,821	6,785
Corporate supplies, warehouse and other	4,168	5,443
	\$ 13.782	\$ 15,105

#### (Predecessor)

*Property and equipment*—Property and equipment are recorded at cost. Expenditures that substantially increase the useful lives of the property and equipment are capitalized, whereas costs incurred to maintain the appearance and functionality of such assets are charged to repair and maintenance expense. Interest costs incurred during construction are capitalized and depreciated based on the estimated useful life of the underlying asset. Interest costs capitalized during the construction of facilities in fiscal years 2009, 2008, and 2007 were \$640, \$522, and \$151, respectively.

Property and equipment, excluding most games, are depreciated using the straight-line method over the estimated useful life of the assets. Games are generally depreciated on the 150 percent declining-balance method over the estimated useful life of the assets. Depreciation expense totaled \$52,058, \$48,052, and \$50,298 in fiscal 2009, 2008, and 2007, respectively. Reviews are performed regularly to determine whether facts or circumstances exist that indicate the carrying values of the property and equipment are impaired. We assess the recoverability of property and equipment by comparing the projected future undiscounted net cash flows associated with these assets to their respective carrying amounts. Impairment, if any, is based on the excess of the carrying amount over the estimated fair market value of the assets.

*Goodwill and other intangible assets*—In accordance with accounting guidance for goodwill and other intangible assets, goodwill and indefinite lived intangibles, such as tradenames, are not amortized, but are reviewed for impairment at least annually. Indefinite lived intangibles include goodwill in the amount of \$65,857 and tradenames in the amount of \$63,000.

We have developed and acquired certain trademarks that are utilized in our business and have been determined to have finite lives. These trademarks in the amount of \$8,000 are amortized over their estimated life of five years. As of January 31, 2010 and February 1, 2009, we had trademarks of \$1,723 and \$3,323, respectively, included in other assets and deferred charges. Amortization expense related to trademarks totaled \$1,600 each year for fiscal years 2009, 2008, and 2007, respectively. Total estimated amortization expense for future years is currently estimated at \$1,600 for 2010 and \$123 in 2011.

Deferred financing costs—The Company capitalizes costs incurred in connection with borrowings or establishment of credit facilities. These costs are included in other assets and deferred charges and are amortized as an adjustment to interest expense over the life of the borrowing or life of the credit facility. In the case of early debt principal repayments, the Company adjusts the value of the corresponding deferred financing costs with a charge to interest expense, and similarly adjusts the future amortization expense. The following table details amounts relating to those assets:

	January 31, 2010	February 1, 2009
Balance at beginning of year	\$ 6,132	\$ 8,066
Write-off during period due to prepayments of principal	—	(429)
Amortization during period	(1,464)	(1,505)
Balance at end of year	\$ 4,668	\$ 6,132

#### NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

Scheduled amortization for future years, assuming no further prepayment of principal is as follows:

2010	\$1,464
2011	1,151
2012	1,139
2013	850
2014	64
Total amortization	\$4,668

Income taxes. We use the liability method for recording income taxes, which recognizes the amount of current and deferred taxes payable or refundable at the date of the financial statements as a result of all events that are recognized in the financial statements and as measured by the provisions of enacted tax laws. We have adopted accounting guidance for uncertainty in income taxes. This guidance limits the recognition of income tax benefits to those items that meet the "more likely than not" threshold on the effective date. Initial derecognition amounts are reported as adjustments to retained earnings on the effective date. We analyzed our tax positions as of February 5, 2007 and determined that the implementation of this guidance had no material impact on our financial statements.

The calculation of tax liabilities involves significant judgment and evaluation of uncertainties in the interpretation of store tax regulations. As a result, we have established reserves for taxes that may become payable in future years as a result of audits by tax authorities. Tax reserves are reviewed regularly pursuant to accounting guidance for uncertainty in income taxes. Tax reserves are adjusted as events occur that affect the potential liability for additional taxes, such as the expiration of statutes of limitations, conclusion of tax audits, identification of additional exposure based on current calculations, identification of new issues, or the issuance of statutory or administrative guidance or rendering of a court decision affecting a particular issue. Accordingly, we may experience significant changes in tax reserves in the future, if or when such events occur.

Deferred tax assets. A deferred income tax asset or liability is established for the expected future consequences resulting from temporary differences in the financial reporting and tax bases of assets and liabilities. As of January 31, 2010, we have recorded a \$10,787 valuation allowance against our deferred tax assets. The valuation allowance was established in accordance with accounting guidance for income taxes. If we generate taxable income in future periods or if the facts and circumstances on which our estimates and assumptions are based were to change, thereby impacting the likelihood of realizing the deferred tax assets, judgment would have to be applied in determining the amount of valuation allowance no longer required.

*Share-based expense*—In December 2006, the members of the board of directors of D&B Holdings approved the adoption of D&B Holdings stock option plan (the "Stock Option Plan"). The Stock Option Plan allows for the granting to certain of our employees and consultants options to acquire stock in D&B Holdings. The expense associated with share-based equity awards granted as more fully described in Note 9 have been calculated as required by current accounting standards related to stock compensation. In connection with the acquisition of D&B Holdings by Oak Hill Capital Partners all outstanding options become fully vested under the terms of the option agreements. Vested options were converted into the right to receive an amount in cash equal to the difference between the per share exercise price and the per share acquisition consideration. The grant date fair values of the options granted in 2009 have been determined based on a Black-Scholes option pricing model. We determined that this model yields materially similar values to option pricing models previously used and allows for the application of a uniform set of criteria across all grants. The expected term of the options is based on the weighted average of anticipated exercise dates. Since we do not have publicly traded equity securities, the

volatility of our options has been estimated using peer group volatility information. The risk-free interest rate is based on the implied yield on U.S. Treasury zero-coupon issues with a remaining term equivalent to the expected term. We have not paid dividends in the past and do not plan to pay any dividends in the near future. No options were granted in 2008. The significant assumptions used in determining the underlying fair value of the weighted-average options granted in fiscal 2009 and fiscal 2007 were as follows:

	Fi	Fiscal Year 2009 Grants			scal Year 2007 Grants	;
	Series A	Series A	Series B	Series A	Series A	Series B
	Service	Performan ce	Performance	Service	<b>Performance</b>	Performance
	Based	Based	Based	Based	Based	Based
	Options	Options	Options	Options	Options	Options
Valuation	Black-	Black-	Black-	Black-	Monte Carlo	Monte Carlo
Model	Scholes	Scholes	Scholes	Scholes	Simulation	Simulation
Volatility	55.0%	55.0%	55.0%	38.1%	38.1%	38.1%
Risk free interest rate	1.5%	1.5%	1.4%	4.7%	4.7%	4.7%
Expected dividend yield	0%	0%	0%	0%	0%	0%
Expected term	2.7 years	2.7 years	2.8 years	5.25 years	5.25 years	5.25 years

*Foreign currency translation*—The financial statements related to the operations of our Toronto store are prepared in Canadian dollars. Income statement amounts are translated at average exchange rates for each period, while the assets and liabilities are translated at year-end exchange rates. Translation adjustments for assets and liabilities are included in shareholders' equity as a component of comprehensive income.

*Revenue recognition*—Food and beverage revenues are recorded at point of service. Amusement revenues consist primarily of credits on Power Cards purchased and used by customers to activate most of the video and redemption games in our midway. Amusement revenues are primarily recognized upon utilization of these game play credits. We have recognized a liability for the estimated amount of unused game play credits, which we believe our guests will utilize in the future.

*Food and beverage cost of products*—Our dependence on a small number of suppliers subjects us to the possible risks of shortages, interruptions and price fluctuations. We have entered into a long-term contract with U.S. Foodservice, Inc. which provides for the purchasing, warehousing and distributing of a substantial majority of our food, non-alcoholic beverage and chemical supplies. The unplanned loss of this distributor could adversely affect our business by disrupting our operations as we seek out and negotiate a new distribution contract. We also have multiple short-term supply contracts with a limited number of suppliers. If any of these suppliers do not perform adequately or otherwise fail to distribute products or supplies to our stores, we may be unable to replace the suppliers in a short period of time on acceptable terms, which could increase our costs, cause shortages of food and other items at our stores and cause us to remove certain items from our menu. We currently do not engage in futures contracts or other financial risk management strategies with respect to potential price fluctuations in the cost of food and other supplies, which we purchase at prevailing market or contracted prices.

Amusement costs of products—Certain midway games allow guests to earn coupons, which may be redeemed for prizes. The cost of these prizes is included in the cost of amusement products and is generally recorded when coupons are utilized by the customer by redeeming the coupons for a prize in our "Winner's Circle." Customers may also store the coupon value on a Power Card for future redemption. We have accrued a liability for the estimated amount of outstanding coupons that will be redeemed in subsequent periods based on tickets outstanding, historic redemption patterns and the estimated redemption cost of products per ticket.

## NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

*Related party transaction*—We have entered into an expense reimbursement agreement with an affiliate of Wellspring, pursuant to which the Wellspring affiliate provides general advice to us in connection with long-term strategic plans, financial management, strategic transactions and other business matters. The expense reimbursement agreement provides for an annual expense reimbursement of up to \$750 to the Wellspring affiliate. The agreement also provides for the dollar-for-dollar reimbursement of certain third-party expenses paid by Wellspring on behalf of the Company. The initial term of the expense reimbursement agreement will expire in March 2011, and after that date, such agreement will renew automatically on a year-to-year basis unless one party gives at least 30 days' prior notice of its intention not to renew. In each fiscal year 2009, 2008 and 2007, we paid the Wellspring affiliate \$750 under the terms of the expense reimbursement agreement. During fiscal 2009, and fiscal 2008, we expensed approximately \$155 and \$1,184, respectively, for third-party expenses arranged by Wellspring in connection with the potential sale of Dave & Buster's or the initial public offering of D&B Holdings.

*Advertising costs*—Advertising costs are recorded as an expense in the period in which we incur the costs or the first time the advertising takes place. Advertising expenses were \$26,588, \$26,605, and \$25,309 for 2009, 2008, and 2007, respectively.

*Pre-opening costs*—Pre-opening costs include costs associated with the opening and organizing of new stores or conversion of existing stores, including the cost of feasibility studies, pre-opening rent, training and recruiting and travel costs for employees engaged in such pre-opening activities. All pre-opening costs are expensed as incurred.

Lease accounting—Rent expense is recorded on a straight-line basis over the lease term. The lease term commences on the date when we take possession and have the right to control the use of the leased premises. The lease term includes the initial non-cancelable lease term plus any periods covered by renewal options that we consider reasonably assured of exercising. Construction allowances we receive from the lessor to reimburse us for the cost of leasehold improvements are recorded as deferred occupancy costs and amortized as a reduction of rent over the term of the lease.

*Comprehensive income*—Comprehensive income is defined as the change in equity of a business enterprise during a period from transactions and other events and circumstances from non-owner sources. In addition to net income (loss), unrealized foreign currency translation gain (loss) is included in comprehensive income. Unrealized translation gains (losses) for fiscal years 2009, 2008, and 2007 were \$250, \$(1,228), and \$1,378, respectively.

*Recent accounting pronouncements*—In December 2007, the Financial Accounting Standards Board ("FASB") issued new accounting guidance on business combinations which expands the use of the acquisition method of accounting used in business combinations to all transactions and other events in which one entity obtains control over one or more other businesses or assets. This new accounting guidance requires measurement at the acquisition date of the fair value of assets acquired, liabilities assumed and any non-controlling interest. Additionally, the guidance requires that acquisition-related costs, including restructuring costs, be recognized as expense separately from the acquisition. We adopted the new accounting guidance on February 2, 2009. Refer to Notes 2 and 3 for additional discussion.

In December 2007, the FASB issued new accounting guidance on non-controlling interests in consolidated financial statements. This new guidance applies to the accounting for non-controlling interests (previously referred to as minority interest) in a subsidiary and for the deconsolidation of a subsidiary. We adopted the new accounting guidance on February 2, 2009.

In March 2008, the FASB issued new accounting guidance regarding disclosures about derivative instruments and hedging activities. Entities with instruments subject to this accounting guidance are required to provide qualitative disclosures including (a) how and why derivative instruments are used, (b) how derivative instruments and related hedge items are accounted for under this accounting guidance, and its related interpretations, and (c) how derivative instruments and related hedge items affect an entity's financial position, financial performance, and cash flows. Additionally, under this accounting guidance, entities must disclose the fair values of derivative instruments and heir gains and losses in a tabular format that identifies the location of derivative positions and the effect of their use in an entity's financial statements. Effective February 2, 2009, we adopted the new guidance. The new disclosure requirements are presented in Note 7.

In April 2009, the FASB issued new accounting guidance on interim disclosures about fair value of financial instruments. This new accounting guidance was effective for our reporting periods beginning with our August 2, 2009 interim financial statements. The new accounting guidance expanded the previous disclosure requirements to require disclosure of the fair value of financial instruments in interim reporting periods. We implemented this guidance during the second quarter of fiscal 2009 and have included the required disclosures within these financial statements. See additional discussion related to recent pronouncements on fair value and derivative instruments in Note 4 and Note 7, respectively.

In May 2009, the FASB issued new accounting guidance on subsequent events. This new guidance establishes general standards of accounting for, and disclosure of, events that occur after the balance sheet date but before financial statements are issued or are available to be issued. This new accounting guidance is effective for interim or annual periods ending after June 15, 2009 and was implemented by the Company during the second quarter of fiscal 2009. We performed a review for subsequent events through the date of this report. No recognized or non-recognized subsequent events were noted.

In June 2009, the FASB issued new accounting guidance on the FASB Accounting Standards Codification ("Codification") and the hierarchy of generally accepted accounting principles, which establishes the Codification as the source of authoritative accounting principles recognized by the FASB to be applied in the preparation of financial statements in conformity with generally accepted accounting principles ("GAAP"). This new guidance explicitly recognized rules and interpretive releases of the Securities and Exchange Commission ("SEC") under federal securities laws as authoritative GAAP for SEC registrants. The new accounting guidance is effective for financial statements issued for interim and annual reporting periods ending after September 15, 2009. The adoption of this new guidance did not have an impact on our consolidated financial statements.

## Note 2: Acquisition of limited partnership

Effective June 30, 2009, we acquired the 49.9% limited partner interest in a limited partnership which owns a Jillian's store in the Discover Mills Mall near Atlanta, Georgia. Prior to our June 30, 2009 acquisition, we owned a 50.1% general partner interest in the limited partnership. Historically, we accounted for our ownership of the general partnership interest using the equity method due to the substantive participative rights of the limited partner in the operations of the partnership.

The acquisition date fair value of the consideration given for the limited partner interest was \$1,860 and consisted of an agreement to extend the underlying premises lease by an additional thirty-two months. Under the terms of the extended lease we also agreed to convert the Jillian's operations to the "Dave & Buster's" trade name by January 30, 2010. The Company completed the conversion of the store operations to Dave & Buster's on November 12, 2009.

## NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

The acquisition of the limited partner interest was accounted for in accordance with accounting guidance for business combinations and, accordingly, resulted in the recognition of the assets acquired and the liabilities assumed at the June 30, 2009 fair values as summarized below:

	Fair Value
Assets:	
Current asset	\$ 1,030
Property and equipment, net	2,185
Total assets	\$ 3,215
Liabilities:	
Current liabilities	\$ 498
Deferred occupancy costs	2,360
Total liabilities	<u>\$ 2,858</u>

The acquisition resulted in a gain of approximately \$357, which is included as a component of Other store operating expenses in the accompanying consolidated statements of operations.

# Note 3: Fair value

In September 2006, the FASB issued new accounting guidance, which establishes a framework for measuring fair value and requires enhanced disclosures about fair value measurements. The new accounting guidance, which we adopted February 4, 2008, requires companies to disclose the fair value of their financial instruments according to a three-level fair value hierarchy that prioritizes the inputs used to measure fair value. This guidance requires companies to provide additional disclosures based on that hierarchy. The three-levels of inputs used to measure fair value are as follows: 1) defined as observable inputs such as quoted prices in active markets for identical assets or liabilities as of the reporting date, 2) defined as pricing inputs other than quoted prices in active markets included in level 1, which are either directly or indirectly observable as of the reporting date, 3) defined as pricing inputs that are generally less observable from objective sources. In February 2008, the FASB issued new accounting guidance, which delayed the effective date of previously issued accounting guidance on fair value measurements for all non-financial assets and liabilities, except those that are recognized or disclosed at fair value in the financial statements on a recurring basis until January 1, 2009. Effective February 2, 2009, we adopted this guidance and the required disclosure relating to our interest rate swap contracts is presented below.

In February 2007, the FASB issued accounting guidance that permits entities to report many financial instruments and certain other items at fair value. If the fair value option is elected, unrealized gains and losses will be recognized in earnings at each subsequent reporting date. Effective February 4, 2008, we adopted this guidance. We did not elect to measure any additional financial assets or liabilities at fair value that were not already measured at fair value under existing standards. Therefore, the adoption of this standard did not have an impact on our consolidated financial statements or results of operations.

As discussed more fully in Note 6, the fair value of our interest rate swap contracts is determined by third parties by means of a mathematical model that calculates the present value of the anticipated cash flows from the transaction using mid-market prices and other economic data and assumptions, or by means of pricing indications from one or more other dealers selected at their discretion.

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

(Predecessor)

The following table presents our financial assets and liabilities as of January 31, 2010 that were measured at fair value on a recurring basis:

	Fai	Fair Value Measurements		
	Level 1	Level 2	Level 3	
Liabilities:				
Interest rate swap contracts		\$2,114	_	

# Note 4: Property and equipment

Property and equipment consist of the following:

	Estimated Depreciable Lives (In Years)	January 31, 2010	, February 1, 2009
Land		\$ 385	5 \$ 385
Buildings	Shorter of 40 or		
	ground lease term	16,350	6 16,114
Leasehold and building improvements	Shorter of 20 or		
	lease term	280,629	9 260,240
Furniture, fixtures and equipment	5-10	100,519	9 87,806
Games	5	68,39	1 62,307
Construction in progress	—	16,552	2 8,806
Total cost		482,832	2 435,658
Less accumulated depreciation		(188,68)	<u>1) (138,853)</u>
Property and equipment, net		\$ 294,15	1 \$ 296,805

# Note 5: Accrued liabilities

Accrued liabilities consist of the following:

	January 31, 2010	February 1, 2009
Compensation and benefits	\$ 11,698	\$ 10,271
Interest	9,305	11,279
Deferred amusement revenue	8,076	7,609
Amusement redemption liability	4,175	3,627
Deferred gift card revenue	3,729	3,930
Sales and use taxes	2,767	4,103
Accrued severance	344	2,104
Customer deposits	1,434	1,706
Property taxes	2,683	1,758
Other	7,028	8,110
Total accrued liabilities	<u>\$ 51,239</u>	\$ 54,497

# DAVE & BUSTER'S, INC. NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

# Note 6: Long-term debt

Long-term debt consisted of the following:

	January 31, 2010	February 1, 2009
Senior credit facility—revolving	\$ —	\$ 2,000
Senior credit facility—term	67,250	67,750
Senior notes	160,000	160,000
	227,250	229,750
Less current installments	836	500
Long-term debt, less current installments	\$ 226,414	\$ 229,250

Senior Credit Facility—As of January 31, 2010, our senior secured credit facility ("senior credit facility") consisted of (a) a \$100,000 term loan facility with a maturity of seven years from the closing date of the WS Merger and (b) provides a \$60,000 revolving credit facility with a maturity of five years from the closing date of the WS Merger and (b) a \$20,000 letter of credit sub-facility, (ii) a \$5,000 swingline sub-facility and (iii) a \$5,000 (in U.S. Dollar equivalent) sub-facility available in Canadian dollars to our Canadian subsidiary. The revolving credit facility is used to provide financing for general corporate purposes. As of January 31, 2010, in addition to the borrowings indicated above, we had \$7,641 in letters of credit outstanding.

The interest rates per annum applicable to loans, other than swingline loans, under the senior credit facility are, at our option, equal to, either a base rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, 30, 60, 90 or 180-day) interest periods chosen by us, in each case, plus an applicable margin percentage. Swingline loans bear interest at the base rate plus the applicable margin. The weighted average rate of interest on borrowings under our senior credit facility was 6.82 percent at January 31, 2010.

Our senior credit facility requires compliance with financial covenants including a minimum fixed charge coverage ratio test and a maximum leverage ratio test. We are required to maintain a minimum fixed charge coverage ratio of 1.20:1.00 and a maximum leverage ratio of 3.75:1.00 until the fourth quarter of fiscal year 2010, at which time the maximum leverage ratio decreases to 3.50:1.00. In addition, our senior credit facility includes negative covenants restricting or limiting the ability of D&B Holdings and its subsidiaries to, among other things, incur additional indebtedness, make capital expenditures, make distributions or payments to affiliates outside the normal course of business and sell or acquire assets. Virtually all of our assets are pledged as collateral for the senior credit facility.

The senior credit facility also contains certain customary representations and warranties, affirmative covenants and events of default, including payment defaults, breaches of representations and warranties, covenant defaults, cross-defaults and cross-acceleration to certain indebtedness, certain events of bankruptcy, certain events under ERISA, material judgments, actual or asserted failures of any guarantee or security document supporting the senior credit facility to be in full force and effect and a change of control. If an event of default occurs, the lenders under the senior credit facility would be entitled to take various actions, including acceleration of amounts due under the senior credit facility and all actions permitted to be taken by a secured creditor.

Derivative instrument—In March 2008, the FASB issued new accounting guidance regarding disclosures about derivative instruments and hedging activities. Entities with instruments subject to this accounting guidance are required to provide qualitative disclosures including (a) how and why derivative instruments are used, (b) how derivative instruments and related hedge items are accounted for under this accounting guidance, and its related interpretations, and (c) how derivative instruments and related hedge items affect an entity's financial position, financial performance, and cash flows. Additionally, under this accounting guidance, entities must disclose the fair values of derivative instruments and their gains and losses in a tabular format that identifies the location of derivative positions and the effect of their use in an entity's financial statements. Effective February 2, 2009, we adopted the new guidance. The new disclosure requirements are presented in Note 7.

At January 31, 2010, we held two interest rate swap contracts that expire in 2011. The interest rate swaps are utilized to change a portion of the variable rate debt on our senior credit facility to fixed rate debt. Pursuant to the swap contracts, the interest rate on notional amounts aggregating \$57,400 at January 31, 2010 is fixed at 5.31 percent plus applicable margin. The notional amounts decline ratably over the term of the contracts. The contracts have not been designated as hedges and adjustments to mark the instruments to their fair value are recorded as interest income/expense. In connection with the Acquisition (see Note 14), our interest rate swap contracts were terminated on June 1, 2010.

The fair value and balance sheet location of our derivative instrument is as follows:

	Liability Derivative			
	January 31, 2010		February 1, 2009	
	Balance Sheet	Fair	Balance Sheet	Fair
Derivatives not designated as hedging instruments	Location	Value	Location	Value
Interest rate swap contracts	Accrued liabilities	\$ 2,114	Accrued liabilities	\$ 3,981

The effect of our derivative instrument on our consolidated statements of operations is as follows:

		Amount (Loss) Rec	of Gain ognized in
	Location of Gain		Derivative
		Fiscal Year	Fiscal Year
		Ended	Ended
	(Loss) Recognized In	January 31,	February 1,
Derivatives not designated as hedging instruments	Income on Derivative	2010	2009
Interest rate swap contracts	Interest expense, net	\$ 1,992	\$ (171)

Senior notes—As of January 31, 2010, our senior notes are general unsecured, unsubordinated obligations of ours and mature on March 15, 2014. Interest on the senior notes compounds semi-annually and accrues at the rate of 11.25 percent per annum. In September 2008, we retired notes with a principal amount of \$15,000. On or after March 15, 2010, we may redeem all, or from time-to-time, a part of the senior notes upon not less than 30 nor more than 60 days notice, at a redemption price of 105.625 percent (expressed as a percentage of principal amount) plus accrued and unpaid interest on the senior notes. As of January 31, 2010, our \$160,000 of senior notes had an approximate fair value of \$167,000, based on quoted market prices.

*Debt obligations*—The following table sets forth our future debt payment obligations as of January 31, 2010 and following the Acquisition (excluding repayment obligations under the revolving portion of our senior credit facility:)

	Debt Outstanding at January 31, 2010
1 year or less	\$ 836
2 years	982
3 years	49,135
4 years	16,297
5 years	160,000
Thereafter	
Total future payments	\$ 227,250

The following table sets forth our recorded interest expense, net:

	Fiscal Year Ended January 31, 2010	Fiscal Year Ended February 1, 2009	Fiscal Year Ended February 3, 2008
Gross interest expense	\$ 23,078	\$ 27,221	\$ 31,830
Capitalized interest	(640)	(522)	(151)
Interest income	(316)	(522)	(496)
Total interest expense, net	\$ 22,122	\$ 26,177	\$ 31,183

# Note 7: Income taxes

The provision (benefit) for income taxes is as follows:

	Fiscal Year Ended January 31, 2010	Fiscal Year Ended February 1, 2009	Fiscal Year Ended February 3, 2008
Current expense			
Federal	\$ 3,219	\$ 3,611	\$ 2,962
Foreign	244	(237)	
State and local	2,883	305	1,772
Deferred expense (benefit)	(6,247)	(3,724)	(5,995)
Total provision (benefit) for income taxes	<u>\$ 99</u>	<u>\$ (45</u> )	<u>\$ (1,261</u> )

Significant components of the deferred tax liabilities and assets in the consolidated balance sheets are as follows:

	January 31, 2010	February 1, 2009
Deferred tax liabilities:		
Trademark/trade name	\$ 22,236	\$ 22,477
Prepaid expenses	552	454
Other	695	_
Total deferred tax liabilities	\$ 23,483	\$ 22,931

	January 31, 2010	February 1, 2009
Deferred tax assets:		
Property and equipment	\$ 4,672	\$ 70
Leasing transactions	5,064	3,423
Worker's compensation and general liability insurance	3,223	3,182
Smallware supplies	745	751
Amusement redemption liability	4,331	3,870
Legal	41	351
Deferred compensation	1,383	1,083
Interest rate swap expense	822	1,571
Accruals	1,209	_
Tax credit carryovers	55	57
State net operating loss carryovers	4,845	5,134
Indirect benefit of unrecognized tax benefits	707	—
Other	808	638
Total deferred tax assets	27,905	20,130
Valuation allowance for deferred tax assets—US	(10,401)	(9,568)
Valuation allowance for deferred tax assets—Canada	(386)	(242)
Total deferred tax assets net of valuation allowance	17,118	10,320
Net deferred tax liability	\$ 6,365	\$ 12,611

At January 31, 2010, we had a \$10,787 valuation allowance against our deferred tax assets. The valuation allowance was established in accordance with accounting guidance for income taxes. Primarily as a result of our experiencing cumulative losses before income taxes for the three-year period ending January 31, 2010, we could not conclude that it is more likely than not that our deferred tax asset will be fully realized. The ultimate realization of our deferred tax assets is dependent on the generation of future taxable income during periods in which temporary differences become deductible.

As of January 31, 2010, we had no federal tax credit carryforwards for income tax purposes. There is a 20-year carryforward on general business credits.

The State of Texas has enacted legislation which established a tax based on taxable margin. As a result of the legislation and in accordance with accounting guidance for income taxes, we recorded an income tax expense of \$222 for the fiscal year ended January 31, 2010.

We currently anticipate that approximately \$1,395 of unrecognized tax benefits will be settled through federal and state audits or will be recognized as a result of the expiration of statute of limitations during fiscal 2010. Future recognition of potential interest or penalties, if any, will be recorded as a component of income tax expense. Because of the impact of deferred tax accounting, \$1,809 of unrecognized tax benefits, if recognized, would affect the effective tax rate.

We file income tax returns, which are periodically audited by various federal, state and foreign jurisdictions. We are generally no longer subject to federal, state, or foreign income tax examinations for years prior to 2005.

The Internal Revenue Service ("IRS") commenced an examination of the Company's U.S. income tax returns for 2006 and 2007 in the fourth quarter of 2008 that is anticipated to be completed by the end of 2010.

As of January 31, 2010, the IRS has proposed certain adjustments to the Company's depreciation and intercompany interest tax positions. Management is currently evaluating those proposed adjustments to determine if it agrees, but if accepted, the Company does not anticipate the adjustments would result in a material change to its financial position. However, the Company anticipates that it is reasonably possible that an additional payment of approximately \$300 will be made by the end of 2010. The change in unrecognized tax benefits excluding interest, penalties and related income tax benefits, for the years ended January 31, 2010 and February 1, 2009 were as follows:

	Fiscal Year Ended January 31, 2010	Fiscal Year Ended February 1, 2009
Balance at beginning of year	\$ 2,242	\$ 2,338
Additions for tax positions of prior years	366	397
Reductions for statute of limitations lapse	(370)	(471)
Reductions for tax positions of prior years		(22)
Settlements	(39)	
Balance at end of year	\$ 2,199	\$ 2,242

As of January 31, 2010, the accrued interest and penalties on the unrecognized tax benefits were \$856 and \$144, respectively, excluding any related income tax benefits. As of February 1, 2009, the accrued interest and penalties on the unrecognized tax benefits were \$696 and \$154, respectively, excluding any related income tax benefits. The \$160 increase in accrued interest is primarily related to the accrual of interest during Fiscal 2009 for uncertain tax positions established at the beginning of the fiscal year as well as tax positions added in Fiscal 2009. The Company recognizes interest accrued related to the unrecognized tax benefits and penalties as a component of the provision for income taxes recognized in the Consolidated Statements of Operations.

The reconciliation of the federal statutory rate to the effective income tax rate follows:

	Fiscal Year Ended January 31, 2010	Fiscal Year Ended February 1, 2009	Fiscal Year Ended February 3, 2008
Federal corporate statutory rate	35.0%	35.0%	35.0%
State and local income taxes, net of federal income tax benefit	(545.7)%	(13.5)%	(7.8)%
Foreign taxes	(129.5)%	(8.6)%	(0.8)%
Nondeductible expenses	(327.4)%	49.7%	4.7%
Tax credits	941.0%	(141.0)%	19.4%
Valuation allowance	(331.0)%	67.8%	(33.4)%
Change in reserve	(100.7)%	13.9%	(10.6)%
Other	418.9%	(6.2)%	6.0%
Effective tax rate	(39.4)%	(2.9)%	12.5%

## Note 8: Leases

We lease certain property and equipment under various non-cancelable capital and operating leases. Some of the leases include options for renewal or extension on various terms. Most of the leases require us to pay

## NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

property taxes, insurance and maintenance of the leased assets. Certain leases also have provisions for additional percentage rentals based on revenues. For fiscal 2009, 2008, and 2007, rent expense for operating leases was \$44,143, \$41,771, and \$40,634, respectively, including contingent rentals of \$1,475, \$707, and \$1,121, respectively. At January 31, 2010 future minimum lease payments, including any periods covered by renewal options we are reasonably assured of exercising (including the sale/leaseback transactions described below), are:

2010	2011	2012	2013	2014	Thereafter	Total
\$45,950	\$45,588	\$44,757	\$43,875	\$44,087	\$244,093	\$468,350

During 2000 and 2001, we completed the sale/leaseback of three stores and the corporate headquarters. Cash proceeds of \$24,774 were received along with twenty-year notes aggregating \$6,750. The notes bear interest of 7 percent to 7.5 percent. At the end of fiscal years 2009, 2008 and 2007, the aggregate balance of the notes receivable due from the lessors under the sale/leaseback agreements was \$3,908, \$4,105, and \$4,281, respectively. Future minimum principal and interest payments due to us under these notes are as follows:

2010	2011	2012	2013	2014	Thereafter	Total
\$529	\$489	\$489	\$489	\$489	\$3,380	\$5,865

# Note 9: Common stock

In December 2006, the members of the board of directors of D&B Holdings approved the adoption of the D&B Holdings stock option plan (the "Stock Option Plan"). The Stock Option Plan allows for the granting to certain of our employees and consultants options to acquire stock in D&B Holdings that are subject to either time-based vesting or performance-based vesting.

Options granted under the Stock Option Plan terminate on the ten-year anniversary of the grants. Termination dates for the various grants outstanding as of January 31, 2010 are as follows:

	Options Outstanding	
Fiscal Year of Grant	at January 31, 2010	Termination Date
2006	15,262.93	March 8, 2016
2007	1,515.52	May 11, 2017
2009	773.66	April 22, 2019
2009	953.83	October 30, 2019

The various options provided for in the Stock Option Plan are as follows:

#### Series A service-based options

These options contain a service-based (or time-based) vesting provision, whereby the options will vest in five equal amounts. Upon sale of the Company or completion of the initial public offering, all service-based options will fully vest.

#### Series A performance options

These options contain a performance-based vesting provision, whereby the options will vest if Wellspring earns a 15 percent internal rate of return ("IRR") on its investment in the Company at the time it sells such investment. If the 15 percent IRR is not achieved upon sale, then the value of the interests of the optionees will

## NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

be reduced by an amount necessary to increase the IRR to 15 percent. In the event that no sale or liquidity event occurs by March 8, 2011, a third party valuation will take place for purposes of determining whether the 15 percent IRR has been achieved in order to establish vesting of these options.

#### Series B performance options

These options contain a similar performance-based vesting provision, whereby the options will vest if Wellspring earns a 25 percent IRR on its investment in the Company at the time it sells such investment. If the 25 percent IRR is not achieved upon sale, the value of the interests of the optionees will be reduced by an amount necessary to increase the IRR to 25 percent. These options do not contain a provision relating to a third party valuation, and therefore vest only upon a liquidity event. Upon the completion of an initial public offering, all performance-based options will fully vest.

Transactions during fiscal years 2009 and 2008 under the Stock Option Plan were as follows:

	Fiscal Year Ended January 31, 2010								
	Series A Services Based Options		Weighted Average Exercise Price	Series A Performance Based Options		Weighted Average Exercise Price	Series B Performance Based Options		Weighted Average Exercise Price
Options outstanding at beginning of year	5,645.21	\$	1,004.07	5,404.98	\$	1,004.25	6,712.11	\$	1,003.32
Granted	510.48		1,613.11	510.47		1,613.11	706.54		1.582.06
Forfeited	180.16		1,000.00	450.42	_	1,000.00	353.27	_	1,000.00
Options outstanding at end of year	5,975.52		1,056.22	5,465.05		1,617.36	7,065.38		1,585.37
Options exercisable at end of year	3,381.12	\$	1002.72		\$			\$	

	Fiscal Year Ended February 1, 2009								
	Series A Services Based		Weighted Average Exercise	Series A Performance Based		Weighted Average Exercise	Series B Performance Based		Weighted Average Exercise
	Options		Price	Options		Price	Options		Price
Options outstanding at beginning of year	6,005.54	\$	1,003.82	6,005.54	\$	1,003.82	7,065.38	\$	1,003.15
Granted			—	_			_		_
Forfeited	360.33		1,000.00	600.56		1,000.00	353.27		1,000.00
Options outstanding at end of year	5,645.21	_	1,004.07	5,404.98	_	1,004.25	6,712.11	_	1,003.32
Options exercisable at end of year	2,300.12	\$	1,002.00		\$			\$	

We recorded share-based compensation expense related to our stock option plan of \$723, \$880, and \$1,514 in fiscal 2009, 2008, and 2007, respectively. The weighted average grant date fair value per option granted in 2009 and 2007 was \$493 and \$256, respectively. The average remaining term for all options outstanding at January 31, 2010 is 6.5 years.

## NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

In the event that vesting of the unvested options is accelerated under the original terms of the plan and the underlying stock option agreements, the remaining unamortized or unrecorded share-based compensation would be accelerated. In addition, assumptions made regarding forfeitures in determining the remaining unamortized share-based compensation would be re-evaluated to determine if additional share-based compensation expense would be required for any changes in the underlying assumptions.

## Note 10: Employee benefit plan

We sponsor a plan to provide retirement benefits under the provisions of Section 401(k) of the Internal Revenue Code (the "401(k) Plan") for all employees who have completed a specified term of service. Our contributions may range from 0 percent to 100 percent of employee contributions, up to a maximum of 6 percent of eligible employee compensation, as defined. Employees may elect to contribute up to 50 percent of their eligible compensation on a pretax basis. Benefits under the 401(k) Plan are limited to the assets of the 401(k) Plan. Our contributions to the 401(k) plan were \$260, \$283, and \$269 for fiscal 2009, 2008, and 2007, respectively.

#### Note 11: Contingencies

We are subject to certain legal proceedings and claims that arise in the ordinary course of its business. In the opinion of management, based upon consultation with legal counsel, the amount of ultimate liability with respect to such legal proceedings and claims will not materially affect the consolidated results of our operations or our financial condition.

#### Note 12: Condensed consolidating financial information

The senior notes are guaranteed on a senior basis by all domestic subsidiaries of the Company. The subsidiaries' guarantee of the senior notes are full and unconditional and joint and several.

The accompanying condensed consolidating financial information have been prepared and presented pursuant to SEC Regulation S-X Rule 3-10 "Financial statements of guarantors and issuers of guaranteed securities registered or being registered." No other condensed consolidating financial statements are presented herein. The results of operations and cash flows from operating activities from the non-guarantor subsidiary were \$(468) and \$701, respectively, for the fiscal year ended January 31, 2010 and \$1,071 and \$(3,170), respectively for the fiscal year ended February 1, 2009. There are no restrictions on cash distributions from the non-guarantor subsidiary.

January 31, 2010:

	Issuer and Subsidiary Guarantors	Subsidiary Non- Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Assets				
Current assets	\$ 44,692	\$ 2,094	\$ —	\$ 46,786
Property and equipment, net	289,817	4,334	—	294,151
Tradename	63,000	—	—	63,000
Goodwill	65,857		—	65,857
Investment in sub	3,755		(3,755)	—
Other assets and deferred charges	13,773	73		13,846
Total assets	\$480,894	\$ 6,501	<u>\$ (3,755)</u>	\$ 483,640
	Issuer and Subsidiary Guarantors	Subsidiary Non- Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Liabilities and stockholders' equity	Subsidiary	Non-	0	
Liabilities and stockholders' equity Current liabilities	Subsidiary	Non-	0	
1 0	Subsidiary Guarantors	Non- Guarantors	Adjustments	Buster's, Inc.
Current liabilities Deferred income taxes	Subsidiary Guarantors \$ 72,285	Non- Guarantors \$ 2,520	Adjustments	Buster's, Inc. \$ 74,805
Current liabilities	Subsidiary Guarantors \$ 72,285 11,493	Non- Guarantors \$ 2,520	Adjustments	Buster's, Inc. \$ 74,805 11,493
Current liabilities Deferred income taxes Deferred occupancy costs	Subsidiary Guarantors \$ 72,285 11,493 66,389	Non- Guarantors \$ 2,520  226	Adjustments	Buster's, Inc. \$ 74,805 11,493 66,615
Current liabilities Deferred income taxes Deferred occupancy costs Other liabilities	Subsidiary Guarantors \$ 72,285 11,493 66,389 11,667	Non- Guarantors \$ 2,520 226	Adjustments	Buster's, Inc. \$ 74,805 11,493 66,615 11,667

# February 1, 2009:

	Issuer and Subsidiary Guarantors	Subsidiary Non-Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Assets				
Current assets	\$ 38,086	\$ 1,067	\$ —	\$ 39,153
Property and equipment, net	292,207	4,598	—	296,805
Tradename	63,000	—	—	63,000
Goodwill	65,857	—	—	65,857
Investment in sub	3,454	—	(3,454)	_
Other assets and deferred charges	16,045	76		16,121
Total assets	\$478,649	\$ 5,741	\$ (3,454)	\$ 480,936
	Issuer and Subsidiary Guarantors	Subsidiary Non-Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Liabilities and stockholders' equity	Subsidiary		0	
Liabilities and stockholders' equity Current liabilities	Subsidiary		0	
1 0	Subsidiary Guarantors	Non-Guarantors	Adjustments	Buster's, Inc.
Current liabilities	Subsidiary Guarantors \$ 72,212	Non-Guarantors \$2,137	Adjustments	Buster's, Inc. \$ 74,349
Current liabilities Deferred income taxes	Subsidiary <u>Guarantors</u> \$ 72,212 17,915	Non-Guarantors \$ 2,137	Adjustments	Buster's, Inc. \$ 74,349 17,915
Current liabilities Deferred income taxes Deferred occupancy costs	Subsidiary Guarantors \$ 72,212 17,915 56,422	Non-Guarantors \$ 2,137	Adjustments	Buster's, Inc. \$ 74,349 17,915 56,572
Current liabilities Deferred income taxes Deferred occupancy costs Other liabilities	Subsidiary Guarantors \$ 72,212 17,915 56,422 10,827	Non-Guarantors \$ 2,137	Adjustments	Buster's, Inc. \$ 74,349 17,915 56,572 10,827



## Note 13: Quarterly financial information (unaudited)

	F	Fiscal Year Ended January 31, 2010				
	First Quarter 5/3/2009	Second Quarter 8/2/2009	Third Quarter 11/1/2009	Fourth Quarter 1/31/2010		
Total revenues	\$138,426	\$131,527	\$117,185	\$133,645		
Income (loss) before provision for income taxes	7,502	(1,415)	(10,008)	3,670		
Net income (loss)	5,167	63	(5,490)	(90)		
		Fiscal Year End	ed February 1, 20	09		
	First Quarter 5/4/2008	Second Quarter 8/3/2008	Third Quarter 11/2/2008	Fourth Quarter 2/1/2009		
Total revenues	\$ 142,463	\$ 136,238	\$ 119,739	\$ 134,918		
Income (loss) before provision for income taxes	7,968	3 1,158	(9,299)	1,743		
Net income (loss)	5,010	970	(5,726)	1,361		

During 2009, we opened three locations: Richmond, Virginia in the first quarter, Indianapolis, Indiana in the second quarter and Columbus, Ohio in the third quarter. In 2008, we opened three locations: Plymouth Meeting, Pennsylvania in the second quarter and Arlington, Texas and Tulsa, Oklahoma in the fourth quarter. Pre-opening costs incurred in fiscal 2009 were \$1,146, \$1,052, \$983, and \$700 in the first, second, third and fourth quarters, respectively. Pre-opening costs incurred in fiscal 2008 were \$282, \$960, \$625, and \$1,121 in the first, second, third and fourth quarters, respectively.

#### Note 14: Subsequent event (unaudited)

On June 1, 2010, Games Acquisition Corp. ("Holdings"), a newly formed Delaware corporation owned by Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management Partners III, L.P. (collectively, "Oak Hill") acquired all of the outstanding capital stock of Dave & Buster's Holdings, Inc. ("D&B Holdings") from Wellspring Capital Partners III, L.P. ("Wellspring") and HBK Main Street Investors L.P. ("HBK" and, together with Wellspring, the "Sellers"). In connection therewith, Games Merger Corp., a newly formed Missouri corporation and an indirect wholly-owned subsidiary of Holdings, merged (the "OH Merger") with and into D&B Holdings' wholly-owned, direct subsidiary, Dave & Buster's, Inc. (with Dave & Buster's, Inc. being the surviving corporation in the OH Merger). After the acquisition transactions described above (collectively "the Acquisition"), Oak Hill indirectly controls approximately 96 percent and certain members of our Board of Directors and management control approximately 4 percent of the outstanding capital stock of Holdings. Subsequent to the transactions described above, Holdings changed its name to Dave & Buster's Parent, Inc.

On the closing date of the Acquisition, the following events occurred:

- All outstanding shares of D&B Holdings' common stock, other than shares held by Holdings, were converted into the right to receive the per share acquisition consideration;
- All vested options to acquire D&B Holdings' common stock were converted into the right to receive an amount in cash equal to the difference between the per share exercise price and the per share acquisition consideration without interest;
- · We retired all outstanding debt and accrued interest related to our existing senior credit facility and senior notes (Note 6);

# NOTES TO CONSOLIDATED FINANCIAL STATEMENTS—(Continued)

#### (Predecessor)

- We issued \$200,000 of 11 percent senior notes due 2018;
  - We entered into a new senior secured credit facility which provides for senior secured financing of up to \$200,000 consisting of:
  - a \$150,000 term loan facility with a maturity on June 1, 2016, and
  - a \$50,000 revolving credit facility, including a sub-facility of up to the U.S. dollar equivalent of \$1,000 for borrowings in Canadian dollars by our Canadian subsidiary, a letter of credit sub-facility, and a swingline sub-facility, with a maturity on June 1, 2015.

The Acquisition will be accounted for in accordance with accounting guidance for business combinations and, accordingly will result in the recognition of assets acquired and liabilities assumed at fair value. As of the date of these financial statements, the valuation studies necessary to estimate the fair value of the assets and liabilities and to allocate the cost of the acquisition have not been completed. Based on the allocation of purchase price, we expect that depreciation of fixed assets and amortization of finite lived intangible assets may change from historical amounts and such changes could be material.

As a result of the Acquisition, effective June 1, 2010, we are no longer subject to the reporting requirements of the Securities Exchange Act of 1934. The New Senior Notes contain registration rights. We anticipate the New Senior Notes will be exchanged for notes registered within 210 days of the close of the Acquisition.

Accounting principles generally accepted in the United States require operating results for Dave & Buster's, Inc. prior to the Acquisition completed June 1, 2010 to be presented as the Predecessor's results in the historical financial statements. Operating results subsequent to the Merger will be presented as the Successor's results and will include all periods including and subsequent to June 1, 2010.

In connection with the Acquisition all outstanding options vested under the original terms of the option agreements. All vested options were converted into the right to receive an amount in cash equal to the difference between the per share exercise price and the per share acquisition consideration. Accordingly, we will record additional stock based compensation to be determined based on the grant date fair value of the outstanding options.

# UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS (PREDECESSOR) FOR THE THIRTEEN WEEK PERIODS ENDED

MAY 2, 2010 AND MAY 3, 2009

# DAVE & BUSTER'S, INC. CONSOLIDATED BALANCE SHEETS

# (Predecessor) (in thousands, except share amounts)

	May 2, 2010	January 31, 2010
ASSETS	(unaudited)	(audited)
ASSE 1 S Current assets:		
Cash and cash equivalents	\$ 19.017	\$ 16.682
Inventories	13,972	13,782
Prepaid expenses	10,516	8,347
Deferred income taxes	5,246	5,308
Income tax receivable	1,038	51
Other current assets	4,533	2,616
Total current assets	54,322	46,786
Property and equipment, net	285,732	294,151
Tradename	63,000	63,000
Goodwill	65,857	65,857
Other assets and deferred charges	13,660	13,846
Total assets	\$482,571	\$483,640
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current liabilities:		
Current installments of long-term debt (Note 5)	\$ 956	\$ 836
Accounts payable	22,559	21,414
Accrued liabilities	42,005	51,239
Income taxes payable	5,671	1,136
Deferred income taxes	39	180
Total current liabilities	71,230	74,805
Deferred income taxes	9,945	11,493
Deferred occupancy costs	66,307	66,615
Other liabilities	11,916	11,667
Long-term debt, less current installments (Note 5)	226,169	226,414
Commitment and contingencies (Note 6)		
Stockholders' equity: (Note 1)		
Common stock, \$0.01 par value, 1,000 authorized; 100 issued and Outstanding as of May 2, 2010 and January 31, 2010	_	
Preferred stock, 10,000,000 authorized; none issued	_	_
Paid-in capital	112,320	112,069
Accumulated comprehensive income	412	216
Retained earnings (deficit)	(15,728)	(19,639)
Total stockholders' equity	97,004	92,646
Total liabilities and stockholders' equity	\$482,571	\$483,640

See accompanying notes to consolidated financial statements.

# DAVE & BUSTER'S, INC. CONSOLIDATED STATEMENTS OF OPERATIONS (Predecessor) (in thousands, unaudited)

	Thirteen Weeks Ended May 2, 2010	Thirteen Weeks Ended May 3, 2009
Food and beverage revenues	\$ 71,357	\$ 71,000
Amusement and other revenues	70,218	67,426
Total revenues	141,575	138,426
Cost of food and beverage	17,277	17,406
Cost of amusement and other	10,586	9,549
Total cost of products	27,863	26,955
Operating payroll and benefits	33,468	34,532
Other store operating expenses	45,605	42,604
General and administrative expenses	8,617	7,405
Depreciation and amortization expense	12,501	12,733
Pre-opening costs	1,189	1,146
Total operating costs	129,243	125,375
Operating income	12,332	13,051
Interest expense, net	5,348	5,549
Income before provision for income taxes	6,984	7,502
Provision for income taxes	3,073	2,335
Net income	\$ 3,911	\$ 5,167

See accompanying notes to consolidated financial statements.

# DAVE & BUSTER'S, INC. CONSOLIDATED STATEMENTS OF CASH FLOWS

# (Predecessor) (in thousands, unaudited)

	For the Thirteen Weeks Ended May 2, 2010	For the Thirteen Weeks Ended May 3, 2009
Cash flows from operating activities:		
Net income	\$ 3,911	\$ 5,167
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation and amortization expense	12,501	12,733
Deferred income tax expense	(1,627)	(1,994)
Stock-based compensation charges	251	10
Other, net	3,499	195
Changes in assets and liabilities:		
Inventories	(190)	1,396
Prepaid expenses	(2,169)	(2,501)
Income tax receivable	(987)	—
Other current assets	(1,917)	(621)
Other assets and deferred charges	(214)	222
Accounts payable	1,145	1,003
Accrued liabilities	(9,234)	(10,574)
Income taxes payable	4,535	4,458
Deferred occupancy costs	(308)	1,491
Other liabilities	249	(82)
Net cash provided by operating activities	9,445	10,903
Cash flows from investing activities:		
Capital expenditures	(6,988)	(8,177)
Proceeds from sales of property and equipment	3	
Net cash used in investing activities	(6,985)	(8,177)
Cash flows from financing activities:		
Borrowings under senior credit facility		
Repayments under senior credit facility	(125)	(2,125)
Repayments under senior notes		
Net cash used in financing activities	(125)	(2,125)
Increase in cash and cash equivalents	2,335	601
Beginning cash and cash equivalents	16,682	8,534
Ending cash and cash equivalents	\$ 19,017	\$ 9,135
Supplemental disclosures of cash flow information:		
Cash paid (refunds received) for income taxes, net	\$ 1.173	\$ (76)
Cash paid for interest, net of amounts capitalized	\$ 10,256	\$ 10,409

See accompanying notes to consolidated financial statements.

# DAVE & BUSTER'S, INC. NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS (Predecessor) (in thousands, except per share amounts)

#### Note 1: Summary of Significant Accounting Policies

Basis of presentation—Dave & Buster's, Inc., a Missouri corporation, was acquired on March 8, 2006, by Dave & Buster's Holdings, Inc. ("D&B Holdings"), formerly known as WS Midway Holdings, Inc. D&B Holdings owns no other significant assets or operations other than all of the common stock of Dave & Buster's, Inc. References to "Dave & Buster's," the "Company," "we," "us," and "our" are references to Dave & Buster's, Inc. and its subsidiaries. All material intercompany accounts and transactions have been eliminated in consolidation.

Our one industry segment is the ownership, operation and licensing of high-volume entertainment and dining venues under the names "Dave & Buster's," and "Dave & Buster's Grand Sports Café." As of May 2, 2010, there were 56 company-owned locations in the United States and Canada and one franchise location in Canada.

Our fiscal year ends on the Sunday after the Saturday closest to January 31. All references to the first quarter of 2010 and 2009 relate to the thirteen week periods ending on May 2, 2010 and May 3, 2009, respectively. All references to fiscal 2010 and 2009 relate to the 52 week periods ending on January 30, 2011 and January 31, 2010, respectively. In the opinion of management, these financial statements contain all adjustments (consisting of normal recurring entries) necessary to present fairly the financial position, results of operations and cash flows for the periods indicated. However, these operating results are not necessarily indicative of the results expected for the full fiscal year. We expect significant fluctuations in quarterly results due to timing of new unit openings and seasonality associated with the year-end holidays. All dollar amounts are presented in thousands, unless otherwise noted, except share amounts.

Use of estimates—The preparation of financial statements in conformity with generally accepted accounting principles requires us to make certain estimates and assumptions that affect the amounts reported in the financial statements and accompanying notes. Actual results could differ from those estimates.

*Cash and cash equivalents*—We consider amounts receivable from credit card companies and all highly liquid temporary investments with original maturities of three months or less to be cash equivalents.

Accounting for income taxes—We use the liability method for recording income taxes, which recognizes the amount of current and deferred taxes payable or refundable at the date of the financial statements as a result of all events that are recognized in the financial statements and as measured by the provisions of enacted tax laws. We have adopted accounting guidance for uncertainty in income taxes. This guidance limits the recognition of income tax benefits to those items that meet the "more likely than not" threshold on the effective date.

The calculation of tax liabilities involves significant judgment and evaluation of uncertainties in the interpretation of state tax regulations. As a result, we have established reserves for taxes that may become payable in future years as a result of audits by tax authorities. Tax reserves are reviewed regularly pursuant to accounting guidance for uncertainty in income taxes. Tax reserves are adjusted as events occur that affect the potential liability for additional taxes, such as the expiration of statutes of limitations, conclusion of tax audits, identification of additional exposure based on current calculations, identification of new issues, or the issuance of statutory or administrative guidance or rendering of a court decision affecting a particular issue. Accordingly, we may experience significant changes in tax reserves in the future, if or when such events occur.

Comprehensive income — Comprehensive income is defined as the change in equity of a business enterprise during a period from transactions and other events and circumstances from non-owner sources. In addition to net

## NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

income (loss), unrealized foreign currency translation gain (loss) is included in comprehensive income. Unrealized translation gains (losses) for the thirteen week periods ended May 2, 2010 and May 3, 2009 were \$196 and \$25, respectively.

*Recent accounting pronouncements*—In January 2010, the Financial Accounting Standards Board ("FASB") amended the guidance related to fair value measurements and disclosures. This guidance uses a three-level fair value hierarchy that prioritizes the inputs used to measure fair value and requires companies to provide additional disclosures based on that hierarchy. The three-levels of inputs used to measure fair value are as follows: Level 1 defined as observable inputs such as quoted prices in active markets for identical assets or liabilities as of the reporting date, Level 2 defined as pricing inputs other than quoted prices in active markets included in Level 1, which are either directly or indirectly observable as of the reporting date, Level 3 defined as pricing inputs that are generally less observable from objective sources. Effective for interim and annual reporting periods beginning after December 15, 2009, disclosure of the amount of and reasons for significant transfers in and out of Level 1 and Level 2 fair value measurements is required. The amendment also clarified that for Level 2 and Level 3 fair value measurements, valuation techniques and inputs used for both recurring and nonrecurring fair value measurements are required to be disclosed. The adoption of this guidance on February 1, 2010 did not have a material impact on the Company's Consolidated Financial Statements. See Note 3 for the Company's disclosures required by this guidance. Additionally, effective for fiscal years beginning after December 15, 2010, a reporting entity should separately present information about purchases, sales, issuances and settlements on a gross basis in its reconciliation of Level 3 recurring fair value measurements. This accounting guidance is not expected to materially affect the Company's Consolidated Financial Statements.

#### Note 2: Casualty loss

On May 2, 2010, flooding occurred in Nashville, Tennessee causing considerable damage to the city and surrounding area. Our Nashville store sustained significant damage, as did the retail mall where our store is located. The store is covered by up to \$25,000 in property and business interruption insurance subject to an overall deductible of one thousand dollars. We have initiated property insurance claims, including business interruption, with our insurers. We cannot estimate at this time when the store will be back in operation.

As of May 2, 2010, we have reduced the carrying value of inventories and property and equipment, net at this location and recorded a corresponding \$3,500 receivable related to the anticipated insurance proceeds for these items. The \$3,500 insurance receivable is included in "Other current assets" on the Company's consolidated balance sheet. This receivable represents our estimate of the carrying value of net assets recoverable from our insurance policies based on the coverage in place and correspondence with our insurance carriers. We have not recorded any gains or losses resulting from the flood with the exception of the one thousand dollar deductible.

#### Note 3: Fair Value

In September 2006, the FASB issued new accounting guidance, which establishes a framework for measuring fair value and requires enhanced disclosures about fair value measurements. The new accounting guidance, which we adopted February 4, 2008, requires companies to disclose the fair value of their financial instruments according to the three-level fair value hierarchy discussed in Note 1. The FASB issued new accounting guidance in February 2008 which delayed the effective date for certain fair value measurements. Effective February 2, 2009, we adopted this guidance and the required disclosure relating to our interest rate swap contracts is presented below.

## NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

As discussed more fully in Note 5, the fair value of our interest rate swap contracts is determined by third parties by means of a mathematical model that calculates the present value of the anticipated cash flows from the transaction using mid-market prices and other economic data and assumptions, or by means of pricing indications from one or more other dealers selected at their discretion.

The following table presents our financial assets and liabilities as of May 2, 2010 that were measured at fair value on a recurring basis:

	Fair Value Measurements		
	Level 1	Level 2	Level 3
Liabilities:			
Interest rate swap contracts		\$1,503	_

#### Note 4: Accrued Liabilities

Accrued liabilities consist of the following:

	May 2, 2010	January 31, 2010
Compensation and benefits	\$ 8,836	\$ 11,698
Interest	4,126	9,305
Deferred amusement revenue	8,404	8,076
Amusement redemption liability	4,077	4,175
Deferred gift card revenue	3,431	3,729
Sales and use taxes	2,585	2,767
Customer deposits	2,299	1,434
Property taxes	3,012	2,683
Other	5,235	7,372
Total accrued liabilities	\$ 42,005	\$ 51,239

#### Note 5: Long-Term Debt

Long-term debt consisted of the following:

	May 2, 2010	January 31, 2010
Senior credit facility—revolving	<u> </u>	\$ —
Senior credit facility—term	67,125	67,250
Senior notes	160,000	160,000
	227,125	227,250
Less current installments	956	836
Long-term debt, less current installments	\$ 226,169	\$ 226,414

Senior Credit Facility—As of May 2, 2010 our senior secured credit facility ("senior credit facility") consisted of (a) provides a \$100,000 term loan facility with a maturity date of March 8, 2013 and (b) provides a \$60,000 revolving credit facility with a maturity date of March 8, 2011. The \$60,000 revolving credit facility

## NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

includes (i) a \$20,000 letter of credit sub-facility, (ii) a \$5,000 swingline sub-facility and (iii) a \$5,000 (in U.S. Dollar equivalent) sub-facility available in Canadian dollars to our Canadian subsidiary. The revolving credit facility is used to provide financing for working capital and general corporate purposes. As of May 2, 2010, in addition to the borrowings indicated above, we had \$5,641 in letters of credit outstanding.

The interest rates per annum applicable to loans, other than swingline loans, under the senior credit facility are, at our option, equal to, either a base rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian revolving credit facility, 30, 60, 90 or 180-day) interest periods chosen by us, in each case, plus an applicable margin percentage. Swingline loans bear interest at the base rate plus the applicable margin. The weighted average rate of interest on borrowings under our senior credit facility was 5.20 percent at May 2, 2010.

Our senior credit facility requires compliance with financial covenants including a minimum fixed charge coverage ratio test and a maximum leverage ratio test. We are required to maintain a minimum fixed charge coverage ratio of 1.20:1.00 and a maximum leverage ratio of 3.75:1.00 until the fourth quarter of fiscal year 2010, at which time the maximum leverage ratio decreases to 3.50:1.00. In addition, our senior credit facility includes negative covenants restricting or limiting the ability of D&B Holdings and its subsidiaries to, among other things, incur additional indebtedness, make capital expenditures, make distributions or payments to affiliates outside the normal course of business and sell or acquire assets. Virtually all of our assets are pledged as collateral for the senior credit facility.

The senior credit facility also contains certain customary representations and warranties, affirmative covenants and events of default, including payment defaults, breaches of representations and warranties, covenant defaults, cross-defaults and cross-acceleration to certain indebtedness, certain events of bankruptcy, certain events under ERISA, material judgments, actual or asserted failures of any guarantee or security document supporting the senior credit facility to be in full force and effect and a change of control. If an event of default occurs, the lenders under the senior credit facility would be entitled to take various actions, including acceleration of amounts due under the senior credit facility and all actions permitted to be taken by a secured creditor.

#### Senior Credit Facility (Successor)

In connection with the Acquisition, we terminated our existing credit facility and entered into a new credit facility that will (a) provide a \$150,000 term loan facility with a maturity date of June 1, 2016 and (b) provide a \$50,000 revolving credit facility with a maturity date of June 1, 2015. The \$50,000 revolving credit facility will include (i) a \$20,000 letter of credit sub-facility (ii) a \$5,000 swingline sub-facility and (iii) a \$1,000 (in US Dollar equivalent) sub-facility available in Canadian dollars to the Canadian subsidiary. The revolving credit facility will be used to provide financing for general purposes. Upon consummation of the Acquisition we drew approximately \$150,000 under the term loan facility, \$2,000 under the new revolving credit facility and had \$5,641 in letters of credit outstanding.

The interest rates per annum applicable to loans, other than swingline loans, under our new senior secured credit facility are, at our option, equal to either a base rate (or, in relation to the Eurodollar rate and in the case of the Canadian revolving credit facility, a Canadian prime rate) or a Eurodollar rate (or, in the case of the Canadian cost funds rate) for one-, two-, three- or six-month (or, if agreed by the applicable lenders, nine or twelve months) or, in relation to the Canadian revolving credit facility, 30-, 60-, 90- or

### NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

180-day interest periods chosen by us or the Canadian Borrower, as applicable in each case, plus an applicable margin percentage. Swingline loans bear interest at the base rate plus the applicable margin.

Derivative instrument—In March 2008, the FASB issued new accounting guidance regarding disclosures about derivative instruments and hedging activities. Entities with instruments subject to this accounting guidance are required to provide qualitative disclosures including (a) how and why derivative instruments are used, (b) how derivative instruments and related hedge items are accounted for under this accounting guidance, and its related interpretations, and (c) how derivative instruments and related hedge items affect an entity's financial position, financial performance, and cash flows. Additionally, under this accounting guidance, entities must disclose the fair values of derivative instruments and their gains and losses in a tabular format that identifies the location of derivative positions and the effect of their use in an entity's financial statements. Effective February 2, 2009, we adopted the new guidance. The new disclosure requirements are presented below.

At May 2, 2010, we held two interest rate swap contracts that expire in 2011. The interest rate swaps are utilized to change a portion of the variable rate debt on our senior credit facility to fixed rate debt. Pursuant to the swap contracts, the interest rate on notional amounts aggregating \$35,000 at May 2, 2010 is fixed at 5.31 percent plus applicable margin. The notional amounts decline ratably over the term of the contracts. The contracts have not been designated as hedges and adjustments to mark the instruments to their fair value are recorded as interest income/expense. In connection with the Acquisition (see Note 8), our interest rate swap contracts were terminated on June 1, 2010.

The fair value and balance sheet location of our derivative instrument is as follows:

		Liability Derivative		
	May 2, 2010	May 2, 2010 January 31,		)
Derivatives not designated	Balance Sheet		Balance Sheet	
as hedging instruments	Location	Fair Value	Location	Fair Value
Interest rate swap contracts	Accrued liabilities	\$ 1,503	Accrued liabilities	\$ 2,114

The effect of our derivative instrument on our consolidated statements of operations is as follows:

		Amount of Gain (Loss) Recognized In Income on Derivative	
	Location of Gain		
	(Loss)		
	Recognized In	Thirteen Weeks	Thirteen Weeks
	Income on	Ended	Ended
Derivative not designated as hedging instruments	Derivative	May 2, 2010	May 3, 2009
Interest rate swap contracts	Interest expense, net	\$ 611	\$ 614

Senior notes—As of May 2, 2010 our senior notes are general unsecured, unsubordinated obligations and mature on March 15, 2014. Interest on the senior notes compounds semi-annually and accrues at the rate of 11.25 percent per annum. On or after March 15, 2010, we may redeem all, or from time-to-time, a part of the senior notes upon not less than 30 nor more than 60 days notice, at a redemption price of 105.625 percent (expressed as a percentage of principal amount) plus accrued and unpaid interest on the senior notes. As of May 2, 2010, our \$160,000 of senior notes had an approximate fair value of \$168,400 based on quoted market prices.

### NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

Debt obligations—The following table sets forth our future debt payment obligations as of May 2, 2010 (excluding repayment obligations under the revolving portion of our senior credit facility

	Debt Outstanding at May 2, 2010
1 year or less	\$ 956
2 years	982
3 years	65,187
4 years	160,000
5 years	—
Thereafter	
Total future payments	\$ 227,125

The following table sets forth our recorded interest expense, net:

	Thirteen Weeks Ended May 2, 2010	Thirteen Weeks Ended May 3, 2009
Gross interest expense	\$ 5,529	\$ 5,792
Capitalized interest	(110)	(169)
Interest income	(71)	(74)
Total interest expense, net	\$ 5,348	\$ 5,549

#### Note 6: Commitments and Contingencies

We have reached an agreement with the Federal Trade Commission ("FTC") on the terms and provisions of a Complaint and Agreement Containing Consent Order (the "Order") that concludes and settles an investigation into our information security practices. The investigation related to a 2007 criminal attack upon our computer system during which approximately 130,000 payment cards used at eleven of our stores were compromised. The terms of the Order provide that we failed to provide reasonable and appropriate security for personal information on our computer networks. Specifically, we failed to (a) employ sufficient measures to detect and prevent unauthorized access to computer networks, (b) adequately restrict third-party access to our networks, (c) monitor and filter outbound traffic from our networks (to identify and block the unauthorized export of sensitive personal information), (d) limit access between in-store networks, and (e) limit access to our computer networks through wireless access points.

Under our settlement with the FTC, we are required to establish, implement, and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. This information security program will contain administrative, technical, and physical safeguards designed to (a) identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information (b) control the identified risks, and (c) ensure that our third-party service providers are capable of appropriately safeguarding personal information they receive from us. As part of the development of the information security program, for a ten-year period, we must obtain initial and biennial assessments and reports from an independent auditor that set out the safeguards implemented and maintained by us, and explain how such safeguards meet or exceed the protections required by the terms of the Order. The Order shall be binding upon us for twenty years. The Order does not require us to pay

### NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

any fines or other monetary assessments and we do not believe that the terms of the Order will have a material adverse effect on our business, operations, or financial performance.

We are subject to certain legal proceedings and claims that arise in the ordinary course of its business. In the opinion of management, based upon consultation with legal counsel, the amount of ultimate liability with respect to such legal proceedings and claims will not materially affect the consolidated results of our operations or our financial condition.

We lease certain property and equipment under various non-cancelable capital and operating leases. Some of the leases include options for renewal or extension on various terms. Most of the leases require us to pay property taxes, insurance, and maintenance of the leased assets. Certain leases also have provisions for additional percentage rentals based on revenues.

The following table sets forth our lease commitments as of May 2, 2010:

	Operating Lease Obligations at May 2, 2010
1 year or less	\$ 46,068
2 years	45,478
3 years	44,495
4 years	43,961
5 years	43,840
Thereafter	233,283
	\$ 457,125

We have signed an operating lease agreement for a site located in Roseville, California, which opened May 3, 2010; the future obligations related to this location are included in the table above. We have also signed lease agreements for certain future sites. Our commitments under these agreements are contingent upon among other things, the landlord's delivery of access to the premises for construction. Future obligations related to these agreements are not included in the table above.

#### Note 7: Condensed Consolidating Financial Information

The senior notes (described in Note 5) are guaranteed on a senior basis by all domestic subsidiaries of the Company. The subsidiaries' guarantee of the senior notes are full and unconditional and joint and several.

The accompanying condensed consolidating financial information have been prepared and presented pursuant to SEC Regulation S-X Rule 3-10 "Financial statements of guarantors and issuers of guaranteed securities registered or being registered." No other condensed consolidating financial statements are presented herein. The results of operations and cash flows from operating activities from the non-guarantor subsidiary were \$62 and \$(116), respectively, for the thirteen week period ended May 2, 2010 and \$161 and \$(465), respectively for the thirteen week period ended May 3, 2009. There are no restrictions on cash distributions from the non-guarantor subsidiary.

# DAVE & BUSTER'S, INC. NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

# May 2, 2010

	Issuer and Subsidiary Guarantors	Subsidiary <u>Non-Guarantors</u>	Consolidating Adjustments	Dave & Buster's, Inc.
Assets:				
Current assets	\$ 52,492	\$ 1,830	\$ —	\$ 54,322
Property and equipment, net	281,323	4,409	—	285,732
Tradename	63,000	_		63,000
Goodwill	65,857	—	—	65,857
Investment in sub	4,013		(4,013)	—
Other assets and deferred charges	13,583	77		13,660
Total assets	\$480,268	\$ 6,316	\$ (4,013)	\$ 482,571
	Issuer and Subsidiary Guarantors	Subsidiary Non-Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Liabilities and stockholders' equity:	Subsidiary			
Liabilities and stockholders' equity: Current liabilities	Subsidiary			
	Subsidiary Guarantors	Non-Guarantors	Adjustments	Buster's, Inc.
Current liabilities	Subsidiary Guarantors \$ 69,179	Non-Guarantors	Adjustments	Buster's, Inc. \$ 71,230
Current liabilities Deferred income taxes	Subsidiary Guarantors \$ 69,179 9,945	Non-Guarantors \$ 2,051	Adjustments	Buster's, Inc. \$ 71,230 9,945
Current liabilities Deferred income taxes Deferred occupancy costs	Subsidiary Guarantors \$ 69,179 9,945 66,055	Non-Guarantors \$ 2,051	Adjustments	Buster's, Inc. \$ 71,230 9,945 66,307
Current liabilities Deferred income taxes Deferred occupancy costs Other liabilities	Subsidiary Guarantors \$ 69,179 9,945 66,055 11,916	Non-Guarantors \$ 2,051	Adjustments	Buster's, Inc. \$ 71,230 9,945 66,307 11,916

## January 31, 2010

	Issuer and Subsidiary Guarantors	Subsidiary Non-Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Assets:				
Current assets	\$ 44,692	\$ 2,094	\$ —	\$ 46,786
Property and equipment, net	289,817	4,334	—	294,151
Tradename	63,000	_		63,000
Goodwill	65,857			65,857
Investment in sub	3,755	—	(3,755)	—
Other assets and deferred charges	13,773	73		13,846
Total assets	\$480,894	\$ 6,501	\$ (3,755)	\$ 483,640

### NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

	Issuer and Subsidiary Guarantors	Subsidiary Non-Guarantors	Consolidating Adjustments	Dave & Buster's, Inc.
Liabilities and stockholders' equity:				
Current liabilities	\$ 72,285	\$ 2,520	\$ —	\$ 74,805
Deferred income taxes	11,493	—	—	11,493
Deferred occupancy costs	66,389	226	—	66,615
Other liabilities	11,667	_	—	11,667
Long-term debt, less current installments (Note 5)	226,414	—	—	226,414
Stockholders' equity	92,646	3,755	(3,755)	92,646
Total liabilities and stockholders' equity	\$480,894	\$ 6,501	\$ (3,755)	\$ 483,640

### Note 8: Subsequent Event

On June 1, 2010, Games Acquisition Corp. ("Holdings"), a newly-formed Delaware corporation owned by Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management Partners III, L.P. (collectively, "Oak Hill") acquired all of the outstanding capital stock of Dave & Buster's Holdings, Inc. ("D&B Holdings") from Wellspring Capital Partners III, L.P. ("Wellspring") and HBK Main Street Investors L.P. ("HBK" and, together with Wellspring, the "Sellers"). In connection therewith, Games Merger Corp., a newly-formed Missouri corporation and an indirect wholly-owned subsidiary of Holdings, merged (the "OH Merger") with and into D&B Holdings' wholly-owned, direct subsidiary, Dave & Buster's, Inc. (with Dave & Buster's, Inc. being the surviving corporation in the OH Merger). After the acquisition transactions described above (collectively, "the Acquisition"), Oak Hill indirectly controls approximately 97 percent and certain members of our management control approximately 3 percent of the outstanding capital stock of Holdings. Subsequent to the transactions described above, Holdings changed its name to Dave & Buster's Parent, Inc.

On the closing date of the Acquisition, the following events occurred:

- All outstanding shares of D&B Holdings' common stock, other than shares held by Holdings, were converted into the right to receive the per share acquisition consideration;
- All vested options to acquire D&B Holdings' common stock were converted into the right to receive an amount in cash equal to the difference between the per share exercise price and the per share acquisition consideration without interest;
- We retired all outstanding debt and accrued interest related to our existing senior credit facility and senior notes;
- We issued \$200,000 of 11 percent senior notes due 2018 ("New Senior Notes");
- We entered into a senior secured credit facility which provides for senior secured financing of up to \$200,000 consisting of:
  - a \$150,000 term loan facility with a maturity on June 1, 2016, and
  - a \$50,000 revolving credit facility, including a sub-facility of up to the U.S. dollar equivalent of \$1,000 for borrowings in Canadian dollars by our Canadian subsidiary, a letter of credit sub-facility, and a swingline sub-facility, with a maturity on June 1, 2015.

Accounting principles generally accepted in the United States require operating results for Dave & Buster's Inc. prior to the Acquisition completed June 1, 2010 to be presented as the Predecessor's results in the historical

### NOTES TO UNAUDITED CONSOLIDATED FINANCIAL STATEMENTS—(Continued) (Predecessor)

financial statements. Operating results subsequent to the Merger will be presented as the Successor's results and will include all periods including and subsequent to June 1, 2010.

The Acquisition will be accounted for in accordance with accounting guidance for business combinations and, accordingly will result in the recognition of assets acquired and liabilities assumed at fair value. As of the date of these financial statements, the valuation studies necessary to estimate the fair value of the assets and liabilities and to allocate the cost of the acquisition have not been completed. Based on the allocation of purchase price, we expect that depreciation of fixed assets and amortization of finite lived intangible assets may change from historical amounts and such changes could be material.

As a result of the Acquisition, effective June 1, 2010, we are no longer subject to the reporting requirements of the Securities Exchange Act of 1934. The New Senior Notes contain registration rights. We anticipate the New Senior Notes will be exchanged for notes registered within 210 days of the close of the Acquisition. Accordingly, these interim financial statements have been prepared on a similar basis as if we were an SEC registrant.

We have not authorized any dealer or salesperson or other person to give any information or represent anything not contained in this prospectus. You must not rely on any unauthorized information. This prospectus is not an offer to sell any securities and is not soliciting an offer to buy any securities in any jurisdiction where the offer or sale is not permitted. The information in this prospectus is current only as of the date of this prospectus unless the information specifically indicates that another date applies.

UNTIL , 2010, ALL DEALERS THAT EFFECT TRANSACTIONS IN THESE SECURITIES, WHETHER OR NOT PARTICIPATING IN THIS OFFERING, MAY BE REQUIRED TO DELIVER A PROSPECTUS. THIS IS IN ADDITION TO THE DEALERS' OBLIGATION TO DELIVER A PROSPECTUS WHEN ACTING AS UNDERWRITERS AND WITH RESPECT TO THEIR UNSOLD ALLOTMENTS OR SUBSCRIPTIONS.



Offer to Exchange \$200,000,000 Aggregate Principal Amount of 11% Senior Notes due 2018 that have been registered under the Securities Act of 1933 for Outstanding 11% Senior Notes due 2018

DAVE & BUSTER'S, INC.

PROSPECTUS

Dated , 2010

#### PART II: Information not required in prospectus

### Item 20. Indemnification of Directors and Officers

Generally, under Missouri law, a corporation may indemnify a director or officer against expenses (including attorneys' fees), judgments, fines and settlement payments actually and reasonably incurred in connection with an action, suit or proceeding (other than by or in the right of the corporation) to which he is made a party by virtue of his service to the corporation, provided that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, he had no reasonable cause to believe his conduct was unlawful. With respect to an action or suit by or in the right of a corporation, the corporation may generally indemnify a director or officer against expenses and settlement payments actually and reasonably incurred if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, except that indemnification is not permitted, unless a court otherwise determines it proper, to the extent such person is found liable for negligence or misconduct. Missouri law further states that a corporation shall indemnify a director or officer against expenses actually and reasonably incurred in any of the above actions, suits, or proceedings to the extent such person is successful on the merits or otherwise in defense of the same.

Missouri law generally grants a corporation the power to adopt broad indemnification provisions with respect to its directors and officers, but it places certain restrictions on a corporation's ability to indemnify its officers and directors against conduct which is finally adjudged to have been knowingly fraudulent or deliberately dishonest or to have involved willful misconduct.

Article Seventh of the registrant's Articles of Incorporation eliminates, to the fullest extent permissible under the corporation laws of the State of Missouri, the liability of directors of the registrant and the stockholders for monetary damages for breach of fiduciary duty as a director. Such provisions further provide that indemnification of directors and officers shall be provided to the fullest extent permitted under Missouri law.

An insurance policy obtained by the registrant provides for indemnification of officers and directors of the registrant and certain other persons against liabilities and expenses incurred by any of them in certain stated proceedings and under certain stated conditions.



Item 21.	Exhibits and Financial Statement Schedules
(a) Exhi	ibits.
The f	following is a complete list of Exhibits filed as part of the Registration Statement:
Exhibit Number	Description
3.1	Amended and Restated Certificate of Incorporation of Dave & Buster's, Inc.(1)
3.2	Amended and Restated By-Laws of Dave & Buster's, Inc.(1)
4.1	Indenture dated as of June 1, 2010 among Dave & Buster's, Inc., the Guarantors as defined therein and Wells Fargo National Association, as Trustee.(1)
4.2	Registration Rights Agreement dated as of June 1, 2010 among Dave & Buster's, Inc. the guarantors listed in Schedule I thereto and Initial Purchasers named therein.(1)
4.3	Form of 11% Senior Notes due 2018 (included in Exhibit 4.1).
4.4	Purchase Agreement dated as of May 19, 2010 among Games Merger Corp., JP Morgan Securities and Jefferies & Company.(1)
5.1	Opinion of Hallett & Perrin(1)
10.1	Credit Agreement, dated as of June 1, 2010, among Games Intermediate Merger Corp., Games Merger Corp., 6131646 Canada, Inc. and the several banks and other financial institutions or entities from time to time parties thereto.(1)
10.2	Form of Amended and Restated Employment Agreement, dated as of May 2, 2010, by and among Dave & Buster's Management Corporation, Dave & Buster's, Inc., and the various executive officers of Dave & Buster's, Inc.(1)
10.3	Dave & Buster's Parent, Inc. 2010 Management Incentive Plan(1)
12.1	Statement Regarding Computation of Ratio of Earnings to Fixed Charges(1)
21.1	Subsidiaries of Dave & Buster's, Inc.(1)
23.1	Consent of Ernst & Young LLP.(1)
23.2	Consent of Hallett & Perrin (included as part of Exhibit 5.1).
24.1	Power of attorney of Dave & Buster's, Inc. (included in signature pages hereto).
25.1	Form T-1 Statement of Eligibility of Wells Fargo National Association to act as Trustee under the Indenture.(1)
99.1	Form of Letter of Transmittal.(1)
99.2	Form of Notice of Guaranteed Delivery.(1)
99.3	Form of Letter to Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.(1)
99.4	Form of Letter to Clients.(1)

(1) Filed herewith

#### Item 22. Undertakings

(a) Each of the undersigned registrants hereby undertakes:

1. To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

i. To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;

ii. To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the SEC pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

iii. To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

2. That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

3. To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

4. That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser, each prospectus filed pursuant to Rule 424(b) as part of a registration statement relating to an offering, other than registration statements relying on Rule 430B or other than prospectuses filed in reliance on Rule 430A, shall be deemed to be part of and included in the registration statement as of the date it is first used after effectiveness. Provided, however, that no statement made in a registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such first use, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such date of first use.

5. That, for the purpose of determining liability of the registrant under the Securities Act of 1933 to any purchaser in the initial distribution of the securities, each of the undersigned registrants undertake that in a primary offering of securities of the undersigned registrants pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

i. Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424;

ii. Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

iii. The portion of any other free writing prospectus relating to the offering containing material information about the undersigned registrant or its securities provided by or on behalf of the undersigned registrant; and

iv. Any other communication that is an offer in the offering made by the undersigned registrant to the purchaser.

(b) Each of the undersigned registrants hereby undertakes that, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act of 1933 and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

(d) Each of the undersigned registrants hereby undertakes:

1. To respond to requests for information that is incorporated by reference into the prospectus pursuant to Items 4, 10(b), 11, or 13 of this Form S-4, within one business day of receipt of such request, and to send the incorporated documents by first class mail or other equally prompt means. This includes information contained in documents filed subsequent to the effective date of the registration statement through the date of responding to the request.

2. To supply by means of a post-effective amendment all information concerning a transaction, and the company being acquired or involved therein, that was not the subject of and included in the registration statement when it became effective.

### Signatures

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 10 day of August, 2010.

DAVE	& BUSTER'S, INC.
By:	/s/ STEPHEN M. KING
Name:	Stephen M. King
Title:	Chief Executive Officer

DATE & DUCTEDIC DIC

Each of the undersigned, being a director or officer of Dave & Buster's, Inc., a Missouri corporation, hereby constitutes and appoints Jay L. Tobin his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this registration statement, and any registration statement related to the offering contemplated by this registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act of 1933, and to file the same, with all exhibits thereto and all other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done to the end that such registration statement or registration statements shall comply with the Securities Act of 1933, as amended, and the applicable rules and regulations adopted or issued pursuant thereto, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them or their substitute or resubstitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ STEPHEN M. KING Stephen M. King	Chief Executive Officer (Principal Executive Officer) and Director	August 10, 2010
/s/ STARLETTE B. JOHNSON Starlette B. Johnson	President and Director	August 10, 2010
/s/ BRIAN A. JENKINS Brian A. Jenkins	Senior Vice President and Chief Financial Officer (Principal Financial Officer)	August 10, 2010
/s/ MICHAEL J. METZINGER Michael J. Metzinger	Vice President—Accounting and Controller (Principal Accounting Officer)	August 10, 2010
/s/ TYLER J. WOLFRAM Tyler J. Wolfram	Director	August 10, 2010
/s/ MICHAEL S. GREEN Michael S. Green	Director	August 10, 2010
/s/ KEVIN M. MAILENDER Kevin M. Mailender	Director	August 10, 2010
/s/ ALAN J. LACY Alan J. Lacy	Director	August 10, 2010
/s/ DAVID A. JONES David A. Jones	Director	August 10, 2010

#### Signatures

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 10 day of August, 2010.

D&B Leasing, Inc. D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Tango Acquisition, Inc. **Tango License Corporation** Tango of Arizona, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc.

By:	/s/ STEPHEN M. KING
Name:	Stephen M. King
Title:	President

Each of the undersigned, being a director or officer of the above-named companies, hereby constitutes and appoints Jay L. Tobin his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this registration statement, and any registration statement related to the offering contemplated by this registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act of 1933, and to file the same, with all exhibits thereto and all other documents in connection therewith, with the Securities and Exchange Commission, granting unto said

attorney-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done to the end that such registration statement or registration statements shall comply with the Securities Act of 1933, as amended, and the applicable rules and regulations adopted or issued pursuant thereto, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them or their substitute or resubstitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Signature	Titte	Date
/s/ JAY L. TOBIN Jay L. Tobin	Director	August 10, 2010
/s/ STEPHEN M. KING Stephen M. King	President and Director (Principal Executive, Financial and Accounting Officer)	August 10, 2010

#### Signatures

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 10 day of August, 2010.

### **D&B** Marketing Company, LLC

By:	/s/ STEPHEN M. KING
Name:	Stephen M. King
Title:	President

Each of the undersigned, being a member or officer of D&B Marketing Company, LLC, hereby constitutes and appoints Jay L. Tobin his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this registration statement, and any registration statement related to the offering contemplated by this registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act of 1933, and to file the same, with all exhibits thereto and all other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done to the end that such registration statement or registration statements shall comply with the Securities Act of 1933, as amended, and the applicable rules and regulations adopted or issued pursuant thereto, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them or their substitute or resubstitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ STEPHEN M. KING Stephen M. King	President (Principal Executive Officer)	August 10, 2010
/s/ MICHAEL J. METZINGER Michael J. Metzinger	Treasurer and Chief Financial Officer (Principal Financial and Accounting Officer)	August 10, 2010
/s/ STEPHEN M. KING Stephen M. King, as CEO of Dave & Buster's, Inc. (sole member)	Sole Member	August 10, 2010

#### Signatures

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 10 day of August, 2010.

### Tango of Arundel, Inc.

By:	/s/ JAY L. TOBIN
Name:	Jay L. Tobin
Title:	President

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ JAY L. TOBIN Jay L. Tobin	President and Director (Principal Executive, Financial and Accounting Officer)	August 10, 2010

### Signatures

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 10 day of August, 2010.

#### Dave & Buster's I, L.P.

By Dave & Buster's, Inc., its general partner

By:	/s/ STEPHEN M. KING
Name:	Stephen M. King
Title:	President

Each of the undersigned, being a director or officer of the above-named companies, hereby constitutes and appoints Jay L. Tobin his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this registration statement, and any registration statement related to the offering contemplated by this registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act of 1933, and to file the same, with all exhibits thereto and all other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done to the end that such registration statement or registration statements shall comply with the Securities Act of 1933, as amended, and the applicable rules and regulations adopted or issued pursuant thereto, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them or their substitute or resubstitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ STEPHEN M. KING Stephen M. King	President (Principal Executive, Financial and Accounting Officer)	August 10, 2010

#### Signatures

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Dallas, State of Texas, on this 10 day of August, 2010.

#### Sugarloaf Gwinnett Entertainment Company, L.P.

By Tango of Sugarloaf, Inc., its general partner

By:	/s/ STEPHEN M. KING
Name:	Stephen M. King
Title:	President

Each of the undersigned, being a director or officer of the above-named companies, hereby constitutes and appoints Jay L. Tobin his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this registration statement, and any registration statement related to the offering contemplated by this registration statement that is to be effective upon filing pursuant to Rule 462(b) under the Securities Act of 1933, and to file the same, with all exhibits thereto and all other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done to the end that such registration statement or registration statements shall comply with the Securities Act of 1933, as amended, and the applicable rules and regulations adopted or issued pursuant thereto, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents, or any of them or their substitute or resubstitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ STEPHEN M. KING Stephen M. King	President (Principal Executive, Financial and Accounting Officer)	August 10, 2010

# EXHIBIT INDEX

Exhibit Number	Description
3.1	Amended and Restated Certificate of Incorporation of Dave & Buster's, Inc.
3.2	Amended and Restated By-Laws of Dave & Buster's, Inc.
4.1	Indenture dated as of June 1, 2010 among Dave & Buster's, Inc., the Guarantors as defined therein and Wells Fargo National Association, as Trustee.
4.2	Registration Rights Agreement dated as of June 1, 2010 among Dave & Buster's, Inc. the guarantors listed in Schedule I thereto and Initial Purchasers named therein.
4.3	Form of 11% Senior Notes due 2018 (included in Exhibit 4.1).
4.4	Purchase Agreement dated as of May 19, 2010 among Games Merger Corp., JP Morgan Securities and Jefferies & Company.
5.1	Opinion of Hallett & Perrin
10.1	Credit Agreement, dated as of June 1, 2010, among Games Intermediate Merger Corp., Games Merger Corp., 6131646 Canada, Inc. and the several banks and other financial institutions or entities from time to time parties thereto.
10.2	Form of Amended and Restated Employment Agreement, dated as of May 2, 2010, by and among Dave & Buster's Management Corporation, Dave & Buster's, Inc., and the various executive officers of Dave & Buster's, Inc.
10.3	Dave & Buster's Parent, Inc. 2010 Management Incentive Plan
12.1	Statement Regarding Computation of Ratio of Earnings to Fixed Charges
21.1	Subsidiaries of Dave & Buster's, Inc.
23.1	Consent of Ernst & Young LLP.
23.2	Consent of Hallett & Perrin (included as part of Exhibit 5.1).
24.1	Power of attorney of Dave & Buster's, Inc. (included in signature pages hereto).
25.1	Form T-1 Statement of Eligibility of Wells Fargo National Association to act as Trustee under the Indenture.
99.1	Form of Letter of Transmittal.
99.2	Form of Notice of Guaranteed Delivery.
99.3	Form of Letter to Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.
00.4	

II-12

99.4 Form of Letter to Clients.

#### AMENDED AND RESTATED

#### ARTICLES OF INCORPORATION

OF

#### DAVE & BUSTER'S INC.

FIRST: The name of the Corporation is Dave & Buster's Inc. (hereinafter the "Corporation").

SECOND: The address of the registered office of the Corporation in the State of Missouri is 300-B East High Street, Jefferson City, Missouri 65101. The name of its registered agent at that address is Capitol Corporate Services, Inc.

*THIRD*: The purpose of the Corporation is to own, operate and develop restaurant and/or entertainment facilities and to engage in any other lawful act or activity for which a corporation may be organized under the General and Business Corporation Law of the State of Missouri as set forth in Chapter 351 of the Missouri Revised Statutes (the "GBCL").

FOURTH: The duration of the Corporation is perpetual.

*FIFTH*: The total number of shares of stock which the Corporation shall have authority to issue is 1,000 shares of Common Stock, each having a par value of \$.01.

SIXTH: The name and mailing address of the Sole Incorporator is as follows:

NameAddressStephanie Morrison549 N. Van Buren,<br/>Kirkwood, Missouri 63122

SEVENTH: The following provisions are inserted for the management of the business and the conduct of the affairs of the Corporation, and for further definition, limitation and regulation of the powers of the Corporation and of its directors and stockholders:

(1) The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors.

(2) The directors shall have concurrent power with the stockholders to make, alter, amend, change, add to or repeal the By-Laws of the Corporation.

(3) The number of directors of the Corporation shall be as from time to time fixed by, or in the manner provided in, the By-Laws of the Corporation. Election of directors need not be by written ballot unless the By-Laws so provide.

(4) No director shall be personally liable to the Corporation or any of its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 351.345 of the GBCL or (iv) for any transaction from which the director derived an improper personal benefit. Any repeal or modification of this Article SEVENTH by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification with respect to acts or omissions occurring prior to such repeal or modification.

(5) In addition to the powers and authority hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the Corporation, subject, nevertheless, to the provisions of the GBCL, these Articles of Incorporation, and any By-Laws adopted by the stockholders; provided, however, that no By-Laws hereafter adopted by the stockholders shall invalidate any prior act of the directors which would have been valid if such By-Laws had not been adopted.

(6) Stockholders shall have the power and authority to act by written consent in lieu of meeting. Any such actions by written consent shall be taken pursuant to the procedures set forth in the By-Laws.

*EIGHTH*: The Corporation shall indemnify its directors and officers to the fullest extent authorized or permitted by law, as now or hereafter in effect, and such right to indemnification shall continue as to a person who has ceased to be a director or officer of the Corporation and shall inure to the benefit of his or her heirs, executors and personal and legal representatives; *provided, however*, that, except for proceedings to enforce rights to indemnification, the Corporation shall not be obligated to indemnify any director or officer (or his or her heirs, executors or personal or legal representatives) in connection with a proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of Directors. The right to indemnification conferred by this Article EIGHTH shall include the right to be paid by the Corporation the expenses incurred in defending or otherwise participating in any proceeding in advance of its final disposition.

The Corporation may, to the extent authorized from time to time by the Board of Directors, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Article EIGHTH to directors and officers of the Corporation.

The rights to indemnification and to the advance of expenses conferred in this Article EIGHTH shall not be exclusive of any other right which any person may have or hereafter acquire under these Articles of Incorporation, the By-Laws of the Corporation, any statute, agreement, vote of stockholders or disinterested directors or otherwise.

Any repeal or modification of this Article EIGHTH by the stockholders of the Corporation shall not adversely affect any rights to indemnification and to the advancement of expenses of a director or officer of the Corporation existing at the time of such repeal or modification with respect to any acts or omissions occurring prior to such repeal or modification.

*NINTH*: Meetings of stockholders may be held within or without the State of Missouri, as the By-Laws may provide. The books of the Corporation may be kept (subject to any provision contained in the GBCL) outside the State of Missouri at such place or places as may be designated from time to time by the Board of Directors or in the By-Laws of the Corporation.

TENTH: The Corporation reserves the right to amend, alter, change or repeal any provision contained in these Articles of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

#### AMENDED AND RESTATED

### BY-LAWS

OF

### DAVE & BUSTER'S, INC.

### A Missouri Corporation

## (hereinafter called the "Corporation")

### ARTICLE I

#### **OFFICES**

Section 1. Registered Office. The registered office of the Corporation shall be in the City of Jefferson City, County of Cole, State of Missouri.

Section 2. Other Offices. The Corporation may also have offices at such other places, both within and without the State of Missouri, as the Board of Directors may from time to time determine.

#### ARTICLE II

#### MEETINGS OF STOCKHOLDERS

Section 1. *Place of Meetings*. Meetings of the stockholders for the election of directors or for any other purpose shall be held at such time and place, either within or without the State of Missouri, as shall be designated from time to time by the Board of Directors.

Section 2. Annual Meetings. The Annual Meeting of Stockholders for the election of directors shall be held at the hour of 10 o'clock a.m. on the second Tuesday of June of each year. If the day fixed for the Annual Meeting shall be a legal holiday in the place designated for the meeting, such meeting shall be held on the next succeeding business day. Any other proper business may be transacted at the Annual Meeting of Stockholders.

Section 3. *Special Meetings.* Unless otherwise required by law or by the articles of incorporation of the Corporation, as amended and restated from time to time (the "Articles of Incorporation"), Special Meetings of Stockholders, for any purpose or purposes, may be called by either (i) the Chairman, if there be one, or (ii) the President, (iii) any Vice President, if there be one, (iv) the Secretary or (v) any Assistant Secretary, if there be one, and shall be called by any such officer at the request in writing of (i) the Board of Directors, (ii) a committee of the Board of Directors that has been duly designated by the Board of Directors and whose powers and authority include the power to call such meetings or (iii) stockholders owning a majority of the capital stock of the Corporation issued and outstanding and entitled to vote. Such request shall state the purpose or purposes of the proposed meeting. At a Special Meeting of Stockholders, only such business shall be conducted as shall be specified in the notice of meeting (or any supplement thereto).

Section 4. *Notice*. Whenever stockholders are required or permitted to take any action at a meeting, a written notice of the meeting shall be given which shall state the place, date and hour of the meeting, and, in the case of a Special Meeting, the purpose or purposes for which the meeting is called. Unless otherwise required by law, written notice of any meeting shall be given not less than ten (10) nor more than seventy (70) days before the date of the meeting to each stockholder entitled to notice of and to vote at such meeting.

Section 5. *Adjournments*. Any meeting of the stockholders may be adjourned from time to time to reconvene at the same or some other place, and notice need not be given of any such adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than ninety (90) days, or if after the adjournment a new record date is fixed for the adjourned meeting, notice of the adjourned meeting in accordance with the requirements of Section 4 hereof shall be given to each stockholder of record entitled to notice of and to vote at the meeting.

Section 6. *Quorum.* Unless otherwise required by applicable law or the Articles of Incorporation, the holders of a majority of the Corporation's capital stock issued and outstanding and entitled to vote thereat, present in person or represented by proxy, shall constitute a quorum at all meetings of the stockholders for the transaction of business. If, however, such quorum shall not be present or represented at any meeting of the stockholders, the stockholders entitled to vote thereat, present by proxy, shall have power to adjourn the meeting from time to time, in the manner provided in Section 5 hereof, until a quorum shall be present or represented.

Section 7. *Voting*. Unless otherwise required by law, the Articles of Incorporation or these By-Laws, any question brought before any meeting of the stockholders, other than the election of directors, shall be decided by the vote of the holders of a majority of the total number of votes of the Corporation's capital stock represented and entitled to vote thereat, voting as a single class. Unless otherwise provided in the Articles of Incorporation, and subject to Section 11 of this Article II, each stockholder represented at a meeting of the stockholders shall be entitled to cast one (1) vote for each share of the capital stock entitled to vote thereat held by such stockholder. Such votes may be cast in person or by proxy as provided in Section 8 of this Article II. The Board of Directors, in its discretion, or the officer of the Corporation presiding at a meeting of the stockholders, in such officer's discretion, may require that any votes cast at such meeting shall be cast by written ballot.

Section 8. *Proxies.* Each stockholder entitled to vote at a meeting of the stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder as proxy, but no such proxy shall be voted upon after eleven (11) months from its date, unless such proxy provides for a longer period. Without limiting the manner in which a stockholder may authorize another person or persons to act for such stockholder as you which a stockholder may authorize another person or persons to act for such stockholder as proxy, the following shall constitute a valid means by which a stockholder may grant such authority:

(i) A stockholder may execute a writing authorizing another person or persons to act for such stockholder as proxy. Execution may be accomplished by the stockholder or such stockholder's authorized officer, director, employee or agent signing such writing or causing such person's signature to be affixed to such writing by any reasonable means, including, but not limited to, by facsimile signature.

(ii) A stockholder may authorize another person or persons to act for such stockholder as proxy by transmitting or authorizing the transmission of a telegram or cablegram to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive such telegram or cablegram, provided that any such telegram or cablegram must either set forth or be submitted with information from which it can be determined that the telegram or cablegram was authorized by the stockholder. If it is determined that such telegrams or cablegrams are valid, the inspectors or, if there are no inspectors, such other persons making that determination shall specify the information on which they relied.

Any copy, facsimile telecommunication or other reliable reproduction of the writing, telegram or cablegram authorizing another person or persons to act as proxy for a stockholder may be substituted or used in lieu of the original writing, telegram or cablegram for any and all purposes for which the original writing, telegram or cablegram could be used; provided, however, that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing, telegram or cablegram.

Section 9. Consent of Stockholders in Lieu of Meeting. Unless otherwise provided in the Articles of Incorporation, any action required or permitted to be taken at any Annual or Special Meeting of Stockholders of the Corporation may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Such consents shall have the same force and effect as a unanimous vote of the shareholders at a meeting duly held, and may be stated as such in any certificate or document filed under the General and Business Corporation Law of the State of Missouri. The Secretary shall file such consents with the minutes of the meetings of the shareholders.

Section 10. *List of Stockholders Entitled to Vote.* The officer of the Corporation who has charge of the transfer books of the Corporation shall prepare and make, at least ten (10) days before every meeting of the stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be kept on file at the registered office of the Corporation and shall be open to the examination and inspection of any stockholder, during ordinary business hours, for a period of at least ten (10) days prior to the meeting. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present.

Section 11. *Record Date.* In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of the stockholders or any adjournment thereof, the Board of Directors may fix a record date, which record date shall not be more than seventy (70) days before the date of such meeting. If the Board of Directors does not set a record date for the determination of the shareholders entitled to notice of, and to vote at, a meeting of shareholders, only the shareholders who are shareholders of record at the close of business on the twentieth day preceding the date of the meeting shall be entitled to notice of, and to vote at, the meeting, and any adjournment or postponement thereof, except as otherwise provided by statute.

Section 12. *Transfer Books/Stock Ledger*. The transfer books or stock ledger of the Corporation shall be the only evidence as to who are the stockholders entitled to examine the stock ledger, the list required by Section 10 of this Article II or the transfer books of the Corporation, or to vote in person or by proxy at any meeting of the stockholders.

Section 13. *Conduct of Meetings*. The Board of Directors of the Corporation may adopt by resolution such rules and regulations for the conduct of any meeting of the stockholders as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board of Directors, the chairman of any meeting of the stockholders shall have the right and authority to prescribe such rules, regulations and procedures and to do all such acts as, in the judgment of such chairman, are appropriate for the proper conduct of the meeting. Such rules, regulations or procedures, whether adopted by the Board of Directors or prescribed by the chairman of the meeting, may include, without limitation, the following: (i) the establishment of an agenda or order of business for the meeting; (ii) the determination of when the polls shall open and close for any given matter to be voted on at the meeting; (iii) rules and procedures for maintaining order at the meeting and the safety of those present; (iv) limitations on attendance at or participation in the meeting to stockholders of record of the Corporation, their duly authorized and constituted proxies or such other persons as the chairman of the meeting shall determine; (v) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (vi) limitations on the time allotted to questions or comments by participants.

### ARTICLE III

#### DIRECTORS

Section 1. *Number and Election of Directors.* The Board of Directors shall consist of not less than one nor more than fifteen members, the exact number of which shall initially be fixed at two (2) and thereafter from time to time by the Board of Directors. Except as provided in Section 2 of this Article III, directors shall be elected by a plurality of the votes cast at each Annual Meeting of Stockholders and each director's earlier death or removal. Directors need not be stockholders.

Section 2. *Vacancies*. Unless otherwise required by law or the Articles of Incorporation, vacancies arising through death, resignation, removal, an increase in the number of directors or otherwise may be filled only by a majority of the directors then in office, though less than a quorum, or by a sole remaining director, and the directors so chosen shall hold office until the next annual election and until their successors are duly elected and qualified, or until their earlier death, resignation or removal.

Section 3. Duties and Powers. The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors which may exercise all such powers of the Corporation and do all such lawful acts and things as are not by statute or by the Articles of Incorporation or by these By-Laws required to be exercised or done by the stockholders.

Section 4. *Meetings*. The Board of Directors may hold meetings, both regular and special, either within or without the State of Missouri. Regular meetings of the Board of Directors may be held without notice at such time and at such place as may from time to time be determined by the Board of Directors. Special meetings of the Board of Directors may be called by the Chairman, if there be one, the President, or by any director. Notice thereof stating the place, date and hour of the meeting shall be given to each director either by mail not less than forty-eight (48) hours before the date of the meeting, by telephone or telegram on twenty-four (24) hours' notice, or on such shorter notice as the person or persons calling such meeting may deem necessary or appropriate in the circumstances.

Section 5. Organization. At each meeting of the Board of Directors, the Chairman of the Board of Directors, or, in his or her absence, a director chosen by a majority of the directors present, shall act as chairman. The Secretary of the Corporation shall act as secretary at each meeting of the Board of Directors. In case the Secretary shall be absent from any meeting of the Board of Directors, an Assistant Secretary shall perform the duties of secretary at such meeting; and in the absence from any such meeting of the Secretary and all the Assistant Secretaries, the chairman of the meeting may appoint any person to act as secretary of the meeting.

Section 6. *Removals of Directors*. Except as otherwise required by applicable law and subject to the rights, if any, of the holders of shares of preferred stock then outstanding, any director or the entire Board of Directors may be removed from office at any time by the affirmative vote of the holders of at least a majority in voting power of the issued and outstanding capital stock of the Corporation entitled to vote in the election of directors.

Section 7. Quorum. Except as otherwise required by law or the Articles of Incorporation, at all meetings of the Board of Directors, a majority of the entire Board of Directors shall constitute a quorum for the transaction of business and the act of a majority of the directors present at any meeting at which there is a quorum shall be the act of the Board of Directors. If a quorum shall not be present at any meeting of the Board of Directors, the directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting of the time and place of the adjourned meeting, until a quorum shall be present.

Section 8. Actions of the Board by Written Consent. Unless otherwise provided in the Articles of Incorporation or these By-Laws, any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting, if all the members of the Board of Directors or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board of Directors or committee.

Section 9. *Meetings by Means of Conference Telephone*. Unless otherwise provided in the Articles of Incorporation or these By-Laws, members of the Board of Directors of the Corporation, or any committee thereof, may participate in a meeting of the Board of Directors or such committee by means of a conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section 9 shall constitute presence in person at such meeting.

Section 10. *Committees.* The Board of Directors may designate one or more committees, each committee to consist of two or more of the directors of the Corporation. Any committee, to the extent permitted by law and provided in the resolution establishing such committee, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it. Each committee shall keep regular minutes and report to the Board of Directors when required.

Section 11. Compensation. The directors may be paid their expenses, if any, of attendance at each meeting of the Board of Directors and may be paid a fixed sum for attendance at each meeting of the Board of Directors or a stated salary for service as director, payable in cash or securities. No such payment shall preclude any director from serving the Corporation in any other capacity and receiving compensation therefore. Members of special or standing committees may be allowed like compensation for service as committee members.

Section 12. Interested Directors. No contract or transaction between the Corporation and one or more of its directors or officers, or between the Corporation and any other corporation, partnership, association or other organization in which one or more of its directors or officers are directors or officers or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or committee thereof which authorizes the contract or transaction, or solely because any such director's or officer's vote is counted for such purpose if: (i) the material facts as to the director's or officer's relationship or interest and as to the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or (ii) the material facts as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified by the Board of Directors, a committee thereof or the stockholders. Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee which authorizes the contract or transaction.

### ARTICLE IV

#### **OFFICERS**

Section 1. General. The officers of the Corporation shall be chosen by the Board of Directors and shall be a President, a Secretary and a Treasurer. The Board of Directors, in its discretion, also may choose a Chairman of the Board of Directors (who must be a director) and one or more Vice Presidents, Assistant Secretaries, Assistant Treasurers and other officers. Any number of offices may be held by the same person, unless otherwise prohibited by law, the Articles of Incorporation or these By-Laws. The officers of the Corporation need not be stockholders of the Corporation nor, except in the case of the Chairman of the Board of Directors, need such officers be directors of the Corporation.

Section 2. *Election*. The Board of Directors, at its first meeting held after each Annual Meeting of Stockholders (or action by written consent of stockholders in lieu of the Annual Meeting of Stockholders), shall elect the officers of the Corporation who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board of Directors; and each officer of the Corporation shall hold office until such officer's successor is elected and qualified, or until such officer's earlier death, resignation or removal. Any officer elected by the Board of Directors may be removed at any time by the Board of Directors. Any vacancy occurring in any office of the Corporation shall be filled by the Board of Directors.

Section 3. Voting Securities Owned by the Corporation. Powers of attorney, proxies, waivers of notice of meeting, consents and other instruments relating to securities owned by the Corporation may be executed in the name of and on behalf of the Corporation by the President or any Vice President or any other officer authorized to do so by the Board of Directors and any such officer may, in the name of and on behalf of the Corporation, take all such action as any such officer may deem advisable to vote in person or by proxy at any meeting of security holders of any corporation in which the Corporation may own securities and at any such meeting shall possess and may exercise any and all rights and power incident to the ownership of such securities and which, as the owner thereof, the Corporation might have exercised and possessed if present. The Board of Directors may, by resolution, from time to time confer like powers upon any other person or persons.

Section 4. *Chairman of the Board of Directors*. The Chairman of the Board of Directors, if there be one, shall preside at all meetings of the stockholders and of the Board of Directors. The Chairman of the Board of Directors shall be the Chief Executive Officer of the Corporation, unless the Board of Directors designates the President as the Chief Executive Officer, in which case, the Chairman of the Board of Directors shall have the powers of the Chief Executive Officer coextensively with the President, and the Chairman of the Board of Directors shall possess the same power as the President to sign all contracts, certificates and other instruments of the Corporation which may be authorized by the Board of Directors. During the absence or disability of the President, the Chairman of the Board of Directors shall exercise all the powers and discharge all the duties of the President. The Chairman of the Board of Directors shall also perform such other duties and may exercise such other powers as may from time to time be assigned by these By-Laws or by the Board of Directors.

Section 5. *President*. The President shall, subject to the control of the Board of Directors and, if there be one, the Chairman of the Board of Directors, have general supervision of the business of the Corporation and shall see that all orders and resolutions of the Board of Directors are carried into effect. The President shall execute all bonds, mortgages, contracts and other instruments of the Corporation requiring a seal, under the seal of the Corporation, except where required or permitted by law to be otherwise signed and executed and except that the other officers of the Corporation may sign and execute documents when so authorized by these By-Laws, the Board of Directors or the President. In the absence or disability of the Chairman of the Board of Directors, or if there be none, the President shall preside at all meetings of the stockholders and, provided the President is also a director, the Board of Directors, or if the Board of Directors shall otherwise designate, the President shall be the Chief Executive Officer of the Corporation. The President shall also perform such other duties and may exercise such other powers as may from time to time be assigned to such officer by these By-Laws or by the Board of Directors.

Section 6. *Vice Presidents.* At the request of the President or in the President's absence or in the event of the President's inability or refusal to act (and if there be no Chairman of the Board of Directors), the Vice President, or the Vice Presidents if there are more than one (in the order designated by the Board of Directors), shall perform the duties of the President, and when so acting, shall have all the powers of and be subject to all the restrictions upon the President. Each Vice President shall perform such other duties and have such other powers as the Board of Directors from time to time may prescribe. If there be no Chairman of the Board of Directors and no Vice President, the Board of Directors shall designate the officer of the Corporation who, in the absence of the President or in the event of the inability or refusal of the President to act, shall perform the duties of the President, and when so acting, shall have all the powers of and be subject to all the restrictions upon the President.

Section 7. Secretary. The Secretary shall attend all meetings of the Board of Directors and all meetings of the stockholders and record all the proceedings thereat in a book or books to be kept for that purpose; the Secretary shall also perform like duties for committees of the Board of Directors when required. The Secretary shall give, or cause to be given, notice of all meetings of the stockholders and special meetings of the Board of Directors, and shall perform such other duties as may be prescribed by the Board of Directors, the Chairman of the Board of Directors or the President, under whose supervision the Secretary shall be. If the Secretary shall be unable or shall refuse to cause to be given notice of all meetings of the stockholders and special meetings of the Board of Directors, and if there be no Assistant Secretary, then either the Board of Directors or the President may choose another officer to cause such notice to be given. The Secretary shall have custody of the seal of the Corporation and the Secretary or any Assistant Secretary if there be one, shall have authority to affix the same to any instrument requiring it and when so affixed, it may be attested by the signature of the Secretary or by the signature of any such Assistant Secretary. The Board of Directors may give general authority to any other officer to affix the seal of the Corporation and to attest to the affixing by such officer's signature. The Secretary shall see that all books, reports, statements, certificates and other documents and records required by law to be kept or filed are properly kept or filed, as the case may be.

Section 8. *Treasurer*. The Treasurer shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the Corporation in such depositories as may be designated by the Board of Directors. The Treasurer shall disburse the funds of the Corporation as may be ordered by the Board of Directors, taking proper vouchers for such disbursements, and shall render to the President and the Board of Directors, at its regular meetings, or when the Board of Directors so requires, an account of all transactions as Treasurer and of the financial condition of the Corporation. If required by the Board of Directors, the Treasurer shall give the Corporation a bond in such sum and with such surety or sureties as shall be satisfactory to the Board of Directors for the faithful performance of the duties of the office of the Treasurer and for the restoration to the Corporation, in case of the Treasurer's death, resignation, retirement or removal from office, of all books, papers, vouchers, money and other property of whatever kind in the Treasurer's possession or under the Treasurer's control belonging to the Corporation.

Section 9. Other Officers. Such other officers as the Board of Directors may choose shall perform such duties and have such powers as from time to time may be assigned to them by the Board of Directors. The Board of Directors may delegate to any other officer of the Corporation the power to choose such other officers and to prescribe their respective duties and powers.

#### ARTICLE V

## STOCK

Section 1. *Form of Certificates.* Every holder of stock in the Corporation shall be entitled to have a certificate signed by, or in the name of the Corporation (i) by the President or a Vice President and (ii) by the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary of the Corporation and sealed with the seal of the Corporation, certifying the number of shares owned by such stockholder in the Corporation.

Section 2. Signatures. Any or all of the signatures on a certificate may be a facsimile and the seal of the Corporation may be a facsimile, engraved, or printed. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if such person were such officer, transfer agent or registrar at the date of issue.

Section 3. Lost Certificates. The Board of Directors may direct a new certificate to be issued in place of any certificate theretofore issued by the Corporation alleged to have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost, stolen or destroyed. When authorizing such issue of a new certificate, the Board of Directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost, stolen or destroyed certificate, or such owner's legal representative, to advertise the same in such manner as the Board of Directors shall require and/or to give the Corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate or the issuance of such new certificate.

Section 4. *Transfers*. Stock of the Corporation shall be transferable in the manner prescribed by applicable law and in these By-Laws. Transfers of stock shall be made on the books of the Corporation only by the person named in the certificate or by such person's attorney lawfully constituted in writing and upon the surrender of the certificate therefore, properly endorsed for transfer and payment of all necessary transfer taxes; provided, however, that such surrender and endorsement or payment of taxes shall not be required in any case in which the officers of the Corporation shall determine to waive such requirement. Every certificate exchanged, returned or surrendered to the Corporation shall be marked "Cancelled," with the date of cancellation, by the Secretary or Assistant Secretary of the Corporation or the transfer agent thereof. No transfer of stock shall be valid as against the Corporation for any purpose until it shall have been entered in the stock records of the Corporation by an entry showing from and to whom transferred.

Section 5. *Dividend Record Date.* In order that the Corporation may determine the stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights or the stockholders entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix a record date, which record date shall be not more than seventy (70) days prior to such action. If no record date is fixed, the record date for determining stockholders for any such purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.

Section 6. *Record Owners*. The Corporation shall be entitled to recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, and to hold liable for calls and assessments a person registered on its books as the owner of shares, and shall not be bound to recognize any equitable or other claim to or interest in such share or shares on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise required by law.

Section 7. Transfer and Registry Agents. The Corporation may from time to time maintain one or more transfer offices or agencies and registry offices or agencies at such place or places as may be determined from time to time by the Board of Directors.

## ARTICLE VI

#### NOTICES

Section 1. *Notices.* Whenever written notice is required by law, the Articles of Incorporation or these By-Laws, to be given to any director, member of a committee or stockholder, such notice may be given by mail, addressed to such director, member of a committee or stockholder, at such person's address as it appears on the records of the Corporation, with postage thereon prepaid, and such notice shall be deemed to be given at the time when the same shall be deposited in the United States mail. Written notice may also be given personally or by telegram, telex or cable.

Section 2. *Waivers of Notice*. Whenever any notice is required by applicable law, the Articles of Incorporation or these By-Laws, to be given to any director, member of a committee or stockholder, a waiver thereof in writing, signed by the person or persons entitled to notice, whether before or after the time stated therein, shall be deemed equivalent thereto. Attendance of a person at a meeting, present in person or represented by proxy, shall constitute a waiver of notice of such meeting, except where the person attends the meeting for the express purpose of objecting at the beginning of the meeting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any Annual or Special Meeting of Stockholders or any regular or special meeting of the directors or members of a committee of directors need be specified in any written waiver of notice unless so required by law, the Articles of Incorporation or these By-Laws.

#### ARTICLE VII

#### GENERAL PROVISIONS

Section 1. *Dividends*. Dividends upon the capital stock of the Corporation, subject to the requirements of the General and Business Corporation Law of the State of Missouri and the provisions of the Articles of Incorporation, if any, may be declared by the Board of Directors at any regular or special meeting of the Board of Directors (or any action by written consent in lieu thereof in accordance with Section 8 of Article III hereof), and may be paid in cash, in property, or in shares of the Corporation's capital stock. Before payment of any dividend, there may be set aside out of any funds of the Corporation available for dividends such sum or sums as the Board of Directors from time to time, in its absolute discretion, deems proper as a reserve or reserves to meet contingencies, or for purchasing any of the shares of capital stock, warrants, rights, options, bonds, debentures, notes, scrip or other securities or evidences of indebtedness of the Corporation, or for equalizing dividends, or for repairing or maintaining any property of the Corporation, or for any proper purpose, and the Board of Directors may modify or abolish any such reserve.

Section 2. Disbursements. All checks or demands for money and notes of the Corporation shall be signed by such officer or officers or such other person or persons as the Board of Directors may from time to time designate.

Section 3. Fiscal Year. The fiscal year of the Corporation shall be fixed by resolution of the Board of Directors.

Section 4. Corporate Seal. The corporate seal shall have inscribed thereon the name of the Corporation, the year of its organization and the words "Corporate Seal, Missouri". The seal may be used by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

### ARTICLE VIII

### INDEMNIFICATION

Section 1. Power to Indemnify in Actions, Suits or Proceedings other than Those by or in the Right of the Corporation. Subject to Section 3 of this Article VIII, the Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation), by reason of the fact that such person is or was a director or officer of the Corporation, or is or was a director or officer of the Corporation serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person in connection with such action, suit or proceeding if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which such person reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that such person's conduct was unlawful.

Section 2. Power to Indemnify in Actions, Suits or Proceedings by or in the Right of the Corporation. Subject to Section 3 of this Article VIII, the Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that such person is or was a director or officer of the Corporation, or is or was a director or officer of the Corporation serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper.

Section 3. *Authorization of Indemnification*. Any indemnification under this Article VIII (unless ordered by a court) shall be made by the Corporation only as authorized in the specific case upon a determination that indemnification of the present or former director or officer is proper in the circumstances because such person has met the applicable standard of conduct set forth in Section 1 or Section 2 of this Article VIII, as the case may be. Such determination shall be made, with respect to a person who is a director or officer at the time of such determination, by the board of directors by a majority vote of a quorum consisting of directors who were not parties to the action, suit, or proceeding, or if such a quorum is not obtainable, or even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or by the shareholders. Such determination shall be made, with respect to former directors and officers, by any person or persons having the authority to act on the matter on behalf of the Corporation. To the extent, however, that a present or former director or officer of the Corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding described above, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith, without the necessity of authorization in the specific case.

Section 4. *Good Faith Defined*. For purposes of any determination under Section 3 of this Article VIII, a person shall be deemed to have acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Corporation, or, with respect to any criminal action or proceeding, to have had no reasonable cause to believe such person's conduct was unlawful, if such person's action is based on the records or books of account of the Corporation or another enterprise, or on information supplied to such person by the officers of the Corporation or another enterprise in the course of their duties, or on the advice of legal counsel for the Corporation or another enterprise or on information or records given or reports made to the Corporation or another enterprise by an independent certified public accountant or by an appraiser or other expert selected with reasonable care by the Corporation or another enterprise. The provisions of this Section 4 shall not be deemed to be exclusive or to limit in any way the circumstances in which a person may be deemed to have met the applicable standard of conduct set forth in Section 1 or Section 2 of this Article VIII, as the case may be.

Section 5. Indemnification by a Court. Notwithstanding any contrary determination in the specific case under Section 3 of this Article VIII, and notwithstanding the absence of any determination thereunder, any director or officer may apply to any court of competent jurisdiction in the State of Missouri for indemnification to the extent otherwise permissible under Section 1 or Section 2 of this Article VIII. The basis of such indemnification by a court shall be a determination by such court that indemnification of the director or officer is proper in the circumstances because such person has met the applicable standard of conduct set forth in Section 1 or Section 2 of this Article VIII, as the case may be. Neither a contrary determination in the specific case under Section 3 of this Article VIII nor the absence of any determination thereunder shall be a defense to such application or create a presumption that the director or officer seeking indemnification promptly upon the filing of such application. If successful, in whole or in part, the director or officer seeking indemnification shall also be entitled to be paid the expense of prosecuting such application.

Section 6. *Expenses Payable in Advance*. Expenses (including attorneys' fees) incurred by a director or officer in defending any civil, criminal, administrative or investigative action, suit or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the Corporation as authorized in this Article VIII. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the Corporation deems appropriate.

Section 7. Nonexclusivity of Indemnification and Advancement of Expenses. The indemnification and advancement of expenses provided by, or granted pursuant to, this Article VIII shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under the Articles of Incorporation, these By-Laws, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office, it being the policy of the Corporation that indemnification of the persons specified in Section 1 and Section 2 of this Article VIII shall be made to the fullest extent permitted by law. The provisions of this Article VIII shall not be deemed to preclude the indemnification of any person who is not specified in Section 1 or Section 2 of this Article VIII shall be made to the General and Business Corporation Law of the State of Missouri, or otherwise.

Section 8. *Insurance*. The Corporation may purchase and maintain insurance on behalf of any person who is or was a director or officer of the Corporation, or is or was a director or officer of the Corporation serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power or the obligation to indemnify such person against such liability under the provisions of this Article VIII.

Section 9. *Certain Definitions.* For purposes of this Article VIII, references to "the Corporation" shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors or officers, so that any person who is or was a director or officer of such constituent corporation serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under the provisions of this Article VIII with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued. The term "another enterprise" as used in this Article VIII shall mean any other corporation or any partnership, joint venture, trust, employee benefit plan or other enterprise of which such person is or was serving at the request of the Corporation as a director, officer, employee or agent. For purposes of this Article VIII, references to "fines" shall include any excise taxes assessed on a person with respect to an employee benefit plan; and references to "serving at the request of the Corporation which imposes duties on, or involves services by, such director or officer with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the Corporation" as referred to in this Article VIII.

Section 10. Survival of Indemnification and Advancement of Expenses. The indemnification and advancement of expenses provided by, or granted pursuant to, this Article VIII shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director or officer and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 11. *Limitation on Indemnification*. Notwithstanding anything contained in this Article VIII to the contrary, except for proceedings to enforce rights to indemnification (which shall be governed by Section 5 of this Article VIII), the Corporation shall not be obligated to indemnify any director or officer (or his or her heirs, executors or personal or legal representatives) or advance expenses in connection with a proceeding (or part thereof) initiated by such person unless such proceeding (or part thereof) was authorized or consented to by the Board of Directors of the Corporation.

Section 12. Indemnification of Employees and Agents. The Corporation may, to the extent authorized from time to time by the Board of Directors, provide rights to indemnification and to the advancement of expenses to employees and agents of the Corporation similar to those conferred in this Article VIII to directors and officers of the Corporation.

# ARTICLE IX

#### AMENDMENTS

Section 1. Amendments. These By-Laws may be altered, amended or repealed, in whole or in part, or new By-Laws may be adopted by the stockholders or by the Board of Directors; provided, however, that notice of such alteration, amendment, repeal or adoption of new By-Laws be contained in the notice of such meeting of the stockholders or Board of Directors, as the case may be. All such amendments must be approved by either the holders of a majority of the outstanding capital stock entitled to vote thereon or by a majority of the entire Board of Directors then in office.

Section 2. Entire Board of Directors. As used in this Article IX and in these By-Laws generally, the term "entire Board of Directors" means the total number of directors which the Corporation would have if there were no vacancies.

\* \* \*

GAMES MERGER CORP. (to be merged with and into Dave & Buster's, Inc.)

AND

# WELLS FARGO BANK, NATIONAL ASSOCIATION,

as Trustee

11% Senior Notes due 2018

INDENTURE

Dated as of June 1, 2010

# CROSS-REFERENCE TABLE

TIA Section	Indenture Section
<u>310(a)(1)</u>	7.10
(a)(2)	7.10
(a)(3)	N.A.
(a)(4)	N.A.
(a)(5)	7.10
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(c)	N.A.
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(c)(2)	11.4
(c)(3)	N.A.
(d)	N.A.
(e)	11.5
(f)	N.A.
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(b)	7.5; 11.2
(c)	7.1
(d)	7.1
(e)	6.11
316(a)(last sentence)	11.6
(a)(1)(A)	6.5
(a)(1)(B)	6.4
(a)(2)	N.A.
(b)	6.7
(c)	9.4
317(a)(1)	6.8
(a)(2)	6.9
(b)	2.4
318(a)	11.1
N.A. means Not Applicable.	

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# **EXHIBITS**

- EXHIBIT A Form of the Series A Note
- EXHIBIT B Form of the Series B Note
- EXHIBIT C Form of Notation of Guarantee
- EXHIBIT D
- Form of Successor Supplemental Indenture to be delivered by Dave & Buster's, Inc. Form of Guarantor Supplemental Indenture to be delivered by the Initial Guarantors Form of Indenture Supplement to Add Guarantors EXHIBIT E
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INDENTURE dated as of June 1, 2010 by and between Games Merger Corp., a Missouri corporation (to be merged (the "<u>Merger</u>") with and into Dave & Buster's, Inc., a Missouri corporation ("<u>Dave & Buster's</u>"), upon consummation of the Transactions (as defined herein) with Dave & Buster's as the survivor in the Merger) (the "<u>Company</u>"), and Wells Fargo Bank, National Association, a national banking association, as trustee (the "<u>Trustee</u>"). Upon the consummation of the Transactions, (1) Dave & Buster's will be required to execute and deliver a supplemental indenture to this Indenture, substantially in the form attached hereto as Exhibit D (the "<u>Successor Supplemental Indenture</u>"), pursuant to which it will assume all the obligations of the Company under the Notes (as defined below) and this Indenture as successor to the Company, and (2) each of the direct and indirect domestic subsidiaries of Dave & Buster's named in Schedule A hereto (the "<u>Initial Guarantors</u>") will be required to execute and deliver a supplemental indenture, substantially in the form attached hereto as Exhibit E (the "<u>Guarantor Supplemental Indenture</u>" and, together with the Successor Supplemental Indenture, the "<u>Supplemental Indenture</u>"), pursuant to which each of the Initial Guarantors will guarantee all the obligations of Dave & Buster's under the Notes and this Indenture.

## Recitals Of The Company

The Company has duly authorized the execution and delivery of this Indenture to provide for the issuance of (i) the Company's 11% Senior Notes, Series A, due 2018, issued on the Issue Date (the "<u>Initial Notes</u>"), (ii) if and when issued, an unlimited principal amount of additional 11% Senior Notes, Series A, due 2018 that may be offered from time to time subsequent to the Issue Date in a non-registered offering or 11% Senior Notes, Series B, due 2018 in a registered offering of the Company that may be offered from time to time subsequent to the Issue Date, in each case, having identical terms and conditions as the Notes other than the issue date, issue price and the first interest payment date (the "<u>Additional Notes</u>") and (iii) if and when issued, Dave & Buster's 11% Senior Notes, Series B, due 2018 that may be issued from time to time in exchange for Initial Notes or Additional Notes pursuant to a Registration Rights Agreement (as hereinafter defined, the "<u>Exchange Notes</u>" and together with the Initial Notes and Additional Notes, the "<u>Notes</u>"). \$200,000,000 in aggregate principal amount of Initial Notes shall be initially issued on the date hereof.

Each party agrees as follows for the benefit of the other parties and for the equal and ratable benefit of the Holders:

## ARTICLE I

## Definitions and Incorporation by Reference

SECTION 1.1. <u>Definitions.</u> "Acquired Indebtedness" means Indebtedness (i) of a Person or any of its Subsidiaries existing at the time such Person becomes a Restricted Subsidiary or (ii) assumed in connection with the acquisition of assets from such Person, in each case whether or not Incurred by such Person in connection with, or in anticipation or contemplation of, such Person becoming a Restricted Subsidiary or such acquisition. Acquired Indebtedness shall be deemed to have been Incurred, with respect to clause (i) of the preceding sentence, on the date such Person becomes a Restricted Subsidiary and, with respect to clause (ii) of the preceding sentence, on the date of consummation of such acquisition of assets; *provided*, *however*, that Indebtedness of such acquired Person or assumed in connection with such acquisition of assets that is redeemed, defeased, retired or otherwise repaid at the time of or immediately upon consummation of the transactions by which such Person merges with or into or becomes a Restricted Subsidiary of such Person or such assets are acquired shall not be Acquired Indebtedness.

"Additional Assets" means (i) any assets (other than assets that are qualified as current assets under GAAP), property, plant or equipment (excluding working capital for the avoidance of doubt) to be used by the Company or a Restricted Subsidiary in a Related Business; (ii) assets (other than assets that are qualified as current assets under GAAP), property and/or the Capital Stock of a Person that becomes a Restricted Subsidiary as a result of the acquisition of such Capital Stock by the Company or a Restricted Subsidiary; (iii) Capital Stock constituting a minority interest in any Person that at such time is a Restricted Subsidiary; or (iv) capital expenditures used or useful in a Related Business, *provided, however*, that, in the case of clauses (ii) and (iii), such Restricted Subsidiary is primarily engaged in a Related Business.

"Affiliate" of any specified Person means any other Person, directly or indirectly, controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, "control" when used with respect to any Person means the power to direct the management and 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.

"Applicable Premium" means, with respect to a Note on any date of redemption, the greater of:

(1) 1.0% of the principal amount of such Note and

(2) the excess, if any, of (a) the present value as of such date of redemption of (i) the redemption price of such note on June 1, 2014 (each such redemption price being described under <u>Section 5.1</u>), plus (ii) all required interest payments due on such Note through June 1, 2014 (excluding accrued but unpaid interest to the date of redemption), computed using a discount rate equal to the Treasury Rate as of such date of redemption plus 50 basis points, over (b) the then-outstanding principal of such Note.

"<u>Asset Disposition</u>" means any direct or indirect sale, lease (other than an operating lease entered into in the ordinary course of business), transfer, issuance or other disposition, or a series of related sales, leases, transfers, issuances or dispositions that are part of a common plan, of shares of Capital Stock of a Subsidiary (other than directors' qualifying shares), property or other assets (each referred to for the purposes of this definition as a "disposition") by the Company or any of its Restricted Subsidiaries, including any disposition by means of a merger, consolidation or similar transaction.

Notwithstanding the preceding, the following items shall not be deemed to be Asset Dispositions: (i) a disposition of assets by a Restricted Subsidiary to the Company or by the Company or a Restricted Subsidiary to a Restricted Subsidiary; (ii) the sale or other disposition of cash or Cash Equivalents in the ordinary course of business; (iii) the sale, lease or discount of products, services or accounts receivable in the ordinary course of business, including a disposition of inventory in the ordinary course of business; (iv) a disposition of damaged, obsolete or worn out equipment or equipment that is no longer useful in the conduct of the business of the Company and its Restricted Subsidiaries and that is disposed of in each case in the ordinary course of business; (v) transactions permitted under Article IV or any disposition that constitutes a Change of Control; (vi) an issuance of Equity Interests by a Restricted Subsidiary to the Company or to a Wholly Owned Subsidiary; (vii) for purposes of Section 3.8 only, (a) the making of a Permitted Investment (provided that any cash or Cash Equivalents received in such Asset Disposition shall be treated as Net Available Cash) or (b) a disposition subject to Section 3.4; (viii) an Asset Swap effected in compliance with Section 3.8; (ix) dispositions of assets in a single transaction or series of related transactions with an aggregate fair market value of less than \$1.0 million; (x) the creation of a Permitted Lien and dispositions in connection with Permitted Liens; (xi) dispositions of Investments or receivables, in each case in connection with the compromise, settlement or collection thereof in the ordinary course of business or in bankruptcy or similar proceedings and exclusive of factoring or similar arrangements; (xii) the issuance by a Restricted Subsidiary of Preferred Stock that is permitted by the covenant described in Section 3.3; (xiii) the licensing or sublicensing of intellectual property or other general intangibles and licenses, leases or subleases of other property in the ordinary course of business which do not materially interfere with the business of the Company and its Restricted Subsidiaries; (xiv) the unwinding of any Hedging Obligations; (xv) the sale of Permitted Investments (other than sales of Equity Interests of any of the Company's Restricted Subsidiaries) made by the Company or any Restricted Subsidiary after the Issue Date, if such Permitted Investments were (a) received in exchange for, or purchased out of the Net Cash Proceeds of the substantially concurrent sale (other than to a Subsidiary of the Company) of, Equity Interests of the Company (other than Disqualified Stock) or (b) received in the form of, or were purchased from the proceeds of, a substantially concurrent contribution of common equity capital to the Company; provided that any such proceeds or contributions in clauses (a) and (b) will be excluded from clause (c)(ii) of Section 3.4(a); (xvi) foreclosure on assets; and (xvii) the sale or other Investment of Equity Interests of, or any Investment in, any Unrestricted Subsidiary.

"<u>Asset Swap</u>" means a concurrent purchase and sale or exchange of Related Business Assets between the Company or any of its Restricted Subsidiaries and another Person; *provided* that any cash received must be applied in accordance with <u>Section 3.8</u>.

"<u>Attributable Indebtedness</u>" in respect of a Sale/Leaseback Transaction means, as at the time of determination, the present value (discounted at the interest rate implicit in the transaction) of the total obligations of the lessee for rental payments during the remaining term of the lease included in such Sale/Leaseback Transaction (including any period for which such lease has been extended), determined in accordance with GAAP; *provided*, *however*, that if such Sale/Leaseback Transaction results in a Capitalized Lease Obligation, the amount of Indebtedness represented thereby will be determined in accordance with the definition of "Capitalized Lease Obligations."

"<u>Average Life</u>" means, as of the date of determination, with respect to any Indebtedness or Preferred Stock, the quotient obtained by dividing (i) the sum of the products of the numbers of years from the date of determination to the dates of each successive scheduled principal payment of such Indebtedness or redemption or similar payment with respect to such Preferred Stock multiplied by the amount of such payment by (ii) the sum of all such payments.

"Bankruptcy Law" means Title 11 of the United States Code or any similar federal or state law for the relief of debtors.

"Board of Directors" means, as to any Person, the board of directors or managers, as applicable, of such Person (or, if such Person is a partnership, the board of directors or other governing body of the general partner of such Person) or any duly authorized committee thereof.

"<u>Board Resolution</u>" means a copy of a resolution or unanimous written consent certified by the Secretary or an Assistant Secretary of a company to have been duly adopted by the Board of Directors of such company and to be in full force and effect on the date of such certification, and delivered to the Trustee.

"Business Day" means each day that is not a Saturday, Sunday or other day on which banking institutions in New York, New York are authorized or required by law to close.

"<u>Capital Stock</u>" of any Person means: (i) in the case of a corporation, corporate stock; (ii) in the case of an association or business entity, any and all shares, interests, participations, rights or other equivalents (however designated) of corporate stock; (iii) in the case of a partnership or limited liability company, partnership interests (whether general or limited) or membership interests; and (iv) any other interest or participation that confers on a Person the right to receive a share of the profits and losses of, or distributions of assets of, the issuing Person, but excluding from all of the foregoing any debt securities convertible or exchangeable into Capital Stock, whether or not such debt securities include any right of participation with Capital Stock, including, in each case, Preferred Stock.

"<u>Capitalized Lease Obligations</u>" means an obligation that is required to be classified and accounted for as a capitalized lease for financial reporting purposes in accordance with GAAP, and the amount of Indebtedness represented by such obligation shall be the capitalized amount of such obligation at the time any determination thereof is to be made as determined in accordance with GAAP, and the Stated Maturity thereof shall be the date of the last payment of rent or any other amount due under such lease prior to the first date such lease may be terminated without penalty.

"<u>Cash Equivalents</u>" means: (i) U.S. dollars, or in the case of any Foreign Subsidiary, such local currencies held by it from time to time in the ordinary course of business; (ii) securities issued or directly and fully guaranteed or insured by the United States Government or any agency or instrumentality of the United States (*provided* that the full faith and credit of the United States is pledged in support thereof), having maturities of not more than one year from the date of acquisition; (iii) marketable general obligations issued by any state of the United States or any political subdivision of any such state or any public instrumentality thereof maturing within one year from the date of acquisition and, at the time of acquisition, having a credit rating of "A" or better from either Standard & Poor's Ratings Group, Inc. or Moody's Investors Service, Inc.; (iv) certificates of deposit, time deposits, Eurodollar time deposits, overnight bank deposits or bankers' acceptances having maturities of not more than one year from the date of acquisition thereof issued by any commercial bank the long-term debt of which is rated at the time of acquisition thereof at least "A" or the equivalent thereof by Moody's Investors Service, Inc., and having combined capital and surplus in excess of \$500.0 million; (v) repurchase obligations with a term of not more than seven days for underlying securities of the types described in clauses (ii), (iii) and (iv) entered into with any bank meeting the qualifications specified in clause (iv) above; (vi) commercial paper rated at the time of acquisition thereof at least "A-2" or the equivalent thereof by Standard & Poor's Ratings Group, Inc. or "P-2" or the equivalent thereof by Moody's Investors Service, Inc., or carrying an equivalent rating by a nationally recognized rating agency, if both of the two named rating agencies cease publishing ratings of investments, and in any case maturing within one year after the date of acquisition thereof; and (vii) interests in any investment c

"Change of Control" means the occurrence of any of the following:

(1) the Company becomes aware that any "person" or "group" of related persons (as such terms are used in Sections 13(d) and 14(d) of the Exchange Act) other than one or more Permitted Holders has become the beneficial owner (as defined in Rules 13d-3 and 13d-5 under the Exchange Act, except that such person or group shall be deemed to have "beneficial ownership" of all shares that any such person or group has the right to acquire, whether such right is exercisable immediately or only after the passage of time), directly or indirectly, of more than 50% of the total voting power of the Voting Stock of the Company or Holdings (or its successor by merger, consolidation or purchase of all or substantially all of its assets) (for the purposes of this clause, such person or group shall be deemed to beneficially own any Voting Stock of the Company or Holdings held by a parent entity, if such person or group "beneficially owns" (as defined above), directly or indirectly, more than 50% of the voting Stock of such parent entity); or

(2) the first day on which a majority of the members of the Board of Directors of the Company or Holdings are not Continuing Directors; or

(3) the sale, lease, transfer, conveyance or other disposition (other than by way of merger or consolidation), in one or a series of related transactions, of all or substantially all of the assets of Holdings or the Company and its Restricted Subsidiaries taken as a whole to any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act) other than a Permitted Holder; or

(4) the adoption by the stockholders of the Company or Holdings of a plan or proposal for the liquidation or dissolution of the Company or Holdings.

"Clearstream" means Clearstream Banking, société anonyme, or any successor securities clearing agency.

"Code" means the Internal Revenue Code of 1986, as amended.

"<u>Commodity Agreement</u>" means any commodity futures contract, commodity option or other similar agreement or arrangement entered into by the Company or any Restricted Subsidiary designed to protect the Company or any Restricted Subsidiaries against fluctuations in the price of commodities actually used in the ordinary course of business of the Company and its Restricted Subsidiaries.

"<u>Common Stock</u>" means with respect to any Person, any and all shares, interest or other participations in, and other equivalents (however designated and whether voting or nonvoting) of such Person's common stock whether or not outstanding on the Issue Date, and includes, without limitation, all series and classes of such common stock.

"<u>Consolidated Coverage Ratio</u>" means as of any date of determination, with respect to any Person, the ratio of (x) the aggregate amount of Consolidated EBITDA of such Person for the period of the most recent four consecutive fiscal quarters ending prior to the date of such determination for which financial statements prepared on a consolidated basis in accordance with GAAP are available to (y) Consolidated Interest Expense for such four fiscal quarters, *provided*, *however*, that:

#### (1) if the Company or any Restricted Subsidiary:

(a) has Incurred any Indebtedness since the beginning of such period that remains outstanding on such date of determination or if the transaction giving rise to the need to calculate the Consolidated Coverage Ratio is an Incurrence of Indebtedness, Consolidated EBITDA and Consolidated Interest Expense for such period shall be calculated after giving effect on a pro forma basis to such Indebtedness as if such Indebtedness had been Incurred on the first day of such period (except that in making such computation, the amount of Indebtedness under any revolving credit facility outstanding on the date of such calculation shall be deemed to be (i) the average daily balance of such Indebtedness during such four fiscal quarters or such shorter period for which such facility was outstanding or (ii) if such facility was created after the end of such four fiscal quarters, the average daily balance of such Indebtedness during the period from the date of creation of such facility to the date of such calculations shall be detended or otherwise discharged with the proceeds of such new Indebtedness as if such discharge had occurred on the first day of such period; or

(b) has repaid, repurchased, defeased or otherwise discharged any Indebtedness since the beginning of the period that is no longer outstanding on such date of determination or if the transaction giving rise to the need to calculate the Consolidated Coverage Ratio involves a discharge of Indebtedness (in each case other than Indebtedness Incurred under any revolving credit facility unless such Indebtedness has been permanently repaid and the related commitment terminated), Consolidated EBITDA and Consolidated Interest Expense for such period shall be calculated after giving effect on a pro forma basis to such repayment, repurchase, defeasance or other discharge of such Indebtedness, including with the proceeds of such new Indebtedness, as if such discharge had occurred on the first day of such period;

(2) if since the beginning of such period the Company or any Restricted Subsidiary shall have made any Asset Disposition or disposed of any company, division, operating unit, segment, business, group of related assets or line of business or if the transaction giving rise to the need to calculate the Consolidated Coverage Ratio is such an Asset Disposition:

(a) the Consolidated EBITDA for such period shall be reduced by an amount equal to the Consolidated EBITDA (if positive) directly attributable to the assets which are the subject of such disposition for such period or increased by an amount equal to the Consolidated EBITDA (if negative) directly attributable thereto for such period; and

(b) Consolidated Interest Expense for such period shall be reduced by an amount equal to the Consolidated Interest Expense directly attributable to any Indebtedness of the Company or any Restricted Subsidiary repaid, repurchased, defeased or otherwise discharged (including, but not limited to, through the assumption of such Indebtedness by another Person if the Company and its Restricted Subsidiaries are no longer liable for such Indebtedness after the assumption thereof) with respect to the Company and its continuing Restricted Subsidiaries in connection with such disposition for such period (or, if the Capital Stock of any Restricted Subsidiary is sold, the Consolidated Interest Expense for such period directly attributable to the Indebtedness of such Restricted Subsidiary to the extent the Company and its continuing Restricted Subsidiaries are no longer liable for such Indebtedness after such sale);

(3) if since the beginning of such period the Company or any Restricted Subsidiary (by merger or otherwise) shall have made an Investment in any Restricted Subsidiary (or any Person which becomes a Restricted Subsidiary or is merged with or into the Company) or an acquisition of assets, including any acquisition of assets occurring in connection with a transaction causing a calculation to be made hereunder, which constitutes all or substantially all of a company, division, operating unit, segment, business, group of related assets or line of business, Consolidated EBITDA (plus adjustments which will only include annualized cost savings achievable within 180 days and which shall be itemized in an Officer's Certificate delivered to the Trustee by the chief financial officer of the Company) and Consolidated Interest Expense for such period shall be calculated after giving pro forma effect thereto (including the Incurrence of any Indebtedness) as if such Investment or acquisition occurred on the first day of such period; and

(4) if since the beginning of such period any Person (that subsequently became a Restricted Subsidiary or was merged with or into the Company or any Restricted Subsidiary since the beginning of such period) shall have Incurred any Indebtedness or discharged any Indebtedness, made any Asset Disposition or any Investment or acquisition of assets that would have required an adjustment pursuant to clauses (2) or (3) above if made by the Company or a Restricted Subsidiary during such period, Consolidated EBITDA and Consolidated Interest Expense for such period shall be calculated after giving pro forma effect thereto as if such transaction occurred on the first day of such period.

For purposes of this definition, whenever pro forma effect is to be given to any calculation under this definition, the pro forma calculations shall be determined in good faith by a responsible financial or accounting officer of the Company (including pro forma expense and cost reductions calculated on a basis consistent with Regulation S-X under the Securities Act). If any Indebtedness bears a floating rate of interest and is being given pro forma effect, the interest expense on such Indebtedness shall be calculated as if the rate in effect on the date of determination had been the applicable rate for the entire period (taking into account any Interest Rate Agreement applicable to such Indebtedness if such Interest Rate Agreement has a remaining term in excess of 12 months). If any Indebtedness that is being given pro forma effect bears an interest rate at the option of the Company or any Restricted Subsidiary, the interest rate shall be calculated by applying such optional rate chosen by the Company or such Restricted Subsidiary.

"<u>Consolidated EBITDA</u>" for any period means, without duplication, the Consolidated Net Income for such period, plus the following to the extent deducted in calculating such Consolidated Net Income:

- (1) Consolidated Interest Expense; plus
- (2) Consolidated Income Taxes; plus
- (3) consolidated depreciation expense; plus

(4) consolidated amortization expense or impairment charges recorded in connection with the application of Financial Accounting Standard No. 142 "Goodwill and Other Intangibles" and Financial Accounting Standard No. 144 "Accounting for the Impairment or Disposal of Long Lived Assets;" plus

(5) other non-cash charges reducing Consolidated Net Income (including any net change in deferred amusement revenue and ticket liability reserves, but excluding any other non-cash charge to the extent it represents an accrual of or reserve for cash charges in any future period or amortization of a prepaid cash expense that was paid in a prior period not included in the calculation); plus

- (6) any non-recurring, extraordinary or unusual loss; plus
- (7) fees, expenses and charges resulting from the Transactions described in the Offering Memorandum; plus

(8) the aggregate amount of cash Preopening Costs incurred during such period in an aggregate amount not to exceed \$5.0 million in any period;

plus

(9) payments made pursuant to the Expense Reimbursement Agreement as in effect on the Issue Date; less

(10) noncash items increasing Consolidated Net Income of such Person for such period (excluding any items which represent the reversal of any accrual of, or reserve for, anticipated cash charges made in any prior period).

Notwithstanding the preceding sentence, clauses (2) through (6), (8) and (10) relating to amounts of a Restricted Subsidiary of a Person shall be added to Consolidated Net Income to compute Consolidated EBITDA of such Person only to the extent (and in the same proportion) that the net income (loss) of such Restricted Subsidiary was included in calculating the Consolidated Net Income of such Person and, to the extent the amounts set forth in clauses (2) through (6), (8) and (10) are in excess of those necessary to offset a net loss of such Restricted Subsidiary or if such Restricted Subsidiary has net income for such period included in Consolidated Net Income, only if a corresponding amount would be permitted at the date of determination to be dividended or distributed to the Company by such Restricted Subsidiary without prior approval (that has not been obtained), pursuant to the terms of its charter and all agreements, instruments, judgments, decrees, orders, statutes, rules and governmental regulations applicable to that Restricted Subsidiary or its stockholders.

"<u>Consolidated Income Taxes</u>" means, with respect to any Person for any period, taxes imposed upon such Person or other payments required to be made by such Person by any governmental authority which taxes or other payments are calculated by reference to the income or profits of such Person or such Person and its Restricted Subsidiaries (to the extent such income or profits were included in computing Consolidated Net Income for such period), regardless of whether such taxes or payments are required to be remitted to any governmental authority.

"<u>Consolidated Interest Expense</u>" means, for any period, the total interest expense of the Company and its consolidated Restricted Subsidiaries, whether paid or accrued, plus, to the extent not included in such interest expense:

(1) interest expense attributable to Capitalized Lease Obligations and the interest portion of rent expense associated with Attributable Indebtedness in respect of the relevant lease giving rise thereto, determined as if such lease were a capitalized lease in accordance with GAAP and the interest component of any deferred payment obligations;

(2) amortization of debt discount and debt issuance cost (*provided* that any amortization of bond premium shall be credited to reduce Consolidated Interest Expense, pursuant to GAAP, such amortization of bond premium has otherwise reduced Consolidated Interest Expense);

(3) non-cash interest expense;

(4) commissions, discounts and other fees and charges owed with respect to letters of credit and bankers' acceptance financing;

(5) the interest expense on Indebtedness of another Person that is Guaranteed by such Person or one of its Restricted Subsidiaries or secured by a Lien on assets of such Person or one of its Restricted Subsidiaries, whether or not such Guarantee or Lien is called upon;

(6) costs associated with Hedging Obligations (including amortization of fees) *provided, however*, that if Hedging Obligations result in net benefits rather than costs, such benefits shall be credited to reduce Consolidated Interest Expense unless, pursuant to GAAP, such net benefits are otherwise reflected in Consolidated Net Income;

(7) the consolidated interest expense of such Person and its Restricted Subsidiaries that was capitalized during such period;

(8) the product of (a) all dividends paid or payable, in cash, Cash Equivalents or Indebtedness or accrued during such period on any series of Disqualified Stock of such Person or on Preferred Stock of its Restricted Subsidiaries that are not Guarantors payable to a party other than the Company or a Wholly Owned Subsidiary, times (b) a fraction, the numerator of which is one and the denominator of which is one minus the then current combined federal, state, provincial and local statutory tax rate of such Person, expressed as a decimal, in each case, on a consolidated basis and in accordance with GAAP;

## (9) Receivables Fees; and

(10) the cash contributions to any employee stock ownership plan or similar trust to the extent such contributions are used by such plan or trust to pay interest or fees to any Person (other than the Company and its Restricted Subsidiaries) in connection with Indebtedness Incurred by such plan or trust.

For the purpose of calculating the Consolidated Coverage Ratio in connection with the Incurrence of any Indebtedness described in the final paragraph of the definition of "Indebtedness", the calculation of Consolidated Interest Expense shall include all interest expense (including any amounts described in clauses (1) through (10) above) relating to any Indebtedness of the Company or any Restricted Subsidiary described in the final paragraph of the definition of "Indebtedness."

For purposes of the foregoing, total interest expense shall be determined (i) after giving effect to any net payments made or received by the Company and its Subsidiaries with respect to Interest Rate Agreements and (ii) exclusive of amounts classified as other comprehensive income in the balance sheet of the Company. Notwithstanding anything to the contrary contained herein, commissions, discounts, yield and other fees and charges Incurred in connection with any transaction pursuant to which the Company or its Restricted Subsidiaries may sell, convey or otherwise transfer or grant a security interest in any accounts receivable or related assets shall be included in Consolidated Interest Expense.

"<u>Consolidated Net Income</u>" means, for any period, the net income (loss) of the Company and its consolidated Restricted Subsidiaries determined on a consolidated basis in accordance with GAAP; *provided, however*, that there shall not be included in such Consolidated Net Income:

(1) any net income (loss) of any Person if such Person is not a Restricted Subsidiary, except that:

(a) subject to the limitations contained in clauses (3), (4) and (5) below, the Company's equity in the net income of any such Person for such period shall be included in such Consolidated Net Income up to the aggregate amount of cash actually distributed by such Person during such period to the Company or a Restricted Subsidiary as a dividend or other distribution (subject, in the case of a dividend or other distribution to a Restricted Subsidiary, to the limitations contained in clause (2) below); and

(b) the Company's equity in a net loss of any such Person (other than an Unrestricted Subsidiary) for such period shall be included in determining such Consolidated Net Income to the extent such loss has been funded with cash from the Company or a Restricted Subsidiary;

(2) any net income (but not loss) of any Restricted Subsidiary if such Subsidiary is subject to restrictions, directly or indirectly, on the payment of dividends or the making of distributions by such Restricted Subsidiary, directly or indirectly, to the Company, except that:

(a) subject to the limitations contained in clauses (3), (4) and (5) below, the Company's equity in the net income of any such Restricted Subsidiary for such period shall be included in such Consolidated Net Income up to the aggregate amount of cash that could have been distributed by such Restricted Subsidiary during such period to the Company or another Restricted Subsidiary as a dividend (subject, in the case of a dividend to another Restricted Subsidiary, to the limitation contained in this clause); and

(b) the Company's equity in a net loss of any such Restricted Subsidiary for such period shall be included in determining such Consolidated Net Income;

(3) any gain (loss) realized upon the sale or other disposition of any property, plant or equipment of the Company or its consolidated Restricted Subsidiaries (including pursuant to any Sale/Leaseback Transaction) which is not sold or otherwise disposed of in the ordinary course of business and any gain (loss) realized upon the sale or other disposition of any Capital Stock of any Person;

- (4) any extraordinary gain or loss;
- (5) the cumulative effect of a change in accounting principles;
- (6) any after-tax effect of income (loss) from the early extinguishment of Indebtedness or Hedging Obligations or other derivative instruments;

and

(7) any non-cash compensation expense recorded from grants of stock appreciation or similar rights, stock options, restricted stock or other rights to officers, directors or employees shall be excluded.

Corporate overhead expenses payable by Holdings described in clause (9) of <u>Section 3.4(b)</u>, the funds for which are provided by the Company and/or its Restricted Subsidiaries, shall be deducted in calculating the Consolidated Net Income of the Company and its Restricted Subsidiaries. In no event will the proceeds of business interruption insurance (if otherwise included in the net income (loss) of the Company and its consolidated Restricted Subsidiaries determined on a consolidated basis in accordance with GAAP) be excluded from Consolidated Net Income by the foregoing adjustments.

"<u>Consolidated Net Tangible Assets</u>" means Consolidated Total Assets after deducting: (i) all current liabilities; (ii) any item representing investments in Unrestricted Subsidiaries; and (iii) all goodwill, trade names, trademarks, patents, unamortized debt discount and expense and other intangibles.

"<u>Consolidated Secured Debt Leverage Ratio</u>" means, as of any date, the ratio of (x) Consolidated Secured Indebtedness as of such date to (y) Consolidated EBITDA for the period of four consecutive fiscal quarters ending prior to the date of such determination for which financial statements prepared on a consolidated basis in accordance with GAAP are available, *provided* that for purposes of calculating the Consolidated Secured Debt Leverage Ratio, Consolidated EBITDA and Consolidated Secured Indebtedness shall be calculated on a pro forma basis (and with respect to Consolidated EBITDA, consistent with the adjustments in the definition of "Consolidated Coverage Ratio") to give effect, as appropriate, to any Incurrence or discharge of Indebtedness or Asset Disposition, Investment or acquisition since the beginning of the applicable period and as if each such Incurrence, discharge, Asset Disposition, Investment or acquisition had been effected on the first day of such period and as if each such Asset Disposition had been consummated on the day prior to the first day of such period.

"<u>Consolidated Secured Indebtedness</u>" means, as of any date, the total Secured Indebtedness of the Company and its Restricted Subsidiaries determined on a consolidated basis in accordance with GAAP.

"<u>Consolidated Total Assets</u>" as of any date of determination, means the total amount of assets which would appear on a consolidated balance sheet of the Company and its Restricted Subsidiaries, determined on a consolidated basis in accordance with GAAP.

"<u>Continuing Directors</u>" means, as of any date of determination, any member of the Board of Directors of the Company or Holdings, as the case may be, who: (1) was a member of such Board of Directors on the date of this Indenture; or (2) was nominated for election or elected to such Board of Directors with the approval of a majority of the Continuing Directors who were members of the relevant Board of Directors at the time of such nomination or election.

"<u>Corporate Trust Office</u>" means the principal office of the Trustee at which at any time its corporate trust business shall be administered, which office at the date hereof is located at 45 Broadway, 14<sup>th</sup> floor, New York, NY 10006, Attention: Corporate Trust Administration, or such other address as the Trustee may designate from time to time by notice to the Holders and the Company, or the principal corporate trust office of any successor Trustee (or such other address as such successor Trustee may designate from time to time by notice to the Holders and the Company).

"Credit Facility" means, one or more debt facilities (which may be outstanding at the same time and including, without limitation, the Senior Secured Credit Agreement) or commercial paper facilities, in each case, with banks or other lenders or investors or indentures or other agreements providing for revolving credit loans, term loans, debt securities, receivables financing (including through the sale of receivables to such lenders or to special purpose entities formed to borrow from such lenders against such receivables) or letters of credit or other indebtedness, in each case, as amended, restated, supplemented, modified, renewed, refunded, replaced in any manner (whether upon or after termination or otherwise) or refinanced (including by means of sales of debt securities to investors) in whole or in part, in one or more instances, from time to time (including successive renewals, extensions, substitutions, refinancings, restructurings, replacements, supplementations or other modifications of the foregoing, including into one or more debt facilities, commercial paper facilities or other debt instruments, indentures or agreements (including by means of sales of debt securities (including additional notes) to investors), providing for revolving credit loans, term loans, letters of credit, debt securities or other debt obligations, from time to time).

"<u>Currency Agreement</u>" means in respect of a Person any foreign exchange contract, currency swap agreement, futures contract, option contract or other similar agreement as to which such Person is a party or a beneficiary.

"Custodian" means any receiver, trustee, assignee, liquidator, custodian or similar official under any Bankruptcy Law.

"Default" means any event which is, or after notice or passage of time or both would be, an Event of Default.

"Defaulted Interest" shall have the meaning set forth in Section 2.14.

"Definitive Notes" means certificated securities.

"Depositary" means The Depository Trust Company, its nominees and their respective successors and assigns, or such other depository institution hereinafter appointed by the Company.

"Disqualified Stock" means, with respect to any Person, any Capital Stock of such Person which by its terms (or by the terms of any security into which it is convertible or for which it is exchangeable) or upon the happening of any event: (1) matures or is mandatorily redeemable pursuant to a sinking fund obligation or otherwise; (2) is convertible into or exchangeable for Indebtedness or Disqualified Stock (excluding Capital Stock which is convertible or exchangeable solely at the option of the Company or a Restricted Subsidiary (it being understood that upon such conversion or exchange it shall be an Incurrence of such Indebtedness or Disqualified Stock)); or (3) is redeemable at the option of the holder of the Capital Stock in whole or in part; in each case on or prior to the date that is 91 days after the earlier of the date (a) of the Stated Maturity of the Notes or (b) on which there are no Notes outstanding, *provided* that only the portion of Capital Stock which so matures or is mandatorily redeemable, is so convertible or exchangeable or is so redeemable at the option of the holder thereof prior to such date shall be deemed to be Disqualified Stock; *provided, further* that any Capital Stock upon the occurrence of a change of control or asset sale (each defined in a substantially identical manner to the corresponding definitions in this Indenture) shall not constitute Disqualified Stock if the terms of such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which it is ratable or exchangeable) provide that the Company may not repurchase or redeem any such Capital Stock (and all such securities into which it is convertible or for which

"<u>Domestic Subsidiary</u>" means any Restricted Subsidiary that is organized under the laws of the United States or any state thereof or the District of Columbia and any Subsidiary of such Restricted Subsidiary, other than any Restricted Subsidiary that is a Foreign Subsidiary.

"Equity Interests" means Capital Stock and all warrants, options, profits, interests, equity appreciation rights or other rights to acquire or purchase Capital Stock (but excluding any debt security that is convertible into, or exchangeable for, Capital Stock).

"Equity Offering" means (i) an offering for cash by the Company or Holdings, as the case may be, of its Common Stock, or options, warrants or rights with respect to its Common Stock, or (ii) a cash capital contribution to the Company or any of its Restricted Subsidiaries, in each case other than (x) public offerings with respect to the Company's or Holdings', as the case may be, Common Stock, or options, warrants or rights, registered on Form S-4 or S-8, (y) an issuance to any Subsidiary or (z) any offering of Common Stock issued in connection with a transaction that constitutes a Change of Control.

"Euroclear" means Euroclear Bank S.A./N.V. or any successor securities clearing agency.

"Exchange Act" means the Securities Exchange Act of 1934, as amended and the rules and regulations of the SEC promulgated thereunder.

"Exchange Offer" shall have the meaning set forth in the Registration Rights Agreement.

"Exchange Securities" shall have the meaning set forth in the Registration Rights Agreement.

"Excluded Contributions" means the Net Cash Proceeds and the fair market value of the assets (as determined conclusively by the Board of Directors of the Company) received by the Company after the Issue Date from:

(1) capital contributions to its common equity capital, and

(2) the sale (other than to a Subsidiary of the Company or an employee stock ownership plan, option plan or similar trust to the extent such sale to an employee stock ownership plan or similar trust is financed by loans from or Guaranteed by the Company or any Restricted Subsidiary unless such loans have been repaid with cash on or prior to the date of determination) of Capital Stock (other than Disqualified Stock) of the Company,

in each case designated as Excluded Contributions pursuant to an Officers' Certificate on or promptly after the date such capital contributions are made or the date such Capital Stock is sold, as the case may be.

"Expense Reimbursement Agreement" means the Expense Reimbursement Agreement between the Company and Oak Hill Capital Management, LLC (and their permitted successors and assigns thereunder) as in effect on the Issue Date.

"<u>Fiscal Year</u>" means the fiscal year of the Company ending on the Sunday after the Saturday closest to January 31 of each year or such other fiscal year as may be determined by the Company and the Board of Directors and of which the Trustee shall receive written notice pursuant to <u>Section 3.20</u> hereof.

"Foreign Subsidiary" means any Restricted Subsidiary that is not organized under the laws of the United States or any state thereof or the District of Columbia and any Subsidiary of such Restricted Subsidiary.

"GAAP" means generally accepted accounting principles in the United States as in effect as of the date of this Indenture, including those set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as approved by a significant segment of the accounting profession. All ratios and computations based on GAAP contained in this Indenture shall be computed in conformity with GAAP.

"Guarantee" means any obligation, contingent or otherwise, of any Person directly or indirectly guaranteeing any Indebtedness of any other Person and any obligation, direct or indirect, contingent or otherwise, of such Person:

(1) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness of such other Person (whether arising by virtue of partnership arrangements, or by agreement to keep-well, to purchase assets, goods, securities or services, to take or pay, or to maintain financial statement conditions or otherwise); or

(2) entered into for purposes of assuring in any other manner the obligee of such Indebtedness of the payment thereof or to protect such obligee against loss in respect thereof (in whole or in part);

provided, however, that the term "Guarantee" shall not include endorsements for collection or deposit in the ordinary course of business. The term "Guarantee" used as a verb has a corresponding meaning.

"<u>Guarantor</u>" means each Restricted Subsidiary (other than Foreign Subsidiaries) in existence on the Issue Date that provides a Note Guarantee on the Issue Date (and any other Restricted Subsidiary that provides a Note Guarantee in accordance with this Indenture); *provided* that upon release or discharge of such Restricted Subsidiary from its Note Guarantee in accordance with this Indenture, such Restricted Subsidiary shall cease to be a Guarantor,

"Guarantor Pari Passu Indebtedness" means Indebtedness of a Guarantor that ranks equally in right of payment to its Note Guarantee.

"<u>Guarantor Subordinated Obligation</u>" means, with respect to a Guarantor, any Indebtedness of such Guarantor (whether outstanding on the Issue Date or thereafter Incurred) which is expressly subordinated in right of payment to the obligations of such Guarantor under its Note Guarantee pursuant to a written agreement.

"Hedging Obligations" of any Person means the obligations of such Person pursuant to any Interest Rate Agreement, Currency Agreement or Commodity Agreement.

"Holder" means a Person in whose name a Note is registered on the Registrar's books.

"Holdings" means Dave & Buster's Holdings, Inc., a Delaware corporation.

"Incur" means issue, create, assume, Guarantee, incur or otherwise become liable for; *provided, however*, that any Indebtedness or Capital Stock of a Person existing at the time such Person becomes a Restricted Subsidiary (whether by merger, consolidation, acquisition or otherwise) shall be deemed to be Incurred by such Restricted Subsidiary at the time it becomes a Restricted Subsidiary; and the terms "Incurred" and "Incurrence" have meanings correlative to the foregoing.

"Indebtedness" means, with respect to any Person on any date of determination (without duplication): (i) the principal of and premium (if any) in respect of obligations of such Person evidenced by bonds, debentures, notes or other similar instruments; (iii) the principal component of all obligations of such Person in respect of letters of credit, bankers' acceptances or other similar instruments (including reimbursement obligations with respect thereto except to the extent such reimbursement obligation relates to a trade payable and such obligation is satisfied within 30 days of Incurrence); (iv) the principal component of all obligations of such Person to pay the deferred and unpaid purchase price of property (except trade payables), which purchase price is due more than six months after the date of placing such property in service or taking delivery and title thereto; (v) Capitalized Lease Obligations and all Attributable Indebtedness of such Person; (vi) the principal component of all obligations of such Persons; (vii) the principal component of all nebtedness of such Persons; (vii) the principal component of Indebtedness of such Persons, with respect to any Subsidiary that is not a Guarantor, any Preferred Stock; (vii) the principal component of all Indebtedness of such Persons secured by a Lien on any asset of such Person, whether or not such Indebtedness is assumed by such Person; *provided, however*, that the amount of such Persons; (viii) the principal component of Indebtedness of such Person so the extent Guaranteed by such Person; and (ix) to the extent not otherwise included in this definition, net obligations of such Person under Hedging Obligations (the amount of any such obligations to be equal at any time to the termination value of such agreement or arrangement giving rise to such obligation that would be payable by such Person at such time).

The amount of Indebtedness of any Person at any date shall be the outstanding balance at such date of all unconditional obligations as described above and the maximum liability, upon the occurrence of the contingency giving rise to the obligation, of any contingent obligations at such date. Notwithstanding the foregoing, money borrowed and set aside at the time of the Incurrence of any Indebtedness in order to pre-fund the payment of interest on such Indebtedness shall not be deemed to be "Indebtedness" *provided* that such money is held to secure the payment of such interest.

In addition, "Indebtedness" of any Person shall include Indebtedness described in the preceding paragraph that would not appear as a liability on the balance sheet of such Person if:

(1) such Indebtedness is the obligation of a partnership or joint venture that is not a Restricted Subsidiary (a "Joint Venture");

(2) such Person or a Restricted Subsidiary of such Person is a general partner of the Joint Venture (a "General Partner"); and

(3) there is recourse, by contract or operation of law, with respect to the payment of such Indebtedness to property or assets of such Person or a Restricted Subsidiary of such Person; and then such Indebtedness shall be included in an amount not to exceed:

(a) the lesser of (i) the net assets of the General Partner and (ii) the amount of such obligations to the extent that there is recourse, by contract or operation of law, to the property or assets of such Person or a Restricted Subsidiary of such Person; or

(b) if less than the amount determined pursuant to clause (a) immediately above, the actual amount of such Indebtedness that is recourse to such Person or a Restricted Subsidiary of such Person, if the Indebtedness is evidenced by a writing and is for a determinable amount.

"Indenture" means this Indenture, as amended or supplemented from time to time.

"<u>Interest Rate Agreement</u>" means, with respect to any Person, any interest rate protection agreement, interest rate future agreement, interest rate coption agreement, interest rate swap agreement, interest rate cap agreement, interest rate collar agreement, interest rate hedge agreement or other similar agreement or arrangement as to which such Person is party or a beneficiary.

"Investment" means, with respect to any Person, all investments by such Person in other Persons (including Affiliates) in the form of any direct or indirect advance, loan (other than advances or extensions of credit to customers in the ordinary course of business) or other extensions of credit (including by way of Guarantee or similar arrangement, but excluding any debt or extension of credit represented by a bank deposit other than a time deposit) or capital contribution to (by means of any transfer of cash or other property to others or any payment for property or services for the account or use of others), or any purchase or acquisition of Capital Stock, Indebtedness or other similar instruments issued by, such Person and all other items that are or would be classified as investments on a balance sheet prepared in accordance with GAAP; *provided* that none of the following shall be deemed to be an Investment:

(1) Hedging Obligations entered into in the ordinary course of business and in compliance with this Indenture;

(2) endorsements of negotiable instruments and documents in the ordinary course of business; and

(3) an acquisition of assets, Capital Stock or other securities by the Company or a Subsidiary for consideration to the extent such consideration consists of Common Stock of the Company.

For purposes of <u>Section 3.4</u>, (i) "Investment" shall include the portion (proportionate to the Company's equity interest in a Restricted Subsidiary to be designated as an Unrestricted Subsidiary) of the fair market value of the net assets of such Restricted Subsidiary at the time that such Restricted Subsidiary is designated an Unrestricted Subsidiary; *provided, however*, that upon a redesignation of such Subsidiary as a Restricted Subsidiary, the Company shall be deemed to continue to have a permanent "Investment" in an Unrestricted Subsidiary in an amount (if positive) equal to (a) the Company's "Investment" in such Subsidiary at the time of such redesignation less (b) the portion (proportionate to the Company's equity interest in such Subsidiary) of the fair market value of the net assets (as conclusively determined by the Board of Directors of the Company in good faith) of such Subsidiary at the time that such Subsidiary is so redesignated a Restricted Subsidiary; (ii) any property transferred to or from an Unrestricted Subsidiary shall be valued at its fair market value at the time of such transfer, in each case as determined in good faith by the Board of Directors of the Company; and (iii) if the Company or any Restricted Subsidiary such that, after giving effect to any such sale or disposition, such entity is no longer a Subsidiary of the Company, the Company shall be deemed to have made an Investment on the date of any such sale or disposition equal to the fair market value (as conclusively determined by the Board of Directors of the Company in good faith) of the Capital Stock of such Subsidiary sold or disposed of.

"Investment Grade Rating" means a rating equal to or higher than Baa3 (or the equivalent) by Moody's Investors Service, Inc. and BBB- (or the equivalent) by Standard & Poor's Ratings Group, Inc., or any equivalent rating by any Rating Agency, in each case, with a stable or better outlook.

"Issue Date" means June 1, 2010.

"Legal Holiday" has the meaning ascribed to it in Section 11.8.

"Lien" means any mortgage, pledge, security interest, encumbrance, lien or charge of any kind (including any conditional sale or other title retention agreement or lease in the nature thereof).

"<u>Net Available Cash</u>" from an Asset Disposition means cash payments received (including any cash payments received by way of deferred payment of principal pursuant to a note or installment receivable or otherwise and net proceeds from the sale or other disposition of any securities received as consideration, but only as and when received, but excluding any other consideration received in the form of assumption by the acquiring person of Indebtedness or other obligations relating to the properties or assets that are the subject of such Asset Disposition or received in any other non-cash form) therefrom, in each case net of:

(1) all legal, accounting, investment banking, title and recording tax expenses, commissions and other fees and expenses Incurred, and all Federal, state, provincial, foreign and local taxes required to be paid or accrued as a liability under GAAP (after taking into account any available tax credits or deductions and any tax sharing agreements), as a consequence of such Asset Disposition;

(2) all payments made on any Indebtedness which is secured by any assets subject to such Asset Disposition, in accordance with the terms of any Lien upon such assets, or which must by its terms, or in order to obtain a necessary consent to such Asset Disposition, or by applicable law is required to be repaid out of the proceeds from such Asset Disposition;

(3) all distributions and other payments required to be made to minority interest holders in Subsidiaries or joint ventures as a result of such Asset Disposition; and

(4) the deduction of appropriate amounts to be provided by the seller as a reserve, in accordance with GAAP, against any liabilities associated with the assets disposed of in such Asset Disposition and retained by the Company or any Restricted Subsidiary after such Asset Disposition.

"<u>Net Cash Proceeds</u>" with respect to any issuance or sale of Capital Stock means the cash proceeds of such issuance or sale net of attorneys' fees, accountants' fees, underwriters' or placement agents' fees, listing fees, discounts or commissions and brokerage, consultant and other fees and charges actually Incurred in connection with such issuance or sale and net of taxes paid or payable as a result of such issuance or sale (after taking into account any available tax credit or deductions and any tax sharing arrangements); *provided* that the cash proceeds of an Equity Offering by Holdings shall not be deemed Net Cash Proceeds, except to the extent such cash proceeds are contributed to the Company.

"Non-Guarantor Restricted Subsidiary" means any Restricted Subsidiary that is not a Guarantor.

"<u>Non-Recourse Debt</u>" means Indebtedness of a Person:

(1) as to which neither the Company nor any Restricted Subsidiary (a) provides any Guarantee or credit support of any kind (including any undertaking, guarantee, indemnity, agreement or instrument that would constitute Indebtedness) or (b) is directly or indirectly liable (as a guarantor or otherwise);

(2) no default with respect to which (including any rights that the holders thereof may have to take enforcement action against an Unrestricted Subsidiary) would permit (upon notice, lapse of time or both) any holder of any other Indebtedness of the Company or any Restricted Subsidiary to declare a default under such other Indebtedness or cause the payment thereof to be accelerated or payable prior to its stated maturity; and

(3) the explicit terms of which provide there is no recourse against any of the assets of the Company or its Restricted Subsidiaries.

"<u>Note Guarantee</u>" means, individually, any Guarantee of payment of the Notes and Exchange Securities issued in a registered Exchange Offer pursuant to the Registration Rights Agreement by a Guarantor pursuant to the terms of this Indenture and any supplemental indenture thereto, and, collectively, all such Guarantees. Each such Guarantee will be substantially in the form of Exhibit C hereto.

"Note Register" means the register of Notes, maintained by the Registrar, pursuant to Section 2.3.

"Notes" means the Notes issued under this Indenture.

"Notes Custodian" means the custodian with respect to the Global Notes (as appointed by the Depositary), or any successor Person thereto and shall initially be the Trustee.

"Offering Memorandum" means the Offering Memorandum, dated May 19, 2010 relating to the issuance of the Notes.

"Officer" means the Chairman of the Board of Directors, the Chief Executive Officer, the President, the Chief Financial Officer, any Vice President, the Treasurer or the Secretary of the Company. Officer of any Guarantor has a correlative meaning.

"Officers' Certificate" means a certificate signed by two Officers or by an Officer and either an Assistant Treasurer or an Assistant Secretary of the Company.

"Opinion of Counsel" means a written opinion from legal counsel who is acceptable to the Trustee. The counsel may be an employee of or counsel to the Company or the Trustee.

"Pari Passu Indebtedness" means Indebtedness that ranks equally in right of payment to the Notes.

"<u>Permitted Holders</u>" means Oak Hill Capital Partners III, L.P., Oak Hill Capital Management Partners III, L.P. and Oak Hill Capital Management, LLC (collectively, "Oak Hill"), investment funds managed or advised by Oak Hill, partners of Oak Hill and any Affiliates or Related Persons thereof.

"Permitted Investment" means an Investment by the Company or any Restricted Subsidiary in:

(1) (a) a Restricted Subsidiary that is a Guarantor or (b) a Person which shall, upon the making of such Investment, become a Restricted Subsidiary that is a Guarantor; *provided*, *however*, that the primary business of such Restricted Subsidiary is a Related Business;

(2) or held by another Person if such other Person is merged or consolidated with or into, or transfers or conveys all or substantially all its assets to, the Company or a Restricted Subsidiary that is a Guarantor; *provided*, *however*, that such Person's primary business is a Related Business; *provided further*, that in the case of Investments held by such other Person, such Investment was not acquired by such Person in contemplation of such acquisition, merger, consolidation or transfer;

## (3) cash and Cash Equivalents;

(4) receivables owing to the Company or any Restricted Subsidiary created or acquired in the ordinary course of business and payable or dischargeable in accordance with customary trade terms; *provided*, *however*, that such trade terms may include such concessionary trade terms as the Company or any such Restricted Subsidiary deems reasonable under the circumstances;

(5) payroll, travel and similar advances to cover matters that are expected at the time of such advances ultimately to be treated as expenses for accounting purposes and that are made in the ordinary course of business;

(6) to the extent permitted by applicable law, loans or advances to employees (other than executive officers) of the Company and its Restricted Subsidiaries made in the ordinary course of business consistent with past practices of the Company or such Restricted Subsidiary in an aggregate amount at any one time outstanding not to exceed \$2.5 million (loans or advances that are forgiven shall continue to be deemed outstanding);

(7) Equity Interests, obligations or securities received in settlement of debts created in the ordinary course of business and owing to the Company or any Restricted Subsidiary or in satisfaction of judgments or pursuant to any plan of reorganization or similar arrangement upon the bankruptcy or insolvency of a debtor;

(8) Investments made as a result of the receipt of non-cash consideration from an Asset Disposition that was made pursuant to and in compliance with <u>Section 3.8;</u>

(9) Investments in existence on the Issue Date;

(10) Currency Agreements, Interest Rate Agreements, Commodity Agreements and related Hedging Obligations, which transactions or obligations are Incurred in compliance with <u>Section 3.3</u>;

(11) Investments by the Company or any of its Restricted Subsidiaries, together with all other Investments pursuant to this clause (11), in an aggregate amount at the time of such Investment not to exceed \$15.0 million outstanding at any one time (with the fair market value of such Investment being measured at the time made and without giving effect to subsequent changes in value);

(12) Guarantees issued in accordance with Section 3.3;

(13) any Asset Swap made in accordance with Section 3.8;

(14) any acquisition of assets or Equity Interests solely in exchange for, or out of the Net Cash Proceeds received from, the substantially contemporaneous issuance of Equity Interests (other than Disqualified Stock) of the Company; *provided* that the amount of any such Net Cash Proceeds that are utilized for any such Investment pursuant to this clause (14) will be excluded from clause (c)(ii) of <u>Section 3.4(a)</u>;

(15) endorsements of negotiable instruments and documents in the ordinary course of business;

(16) pledges or deposits permitted under clause (2) of the definition of Permitted Liens.

(17) Investments made in connection with the funding of contributions under any non-qualified retirement plan or similar employee compensation plan in an amount not to exceed the amount of compensation expense recognized by the Company and its Restricted Subsidiaries in connection with such plans; and

(18) Investments in or by any Foreign Subsidiary in an aggregate amount at the time of such Investments not to exceed \$10.0 million outstanding at any one time (with the fair market value of such Investment being measured at the time made and without giving effect to subsequent changes in value).

"Permitted Liens" means, with respect to any Person:

(1) Liens securing Indebtedness and other obligations under the Senior Secured Credit Agreement and related Hedging Obligations and liens on assets of Restricted Subsidiaries securing Guarantees of Indebtedness and other obligations of the Company under the Senior Secured Credit Agreement permitted to be Incurred under this Indenture in an aggregate principal amount at any one time outstanding not to exceed \$250.0 million;

(2) pledges or deposits by such Person under workers' compensation laws, unemployment insurance laws or similar legislation, or good faith deposits in connection with bids, tenders, contracts (other than for the payment of Indebtedness) or leases to which such Person is a party, or deposits to secure public or statutory obligations of such Person or deposits of cash or United States government bonds to secure surety or appeal bonds to which such Person is a party, or deposits as security for contested taxes or import or customs duties or for the payment of rent, in each case Incurred in the ordinary course of business;

(3) Liens imposed by law, including carriers', warehousemen's, mechanics', materialmen's and repairmen's Liens Incurred in the ordinary course of business;

(4) Liens for taxes, assessments or other governmental charges not yet subject to penalties for non-payment or which are being contested in good faith by appropriate proceedings provided appropriate reserves required pursuant to GAAP have been made in respect thereof;

(5) Liens in favor of issuers of surety or performance bonds or letters of credit or bankers' acceptances issued pursuant to the request of and for the account of such Person in the ordinary course of its business; *provided*, *however*, that such letters of credit do not constitute Indebtedness;

(6) encumbrances, ground leases, easements or reservations of, or rights of others for, licenses, rights of way, sewers, electric lines, telegraph and telephone lines and other similar purposes, or zoning, building codes or other restrictions (including, without limitation, minor defects or irregularities in title and similar encumbrances) as to the use of real properties or Liens incidental to the conduct of the business of such Person or to the ownership of its properties which do not in the aggregate materially adversely affect the value of said properties or materially impair their use in the operation of the business of such Person;

(7) Liens securing Hedging Obligations so long as the related Indebtedness is, and is permitted to be under this Indenture, secured by a Lien on the same property securing such Hedging Obligation;

(8) leases, licenses, subleases and sublicenses of assets (including, without limitation, real property and intellectual property rights) which do not materially interfere with the ordinary conduct of the business of the Company or any of its Restricted Subsidiaries;

(9) judgment Liens not giving rise to an Event of Default so long as such Lien is adequately bonded and any appropriate legal proceedings which may have been duly initiated for the review of such judgment have not been finally terminated or the period within which such proceedings may be initiated has not expired;

(10) Liens for the purpose of securing the payment of all or a part of the purchase price of, or Capitalized Lease Obligations, purchase money obligations or other payments Incurred to finance the acquisition, lease, improvement or construction of, assets or property acquired or constructed in the ordinary course of business, *provided* that:

(a) the aggregate principal amount of Indebtedness secured by such Liens is otherwise permitted to be Incurred under this Indenture and does not exceed the cost of the assets or property so acquired or constructed; and

(b) such Liens are created within 180 days of construction or acquisition of such assets or property and do not encumber any other assets or property of the Company or any Restricted Subsidiary other than such assets or property and assets affixed or appurtenant thereto;

(11) Liens arising solely by virtue of any statutory or common law provisions relating to banker's Liens, rights of set-off or similar rights and remedies as to deposit accounts or other funds maintained with a depositary institution; *provided* that:

(a) such deposit account is not a dedicated cash collateral account and is not subject to restrictions against access by the Company in excess of those set forth by regulations promulgated by the Federal Reserve Board; and

(b) such deposit account is not intended by the Company or any Restricted Subsidiary to provide collateral to the depository institution;

(12) Liens arising from Uniform Commercial Code financing statement filings regarding operating leases entered into by the Company and its Restricted Subsidiaries in the ordinary course of business;

(13) Liens existing on the Issue Date, other than Liens Incurred pursuant to clause (1) of this definition;

(14) Liens on property or Capital Stock of a Person at the time such Person becomes a Restricted Subsidiary; *provided*, *however*, that such Liens are not created, Incurred or assumed in connection with, or in contemplation of, such other Person becoming a Restricted Subsidiary; *provided*, *further*, *however*, that any such Lien may not extend to any other property owned by the Company or any Restricted Subsidiary;

(15) Liens on property at the time the Company or a Restricted Subsidiary acquired the property, including any acquisition by means of a merger or consolidation with or into the Company or any Restricted Subsidiary; *provided*, *however*, that such Liens are not created, Incurred or assumed in connection with, or in contemplation of, such acquisition; *provided further*, *however*, that such Liens may not extend to any other property owned by the Company or any Restricted Subsidiary;

(16) Liens securing Indebtedness or other obligations of a Restricted Subsidiary owing to the Company or another Restricted Subsidiary;

(17) Liens securing the Notes and the Note Guarantees;

(18) Liens securing Refinancing Indebtedness Incurred to refinance, refund, replace, amend, extend or modify, as a whole or in part, Indebtedness that was previously so secured pursuant to clauses (10), (13), (14), (15), (17) (20) and (22), *provided* that any such Lien is limited to all or part of the same property or assets (plus improvements, accessions, proceeds or dividends or distributions in respect thereof) that secured (or, under the written arrangements under which the original Lien arose, could secure) the Indebtedness being refinanced or is in respect of property that is the security for a Permitted Lien hereunder;

(19) any interest or title of a lessor under any Capitalized Lease Obligation or operating lease;

(20) Liens under industrial revenue, municipal or similar bonds;

(21) Liens securing Indebtedness (other than Subordinated Obligations and Guarantor Subordinated Obligations) in an aggregate principal amount outstanding at any one time not to exceed \$25.0 million which may include Liens securing Indebtedness and other obligations of Foreign Subsidiaries that are incurred in accordance with Section 3.3 in an aggregate principal amount outstanding at any one time not to exceed \$10.0 million; and

(22) Liens securing Indebtedness of the Company or any of its Restricted Subsidiaries Incurred pursuant to <u>Section 3.3(a)</u>, provided that on the date thereof the Consolidated Secured Debt Leverage Ratio for the Company and its Restricted Subsidiaries is less than or equal to 1.50 to 1.00.

"Person" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, limited liability company, government or any agency or political subdivision thereof or any other entity.

"Preferred Stock," as applied to the Capital Stock of any corporation, means Capital Stock of any class or classes (however designated) which is preferred as to the payment of dividends, or as to the distribution of assets upon any voluntary or involuntary liquidation or dissolution of such corporation, over shares of Capital Stock of any other class of such corporation.

"Preopening Costs" means "start-up costs" (such term used herein as defined in SOP 98-5 published by the American Institute of Certified Public Accountants) related to the acquisition, opening and organizing of new restaurants, including, without limitation, the cost of feasibility studies, staff training and recruiting and travel costs for employees engaged in such start-up activities.

"<u>QIB</u>" means any "qualified institutional buyer" (as defined in Rule 144A under the Securities Act).

"<u>Rating Agency</u>" means each of Standard & Poor's Ratings Group, Inc. and Moody's Investors Service, Inc. or if Standard & Poor's Ratings Group, Inc. or Moody's Investors Service, Inc. or both shall not make a rating on the Notes publicly available, a nationally recognized statistical Rating Agency or agencies, as the case may be, selected by the Company (as certified by a resolution of the Board of Directors delivered to the Trustee) which shall be substituted for Standard & Poor's Ratings Group, Inc. or Moody's Investors Service, Inc. or both, as the case may be.

"<u>Receivable</u>" means a right to receive payment arising from a sale or lease of goods or the performance of services by a Person pursuant to an arrangement with another Person pursuant to which such other Person is obligated to pay for goods or services under terms that permit the purchase of such goods and services on credit and shall include, in any event, any items of property that would be classified as an "account," "chattel paper," "payment intangible" or "instrument" under the Uniform Commercial Code as in effect in the State of New York and any "supporting obligations" as so defined.

"<u>Receivables Fees</u>" means any fees or interest paid to purchasers or lenders providing the financing in connection with a factoring agreement or other similar agreement, including any such amounts paid by discounting the face amount of Receivables or participations therein transferred in connection with a factoring agreement or other similar arrangement, regardless of whether any such transaction is structured as on-balance sheet or off-balance sheet or through a Restricted Subsidiary or an Unrestricted Subsidiary.

"<u>Refinancing Indebtedness</u>" means Indebtedness that is Incurred to refund, refinance, replace, exchange, renew, repay or extend (including pursuant to any defeasance or discharge mechanism) (collectively, "refinance," and "refinanced" shall have a correlative meaning) any Indebtedness existing on the date of this Indenture or Incurred in compliance with this Indenture (including Indebtedness of the Company that refinances Indebtedness of any Restricted Subsidiary and Indebtedness of any Restricted Subsidiary that refinances Indebtedness of another Restricted Subsidiary or the Company) including Indebtedness that refinances Refinancing Indebtedness; *provided, however*, that:

(1) (a) if the Stated Maturity of the Indebtedness being refinanced is earlier than the Stated Maturity of the Notes, the Refinancing Indebtedness has a Stated Maturity no earlier than the Stated Maturity of the Indebtedness being refinanced or (b) if the Stated Maturity of the Indebtedness being refinanced is later than the Stated Maturity of the Notes, the Refinancing Indebtedness has a Stated Maturity at least 91 days later than the Stated Maturity of the Notes;

(2) the Refinancing Indebtedness has an Average Life at the time such Refinancing Indebtedness is Incurred that is equal to or greater than the Average Life of the Indebtedness being refinanced;

(3) such Refinancing Indebtedness is Incurred in an aggregate principal amount (or if issued with original issue discount, an aggregate issue price) that is equal to or less than the sum of the aggregate principal amount (or if issued with original issue discount, the aggregate accreted value) then outstanding of the Indebtedness being refinanced (plus, without duplication, any additional Indebtedness Incurred to pay interest or premiums required by the instruments governing such existing Indebtedness and fees Incurred in connection therewith);

(4) if the Indebtedness being refinanced is subordinated in right of payment to the Notes or a Subsidiary's Note Guarantee, such Refinancing Indebtedness is subordinated in right of payment to the Notes or a Subsidiary's Note Guarantee on terms at least as favorable to the holders as those contained in the documentation governing the Indebtedness being extended, refinanced, renewed, replaced, defeased or refunded; and

(5) no Restricted Subsidiary (other than a Guarantor) may Incur any Indebtedness if the proceeds are used to refinance Indebtedness of the Company or a Guarantor.

"<u>Registration Rights Agreement</u>" means that certain registration rights agreement dated as of the date of this Indenture by and among Dave & Buster's, the Guarantors and the initial purchasers set forth therein and, with respect to any Additional Notes, one or more substantially similar registration rights agreements among Dave & Buster's and the other parties thereto as such agreements may be amended from time to time.

"<u>Related Business</u>" means (x) any business which is the same as or related, ancillary or complementary to, or a reasonable extension or expansion of, any of the businesses of the Company and its Restricted Subsidiaries on the date of this Indenture and (y) any unrelated business to the extent it is not material to the Company.

"Related Business Assets" means assets used or useful in a Related Business.

"Related Person" with respect to any Permitted Holder means:

(1) any controlling stockholder or a majority (or more) owned Subsidiary of such Permitted Holder or, in the case of an individual, any spouse or immediate family member of such Permitted Holder, any trust created for the benefit of such individual or such individual's estate, executor, administrator, committee or beneficiaries; or

(2) any trust, corporation, partnership or other entity, the beneficiaries, stockholders, partners, owners or Persons beneficially holding a majority (or more) controlling interest of which consist of such Permitted Holder and/or such other Persons referred to in the immediately preceding clause (1).

"<u>Responsible Officer</u>" shall mean, when used with respect to the Trustee, any officer within the corporate trust department of the Trustee, including any vice president, assistant vice president, assistant secretary, assistant treasurer, trust officer or any other officer of the Trustee who customarily performs functions similar to those performed by the persons who at the time shall be such officers, respectively, or to whom any corporate trust matter is referred because of such person's knowledge of and familiarity with the particular subject and who shall have direct responsibility for the administration of this Indenture.

"Restricted Investment" means any Investment other than a Permitted Investment.

"<u>Restricted Note</u>" means a Note that constitutes a "restricted security" within the meaning of Rule 144(a)(3) under the Securities Act; *provided*, *however*, that the Trustee shall be entitled to request and conclusively rely on an opinion of counsel with respect to whether any Note constitutes a Restricted Note.

"<u>Restricted Notes Legend</u>" means the Private Placement Legend set forth in clause (A) of <u>Section 2.1(d)</u> or the Regulation S Legend set forth in clause (B) of <u>Section 2.1(d)</u>, as applicable.

"Restricted Subsidiary" means any Subsidiary of the Company other than an Unrestricted Subsidiary.

"<u>Sale/Leaseback Transaction</u>" with respect to any Person means an arrangement relating to property now owned or hereafter acquired whereby the Company or a Restricted Subsidiary transfers such property to a Person and the Company or a Restricted Subsidiary leases it from such Person.

"SEC" means the United States Securities and Exchange Commission.

"Secured Indebtedness" means, with respect to any Person on any date of determination, any Indebtedness of such Person secured by any Lien.

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations of the SEC promulgated thereunder.

"Senior Secured Credit Agreement" means the Credit Agreement to be entered into among Games Intermediate Merger Corp. (to be merged with and into Holdings, with Holdings as the surviving entity), the Company (to be merged with and into Dave & Buster's, with Dave & Buster's as the surviving entity), as Borrower, 6131646 Canada Inc., as Canadian Borrower, JPMorgan Chase Bank N.A., as Administrative Agent, and the lenders parties thereto from time to time, as the same may be amended, restated, modified, renewed, refunded, replaced or refinanced in whole or in part from time to time (including increasing the amount loaned thereunder *provided* that such additional Indebtedness is Incurred in accordance with <u>Section 3.3</u>); *provided* that a Senior Secured Credit Agreement shall not (x) include Indebtedness issued, created or Incurred pursuant to a registered offering of securities under the Securities Act or a private placement of securities (including under Rule 144A or Regulation S) pursuant to an exemption from the registration requirements of the Securities Act or (y) relate to Indebtedness that does not consist exclusively of Pari Passu Indebtedness or Guarantor Pari Passu Indebtedness.

"Shelf Registration Statement" shall have the meaning set forth in the Registration Rights Agreement.

"<u>Significant Subsidiary</u>" means any Restricted Subsidiary that would be a "Significant Subsidiary" of the Company within the meaning of Rule 1-02 under Regulation S-X promulgated by the SEC.

"<u>Stated Maturity</u>" means, with respect to any security, the date specified in such security as the fixed date on which the payment of principal of such security is due and payable, including pursuant to any mandatory redemption provision, but shall not include any contingent obligations to repay, redeem or repurchase any such principal prior to the date originally scheduled for the payment thereof.

"<u>Stock Purchase Agreement</u>" means the Stock Purchase Agreement by and among Holdings, the sellers party thereto, each option holder of Holdings party thereto and Games Acquisition Corp., a Delaware corporation, as Buyer, dated as of May 2, 2010.

"Subordinated Obligation" means any Indebtedness of the Company (whether outstanding on the Issue Date or thereafter Incurred) which is subordinated or junior in right of payment to the Notes pursuant to a written agreement.

"Subsidiary" of any Person means (a) any corporation, association or other business entity (other than a partnership, joint venture, limited liability company or similar entity) of which more than 50% of the total ordinary voting power of shares of Capital Stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof (or persons performing similar functions) or (b) any partnership, joint venture, limited liability company or similar entity of which more than 50% of the capital accounts, distribution rights, total equity and voting interests or general or limited partnership interests, as applicable, is, in the case of clauses (a) and (b), at the time owned or controlled, directly or indirectly, by (1) such Person, (2) such Person and one or more Subsidiaries of such Person or (3) one or more Subsidiaries of such Person. Unless otherwise specified herein, each reference to a Subsidiary shall refer to a Subsidiary of the Company.

"Subsidiary Guarantees" shall have the meaning set forth in the Registration Rights Agreement.

"Successor Company" shall have the meaning assigned thereto in clause (i) of Section 4.1.

"TIA" or "Trust Indenture Act" means the Trust Indenture Act of 1939 (15 U.S.C. §§ 77aaa-77bbbb), as in effect from time to time.

"<u>Transactions</u>" means the transactions contemplated by the Stock Purchase Agreement, the initial borrowings under the Senior Secured Credit Agreement, the issuance of the Notes, the application of the proceeds therefrom and the payment of related fees and expenses.

"Treasury Rate" means the yield to maturity at the time of computation of United States Treasury securities with a constant maturity (as compiled and published in the most recent Federal Reserve Statistical Release H.15 (519) that has become publicly available at least two Business Days prior to the redemption date (or, if such Statistical Release is no longer published, any publicly available source of similar market data)) most nearly equal to the period from the redemption date to June 1, 2014; *provided, however*, that if the period from the redemption date to June 1, 2014; *provided, however*, that if the period from the redemption date to June 1, 2014; provided, average yield is given, the Treasury Rate shall be obtained by linear interpolation (calculated to the nearest one-twelfth of a year) from the weekly average yields of United States Treasury securities for which such yields are given, except that if the period from the redemption date to June 1, 2014 is less than one year, the weekly average yield on actually traded United States Treasury securities adjusted to a constant maturity of one year will be used.

"Trustee" means the party named as such in this Indenture until a successor replaces it and, thereafter, means such successor.

"Unrestricted Subsidiary" means:

(1) any Subsidiary of the Company that at the time of determination shall be designated an Unrestricted Subsidiary by the Board of Directors of the Company in the manner provided below; and

(2) any Subsidiary of an Unrestricted Subsidiary.

The Board of Directors of the Company may designate any Subsidiary of the Company (including any newly acquired or newly formed Subsidiary or a Person becoming a Subsidiary through merger or consolidation or Investment therein) to be an Unrestricted Subsidiary only if:

(1) such Subsidiary or any of its Subsidiaries does not own any Capital Stock or Indebtedness of or have any Investment in, or own or hold any Lien on any property of, any other Subsidiary of the Company which is not a Subsidiary of the Subsidiary to be so designated or otherwise an Unrestricted Subsidiary;

(2) all the Indebtedness of such Subsidiary and its Subsidiaries shall, at the date of designation, and shall at all times thereafter, consist of Non-Recourse Debt;

(3) such designation and the Investment of the Company in such Subsidiary complies with Section 3.4;

(4) such Subsidiary, either alone or in the aggregate with all other Unrestricted Subsidiaries, does not operate, directly or indirectly, all or substantially all of the business of the Company and its Subsidiaries;

(5) such Subsidiary is a Person with respect to which neither the Company nor any of its Restricted Subsidiaries has any direct or indirect obligation:

(a) to subscribe for additional Capital Stock of such Person; or

(b) to maintain or preserve such Person's financial condition or to cause such Person to achieve any specified levels of operating results;

and

(6) on the date such Subsidiary is designated an Unrestricted Subsidiary, such Subsidiary is not a party to any agreement, contract, arrangement or understanding with the Company or any Restricted Subsidiary with terms substantially less favorable to the Company than those that might have been obtained from Persons who are not Affiliates of the Company.

Any such designation by the Board of Directors of the Company shall be evidenced to the Trustee by filing with the Trustee a resolution of the Board of Directors of the Company giving effect to such designation and an Officers' Certificate certifying that such designation complies with the foregoing conditions. If, at any time, any Unrestricted Subsidiary would fail to meet the foregoing requirements as an Unrestricted Subsidiary, it shall thereafter cease to be an Unrestricted Subsidiary for purposes of this Indenture and any Indebtedness of such Subsidiary shall be deemed to be Incurred as of such date.

The Board of Directors of the Company may designate any Unrestricted Subsidiary to be a Restricted Subsidiary; *provided* that immediately after giving effect to such designation, no Default or Event of Default shall have occurred and be continuing or would occur as a consequence thereof and the Company could Incur at least \$1.00 of additional Indebtedness under the first paragraph of <u>Section 3.3</u> on a pro forma basis taking into account such designation.

"U.S. Government Obligations" means securities that are (a) direct obligations of the United States for the timely payment of which its full faith and credit is pledged or (b) obligations of a Person controlled or supervised by and acting as an agency or instrumentality of the United States the timely payment of which is unconditionally guaranteed as a full faith and credit obligation of the United States, which, in either case, are not callable or redeemable at the option of the issuer thereof, and shall also include a depositary receipt issued by a bank (as defined in Section 3(a)(2) of the Securities Act), as custodian with respect to any such U.S. Government Obligations or a specific payment of principal of or interest on any such U.S. Government Obligations held by such custodian for the account of the holder of such depositary receipt; *provided* that (except as required by law) such custodian is not authorized to make any deduction from the amount payable to the holder of such depositary receipt from any amount received by the custodian in respect of the U.S. Government Obligations or the specific payment of principal of or interest on the U.S. Government Obligations evidenced by such depositary receipt.

"<u>Voting Stock</u>" of a Person means all classes of Capital Stock of such Person then outstanding and normally entitled to vote in the election of directors, managers or trustees, as applicable.

"<u>Wholly Owned Subsidiary</u>" means a Restricted Subsidiary, all of the Capital Stock of which (other than directors' qualifying shares) is owned by the Company or another Wholly Owned Subsidiary.

Other Definitions.

Term	Defined in Section
"Additional Interest Notice"	3.21
"Additional Notes"	Recitals
"Additional Restricted Notes"	2.1(b)
"Affiliate Transaction"	3.9(a)
"Agent Members"	2.1(e)
"Asset Disposition Offer"	3.8(b)
"Asset Disposition Offer Amount"	3.8(c)
"Asset Disposition Offer Period"	3.8(c)
"Asset Disposition Purchase Date"	3.8(c)
"Authenticating Agent"	2.2
"Change of Control Offer"	3.10(b)
"Change of Control Payment"	3.10(b)
"Change of Control Payment Date"	3.10(b)
"Company"	Recitals
"Company Order"	2.2
"covenant defeasance option"	8.1(b)
"Covenant Suspension Event"	3.22(a)
"Defaulted Interest"	2.14
"Dave & Buster's"	Recitals
"Event of Default"	6.1
"Exchange Global Note"	2.1(b)
"Exchange Notes"	Recitals
"Excess Proceeds"	3.8(b)
"Funds in Trust"	8.2(1)
"Global Notes"	2.1(b)
"Guarantor Supplemental Indenture"	Recitals
"IAI"	2.1(b)
"Initial Guarantor"	Recitals
"Initial Notes"	Recitals
"Institutional Accredited Investor Global Note"	2.1(b)
"Institutional Accredited Investor Notes"	2.1(b)
"legal defeasance option"	8.1(b)
"Notes"	Recitals
"Obligations"	10.1
"Pari Passu Notes"	3.8(b)

Term	Defined in Section
"Paying Agent"	2.3
"Permanent Regulation S Global Note"	2.1(b)
"Permitted Holdings Payments"	3.4(b)
"Private Placement Legend"	2.1(d)
"Redemption Date"	5.5
"Registrar"	2.3
"Regulation S"	2.1(b)
"Regulation S Global Note"	2.1(b)
"Regulation S Legend"	2.1(d)
"Regulation S Notes"	2.1(b)
"Reinstatement Date"	3.22(b)
"Reinstatement Event"	3.22(b)
"Resale Restriction Termination Date"	2.6(a)
"Restricted Payment"	3.4(a)
"Restricted Period"	2.1(b)
"Rule 144A Global Note"	2.1(b)
"Rule 144A Note"	2.1(b)
"Series B Global Note"	2.1(b)
"Special Interest Payment Date"	2.14(a)
"Special Record Date"	2.14(a)
"Successor Guarantor"	4.1
"Successor Supplemental Indenture"	Recitals
"Supplemental Indentures"	Recitals
"Suspended Covenants"	3.22(a)
"Suspension Period"	3.22(b)
"Temporary Regulation S Global Note"	2.1(b)

SECTION 1.2. Incorporation by Reference of Trust Indenture Act. This Indenture is subject to the mandatory provisions of the TIA which are incorporated by reference in and made a part of this Indenture. The following TIA terms have the following meaning:

"Commission" means the SEC.

"indenture notes" means the Notes.

"indenture security holder" means a Noteholder.

"indenture to be qualified" means this Indenture.

"indenture trustee" or "institutional trustee" means the Trustee.

"obligor" on the indenture securities means the Company and any other obligor on the indenture securities.

All other TIA terms used in this Indenture that are defined by the TIA, defined by the TIA reference to another statute or defined by SEC rule have the meanings assigned to them by such definitions.

SECTION 1.3. Rules of Construction. Unless the context otherwise requires:

(1) a term has the meaning assigned to it;

(2) an accounting term not otherwise defined has the meaning assigned to it in accordance with GAAP;

(3) "or" is not exclusive;

(4) "including" means including without limitation;

(5) words in the singular include the plural and words in the plural include the singular;

(6) unsecured Indebtedness shall not be deemed to be subordinate or junior to secured Indebtedness merely by virtue of its nature as unsecured Indebtedness;

(7) the principal amount of any noninterest bearing or other discount security at any date shall be the principal amount thereof that would be shown on a balance sheet of the issuer dated such date prepared in accordance with GAAP;

(8) the principal amount of any Preferred Stock shall be (i) the maximum liquidation value of such Preferred Stock or (ii) the maximum mandatory redemption or mandatory repurchase price with respect to such Preferred Stock, whichever is greater; and

(9) "\$" and "U.S. dollars" each refer to United States dollars, or such other money of the United States that at the time of payment is legal tender for payment of public and private debts.

#### ARTICLE II

#### The Notes

SECTION 2.1. Form, Dating and Terms. (a) The aggregate principal amount of Notes that may be authenticated and delivered under this Indenture is unlimited. The Initial Notes issued on the date hereof will be in an aggregate principal amount of \$200,000,000. In addition, the Company may issue, from time to time in accordance with the provisions of this Indenture, including, without limitation, <u>Section 3.3(a)</u> hereof, Additional Notes and Exchange Notes. Furthermore, Notes may be authenticated and delivered upon registration or transfer, or in lieu of, other Notes pursuant to <u>Section 2.6, 2.10</u>, 2.12 or 9.5 or in connection with an Asset Disposition Offer pursuant to <u>Section 3.8</u> or a Change of Control Offer pursuant to <u>Section 3.10</u>.

The Initial Notes shall be known and designated as "11% Senior Notes, Series A, due 2018" of the Company. Additional Notes issued as Restricted Notes shall be known and designated as "11% Senior Notes, Series A, due 2018" of the Company. Additional Notes issued other than as Restricted Notes shall be known and designated as "11% Senior Notes, Series B, due 2018" of the Company, and Exchange Notes shall be known and designated as "11 Senior Notes, Series B, due 2018" of the Company, and Exchange Notes shall be known and designated as "11 Senior Notes, Series B, due 2018" of the Company, and Exchange Notes shall be known and designated as "11 Senior Notes, Series B, due 2018" of the Company.

With respect to any Additional Notes, the Company shall set forth in (a) a Board Resolution and (b)(i) an Officers' Certificate or (ii) one or more indentures supplemental hereto, the following information:

(i) the aggregate principal amount of such Additional Notes to be authenticated and delivered pursuant to this Indenture;

(ii) the issue price and the issue date of such Additional Notes; and

(iii) whether such Additional Notes shall be Restricted Notes issued in the form of Exhibit A hereto and/or shall be issued in the form of Exhibit B hereto.

The Initial Notes, the Additional Notes and the Exchange Notes shall be considered collectively as a single class for all purposes of this Indenture. Holders of the Initial Notes, the Additional Notes and the Exchange Notes shall vote and consent together on all matters to which such Holders are entitled to vote or consent as one class, and none of the Holders of the Initial Notes, the Additional Notes or the Exchange Notes shall have the right to vote or consent as a separate class on any matter to which such Holders are entitled to vote or consent.

(b) The Initial Notes are being offered and sold by the Company pursuant to a Purchase Agreement, dated May 19, 2010 among Games Merger Corp., a Missouri corporation (to be merged with and into the Company) and J.P. Morgan Securities Inc. and Jefferies & Company, Inc. as the initial purchasers, as amended by the Joinder Agreement, dated as of June 1, 2010 executed by the Company and each of the Guarantors. The Initial Notes and any Additional Notes (if issued as Restricted Notes) ("<u>Additional Restricted Notes</u>") shall be resold initially only to (A) QIBs and (B) Persons other than U.S. Persons (as defined in Regulation S under the Securities Act ("<u>Regulation S</u>")) in reliance on Regulation S. Such Initial Notes and Additional Restricted Notes may thereafter be transferred to, among others, QIBs, purchasers in reliance on Regulation S and institutional "accredited investors" (as defined in Rules 501(a)(1), (2), (3) and (7) under the Securities Act) who are not QIBs ("<u>IAIs</u>") in accordance with Rule 501 of the Securities Act in accordance with the procedure described herein. Additional Notes offered after the date hereof may be offered and sold by the Company from time to time pursuant to one or more purchase agreements in accordance with applicable law.

Initial Notes and Additional Restricted Notes offered and sold to QIBs in the United States in reliance on Rule 144A (the "<u>Rule 144A Notes</u>") shall be issued in the form of a permanent global Note substantially in the form of Exhibit A, which is hereby incorporated by reference and made a part of this Indenture, including appropriate legends as set forth in <u>Section 2.1(d)</u> (the "<u>Rule 144A Global Note</u>"), deposited with the Notes Custodian, duly executed by the Company and authenticated by the Trustee as hereinafter provided. The Rule 144A Global Note may be represented by more than one certificate, if so required by the Depositary's rules regarding the maximum principal amount to be represented by a single certificate. The aggregate principal amount of the Rule 144A Global Note may from time to time be increased or decreased by adjustments made on the records of the Trustee and the Depositary or its nominee, as hereinafter provided.

Initial Notes and any Additional Restricted Notes offered and sold outside the United States (the "<u>Regulation S Notes</u>") in reliance on Regulation S shall initially be issued in the form of a temporary global security (the "<u>Temporary Regulation S Global Note</u>"), without interest coupons. Beneficial interests in the Temporary Regulation S Global Note will be exchanged for beneficial interests in a corresponding permanent global Note, without interest coupons, substantially in the form of Exhibit A including appropriate legends as set forth in <u>Section 2.1(d)</u> (the "<u>Permanent Regulation S Global</u> <u>Note</u>" and, together with the Temporary Regulation S Global Note, each a "<u>Regulation S Global Note</u>") within a reasonable period after the expiration of the Restricted Period (as defined below) upon delivery of the certification contemplated by <u>Section 2.7</u>. Each Regulation S Global Note shall be deposited upon issuance with the Notes Custodian in the manner described in this <u>Article II</u> for credit by the Depositary to the respective accounts of the purchasers (or to such other accounts as they may direct), including, but not limited to, accounts at Euroclear or Clearstream. Prior to the 40th day after the later of the commencement of the offering of the Initial Notes and the Issue Date (such period through and including such 40th day, the "<u>Restricted Period</u>"), interests in the Temporary Regulation S Global Note may only be transferred to non-U.S. persons pursuant to Regulation S, unless exchanged for interests in a Global Note in accordance with the transfer and certification requirements described herein.

Investors may hold their interests in the Regulation S Global Note directly through Euroclear or Clearstream, if they are participants in such systems, or indirectly through organizations that are participants in such systems. Investors may also hold such interests through organizations other than Euroclear or Clearstream that are participants in the Depositary's system. If interests in the Regulation S Global Note are held through Euroclear or Clearstream, Euroclear and Clearstream shall hold such interests in the Regulation S Global Note through the Depositary on behalf of their participants through customers' securities accounts in their respective names on the books of their respective depositaries. Such depositaries, in turn, shall hold such interests in the applicable Regulation S Global Note in customers' securities accounts in the depositaries in the depositaries. The Regulation S Global Note may be represented by more than one certificate, if so required by the Depositary's rules regarding the maximum principal amount to be represented by a single certificate. The aggregate principal amount of the Regulation S Global Note may from time to time be increased or decreased by adjustments made on the records of the Trustee, and the Depositary or its nominee, as hereinafter provided.

Initial Notes and any Additional Restricted Notes resold to IAIs (the "<u>Institutional Accredited Investor Notes</u>") in the United States shall be issued in the form of a permanent global Note substantially in the form of Exhibit A including appropriate legends as set forth in <u>Section 2.1(d)</u> (the "<u>Institutional Accredited Investor Global Note</u>") deposited with the Notes Custodian, duly executed by the Company and authenticated by the Trustee as hereinafter provided. The Institutional Accredited Investor Global Note may be represented by more than one certificate, if so required by the Depositary's rules regarding the maximum principal amount to be represented by a single certificate. The aggregate principal amount of the Institutional Accredited Investor Global Note may from time to time be increased or decreased by adjustments made on the records of the Trustee and the Depositary, as hereinafter provided.

Exchange Notes exchanged for interests in the Rule 144A Note, the Regulation S Note and the Institutional Accredited Investor Note, if any, as the case may be, shall be issued in the form of a permanent global Note substantially in the form of Exhibit B hereto, which is hereby incorporated by reference and made a part of this Indenture, deposited with the Notes Custodian as hereinafter provided, including the appropriate legend set forth in <u>Section 2.1(d)</u> hereof (the "<u>Exchange Global Note</u>"). The Exchange Global Note may be represented by more than one certificate, if so required by the Depositary's rules regarding the maximum principal amount to be represented by a single certificate.

Any Additional Notes issued other than as Restricted Notes shall be issued in the form of one or more permanent global Notes substantially in the form of Exhibit B (each, a "Series B Global Note") deposited with the Notes Custodian, duly executed by the Company and authenticated by the Trustee as hereinafter provided. A Series B Global Note may be represented by more than one certificate, if so required by the Depositary's rules regarding the maximum principal amount to be represented by a single certificate. The aggregate principal amount of the Series B Global Notes may from time to time be increased or decreased by adjustments made on the records of the Trustee and the Depositary or its nominee, as hereinafter provided.

The Rule 144A Global Note, the Regulation S Global Note, the Institutional Accredited Investor Global Note, if any, the Exchange Global Note, and the Series B Global Note are sometimes collectively herein referred to as the "Global Notes."

The principal of (and premium, if any) and interest on the Notes shall be payable at the office or agency of the Company maintained for such purpose in The City of New York, or at such other office or agency of the Company as may be maintained for such purpose pursuant to <u>Section 2.3</u>; *provided*, *however*, that, at the option of the Company, each installment of interest may be paid by (i) check mailed to addresses of the Persons entitled thereto as such addresses shall appear on the Note Register or (ii) wire transfer or to an account located in the United States maintained by the payee. Payments in respect of Notes represented by a Global Note (including principal, premium and interest) shall be made by wire transfer of immediately available funds to the accounts specified by the Depositary. Payments in respect of Notes represented by Definitive Notes (including principal, premium, if any, and interest) held by a Holder of at least \$1,000,000 aggregate principal amount of Notes represented by Definitive Notes shall be made by wire transfer to a U.S. dollar account maintained by the payee with a bank in the United States if such Holder elects payment by wire transfer by giving written notice to the Trustee or the Paying Agent to such effect designating such account no later than 15 days immediately preceding the relevant due date for payment (or such other date as the Trustee may accept).

The Exchange Notes shall be in the form of <u>Exhibit B</u>. The Notes may have notations, legends or endorsements required by law, stock exchange rule or usage, in addition to those set forth on <u>Exhibit A</u> and <u>Exhibit B</u> and in <u>Section 2.1(d</u>). The Company shall approve the forms of the Notes and any notation, endorsement or legend on them. Any such notation, endorsement or legend shall be furnished to the Trustee in writing. Each Note shall be dated the date of its authentication. The terms of the Notes set forth in <u>Exhibit A</u> and <u>Exhibit B</u> are part of the terms of this Indenture and, to the extent applicable, the Company and the Trustee, by their execution and delivery of this Indenture, expressly agree to be bound by such terms.

(c) <u>Denominations</u>. The Notes shall be issuable only in fully registered form, without coupons, and only in denominations of \$2,000 and integral multiples of \$1,000 in excess thereof.

(d) <u>Restrictive Legends</u>. Unless and until (i) an Initial Note or an Additional Note issued as a Restricted Note is sold under an effective registration statement or (ii) an Initial Note or an Additional Note issued as a Restricted Note is exchanged for an Exchange Note in connection with an effective registration statement, in each case pursuant to the Registration Rights Agreement,

(A) the Rule 144A Global Note and the Institutional Accredited Investor Global Note shall (x) be subject to the restrictions on transfer set forth in Section 2.6 (including those set forth in the legend below) and (y) bear the following legend (the "Private Placement Legend") on the face thereof:

"THIS SECURITY HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), OR THE SECURITIES LAWS OF ANY STATE OR OTHER JURISDICTION. NEITHER THIS SECURITY NOR ANY INTEREST OR PARTICIPATION HEREIN MAY BE REOFFERED, SOLD, ASSIGNED, TRANSFERRED, PLEDGED, ENCUMBERED OR OTHERWISE DISPOSED OF IN THE ABSENCE OF SUCH REGISTRATION OR UNLESS SUCH TRANSACTION IS EXEMPT FROM, OR NOT SUBJECT TO, SUCH REGISTRATION. THE HOLDER OF THIS SECURITY, BY ITS ACCEPTANCE HEREOF, AGREES ON ITS OWN BEHALF AND ON BEHALF OF ANY INVESTOR ACCOUNT FOR WHICH IT HAS PURCHASED SECURITIES, TO OFFER, SELL OR OTHERWISE TRANSFER SUCH SECURITY, PRIOR TO THE DATE (THE "RESALE RESTRICTION TERMINATION DATE") THAT IS ONE YEAR AFTER THE LATER OF THE ORIGINAL ISSUE DATE HEREOF AND THE LAST DATE ON WHICH THE COMPANY OR ANY AFFILIATE OF THE COMPANY WAS THE OWNER OF THIS SECURITY (OR ANY PREDECESSOR OF SUCH SECURITY), ONLY (A) TO THE COMPANY, (B) PURSUANT TO A REGISTRATION STATEMENT THAT HAS BEEN DECLARED EFFECTIVE UNDER THE SECURITIES ACT, (C) FOR SO LONG AS THE SECURITIES ARE ELIGIBLE FOR RESALE PURSUANT TO RULE 144A UNDER THE SECURITIES ACT, TO A PERSON IT REASONABLY BELIEVES IS A "QUALIFIED INSTITUTIONAL BUYER" AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT THAT PURCHASES FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF A QUALIFIED INSTITUTIONAL BUYER TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING MADE IN RELIANCE ON RULE 144A, (D) PURSUANT TO OFFERS AND SALES THAT OCCUR OUTSIDE THE UNITED STATES WITHIN THE MEANING OF REGULATION S UNDER THE SECURITIES ACT, (E) TO AN INSTITUTIONAL "ACCREDITED INVESTOR" WITHIN THE MEANING OF RULE 501(a)(1), (2), (3) OR (7) UNDER THE SECURITIES ACT THAT IS AN INSTITUTIONAL ACCREDITED INVESTOR ACQUIRING THE SECURITY FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF SUCH AN INSTITUTIONAL ACCREDITED INVESTOR, IN EACH CASE IN A MINIMUM PRINCIPAL AMOUNT OF THE SECURITIES OF \$250,000, FOR INVESTMENT PURPOSES AND NOT WITH A VIEW TO OR FOR OFFER OR SALE IN CONNECTION WITH ANY DISTRIBUTION IN VIOLATION OF THE SECURITIES ACT, OR (F) PURSUANT TO ANOTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT, SUBJECT TO THE COMPANY'S AND THE TRUSTEE'S RIGHT PRIOR TO ANY SUCH OFFER, SALE OR TRANSFER PURSUANT TO CLAUSES (D), (E) OR (F) TO REQUIRE THE DELIVERY OF AN OPINION OF COUNSEL, CERTIFICATION AND/OR OTHER INFORMATION SATISFACTORY TO EACH OF THEM. THIS LEGEND WILL BE REMOVED UPON THE REQUEST OF THE HOLDER AFTER THE RESALE RESTRICTION TERMINATION DATE.

BY ITS ACQUISITION OF THIS SECURITY THE HOLDER HEREOF WILL BE DEEMED TO HAVE REPRESENTED AND WARRANTED THAT EITHER (I) NO PORTION OF THE ASSETS USED BY SUCH HOLDER TO ACQUIRE, HOLD OR DISPOSE OF THIS SECURITY CONSTITUTES ASSETS OF AN EMPLOYEE BENEFIT PLAN THAT IS SUBJECT TO TITLE I OF THE U.S. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED ("ERISA"), ANY PLAN, INDIVIDUAL RETIREMENT ACCOUNT OR OTHER ARRANGEMENT THAT IS SUBJECT TO SECTION 4975 OF THE U.S. INTERNAL REVENUE CODE OF 1986, AS AMENDED (THE "CODE"), ANY GOVERNMENTAL, CHURCH, NON-U.S. OR OTHER LAWS OR REGULATIONS THAT ARE SIMILAR TO SUCH PROVISIONS OF ERISA OR THE CODE (COLLECTIVELY, "SIMILAR LAWS"), OR ANY ENTITY WHOSE UNDERLYING ASSETS ARE CONSIDERED TO INCLUDE "PLAN ASSETS" OF ANY SUCH PLAN, ACCOUNT OR ARRANGEMENT, OR (II) THE ACQUISITION, HOLDING OR DISPOSITION OF THIS SECURITY WILL NOT CONSTITUTE A NON-EXEMPT PROHIBITED TRANSACTION UNDER SECTION 406 OF ERISA OR SECTION 4975 OF THE CODE OR A SIMILAR VIOLATION UNDER ANY APPLICABLE SIMILAR LAWS."

(B) the Regulation S Global Note shall (x) be subject to the restrictions on transfer set forth in <u>Section 2.6</u> (including those set forth in the legend below) and (y) bear the following legend (the "<u>Regulation S Legend</u>") on the face thereof:

"THIS SECURITY HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND. ACCORDINGLY, MAY NOT BE OFFERED OR SOLD WITHIN THE UNITED STATES OR TO OR FOR THE ACCOUNT OR BENEFIT OF, U.S. PERSONS EXCEPT AS SET FORTH IN THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF, THE HOLDER (1) REPRESENTS THAT IT IS NOT A U.S. PERSON NOR IS IT PURCHASING FOR THE ACCOUNT OF A U.S. PERSON AND IS ACQUIRING THIS SECURITY IN AN OFFSHORE TRANSACTION IN ACCORDANCE WITH REGULATION S UNDER THE SECURITIES ACT ("REGULATION S"), (2) BY ITS ACCEPTANCE HEREOF, AGREES ON ITS OWN BEHALF AND ON BEHALF OF ANY INVESTOR ACCOUNT FOR WHICH IT HAS PURCHASED SECURITIES, TO OFFER, SELL OR OTHERWISE TRANSFER SUCH SECURITY, PRIOR TO THE DATE (THE "RESALE RESTRICTION TERMINATION DATE") THAT IS 40 DAYS AFTER THE LATER OF THE ORIGINAL ISSUE DATE HEREOF AND THE LAST DATE ON WHICH THE COMPANY OR ANY AFFILIATE OF THE COMPANY WAS THE OWNER OF THIS SECURITY (OR ANY PREDECESSOR OF SUCH SECURITY), ONLY (A) TO THE COMPANY, (B) PURSUANT TO A REGISTRATION STATEMENT THAT HAS BEEN DECLARED EFFECTIVE UNDER THE SECURITIES ACT, (C) FOR SO LONG AS THE SECURITIES ARE ELIGIBLE FOR RESALE PURSUANT TO RULE 144A UNDER THE SECURITIES ACT, TO A PERSON IT REASONABLY BELIEVES IS A "QUALIFIED INSTITUTIONAL BUYER" AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT THAT PURCHASES FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF A QUALIFIED INSTITUTIONAL BUYER TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING MADE IN RELIANCE ON RULE 144A, (D) PURSUANT TO OFFERS AND SALES THAT OCCUR OUTSIDE THE UNITED STATES WITHIN THE MEANING OF REGULATION S UNDER THE SECURITIES ACT, (E) TO AN INSTITUTIONAL "ACCREDITED INVESTOR" WITHIN THE MEANING OF RULE 501(a)(1), (2), (3) OR (7) UNDER THE SECURITIES ACT THAT IS AN INSTITUTIONAL ACCREDITED INVESTOR ACQUIRING THE SECURITY FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF SUCH AN INSTITUTIONAL ACCREDITED INVESTOR, IN EACH CASE IN A MINIMUM PRINCIPAL AMOUNT OF THE SECURITIES OF \$250,000, FOR INVESTMENT PURPOSES AND NOT WITH A VIEW TO OR FOR OFFER OR SALE IN CONNECTION WITH ANY DISTRIBUTION IN VIOLATION OF THE SECURITIES ACT, OR (F) PURSUANT TO ANOTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT, SUBJECT TO THE COMPANY'S AND THE TRUSTEE'S RIGHT PRIOR TO ANY SUCH OFFER, SALE OR TRANSFER PURSUANT TO CLAUSES (D), (E) OR (F) TO REQUIRE THE DELIVERY OF AN OPINION OF COUNSEL, CERTIFICATION AND/OR OTHER INFORMATION SATISFACTORY TO EACH OF THEM. THIS LEGEND WILL BE REMOVED AFTER 40 CONSECUTIVE DAYS BEGINNING ON AND INCLUDING THE LATER OF (A) THE DAY ON WHICH THE SECURITIES ARE OFFERED TO PERSONS OTHER THAN DISTRIBUTORS (AS DEFINED IN REGULATION S) AND (B) THE DATE OF THE CLOSING OF THE ORIGINAL OFFERING. AS USED HEREIN, THE TERMS "OFFSHORE TRANSACTION," "UNITED STATES" AND "U.S. PERSON" HAVE THE MEANINGS GIVEN TO THEM BY REGULATION S UNDER THE SECURITIES ACT.

BY ITS ACQUISITION OF THIS SECURITY THE HOLDER HEREOF REPRESENTS THAT IT IS NOT A U.S. PERSON NOR IS IT PURCHASING FOR THE ACCOUNT OF A U.S. PERSON AND IS ACQUIRING THIS SECURITY IN AN OFFSHORE TRANSACTION IN ACCORDANCE WITH REGULATION S UNDER THE SECURITIES ACT.

BY ITS ACQUISITION OF THIS SECURITY THE HOLDER HEREOF WILL BE DEEMED TO HAVE REPRESENTED AND WARRANTED THAT EITHER (I) NO PORTION OF THE ASSETS USED BY SUCH HOLDER TO ACQUIRE, HOLD OR DISPOSE OF THIS SECURITY CONSTITUTES ASSETS OF AN EMPLOYEE BENEFIT PLAN THAT IS SUBJECT TO TITLE I OF THE U.S. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED ("ERISA"), ANY PLAN, INDIVIDUAL RETIREMENT ACCOUNT OR OTHER ARRANGEMENT THAT IS SUBJECT TO SECTION 4975 OF THE U.S. INTERNAL REVENUE CODE OF 1986, AS AMENDED (THE "CODE"), ANY GOVERNMENTAL, CHURCH, NON-U.S. OR OTHER LAWS OR REGULATIONS THAT ARE SIMILAR TO SUCH PROVISIONS OF ERISA OR THE CODE (COLLECTIVELY, "SIMILAR LAWS"), OR ANY ENTITY WHOSE UNDERLYING ASSETS ARE CONSIDERED TO INCLUDE "PLAN ASSETS" OF ANY SUCH PLAN, ACCOUNT OR ARRANGEMENT, OR (II) THE ACQUISITION, HOLDING OR DISPOSITION OF THIS SECURITY WILL NOT CONSTITUTE A NON-EXEMPT PROHIBITED TRANSACTION UNDER SECTION 406 OF ERISA OR SECTION 4975 OF THE CODE OR A SIMILAR VIOLATION UNDER ANY APPLICABLE SIMILAR LAWS."

(C) Each Global Note, whether or not an Initial Note, shall bear the following legend on the face thereof:

"UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION ("DTC"), NEW YORK, NEW YORK, TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHER WISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

TRANSFERS OF THIS GLOBAL SECURITY SHALL BE LIMITED TO TRANSFERS IN WHOLE, BUT NOT IN PART, TO DTC, TO NOMINEES OF DTC OR TO A SUCCESSOR THEREOF OR SUCH SUCCESSOR'S NOMINEE AND TRANSFERS OF PORTIONS OF THIS GLOBAL SECURITY SHALL BE LIMITED TO TRANSFERS MADE IN ACCORDANCE WITH THE RESTRICTIONS SET FORTH IN THE INDENTURE REFERRED TO ON THE REVERSE HEREOF."

(e) Book-Entry Provisions. (i) This Section 2.1(e) shall apply only to Global Notes deposited with the Notes Custodian.

(ii) Each Global Note initially shall (x) be registered in the name of the Depositary for such Global Note or the nominee of such Depositary, (y) be delivered to the Notes Custodian for such Depositary and (z) bear legends as set forth in Section 2.1(d).

(iii) Members of, or participants in, the Depositary ("<u>Agent Members</u>") shall have no rights under this Indenture with respect to any Global Note held on their behalf by the Depositary or by the Trustee as the custodian of the Depositary or under such Global Note, and the Depositary may be treated by the Company, the Trustee and any agent of the Company or the Trustee as the absolute owner of such Global Note for all purposes whatsoever. Notwithstanding the foregoing, nothing herein shall prevent the Company, the Trustee or any agent of the Company or the Trustee from giving effect to any written certification, proxy or other authorization furnished by the Depositary or impair, as between the Depositary and its Agent Members, the operation of customary practices of the Depositary governing the exercise of the rights of a Holder of a beneficial interest in any Global Note.

(iv) The registered Holder of a Global Note may grant proxies and otherwise authorize any person, including Agent Members and persons that may hold interests through Agent Members, to take any action which a Holder is entitled to take under this Indenture or the Notes.

(v) In connection with any transfer of a portion of the beneficial interest in a Global Note pursuant to subsection (f) of this <u>Section 2.1</u> to beneficial owners who are required to hold Definitive Notes, the Trustee shall reflect on its books and records the date and a decrease in the principal amount of such Global Note in an amount equal to the principal amount of the beneficial interest in the Global Note to be transferred, and the Company shall execute, and the Trustee shall authenticate and deliver, one or more Definitive Notes of like tenor and amount.

(vi) In connection with the transfer of an entire Global Note to beneficial owners pursuant to subsection (e) of this Section, such Global Note shall be deemed to be surrendered to the Trustee for cancellation, and the Company shall execute, and the Trustee shall authenticate and deliver, to each beneficial owner identified by the Depositary in exchange for its beneficial interest in such Global Note, an equal aggregate principal amount of Definitive Notes of authorized denominations.

(vii) Any Holder of a Global Note shall, by acceptance of such Global Note, agree that transfers of beneficial interests in such Global Note may be effected only through a book-entry system maintained by (a) the Holder of such Global Note (or its agent) or (b) any Holder of a beneficial interest in such Global Note, and that ownership of a beneficial interest in such Global Note shall be required to be reflected in a book entry.

(f) <u>Definitive Notes</u>. Except as provided below, owners of beneficial interests in Global Notes shall not be entitled to receive Definitive Notes. If required to do so pursuant to any applicable law or regulation, beneficial owners may obtain Definitive Notes in exchange for their beneficial interests in a Global Note upon written request in accordance with the Depositary's and the Registrar's procedures. In addition, Definitive Notes shall be delivered to all beneficial owners in exchange for their beneficial interests in a Global Note if (i) the Depositary notifies the Company that it is unwilling or unable to continue as depositary for such Global Note or the Depositary ceases to be a clearing agency registered under the Exchange Act, at a time when the Depositary is required to be so registered in order to act as Depositary, and in each case a successor depositary is not appointed by the Company within 90 days of such notice or, (ii) the Company executes and delivers to the Trustee and Registrar an Officers' Certificate stating that such Global Note shall be so exchangeable or (iii) an Event of Default has occurred and is continuing and the Registrar has received a request from the Depositary.

(g) Any Definitive Note delivered in exchange for an interest in a Global Note pursuant to Section 2.1(e)(v) or (vi) shall, except as otherwise provided by paragraph (c) of Section 2.6, bear the applicable legend regarding transfer restrictions applicable to the Definitive Note set forth in Section 2.1(d).

(h) In connection with the exchange of a portion of a Definitive Note for a beneficial interest in a Global Note, the Trustee shall cancel such Definitive Note, and the Company shall execute, and the Trustee shall authenticate and deliver, to the transferring Holder a new Definitive Note representing the principal amount not so transferred and the relevant Global Note shall be increased by an adjustment made on the records of the Trustee and the Depositary.

SECTION 2.2. Execution and Authentication. Two Officers shall sign the Notes for the Company by manual or facsimile signature. If an Officer whose signature is on a Note no longer holds that office at the time the Trustee authenticates the Note, the Note shall be valid nevertheless.

A Note shall not be valid until an authorized signatory of the Trustee manually authenticates the Note. The signature of the Trustee on a Note shall be conclusive evidence that such Note has been duly and validly authenticated and issued under this Indenture. A Note shall be dated the date of its authentication.

At any time and from time to time after the execution and delivery of this Indenture, the Trustee shall authenticate and make available for delivery: (1) Initial Notes for original issue on the Issue Date in an aggregate principal amount of \$200,000,000, (2) subject to the terms of this Indenture, Additional Notes for original issue in an unlimited principal amount and (3) Exchange Notes for issue only in an Exchange Offer pursuant to a Registration Rights Agreement or upon resale under an effective Shelf Registration Statement, and only in exchange for Initial Notes or Additional Notes, as the case may be, of an equal principal amount, in each case upon a written order of the Company signed by two Officers or by an Officer and either a Treasurer or an Assistant Secretary of the Company (the "Company Order"). Such Company Order shall specify the amount of the Notes to be authenticated and the date on which the original issue of Notes is to be authenticated and whether the Notes are to be Initial Notes, Additional Notes.

The Trustee may (at the expense of the Company) appoint an agent (the "<u>Authenticating Agent</u>") reasonably acceptable to the Company to authenticate the Notes. Unless limited by the terms of such appointment, any such Authenticating Agent may authenticate Notes whenever the Trustee may do so. Each reference in this Indenture to authentication by the Trustee includes authentication by such agent.

In case the Company, pursuant to <u>Article IV</u> shall be consolidated or merged with or into any other Person or shall convey, transfer, lease or otherwise dispose of its properties and assets substantially as an entirety to any Person, and the successor Person resulting from such consolidation, or surviving such merger, or into which the Company shall have been merged, or the Person which shall have received a conveyance, transfer, lease or other disposition as aforesaid, shall have executed an indenture supplemental hereto with the Trustee pursuant to <u>Article IV</u>, any of the Notes authenticated or delivered prior to such consolidation, merger, conveyance, transfer, lease or other disposition may, from time to time, at the request of the successor Person, be exchanged for other Notes executed in the name of the successor Person with such changes in phraseology and form as may be appropriate, but otherwise in substance of like tenor as the Notes surrendered for such exchange and of like principal amount; and the Trustee, upon Company Order of the successor Person, shall authenticate and deliver Notes as specified in such order for the purpose of such exchange. If Notes shall at any time be authenticated and delivered in any new name of a successor Person pursuant to this <u>Section 2.2</u> in exchange or substitution for or upon registration of transfer of any Notes, such successor Person, at the option of the Holders but without expense to them, shall provide for the exchange of all Notes at the time outstanding for Notes authenticated and delivered in such new name.

SECTION 2.3. <u>Registrar and Paying Agent</u>. The Company shall maintain an office or agency where Notes may be presented for registration of transfer or for exchange (the "<u>Registrar</u>") and an office or agency where Notes may be presented for payment (the "<u>Paying Agent</u>"). The Company shall cause each of the Registrar and the Paying Agent to maintain an office or agency in the Borough of Manhattan, The City of New York. The Registrar shall keep a register of the Notes and of their transfer and exchange (the "<u>Note Register</u>"). The Company may have one registrar and one or more additional paying agents. The term "Paying Agent" includes any additional paying agent.

The Company shall enter into an appropriate agency agreement with any Registrar or Paying Agent not a party to this Indenture, which shall incorporate the terms of the TIA. The agreement shall implement the provisions of this Indenture that relate to such agent. The Company shall notify the Trustee in writing of the name and address of each such agent. If the Company fails to maintain a Registrar or Paying Agent, the Trustee shall act as such and shall be entitled to appropriate compensation therefor pursuant to <u>Section 7.7</u>. The Company or any of its Wholly Owned Subsidiaries that is a Domestic Subsidiary may act as Paying Agent, Registrar or transfer agent.

The Company initially appoints the Trustee as Notes Custodian, Registrar and Paying Agent for the Notes. The Company may remove any Notes Custodian, Registrar or Paying Agent upon written notice to such Notes Custodian, Registrar or Paying Agent and to the Trustee; *provided, however*, that no such removal shall become effective until (i) acceptance of any appointment by a successor as evidenced by an appropriate agreement entered into by the Company and such successor Notes Custodian, Registrar or Paying Agent, as the case may be, and delivered to the Trustee or (ii) notification to the Trustee that the Trustee shall serve as Notes Custodian, Registrar or Paying Agent until the appointment of a successor in accordance with clause (i) above. The Notes Custodian, Registrar or Paying Agent may resign at any time upon written notice to the Company and the Trustee.

SECTION 2.4. Paying Agent To Hold Money in Trust. By at least 10:00 a.m. (New York City time) on the date on which any principal of (premium, if any) or interest on any Note is due and payable, the Company shall irrevocably deposit with the Paying Agent a sum sufficient in immediately available funds to pay such principal (premium, if any) or interest when due. The Company shall require each Paying Agent (other than the Trustee) to agree in writing that such Paying Agent shall hold in trust for the benefit of the Holders or the Trustee all money held by such Paying Agent for the payment of principal of (premium, if any) or interest on the Notes and shall notify the Trustee in writing of any default by the Company or any Guarantor in making any such payment. If the Company or a Subsidiary acts as Paying Agent, it shall segregate the money held by it as Paying Agent and hold it as a separate trust fund. The Company at any time may require a Paying Agent (other than the Trustee) to pay all money held by it to the Trustee and to account for any funds disbursed by such Paying Agent. Upon complying with this Section, the Paying Agent (if other than the Company or a Subsidiary) shall have no further liability for the money delivered to the Trustee. Upon any bankruptcy, reorganization or similar proceeding with respect to the Company, the Trustee shall serve as Paying Agent for the Notes.

SECTION 2.5. Holder Lists. The Trustee shall preserve in as current a form as is reasonably practicable the most recent list available to it of the names and addresses of Holders and shall otherwise comply with TIA § 312(a). If the Trustee is not the Registrar or to the extent otherwise required under the TIA, the Company, on its own behalf and on behalf of each Guarantor, shall furnish to the Trustee, in writing at least seven Business Days before each interest payment date and at such other times as the Trustee may request in writing within 15 days, a list in such form and as of such date as the Trustee may reasonably require of the names and addresses of Holders and the Company shall otherwise comply with TIA § 312(a).

# SECTION 2.6. Transfer and Exchange.

(a) The following provisions shall apply with respect to any proposed transfer of a Rule 144A Note or an Institutional Accredited Investor Note prior to the date which is one year after the later of the date of its original issue and the last date on which the Company or any Affiliate of the Company was the owner of such Notes (or any predecessor thereto) (the "<u>Resale Restriction Termination Date</u>"):

(i) a transfer of a Rule 144A Note or an Institutional Accredited Investor Note or a beneficial interest therein to a QIB shall be made upon the representation of the transferee in the form as set forth on the reverse of the Note that it is purchasing the Note for its own account or an account with respect to which it exercises sole investment discretion and that it and any such account is a "qualified institutional buyer" within the meaning of Rule 144A, and is aware that the sale to it is being made in reliance on Rule 144A and acknowledges that it has received such information regarding the Company as it has requested pursuant to Rule 144A or has determined not to request such information and that it is aware that the transferor is relying upon its foregoing representations in order to claim the exemption from registration provided by Rule 144A;

(ii) a transfer of a Rule 144A Note or an Institutional Accredited Investor Note or a beneficial interest therein to an IAI shall be made upon receipt by the Trustee or its agent of a certificate substantially in the form set forth in <u>Section 2.8</u> hereof from the proposed transferee and, if requested by the Company or the Trustee, the delivery of an opinion of counsel, certification and/or other information satisfactory to each of them; and

(iii) a transfer of a Rule 144A Note or an Institutional Accredited Investor Note or a beneficial interest therein to a Non-U.S. Person shall be made upon receipt by the Trustee or its agent of a certificate substantially in the form set forth in <u>Section 2.9</u> hereof from the proposed transferee and, if requested by the Company or the Trustee, the delivery of an opinion of counsel, certification and/or other information satisfactory to each of them.

(b) The following provisions shall apply with respect to any proposed transfer of a Regulation S Note prior to the expiration of the Restricted

Period:

(i) a transfer of a Regulation S Note or a beneficial interest therein to a QIB shall be made upon the representation of the transferee, in the form of assignment on the reverse of the certificate, that it is purchasing the Note for its own account or an account with respect to which it exercises sole investment discretion and that it and any such account is a "qualified institutional buyer" within the meaning of Rule 144A, and is aware that the sale to it is being made in reliance on Rule 144A and acknowledges that it has received such information regarding the Company as the undersigned has requested pursuant to Rule 144A or has determined not to request such information and that it is aware that the transferor is relying upon its foregoing representations in order to claim the exemption from registration provided by Rule 144A;

(ii) a transfer of a Regulation S Note or a beneficial interest therein to an IAI shall be made upon receipt by the Trustee or its agent of a certificate substantially in the form set forth in <u>Section 2.8</u> hereof from the proposed transferee and, if requested by the Company or the Trustee, the delivery of an opinion of counsel, certification and/or other information satisfactory to each of them; and

(iii) a transfer of a Regulation S Note or a beneficial interest therein to a Non-U.S. Person shall be made upon receipt by the Trustee or its agent of a certificate substantially in the form set forth in Section 2.9 hereof from the proposed transferee and, if requested by the Company or the Trustee, receipt by the Trustee or its agent of an opinion of counsel, certification and/or other information satisfactory to each of them.

After the expiration of the Restricted Period, interests in the Regulation S Note may be transferred in accordance with applicable law without requiring the certification set forth in <u>Section 2.9</u> or any additional certification.

(c) <u>Restricted Notes Legend</u>. Upon the transfer, exchange or replacement of Notes not bearing a Restricted Notes Legend, the Registrar shall deliver Notes that do not bear a Restricted Notes Legend. Upon the transfer, exchange or replacement of Notes bearing a Restricted Notes Legend, the Registrar shall deliver only Notes that bear such Restricted Notes Legend unless (i) Initial Notes are being exchanged for Exchange Notes in a Exchange Offer in which case the Exchange Notes shall not bear a Restricted Notes Legend, (ii) an Initial Note is being transferred pursuant to an effective registration statement or (iii) there is delivered to the Registrar an Opinion of Counsel to the effect that neither such legend nor the related restrictions on transfer are required in order to maintain compliance with the provisions of the Securities Act. Any Additional Notes sold in a registered offering shall not be required to bear the Restricted Notes Legend.

(d) The Registrar shall retain copies of all letters, notices and other written communications received pursuant to <u>Section 2.1</u> or this <u>Section 2.6</u> in accordance with its records retention policy. The Company shall have the right to inspect and make copies of all such letters, notices or other written communications at any reasonable time upon the giving of reasonable written notice to the Registrar.

(e) Obligations with Respect to Transfers and Exchanges of Notes.

(i) To permit registrations of transfers and exchanges, the Company shall, subject to the other terms and conditions of this <u>Article II</u>, execute and the Trustee shall authenticate Definitive Notes and Global Notes at the Registrar's request.

(ii) No service charge shall be made to a Holder for any registration of transfer or exchange, but the Company may require payment of a sum sufficient to cover any transfer tax, assessments or similar governmental charge payable in connection therewith (other than any such transfer taxes, assessments or similar governmental charges payable upon exchange or transfer pursuant to <u>Sections 3.8, 3.10</u> or <u>9.5</u>).

(iii) The Registrar shall not be required to register the transfer of or exchange of any Note for a period beginning (1) 15 Business Days before the mailing of a notice of an offer to repurchase Notes and ending at the close of business on the day of such mailing or (2) 15 Business Days before an interest payment date and ending on such interest payment date.

(iv) Prior to the due presentation for registration of transfer of any Note, the Company, the Trustee, the Paying Agent or the Registrar may deem and treat the Person in whose name a Note is registered as the absolute owner of such Note for the purpose of receiving payment of principal of (premium, if any) and interest on such Note and for all other purposes whatsoever, whether or not such Note is overdue, and none of the Company, the Trustee, the Paying Agent or the Registrar shall be affected by notice to the contrary.

(v) All Notes issued upon any transfer or exchange pursuant to the terms of this Indenture shall evidence the same debt and shall be entitled to the same benefits under this Indenture as the Notes surrendered upon such transfer or exchange.

(f) <u>No Obligation of the Trustee</u>. (i) The Trustee shall have no responsibility or obligation to any beneficial owner of a Global Note, a member of, or a participant in, the Depositary or other Person with respect to the accuracy of the records of the Depositary or its nominee or of any participant or member thereof, with respect to any ownership interest in the Notes or with respect to the delivery to any participant, member, beneficial owner or other Person (other than the Depositary) of any notice or the payment of any amount or delivery of any Notes (or other security or property) under or with respect to such Notes. All notices and communications to be given to the Holders and all payments to be made to Holders in respect of the Notes shall be given or made only to or upon the order of the registered Holders (which shall be the Depositary or its nominee in the case of a Global Note). The rights of beneficial owners in any Global Note shall be exercised only through the Depositary subject to the applicable rules and procedures of the Depositary. The Trustee may rely and shall be fully protected in relying upon information furnished by the Depositary with respect to its members, participants and any beneficial owners.

(ii) The Trustee shall have no obligation or duty to monitor, determine or inquire as to compliance with any restrictions on transfer imposed under this Indenture or under applicable law with respect to any transfer of any interest in any Note (including any transfers between or among Depositary participants, members or beneficial owners in any Global Note) other than, if the Trustee has received prior notice of a transfer, to require delivery of such certificates and other documentation or evidence as are expressly required by, and to do so if and when expressly required by, the terms of this Indenture, and to examine the same to determine substantial compliance as to form with the express requirements hereof.

SECTION 2.7. Form of Certificate to be Delivered upon Termination of Restricted Period.

[Date]

Dave & Buster's, Inc. 2481 Mañana Drive Dallas, Texas 75220 Attention: Chief Financial Officer

and

Wells Fargo Bank – DAPS Reorg. MAC N9303-121 608 2nd Avenue South Minneapolis, MN 55479 Fax: (866)969-1290

with a copy to:

Wells Fargo Bank, N.A. Corporate Trust Administration 45 Broadway, 14th Floor New York, NY 10006 Attention: Dave & Buster's, Inc. Administrator

## Re: Games Merger Corp. (to be merged with and into Dave & Buster's, Inc.) <u>11% Senior Notes due 2018 (the "Notes")</u>

Ladies and Gentlemen:

This letter relates to Notes represented by a temporary global note (the "<u>Temporary Regulation S Global Note</u>"). Pursuant to Section 2.1 of the Indenture dated as of June 1, 2010 relating to the Notes (the "Indenture"), we hereby certify that the persons who are the beneficial owners of \$[\_\_\_\_] principal amount of Notes represented by the Temporary Regulation S Global Note are persons outside the United States to whom beneficial interests in such Notes could be transferred in accordance with Rule 904 of Regulation S promulgated under the Securities Act of 1933, as amended. Accordingly, you are hereby requested to issue a Permanent Regulation S Global Note representing the undersigned's interest in the principal amount of Notes represented by the Temporary Regulation S Global Note represented by the Temporary Regulation S Global Note representing the undersigned's interest in the principal amount of Notes represented by the Temporary Regulation S Global Note represented by the Temporary Regulation S Global Note represented by the Temporary Regulation S Global Note represented by the Indenture.

You and the Company are entitled to rely upon this letter and are irrevocably authorized to produce this letter or a copy hereof to any interested party in any administrative or legal proceedings or official inquiry with respect to the matters covered hereby. Terms used in this letter have the meanings set forth in Regulation S.

Very truly yours,

[Name of Transferor]

By:

Authorized Signature

SECTION 2.8. Form of Certificate to be Delivered in Connection with Transfers to Institutional Accredited Investors.

[Date]

Dave & Buster's, Inc. 2481 Mañana Drive Dallas, Texas 75220 Attention: Chief Financial Officer

and

Wells Fargo Bank – DAPS Reorg. MAC N9303-121 608 2nd Avenue South Minneapolis, MN 55479 Fax: (866)969-1290

with a copy to:

Wells Fargo Bank, N.A. Corporate Trust Administration 45 Broadway, 14th Floor New York, NY 10006 Attention: Dave & Buster's, Inc. Administrator

> Re: Games Merger Corp. (to be merged with and into Dave & Buster's, Inc.) <u>11% Senior Notes due 2018 (the "Notes")</u>

Dear Sirs:

This certificate is delivered to request a transfer of \$\_\_\_\_\_ principal amount of the Notes of Games Merger Corp. (to be merged with and into Dave & Buster's, Inc.) (the "<u>Company</u>").

Upon transfer, the Notes would be registered in the name of the new beneficial owner as follows:

Name:

Address: \_\_\_\_\_\_ Taxpayer ID Number:

The undersigned represents and warrants to you that:

1. We are an institutional "accredited investor" (as defined in Rule 501(a)(1), (2), (3) or (7) under the Securities Act of 1933, as amended (the "<u>Securities Act</u>")) purchasing for our own account or for the account of such an institutional "accredited investor" at least \$250,000 principal amount of the Notes, and we are acquiring the Notes not with a view to, or for offer or sale in connection with, any distribution in violation of the Securities Act. We have such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risk of our investment in the Notes and we invest in or purchase securities similar to the Notes in the normal course of our business. We and any accounts for which we are acting are each able to bear the economic risk of our or its investment.

2. We understand that the Notes have not been registered under the Securities Act and, unless so registered, may not be sold except as permitted in the following sentence. We agree on our own behalf and on behalf of any investor account for which we are purchasing Notes to offer, sell or otherwise transfer such Notes prior to the date that is one year after the later of the date of original issue and the last date on which the Company or any affiliate of the Company was the owner of such Notes (or any predecessor thereto) (the "Resale Restriction Termination Date") only (a) to the Company, (b) pursuant to a registration statement which has been declared effective under the Securities Act, (c) in a transaction complying with the requirements of Rule 144A under the Securities Act ("Rule 144A"), to a person we reasonably believe is a qualified institutional buyer under Rule 144A (a "QIB") that purchases for its own account or for the account of a QIB and to whom notice is given that the transfer is being made in reliance on Rule 144A, (d) pursuant to offers and sales that occur outside the United States within the meaning of Regulation S under the Securities Act, (e) to an institutional "accredited investor" within the meaning of Rule 501(a)(1), (2), (3) or (7) under the Securities Act that is purchasing for its own account or for the account of such an institutional "accredited investor," in each case in a minimum principal amount of Notes of \$250,000 or (f) pursuant to any other available exemption from the registration requirements of the Securities Act, subject in each of the foregoing cases to any requirement of law that the disposition of our property or the property of such investor account or accounts be at all times within our or their control and in compliance with any applicable state securities laws. The foregoing restrictions on resale shall not apply subsequent to the Resale Restriction Termination Date. If any resale or other transfer of the Notes is proposed to be made pursuant to clause (e) above prior to the Resale Restriction Termination Date, the transferor shall deliver a letter from the transferee substantially in the form of this letter to the Company and the Trustee, which shall provide, among other things, that the transferee is an institutional "accredited investor" (within the meaning of Rule 501(a)(1), (2), (3) or (7) under the Securities Act) and that it is acquiring such Notes for investment purposes and not for distribution in violation of the Securities Act. Each purchaser acknowledges that the Company and the Trustee reserve the right prior to any offer, sale or other transfer prior to the Resale Restriction Termination Date of the Notes pursuant to clauses (d), (e) or (f) above to require the delivery of an opinion of counsel, certifications and/or other information satisfactory to the Company and the Trustee.

TRANSFEREE:

BY:

SECTION 2.9. Form of Certificate to be Delivered in Connection with Transfers Pursuant to Regulation S.

[Date]

Dave & Buster's, Inc. 2481 Mañana Drive Dallas, Texas 75220 Attention: Chief Financial Officer

and

Wells Fargo Bank – DAPS Reorg. MAC N9303-121 608 2nd Avenue South Minneapolis, MN 55479 Fax: (866)969-1290

#### with a copy to:

Wells Fargo Bank, N.A. Corporate Trust Administration 45 Broadway, 14th Floor New York, NY 10006 Attention: Dave & Buster's, Inc. Administrator

> Re: Games Merger Corp. (to be merged with and into Dave & Buster's, Inc.) <u>11% Senior Notes due 2018 (the "Notes")</u>

Ladies and Gentlemen:

In connection with our proposed sale of \$\_\_\_\_\_\_ aggregate principal amount of the Notes, we confirm that such sale has been effected pursuant to and in accordance with Regulation S under the United States Securities Act of 1933, as amended (the "Securities Act"), and, accordingly, we represent that:

(a) the offer of the Notes was not made to a person in the United States;

(b) either (i) at the time the buy order was originated, the transferee was outside the United States or we and any person acting on our behalf reasonably believed that the transferee was outside the United States or (ii) the transaction was executed in, on or through the facilities of a designated off-shore securities market and neither we nor any person acting on our behalf knows that the transaction has been pre-arranged with a buyer in the United States;

(c) no directed selling efforts have been made in the United States in contravention of the requirements of Rule 903(a)(2) or Rule 904(a)(2) of Regulation S, as applicable; and

(d) the transaction is not part of a plan or scheme to evade the registration requirements of the Securities Act.

In addition, if the sale is made during a restricted period and the provisions of Rule 903(b)(2) or Rule 904(b)(1) of Regulation S are applicable thereto, we confirm that such sale has been made in accordance with the applicable provisions of Rule 903(b)(2) or Rule 904(b)(1), as the case may be.

You and the Company are entitled to rely upon this letter and are irrevocably authorized to produce this letter or a copy hereof to any interested party in any administrative or legal proceedings or official inquiry with respect to the matters covered hereby. Terms used in this certificate have the meanings set forth in Regulation S.

Very truly yours,

[Name of Transferor]

By:

Authorized Signature

SECTION 2.10. <u>Mutilated, Destroyed, Lost or Stolen Notes</u>. If a mutilated Note is surrendered to the Registrar or if the Holder of a Note claims that the Note has been lost, destroyed or wrongfully taken, the Company shall issue and the Trustee, upon Company Order, shall authenticate a replacement Note. The Holder shall meet the requirements of Section 8-405 of the Uniform Commercial Code, such that the Holder (a) notifies the Company and the Trustee within a reasonable time after such Holder has notice of such loss, destruction or wrongful taking and the Registrar has not registered a transfer prior to receiving such notification, (b) makes such request to the Company prior to the Company having notice that the Note has been acquired by a protected purchaser as defined in Section 8-303 of the Uniform Commercial Code (a "protected purchaser") and (c) satisfies any other reasonable requirements of the Company, and the Trustee. Such Holder shall furnish an indemnity bond sufficient in the judgment of the Company and the Trustee to protect the Company, the Trustee, the Paying Agent and the Registrar from any loss which any of them may suffer if a Note is replaced, then, in the absence of notice to the Company, any Guarantor or the Trustee that such Note has been acquired by a protected purchaser, the Company shall execute and upon Company Order the Trustee shall authenticate and deliver, in exchange for any such mutilated Note or in lieu of any such destroyed, lost or stolen Note, a new Note of like tenor and principal amount, bearing a number not contemporaneously outstanding.

In case any such mutilated, destroyed, lost or stolen Note has become or is about to become due and payable, the Company in its discretion may, instead of issuing a new Note, pay such Note.

Upon the issuance of any new Note under this Section, the Company may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses (including the fees and expenses of the Trustee) in connection therewith.

Every new Note issued pursuant to this Section in lieu of any mutilated, destroyed, lost or stolen Note shall constitute an original additional contractual obligation of the Company, any Guarantor and any other obligor upon the Notes, whether or not the mutilated, destroyed, lost or stolen Note shall be at any time enforceable by anyone, and shall be entitled to all benefits of this Indenture equally and proportionately with any and all other Notes duly issued hereunder.

The provisions of this Section are exclusive and shall preclude (to the extent lawful) all other rights and remedies with respect to the replacement or payment of mutilated, destroyed, lost or stolen Notes.

SECTION 2.11. <u>Outstanding Notes</u>. Notes outstanding at any time are all Notes authenticated by the Trustee except for those canceled by it, those paid pursuant to <u>Section 2.10</u>, those delivered to it for cancellation and those described in this Section as not outstanding. A Note does not cease to be outstanding in the event the Company or an Affiliate of the Company holds the Note except that the Company or an Affiliate of the Company shall not obtain voting rights with respect to such Note.

If a Note is replaced pursuant to <u>Section 2.10</u>, it ceases to be outstanding unless the Trustee and the Company receive proof satisfactory to them that the replaced Note is held by a bona fide purchaser.

If the Paying Agent segregates and holds in trust, in accordance with this Indenture, on a maturity date money sufficient to pay all principal and interest payable on that date with respect to the Notes maturing and the Paying Agent is not prohibited from paying such money to the Holders on that date pursuant to the terms of this Indenture, then on and after that date such Notes cease to be outstanding and interest on them ceases to accrue.

SECTION 2.12. Temporary Notes. In the event that Definitive Notes are to be issued under the terms of this Indenture, until such Definitive Notes are ready for delivery, the Company may prepare and the Trustee shall authenticate temporary Notes. Temporary Notes shall be substantially in the form of Definitive Notes but may have variations that the Company considers appropriate for temporary Notes. Without unreasonable delay, the Company shall prepare and the Trustee shall authenticate Definitive Notes. After the preparation of Definitive Notes, the temporary Notes shall be exchangeable for Definitive Notes upon surrender of the temporary Notes at any office or agency maintained by the Company for that purpose and such exchange shall be without charge to the Holder. Upon surrender for cancellation of any one or more temporary Notes, the Company shall execute, and the Trustee shall authenticate and make available for delivery in exchange therefor, one or more Definitive Notes representing an equal principal amount of Notes. Until so exchanged, the Holder of temporary Notes shall in all respects be entitled to the same benefits under this Indenture as a Holder of Definitive Notes.

SECTION 2.13. <u>Cancellation</u>. The Company at any time may deliver Notes to the Trustee for cancellation. The Registrar and the Paying Agent shall forward to the Trustee any Notes surrendered to them for registration of transfer, exchange or payment. The Trustee and no one else shall cancel all Notes surrendered for registration of transfer, exchange, payment or cancellation. The Company may not issue new Notes to replace Notes it has paid or delivered to the Trustee for cancellation.

At such time as all beneficial interests in a Global Note have either been exchanged for Definitive Notes, transferred, redeemed, repurchased or canceled, such Global Note shall be returned by the Depositary to the Trustee for cancellation or retained and canceled by the Trustee. At any time prior to such cancellation, if any beneficial interest in a Global Note is exchanged for Definitive Notes, transferred in exchange for an interest in another Global Note, redeemed, repurchased or canceled, the principal amount of Notes represented by such Global Note shall be reduced and an adjustment shall be made on the Global Note and on the books and records of the Trustee (if it is then the Notes Custodian for such Global Note) with respect to such Global Note, by the Trustee or the Notes Custodian, to reflect such reduction.

SECTION 2.14. <u>Payment of Interest</u>; <u>Defaulted Interest</u>. Interest on any Note which is payable, and is punctually paid or duly provided for, on any interest payment date shall be paid to the Person in whose name such Note (or one or more predecessor Notes) is registered at the close of business on the regular record date for such interest at the office or agency of the Company maintained for such purpose pursuant to <u>Section 2.3</u>.

Any interest on any Note which is payable, but is not paid when the same becomes due and payable and such nonpayment continues for a period of 30 days shall forthwith cease to be payable to the Holder on the regular record date by virtue of having been such Holder, and such defaulted interest and (to the extent lawful) interest on such defaulted interest at the rate borne by the Notes (such defaulted interest and interest thereon herein collectively called "<u>Defaulted Interest</u>") shall be paid by the Company, at its election in each case, as provided in clause (a) or (b) below:

(a) The Company may elect to make payment of any Defaulted Interest to the Persons in whose names the Notes (or their respective predecessor Notes) are registered at the close of business on a Special Record Date (as defined below) for the payment of such Defaulted Interest, which shall be fixed in the following manner. The Company shall notify the Trustee in writing of the amount of Defaulted Interest proposed to be paid on each Note and the date (not less than 30 days after such notice) of the proposed payment (the "<u>Special Interest Payment Date</u>"), and at the same time the Company shall deposit with the Trustee an amount of money equal to the aggregate amount proposed to be paid in respect of such Defaulted Interest or shall make arrangements satisfactory to the Trustee for such deposit prior to the date of the proposed payment, such money when deposited to be held in trust for the benefit of the Persons entitled to such Defaulted Interest as in this clause provided. Thereupon, the Trustee shall fix a record date (the "<u>Special Record Date</u>") for the payment of such Defaulted Interest, which shall be not more than 15 days and not less than 10 days prior to the Special Interest Payment Date and not less than 10 days after the receipt by the Trustee of the notice of the proposed payment. The Trustee shall promptly notify the Company of such Special Record Date, and in the name and at the expense of the Company, shall cause notice of the proposed payment of such Defaulted Interest and the Special Record Date and Special Interest Payment Date therefor having been so given, such Defaulted Interest shall be paid on the Special Interest Payment Date therefor having been so given, such Defaulted Interest and the Special Record Date and Special Interest Payment of such Defaulted Interest and the Special Record Date. Notice of the proposed payment of such Defaulted for in <u>Section 11.2</u>, not less than 10 days prior to such Special Record Date. Notice of the proposed payment of such Defaulted Interest Payment Date the

(b) The Company may make payment of any Defaulted Interest in any other lawful manner not inconsistent with the requirements of any securities exchange on which the Notes may be listed, and upon such notice as may be required by such exchange, if, after notice given by the Company to the Trustee of the proposed payment pursuant to this clause, such manner of payment shall be deemed practicable by the Trustee.

Subject to the foregoing provisions of this Section, each Note delivered under this Indenture upon registration of transfer of or in exchange for or in lieu of any other Note shall carry the rights to interest accrued and unpaid, and to accrue, which were carried by such other Note.

SECTION 2.15. Computation of Interest. Interest on the Notes shall be computed on the basis of a 360-day year of twelve 30-day months.

SECTION 2.16. <u>CUSIP Numbers</u>. The Company in issuing the Notes may use "CUSIP" numbers (if then generally in use). The Trustee shall not be responsible for the use of CUSIP numbers, and the Trustee makes no representation as to their correctness as printed on any Note or notice to Holders and that reliance may be placed only on the other identification numbers printed on the Notes, and any redemption shall not be affected by any defect in or omission of such CUSIP numbers. The Company shall promptly notify the Trustee in writing of any change in the CUSIP numbers.

## ARTICLE III

### Covenants

SECTION 3.1. <u>Payment of Notes</u>. The Company shall promptly pay the principal of and interest on the Notes on the dates and in the manner provided in the Notes and in this Indenture. Principal and interest shall be considered paid on the date due if on such date the Trustee or the Paying Agent holds in accordance with this Indenture money sufficient to pay all principal and interest then due and the Trustee or the Paying Agent, as the case may be, is not prohibited from paying such money to the Holders on that date pursuant to the terms of this Indenture.

The Company shall pay interest on overdue principal at the rate specified therefor in the Notes, and it shall pay interest on overdue installments of interest at the same rate to the extent lawful.

Notwithstanding anything to the contrary contained in this Indenture, the Company may, to the extent it is required to do so by law, deduct or withhold income or other similar taxes imposed by the United States from principal or interest payments hereunder.

SECTION 3.2. SEC Reports. Notwithstanding that the Company may not be subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, to the extent permitted by the Exchange Act, the Company shall file with the SEC, and make available to the Trustee and the Holders, the annual reports and the information, documents and other reports (or copies of such portions of any of the foregoing as the SEC may by rules and regulations prescribe) that are specified in Sections 13 and 15(d) of the Exchange Act within the time periods specified therein; *provided* that the quarterly report with respect to the first quarter ending following the Transactions may be furnished up to 75 days following the end of such quarter. In the event that the Company is not permitted to file such reports, documents and information with the SEC pursuant to the Exchange Act, the Company shall nevertheless make available such Exchange Act information (as well as the details regarding the conference call

described below) to the Trustee and the Holders as if the Company were subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act within the time periods specified therein or in the relevant forms (except as provided above). Unless the Company is subject to the reporting requirements of the Exchange Act, the Company shall also hold a quarterly conference call for the Holders to discuss such financial information. The conference call will not be held later than three Business Days from the time that the Company distributes the financial information as set forth above. No fewer than one Business Day prior to the date of the conference call required to be held in accordance with the preceding sentence the Company shall issue a press release to the appropriate U.S. wire services announcing the time and the date of such conference call and directing the beneficial owners of, and prospective investors in, the Notes and securities analysts to contact an individual at the Company (for whom contact information shall be provided in such press release) to obtain information on how to access such conference call. The Company agrees that it shall not take any action for the purpose of causing the SEC not to accept such filings. The Company shall also comply with the other provisions of TIA § 314(a).

Substantially concurrently with the furnishing or making such information available to the Trustee pursuant to the immediately preceding paragraph, unless the Company has publicly furnished such information to the SEC, the Company shall also post copies of such information required by the immediately preceding paragraph on a website (which may be nonpublic and may be maintained by the Company or a third party) to which access will be given to holders, prospective investors in the Notes (which prospective investors shall be limited to "qualified institutional buyers" within the meaning of Rule 144A of the Securities Act or non-U.S. persons (as defined in Regulation S under the Securities Act) that certify their status as such to the reasonable satisfaction of the Company), and securities analysts and market making financial institutions that are reasonably satisfactory to the Company.

If the Company has designated any of its Subsidiaries as Unrestricted Subsidiaries and the Consolidated EBITDA of the Unrestricted Subsidiaries taken together exceeds 10% of the Consolidated EBITDA of the Company, then the quarterly and annual financial information required by the preceding paragraph shall include a reasonably detailed presentation, either on the face of the financial statements or in the footnotes to the financial statements and in Management's Discussion and Analysis of Results of Operations and Financial Condition, of the financial condition and results of operations of the Company and its Restricted Subsidiaries.

In addition, the Company and the Guarantors shall make available to the Holders and to securities analysts, prospective investors, upon the request of such holders, the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act so long as the Notes are not freely transferable under the Securities Act. For purposes of this covenant, the Company and the Guarantors will be deemed to have furnished the reports to the Trustee and the holders of Notes as required by this covenant if it has filed or furnished such reports with the SEC via the EDGAR filing system and such reports are publicly available. For purposes of the Trustee's administrative convenience only, the Company shall provide the Trustee an electronic copy of such report or provide the Trustee with an electronic link of such report via email; *provided* that in no event shall the failure by the Company to provide the Trustee such electronic copy or such electronic link result in a Default or Event of Default under this Indenture.

The filing requirements set forth above for the applicable period may be satisfied by the Company prior to the commencement of the Exchange Offer or the effectiveness of the Shelf Registration Statement (each as defined in the Registration Rights Agreement) by the filing with the SEC of the exchange offer registration statement and/or shelf registration statement, and any amendments thereto, with such financial information that satisfies Regulation S-X of the Securities Act; *provided* that this paragraph shall not supersede or in any manner suspend or delay the Company's reporting obligations set forth in the first three paragraphs of this covenant, *provided*, *further*, that at such time the Company is not required to pay any additional interest pursuant to the Registration Rights Agreement.

In the event that (1) the rules and regulations of the SEC permit the Company and any direct or indirect parent company of the Company to report at such parent entity's level on a consolidated basis and (2) such parent entity of the Company is not engaged in any business in any material respect other than incidental to its ownership, directly or indirectly of the Capital Stock of the Company, the information and reports required by the covenant may be those of such parent company on a consolidated basis.

SECTION 3.3. Limitation on Indebtedness. (a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, Incur any Indebtedness (including Acquired Indebtedness); *provided*, *however*, that the Company and the Guarantors may Incur Indebtedness (including Acquired Indebtedness) if on the date thereof:

(1) the Consolidated Coverage Ratio for the Company and its Restricted Subsidiaries is at least 2.00 to 1.00; and

(2) no Default or Event of Default shall have occurred or be continuing or shall occur as a consequence of Incurring the Indebtedness or transactions relating to such Incurrence.

(b) The foregoing paragraph (a) shall not prohibit the Incurrence of the following Indebtedness:

(1) Indebtedness of the Company or any Guarantor Incurred under a Credit Facility in an aggregate amount up to \$250.0 million less the aggregate principal amount of all principal repayments with the proceeds from Asset Dispositions utilized in accordance with clause 3(a) of <u>Section 3.8</u> that permanently reduce the commitments thereunder;

(2) (x) Guarantees by the Company or Guarantors of Indebtedness Incurred by the Company or a Guarantor in accordance with the provisions of this Indenture; *provided* that in the event such Indebtedness that is being Guaranteed is a Subordinated Obligation or a Guarantor Subordinated Obligation, then the related Guarantee shall be subordinated in right of payment to the Notes or the Subsidiary's Note Guarantee, as the case may be; and (y) Guarantees by Non-Guarantor Restricted Subsidiaries of Indebtedness Incurred by Non-Guarantor Restricted Subsidiaries in accordance with the provisions of this Indenture;

(3) Indebtedness of the Company owing to and held by any Restricted Subsidiary or Indebtedness of a Restricted Subsidiary owing to and held by the Company or any other Restricted Subsidiary; *provided, however,* 

(a) if the Company is the obligor on such Indebtedness, such Indebtedness is expressly subordinated to the prior payment in full in cash of all obligations with respect to the Notes;

(b) if a Guarantor is the obligor on such Indebtedness and the Company or a Guarantor is not the obligee, such Indebtedness is subordinated in right of payment to the Note Guarantees of such Guarantor; and

(c) (i) any subsequent issuance or transfer of Capital Stock or any other event which results in any such Indebtedness being beneficially held by a Person other than the Company or a Restricted Subsidiary of the Company; and

(ii) any sale or other transfer of any such Indebtedness to a Person other than the Company or a Restricted Subsidiary of the Company shall be deemed, in each case, to constitute an Incurrence of such Indebtedness by the Company or such Subsidiary, as the case may be, not permitted by this clause (3);

(4) (a) Indebtedness represented by (a) the Notes issued on the Issue Date, the Note Guarantees of the Guarantors and the related Exchange Securities and Subsidiary Guarantees issued in a registered Exchange Offer pursuant to the Registration Rights Agreement, (b) any Indebtedness (other than the Indebtedness described in clauses (1), (2), (3), (6), (8), (9) and (10)) outstanding on the Issue Date and (c) any Refinancing Indebtedness Incurred in respect of any Indebtedness (including Refinancing Indebtedness) described in this clause (4) or clause (5) or Incurred pursuant to <u>Section 3.3(a)</u>;

(5) Indebtedness of a Restricted Subsidiary Incurred and outstanding on the date on which such Restricted Subsidiary was acquired by, or merged into, the Company or any Restricted Subsidiary (other than Indebtedness Incurred (a) to provide all or any portion of the funds utilized to consummate the transaction or series of related transactions pursuant to which such Restricted Subsidiary became a Restricted Subsidiary or was otherwise acquired by the Company or (b) otherwise in connection with, or in contemplation of, such acquisition); *provided, however*, that at the time such Restricted Subsidiary is acquired by the Company, either (a) the Company would have been able to Incur \$1.00 of additional Indebtedness pursuant to <u>Section 3.3(a)</u> after giving effect to the Incurrence of such Indebtedness pursuant to this clause (5) or (b) the Consolidated Coverage Ratio of the Company and its Restricted Subsidiaries is higher than such ratio immediately prior to such acquisition or merger;

(6) Indebtedness under Hedging Obligations that are Incurred in the ordinary course of business (and not for speculative purposes);

(7) the Incurrence by the Company or any of its Restricted Subsidiaries of Indebtedness (including Capitalized Lease Obligations) of the Company or a Restricted Subsidiary Incurred to finance or refinance the purchase, lease, construction or improvements of real or personal property, plant or equipment used in the business of the Company or such Restricted Subsidiary, and Attributable Indebtedness, and any Indebtedness of the Company or a Restricted Subsidiary which serves to refund or refinance any Indebtedness Incurred pursuant to this clause (7), in an aggregate outstanding principal amount which, when taken together with the principal amount of all other Indebtedness Incurred pursuant to this clause (7) and then outstanding, will not exceed the greater of (x) 3% of Consolidated Net Tangible Assets and (y) 10.0 million at any time outstanding;

(8) Indebtedness Incurred in respect of workers' compensation claims, health, disability or other employee benefits or property, casualty or liability insurance and premiums related thereto, self-insurance obligations, performance, bid surety and similar bonds and completion guarantees (not for borrowed money) provided by the Company or a Restricted Subsidiary in the ordinary course of business;

(9) Indebtedness arising from agreements of the Company or a Restricted Subsidiary providing for indemnification, adjustment of purchase price or similar obligations, in each case, Incurred or assumed in connection with the disposition of any business or assets of the Company or any business, assets or Capital Stock of a Restricted Subsidiary, *provided* that

(a) the maximum aggregate liability in respect of all such Indebtedness shall at no time exceed the gross proceeds including non-cash proceeds (the fair market value of such non-cash proceeds being measured at the time received and without giving effect to subsequent changes in value) actually received by the Company and its Restricted Subsidiaries in connection with such disposition; and

(b) such Indebtedness is not reflected on the balance sheet of the Company or any of its Restricted Subsidiaries (contingent obligations referred to in a footnote to financial statements and not otherwise reflected on the balance sheet will not be deemed to be reflected on such balance sheet for purposes of this clause (9));

(10) Indebtedness arising from the honoring by a bank or other financial institution of a check, draft or similar instrument (except in the case of daylight overdrafts) drawn against insufficient funds in the ordinary course of business, *provided*, *however*, that such Indebtedness is extinguished within five Business Days of Incurrence; and

(11) in addition to the items referred to in clauses (1) through (10) above, Indebtedness of the Company and its Guarantors in an aggregate outstanding principal amount which, when taken together with the principal amount of all other Indebtedness Incurred pursuant to this clause (11) and then outstanding, will not exceed \$25.0 million at any time outstanding, including all Refinancing Indebtedness Incurred to renew, refund, refinance, replace, defease or discharge any Indebtedness Incurred pursuant to this clause (11); *provided* that a Foreign Subsidiary that is not a Guarantor can Incur Indebtedness under this clause (11) of up to \$10.0 million at any one time outstanding.

### (c) [Reserved.]

(d) For purposes of determining compliance with, and the outstanding principal amount of any particular Indebtedness Incurred pursuant to and in compliance with, this Section 3.3:

(1) in the event that Indebtedness meets the criteria of more than one of the types of Indebtedness described in paragraphs (a) and (b) of this <u>Section 3.3</u>, the Company, in its sole discretion, will classify such item of Indebtedness on the date of Incurrence and, with the exception of clause (1) of paragraph (b), may later classify such item of Indebtedness in any manner that complies with this <u>Section 3.3</u> and only be required to include the amount and type of such Indebtedness in one of such paragraphs;

(2) all Indebtedness outstanding on the date of this Indenture under the Senior Secured Credit Agreement shall be deemed Incurred under clause (1) of paragraph (b) of this Section 3.3 and not paragraph (a) or clause (4) of paragraph (b) of this Section 3.3;

(3) Guarantees of, or obligations in respect of letters of credit relating to, Indebtedness which is otherwise included in the determination of a particular amount of Indebtedness shall not be included;

(4) if obligations in respect of letters of credit are Incurred pursuant to a Credit Facility and are being treated as Incurred pursuant to clause (1) of paragraph (b) of this Section 3.3 and the letters of credit relate to other Indebtedness, then such other Indebtedness shall not be included;

(5) the principal amount of any Disqualified Stock of the Company or a Restricted Subsidiary, or Preferred Stock of a Restricted Subsidiary that is not a Guarantor, shall be equal to the greater of the maximum mandatory redemption or repurchase price (not including, in either case, any redemption or repurchase premium) or the liquidation preference thereof;

(6) Indebtedness permitted by this <u>Section 3.3</u> need not be permitted solely by reference to one provision permitting such Indebtedness but may be permitted in part by one such provision and in part by one or more other provisions of this <u>Section 3.3</u> permitting such Indebtedness; and

(7) the amount of Indebtedness issued at a price that is less than the principal amount thereof shall be equal to the amount of the liability in respect thereof determined in accordance with GAAP.

(e) Accrual of interest, accrual of dividends, the accretion of accreted value, or the amortization of debt discount, the payment of interest in the form of additional Indebtedness, and the payment of dividends in the form of additional shares of Preferred Stock or Disqualified Stock shall not be deemed to be an Incurrence of Indebtedness for purposes of this Section 3.3. The amount of any Indebtedness outstanding as of any date shall be (i) the accreted value thereof in the case of any Indebtedness issued with original issue discount or the aggregate principal amount outstanding in the case of Indebtedness issued with original amount or liquidation preference thereof, together with any interest thereon that is more than 30 days past due, in the case of any other Indebtedness.

(f) In addition, the Company shall not permit any of its Unrestricted Subsidiaries to Incur any Indebtedness or issue any shares of Disqualified Stock, other than Non-Recourse Debt. If at any time an Unrestricted Subsidiary becomes a Restricted Subsidiary, any Indebtedness of such Subsidiary shall be deemed to be Incurred by a Restricted Subsidiary as of such date (and, if such Indebtedness is not permitted to be Incurred as of such date under this <u>Section 3.3</u>, the Company shall be in Default of this <u>Section 3.3</u>).

(g) For purposes of determining compliance with any U.S. dollar-denominated restriction on the Incurrence of Indebtedness, the U.S. dollarequivalent principal amount of Indebtedness denominated in a foreign currency shall be calculated based on the relevant currency exchange rate in effect on the date such Indebtedness was Incurred, in the case of term Indebtedness, or first committed, in the case of revolving credit Indebtedness; *provided* that if such Indebtedness is Incurred to refinance other Indebtedness denominated in a foreign currency, and such refinancing would cause the applicable U.S. dollar-denominated restriction to be exceeded if calculated at the relevant currency exchange rate in effect on the date of such refinancing, such U.S. dollardenominated restriction shall be deemed not to have been exceeded so long as the principal amount of such refinancing Indebtedness being refinanced (plus related fees and expenses). Notwithstanding any other provision of this <u>Section 3.3</u>, the maximum amount of Indebtedness that the Company may Incur pursuant to this <u>Section 3.3</u> shall not be deemed to be exceeded solely as a result of fluctuations in the exchange rate of currencies. The principal amount of any Indebtedness Incurred to refinance other Indebtedness, if Incurred in a different currency from the Indebtedness being refinanced, shall be calculated based on the currency exchange rate applicable to the currencies in which such Refinancing Indebtedness is denominated that is in effect on the date of such refinancing.

SECTION 3.4. Limitation on Restricted Payments. (a) The Company shall not, and shall not permit any of its Restricted Subsidiaries, directly or indirectly, to:

(1) declare or pay any dividend or make any distribution (whether made in cash, securities or other property) on or in respect of its Capital Stock (including any payment in connection with any merger or consolidation involving the Company or any of its Restricted Subsidiaries) except:

(a) dividends or distributions payable in Equity Interests (other than Disqualified Stock) of the Company; and

(b) dividends or distributions payable to the Company or a Restricted Subsidiary (and if such Restricted Subsidiary is not a Wholly Owned Subsidiary, to its other holders of Capital Stock on a pro rata basis, taking into account the relative preferences, if any, of the various classes of Capital Stock in such Restricted Subsidiaries);

(2) purchase, redeem, retire or otherwise acquire for value any Capital Stock of the Company or any direct or indirect parent of the Company held by Persons other than the Company or a Restricted Subsidiary (other than in exchange for Equity Interests of the Company (other than Disqualified Stock));

(3) purchase, repurchase, redeem, defease or otherwise acquire or retire for value, prior to scheduled maturity, scheduled repayment or scheduled sinking fund payment, any Subordinated Obligations or Guarantor Subordinated Obligations (other than (x) Indebtedness of the Company owing to and held by any Guarantor or Indebtedness of a Guarantor owing to and held by the Company or any other Guarantor permitted under clause (3) of paragraph (b) of <u>Section 3.3</u> or (y) the purchase, repurchase, redemption, defeasance or other acquisition or retirement of Subordinated Obligations or Guarantor Subordinated Obligations purchased in anticipation of satisfying a sinking fund obligation, principal installment or final maturity, in each case due within one year of the date of purchase, repurchase, redemption, defeasance or other acquisition or retirement); or

(4) make any Restricted Investment in any Person;

(any such dividend, distribution, purchase, redemption, repurchase, defeasance, other acquisition, retirement or Restricted Investment referred to in clauses (1) through (4) shall be referred to herein as a "<u>Restricted Payment</u>"), if at the time the Company or such Restricted Subsidiary makes such Restricted Payment:

(a) a Default shall have occurred and be continuing (or would result therefrom); or

(b) the Company is not able to Incur an additional \$1.00 of Indebtedness pursuant to paragraph (a) of <u>Section 3.3</u> after giving effect, on a pro forma basis, to such Restricted Payment; or

(c) the aggregate amount of such Restricted Payment and all other Restricted Payments declared or made subsequent to the Issue Date (excluding clauses (1) through (4) and (6) through (14)) would exceed the sum of:

(i) 50% of (i) Consolidated Net Income for the period (treated as one accounting period) from the beginning of the Company's last completed fiscal quarter preceding the Issue Date to the end of the most recent fiscal quarter ending prior to the date of such Restricted Payment for which financial statements are in existence (or, in case such Consolidated Net Income is a deficit, minus 100% of such deficit) and (ii) any dividends received by the Company or a Wholly Owned Subsidiary of the Company that is a Guarantor after the Issue Date from an Unrestricted Subsidiary of the Company, to the extent that such dividends were not otherwise included in Consolidated Net Income for such periods or otherwise included in clause (v) below;

(ii) 100% of the aggregate Net Cash Proceeds and the fair market value of the assets (as determined conclusively by the Board of Directors of the Company) received by the Company from the issue or sale of its Equity Interests (other than Disqualified Stock) or other capital contributions subsequent to the Issue Date (other than Net Cash Proceeds received from an issuance or sale of such Capital Stock to a Subsidiary of the Company or an employee stock ownership plan, option plan or similar trust to the extent such sale to an employee stock ownership plan or similar trust is financed by loans from or Guaranteed by the Company or any Restricted Subsidiary unless such loans have been repaid with cash on or prior to the date of determination) excluding in any event Excluded Contributions or Net Cash Proceeds received by the Company from the issue and sale of its Capital Stock or capital contributions to the extent applied to redeem Notes in compliance with the provisions set forth in the second paragraph of paragraph 5 of the form of Notes set forth in Exhibit A and Exhibit B hereto; *provided* that this clause (ii) shall not apply to Net Cash Proceeds received in connection with the Transactions, as contemplated in the Offering Memorandum;

(iii) the amount by which Indebtedness of the Company or its Restricted Subsidiaries is reduced on the Company's balance sheet upon the conversion or exchange (other than debt held by a Subsidiary of the Company) subsequent to the Issue Date of any Indebtedness of the Company or its Restricted Subsidiaries convertible or exchangeable for Capital Stock (other than Disqualified Stock) of the Company (less the amount of any cash, or the fair market value of any other property, distributed by the Company upon such conversion or exchange);

(iv) to the extent that any Unrestricted Subsidiary designated as such after the Issue Date (A) is redesignated as a Restricted Subsidiary, (B) is merged or consolidated into the Company or any of its Restricted Subsidiaries or (C) transfers all or substantially all of its assets to the Company or any of its Restricted Subsidiaries after the Issue Date, the fair market value (as determined conclusively by the Board of Directors of the Company) of (x) in the case of clause (A) or (B) above, the Company's Investment in such Subsidiary as of the date of such redesignation, merger or consolidation and (y) in the case of clause (C) above, such assets (other than to the extent the Investment in such Unrestricted Subsidiary was made pursuant to clause (15) of the next succeeding paragraph or pursuant to clause (11) of the definition of Permitted Investment); and

(v) to the extent that any Restricted Investment that was made after the Issue Date of this Indenture is sold for cash or otherwise liquidated, repaid, repurchased or redeemed for cash, the lesser of (i) the cash return of capital with respect to such Restricted Investment (less the cost of disposition, if any), and (ii) the initial amount of such Restricted Investment to the extent such amount was not already included in Consolidated Net Income.

(b) The provisions of the preceding paragraph (a) shall not prohibit:

(1) any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Capital Stock, Disqualified Stock or Subordinated Obligations of the Company or Guarantor Subordinated Obligations of any Guarantor made by exchange for, or out of the proceeds of (i) the substantially contemporaneous contribution of common equity capital to the Company or (ii) the substantially concurrent sale of, Capital Stock of the Company (other than Disqualified Stock and other than Capital Stock issued or sold to a Subsidiary or an employee stock ownership plan or similar trust to the extent such sale to an employee stock ownership plan or similar trust is financed by loans from or Guaranteed by the Company or any Restricted Subsidiary unless such loans have been repaid with cash on or prior to the date of determination); *provided, however*, that the Net Cash Proceeds from such sale of Capital Stock shall be excluded from clause (c)(ii) of the preceding paragraph;

(2) any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Subordinated Obligations of the Company or Guarantor Subordinated Obligations of any Guarantor made by exchange for, or out of the proceeds of the substantially concurrent sale of, Subordinated Obligations of the Company or any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Guarantor Subordinated Obligations made by exchange for or out of the proceeds of the substantially concurrent sale of, Subordinated Obligations made by exchange for or out of the proceeds of the substantially concurrent sale of Guarantor Subordinated Obligations that, in each case, is permitted to be Incurred pursuant to Section 3.3 and that in each case constitutes Refinancing Indebtedness;

(3) any purchase, repurchase, redemption, defeasance or other acquisition or retirement of Disqualified Stock of the Company or a Restricted Subsidiary made by exchange for or out of the proceeds of the substantially concurrent sale of Disqualified Stock of the Company or such Restricted Subsidiary, as the case may be, that, in each case, is permitted to be Incurred pursuant to <u>Section 3.3</u> and that in each case constitutes Refinancing Indebtedness;

(4) so long as no Default or Event of Default has occurred and is continuing, any purchase or redemption of Subordinated Obligations or Guarantor Subordinated Obligations of a Guarantor from Net Available Cash to the extent permitted under <u>Section 3.8</u>;

(5) dividends paid within 60 days after the date of declaration if at such date of declaration such dividend would have complied with this <u>Section 3.4</u> and the consummation of any irrevocable redemption within 60 days after the giving of the redemption notice if at the date of such notice the redemption payment would have complied with this <u>Section 3.4</u>;

(6) so long as no Default or Event of Default has occurred and is continuing, the purchase, redemption or other acquisition, cancellation or retirement for value of Equity Interests of the Company or any Restricted Subsidiary or any parent of the Company held by any existing or former employees or management or directors of the Company or Holdings or any Subsidiary of the Company or their assigns, estates or heirs, in each case in connection with (x) the death or disability of such employee, manager or director or (y) the repurchase provisions under employee stock option or stock purchase agreements or other agreements to compensate management employees or directors; *provided* that in the case of clause (y) such redemptions or repurchases pursuant to such clause will not exceed \$2.5 million in the aggregate during any twelve-month period plus the aggregate Net Cash Proceeds received by the Company after the Issue Date from the issuance of such Capital Stock or equity appreciation rights to, or the exercise of options, warrants or other rights to purchase or acquire Capital Stock of the Company and utilized pursuant to this clause (6) for any such repurchase, redemption, acquisition or retirement will be excluded from clause (c)(ii) of <u>Section 3.4(a)</u> and *provided*, *further*, that unused amounts available pursuant to this clause (6) to be utilized for Restricted Payments during any twelve-month period may be carried forward and utilized in the next succeeding twelve-month period;

(7) so long as no Default or Event of Default has occurred and is continuing, the declaration and payment of dividends to holders of any class or series of Disqualified Stock of the Company or Preferred Stock of any Guarantor issued in accordance with the terms of this Indenture to the extent such dividends are included in the definition of "Consolidated Interest Expense";

(8) repurchases of Capital Stock deemed to occur upon the exercise of stock options, warrants or other convertible securities if such Capital Stock represents (i) a portion of the exercise price thereof or (ii) withholding incurred in connection with such exercise, *provided* that the amount of such withholding taxes shall reduce the amount set forth in clause (6) above;

(9) cash dividends or loans to Holdings (which for purposes of this clause (9) shall include any direct or indirect parent of the Company) ("<u>Permitted Holdings Payments</u>") in amounts equal to:

(a) the amounts required for Holdings to pay any Federal, state or local income taxes to the extent that such income taxes are directly attributable to the income of the Company and its Restricted Subsidiaries and, to the extent of amounts actually received from Unrestricted Subsidiaries, in amounts required to pay such taxes to the extent directly attributable to the income of the Unrestricted Subsidiaries;

(b) the amounts required for Holdings to pay franchise taxes and other fees required to maintain its legal existence;

(c) an amount not to exceed \$1.0 million (or \$2.0 million following an initial public offering) in any fiscal year to permit Holdings to pay its corporate overhead expenses Incurred in the ordinary course of business, and to pay salaries or other compensation of employees who perform services for both Holdings and the Company;

(d) dividends or distributions to Holdings to permit Holdings to satisfy its payment obligations, if any, under the Expense Reimbursement Agreement as in effect on the Issue Date, or as later amended, *provided* that any such amendment is not more disadvantageous to the Company in any material respect than the Expense Reimbursement Agreement as in effect on the Issue Date; and

(e) any fees and expenses related to any equity offering or other financing of any direct or indirect parent of the Company to the extent the proceeds of such offering or financing are contributed to the Company;

(10) any payments made in connection with the Transactions pursuant to the Stock Purchase Agreement and any other agreements or documents related to the Transactions and in effect on the closing date of the Transactions (without giving effect to subsequent amendments, waivers or other modifications to such agreements or documents) or as otherwise described in the Offering Memorandum;

(11) the purchase, repurchase, redemption, defeasance or other acquisition or retirement for value of any Subordinated Obligation (i) at a purchase price not greater than 101% of the principal amount of such Subordinated Obligation in the event of a Change of Control in accordance with provisions similar to <u>Section 3.10</u> or (ii) at a purchase price not greater than 100% of the principal amount thereof in accordance with provisions similar to <u>Section 3.8</u>; *provided* that, prior to or simultaneously with such purchase, repurchase, redemption, defeasance or other acquisition or retirement, the Company has made the Change of Control Offer or Asset Disposition Offer, as applicable, as provided in <u>Section 3.10</u> or <u>Section 3.8</u>, respectively, with respect to the Notes and has completed the repurchase or redemption of all Notes validly tendered for payment in connection with such Change of Control Offer or Asset Disposition Offer; and

(12) any payment on intercompany Indebtedness permitted to be Incurred under Section 3.3(b)(3);

(13) Restricted Payments that are made with Excluded Contributions;

(14) the distribution, by dividend or otherwise, of shares of Capital Stock of Unrestricted Subsidiaries (other than Unrestricted Subsidiaries the primary assets of which are cash and/or Cash Equivalents); and

(15) so long as no Default or Event of Default has occurred and is continuing, Restricted Payments in an amount not to exceed \$7.5 million.

The amount of all Restricted Payments (other than cash) shall be the fair market value on the date of such Restricted Payment of the asset(s) or securities proposed to be paid, transferred or issued by the Company or such Restricted Subsidiary, as the case may be, pursuant to such Restricted Payment. The fair market value of any cash Restricted Payment shall be its face amount and the fair market value of any non-cash Restricted Payment shall be determined conclusively by the Board of Directors of the Company acting in good faith whose resolution with respect thereto shall be delivered to the Trustee, such determination to be based upon an opinion or appraisal issued by an accounting, appraisal or investment banking firm of national standing if such fair market value is estimated in good faith by the Board of Directors of the Company to exceed \$20.0 million.

As of the Issue Date, all of the Company's Subsidiaries will be Restricted Subsidiaries. The Company will not permit any Unrestricted Subsidiary to become a Restricted Subsidiary except pursuant to the last sentence of the definition of "Unrestricted Subsidiary."

SECTION 3.5. Limitation on Liens. The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, Incur or suffer to exist any Lien (other than Permitted Liens) upon any of its property or assets (including Capital Stock of Restricted Subsidiaries), whether owned on the date of this Indenture or acquired after that date, which Lien is securing any Indebtedness, unless contemporaneously with the Incurrence of such Liens effective provision is made to secure the Indebtedness due under this Indenture and the Notes or, in respect of Liens on any Restricted Subsidiary's property or assets, any Note Guarantee of such Restricted Subsidiary, equally and ratably with (or senior in priority to in the case of Liens with respect to Subordinated Obligations or Guarantor Subordinated Obligations) the Indebtedness secured by such Lien for so long as such Indebtedness is so secured.

SECTION 3.6. Limitation on Sale/Leaseback Transactions. The Company shall not, and shall not permit any of its Restricted Subsidiaries to, enter into any Sale/Leaseback Transaction *unless*: (i) the Company or such Restricted Subsidiary, as the case may be, receives consideration at the time of such Sale/Leaseback Transaction at least equal to the fair market value (as evidenced by a resolution of the Board of Directors of the Company) of the property subject to such transaction; (ii) the Company or such Restricted Subsidiary could have Incurred Indebtedness in an amount equal to the Attributable Indebtedness in respect of such Sale/Leaseback Transaction pursuant to Section 3.3; (iii) the Company or such Restricted Subsidiary would be permitted under Section 3.5 to create a Lien on the property subject to such Sale/Leaseback Transaction without securing the Notes; and (iv) the Sale/Leaseback Transaction is treated as an Asset Disposition and all of the conditions of this Indenture described in Section 3.8 (including the provisions concerning the application of Net Available Cash) are satisfied with respect to such Sale/Leaseback Transaction, treating all of the consideration received in such Sale/Leaseback Transaction as Net Available Cash for purposes of Section 3.8.

SECTION 3.7. Limitation on Restrictions on Distributions from Restricted Subsidiaries. (a) The Company shall not, and shall not permit any Restricted Subsidiary to, create or otherwise cause or permit to exist or become effective any consensual encumbrance or consensual restriction on the ability of any Restricted Subsidiary to: (1) pay dividends or make any other distributions on its Capital Stock to the Company or any of its Restricted Subsidiaries or pay any Indebtedness or other obligations owed to the Company or any Restricted Subsidiary (it being understood that the priority of any Preferred Stock in receiving dividends or liquidating distributions prior to dividends or liquidating distributions being paid on Common Stock shall not be deemed a restriction on the ability to make distributions on Capital Stock); (2) make any loans or advances to the Company or any Restricted Subsidiary (it being understood that the subordination of loans or advances made to the Company or any Restricted Subsidiary to other Indebtedness Incurred by the Company or any Restricted Subsidiary shall not be deemed a restriction on the ability to make loans or advances); or (3) sell, lease or transfer any of its property or assets to the Company or any Restricted Subsidiary (it being understood that such transfers shall not include any type of transfer described in clause (1) or (2) of this Section 3.7(a).

(b) The provisions of paragraph (a) of this Section 3.7 shall not prohibit:

(i) any encumbrance or restriction pursuant to an agreement in effect at or entered into on the Issue Date, including, without limitation, this Indenture, the Notes, the Exchange Notes, the Note Guarantees, and the Senior Secured Credit Agreement (and related documentation) in effect on such date;

(ii) any encumbrance or restriction with respect to a Restricted Subsidiary pursuant to an agreement relating to any Equity Interests or Indebtedness Incurred by a Restricted Subsidiary on or before the date on which such Restricted Subsidiary was acquired by the Company or a Restricted Subsidiary (other than Equity Interests or Indebtedness Incurred as consideration in, or to provide all or any portion of the funds utilized to consummate, the transaction or series of related transactions pursuant to which such Restricted Subsidiary became a Restricted Subsidiary or was acquired by the Company or in contemplation of the transaction) and outstanding on such date, *provided* that any such encumbrance or restriction shall not extend to any assets or property of the Company or any other Restricted Subsidiary other than the assets and property so acquired, and, that in the case of Indebtedness, such Indebtedness was permitted by the terms of this Indenture to be Incurred;

(iii) any encumbrance or restriction (A) with respect to a Restricted Subsidiary pursuant to an agreement effecting a refunding, replacement or refinancing of Indebtedness Incurred pursuant to an agreement referred to in clause (i) or (ii) of this paragraph or this clause (iii) or (B) contained in any amendment, restatement, modification, renewal, supplement, refunding, replacement or refinancing of an agreement referred to in clause (i) or (ii) of this paragraph or this clause (iii); *provided, however*, that the encumbrances and restrictions with respect to such Restricted Subsidiary contained in any such agreement or amendment, restatement, modification, renewal, supplement, refunding, replacement or refinancing are not materially less favorable, taken as a whole, in the good faith determination of the Company, to the Holders than the encumbrances and restrictions contained in such agreements referred to in clauses (i) or (ii) of this paragraph on the Issue Date or the date such Restricted Subsidiary became a Restricted Subsidiary or was merged into a Restricted Subsidiary, whichever is applicable;

(iv) in the case of clause (3) of paragraph (a) of this <u>Section 3.7</u>, any encumbrance or restriction: (A) that restricts in a customary manner the subletting, assignment or transfer of any property or asset that is subject to a lease, license or similar contract, or the assignment or transfer of any such lease, license or other similar contract; (B) contained in mortgages, pledges or other security agreements permitted under this Indenture securing Indebtedness of the Company or a Restricted Subsidiary to the extent such encumbrances or restrictions restrict the transfer of the property subject to such mortgages, pledges or other security agreements; or (C) pursuant to customary provisions restricting dispositions of real property interests set forth in any reciprocal easement agreements of the Company or any Restricted Subsidiary;

(v) (a) purchase money obligations for property acquired in the ordinary course of business and (b) Capitalized Lease Obligations permitted under this Indenture, in each case, that impose encumbrances or restrictions of the nature described in clause (3) of paragraph (a) of this Section 3.7 on the property so acquired;

(vi) any restriction with respect to a Restricted Subsidiary (or any of its property or assets) imposed pursuant to an agreement entered into for the direct or indirect sale or disposition of the Equity Interests or assets of such Restricted Subsidiary (or the property or assets that are subject to such restriction) pending the closing of such sale or disposition;

(vii) any customary provisions in joint venture agreements relating to joint ventures and other similar agreements entered into in the ordinary course of business; any customary encumbrances or restrictions on any Foreign Subsidiary pursuant to Indebtedness Incurred by such Foreign Subsidiary;

(viii) restrictions on cash and other deposits or net worth provisions in leases and other agreements entered into by the Company or any Restricted Subsidiary in the ordinary course of business;

(ix) encumbrances or restrictions arising or existing by reason of applicable law or any applicable rule, regulation or order;

(x) encumbrances or restrictions contained in indentures or debt instruments or other debt arrangements Incurred or Preferred Stock issued by Guarantors in accordance with Section 3.3 that are not materially more restrictive, taken as a whole, in the good faith determination of the Company, than those applicable to the Company in either this Indenture or the Senior Secured Credit Agreement on the Issue Date (which results in encumbrances or restrictions comparable to those applicable to the Company at a Restricted Subsidiary level);

(xi) encumbrances or restrictions contained in indentures or other debt instruments or debt arrangements Incurred or Preferred Stock issued subsequent to the Issue Date by Restricted Subsidiaries that are not Guarantors pursuant to clause (5) of paragraph (b) of <u>Section 3.3</u> by Restricted Subsidiaries; and

(xii) in the case of <u>Section 3.7(a)(3)</u>, Liens permitted to be Incurred under <u>Section 3.5</u> that limit the right of the debtor to dispose of assets securing such Indebtedness.

SECTION 3.8. Limitation on Sales of Assets and Subsidiary Stock. (a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, make any Asset Disposition unless: (1) the Company or such Restricted Subsidiary, as the case may be, receives consideration at least equal to the fair market value (such fair market value to be determined on the date of contractually agreeing to such Asset Disposition), as determined in good faith by the Board of Directors (including as to the value of all non-cash consideration), of the shares and assets subject to such Asset Disposition; (2) at least 75% of the consideration from such Asset Disposition received by the Company or such Restricted Subsidiary, as the case may be, is in the form of cash or Cash Equivalents; provided that for the purposes of this Section 3.8, the following shall be deemed to be cash: (A) the assumption by the transferee of Indebtedness (other than Subordinated Obligations or Disgualified Stock) of the Company or Indebtedness of a Restricted Subsidiary (other than Guarantor Subordinated Obligations or Disqualified Stock of any Guarantor) and the release of the Company or such Restricted Subsidiary from all liability on such Indebtedness in connection with such Asset Disposition (in which case the Company will, without further action, be deemed to have applied such deemed cash to Indebtedness); and (B) securities, notes or other obligations received by the Company or any Restricted Subsidiary from the transferee that are converted by the Company or such Restricted Subsidiary into cash within 180 days after receipt; and (3) an amount equal to 100% of the Net Available Cash from such Asset Disposition is applied by the Company or such Restricted Subsidiary, as the case may be: (A) to repay Indebtedness of the Company (other than any Disqualified Stock or Subordinated Obligations) or Indebtedness of a Restricted Subsidiary (other than any Disqualified Stock or Guarantor Subordinated Obligations of a Guarantor) (in each case other than Indebtedness owed to the Company or an Affiliate of the Company) and, if the Indebtedness repaid is revolving credit Indebtedness, to correspondingly reduce commitments with respect thereto within 365 days after the later of the date of such Asset Disposition or the receipt of such Net Available Cash; or (B) to invest in Additional Assets within 365 days from the later of the date of such Asset Disposition or the receipt of such Net Available Cash (or enter into a definitive agreement with respect thereto that is consummated within 545 days after the days after the receipt of any such Net Available Cash), provided that pending the final application of any such Net Available Cash in accordance with clause (3)(A) or clause (3)(B) above, the Company and its Restricted Subsidiaries may temporarily reduce Indebtedness or otherwise invest such Net Available Cash in any manner not prohibited by this Indenture.

(b) Any Net Available Cash from Asset Dispositions that are not applied or invested as provided in the preceding paragraph (a) shall be deemed to constitute "Excess Proceeds." On the 366th day after an Asset Disposition (or such later date as permitted in clause (3)(B) of the preceding paragraph (a), if the aggregate amount of Excess Proceeds exceeds \$15.0 million, the Company shall be required to make an offer ("Asset Disposition Offer") to all Holders and to the extent required by the terms of other Pari Passu Indebtedness, to all holders of other Pari Passu Indebtedness outstanding with similar provisions requiring the Company to make an offer to purchase such Pari Passu Indebtedness with the proceeds from any Asset Disposition ("Pari Passu Notes"), to purchase the maximum principal amount of Notes and any such Pari Passu Notes to which the Asset Disposition Offer applies that may be purchased out of the Excess Proceeds, at an offer price in cash in an amount equal to 100% of the principal amount of the Notes and Pari Passu Notes plus accrued and unpaid interest to the date of purchase, in accordance with the procedures set forth in this Indenture or the agreements governing the Pari Passu Notes, as applicable, in the case of the Notes in denominations of \$2,000 and integral multiples of \$1,000 in excess thereof. To the extent that the aggregate amount of Notes and Pari Passu Notes so validly tendered and not properly withdrawn pursuant to an Asset Disposition Offer is less than the Excess Proceeds, the Company may use any remaining Excess Proceeds for general corporate purposes, subject to other covenants contained in this Indenture. If the aggregate principal amount of Notes surrendered by holders thereof and other Pari Passu Notes surrendered by holders or lenders, collectively, exceeds the amount of Excess Proceeds, the Trustee shall select the Notes and Pari Passu Notes to be purchased on a pro rata basis on the basis of the aggregate principal amount of tendered Notes and Pari Passu Notes. Upon completion of such Asset Disposition Offer, the amount of Excess Proceeds shall be reset at zero. Notwithstanding anything to the contrary in the foregoing, the Company may commence an Asset Disposition Offer prior to the expiration of 365 days after the occurrence of an Asset Disposition (or such later date after giving effect to the proviso in clause (3)(B) of the preceding paragraph (a), provided that such Asset Disposition Offer complies with all applicable securities laws and regulations).

(c) The Asset Disposition Offer shall remain open for a period of 20 Business Days following its commencement, except to the extent that a longer period is required by applicable law (the "<u>Asset Disposition Offer Period</u>"). No later than five Business Days after the termination of the Asset Disposition Offer Period (the "<u>Asset Disposition Purchase Date</u>"), the Company shall purchase the principal amount of Notes and Pari Passu Notes required to be purchased pursuant to this <u>Section 3.8</u> (the "<u>Asset Disposition Offer Amount</u>") or, if less than the Asset Disposition Offer Amount has been so validly tendered, all Notes and Pari Passu Notes validly tendered in response to the Asset Disposition Offer.

(d) If the Asset Disposition Purchase Date is on or after an interest record date and on or before the related interest payment date, any accrued and unpaid interest shall be paid to the Person in whose name a Note is registered at the close of business on such record date, and no additional interest shall be payable to Holders who tender Notes pursuant to the Asset Disposition Offer.

(e) Pending the final application of any Net Available Cash pursuant to this <u>Section 3.8</u>, the holder of such Net Available Cash may apply such Net Available Cash temporarily to reduce Indebtedness outstanding under a revolving Credit Facility or otherwise invest such Net Available Cash in any manner not prohibited by this Indenture.

(f) On or before the Asset Disposition Purchase Date, the Company shall, to the extent lawful, accept for payment, on a pro rata basis to the extent necessary, the Asset Disposition Offer Amount of Notes and Pari Passu Notes or portions of Notes and Pari Passu Notes so validly tendered and not properly withdrawn pursuant to the Asset Disposition Offer, or if less than the Asset Disposition Offer Amount has been validly tendered and not properly withdrawn, all Notes and Pari Passu Notes so validly tendered and not properly withdrawn, in the case of the Notes in denominations of \$2,000 and integral multiples of \$1,000 in excess thereof. The Company shall deliver to the Trustee an Officers' Certificate stating that such Notes or portions thereof were accepted for payment by the Company in accordance with the terms of this <u>Section 3.8</u> and, in addition, the Company shall deliver all certificates and notes required, if any, by the agreements governing the Pari Passu Notes. The Company or the Paying Agent, as the case may be, shall promptly (but in any case not later than five Business Days after termination of the Asset Disposition Offer Period) mail or deliver to each tendering Holder or holder or lender of Pari Passu Notes, as the case may be, an amount equal to the purchase price of the Notes or Pari Passu Notes so validly tendered and not properly withdrawn by such holder or lender, as the case may be, and accepted by the Company for purchase, and the Company shall promptly issue a new Note, and the Trustee, upon delivery of an Officers' Certificate from the Company, shall authenticate and mail or deliver such new Note to such holder, in a principal amount equal to any unpurchased portion of the Note surrendered; *provided* that each such new Note shall be in a principal amount of \$2,000 or an integral multiple of \$1,000 in excess thereof. In addition, the Company shall authenticate and mail or deliver such new Note to such holder, in a principal amount equal to any unpurchased portion of the Note surrendered;

(g) The Company will not, and will not permit any Restricted Subsidiary to, engage in any Asset Swaps, unless (1) at the time of entering into such Asset Swap and immediately after giving effect to such Asset Swap, no Default or Event of Default shall have occurred and be continuing or would occur as a consequence thereof; and (2) the Board of Directors has determined that the aggregate fair market value of the property or assets being transferred by the Company or such Restricted Subsidiary is not greater than the aggregate fair market value of the property or assets being received by the Company or such Restricted Subsidiary and has approved the terms of such Asset Swap.

(h) The Company shall comply, to the extent applicable, with the requirements of Rule 14e-1 under the Exchange Act and any other securities laws or regulations in connection with the repurchase of Notes pursuant to this Indenture. To the extent that the provisions of any securities laws or regulations conflict with provisions of this <u>Section 3.8</u>, the Company shall comply with the applicable securities laws and regulations and shall not be deemed to have breached its obligations under this Indenture by virtue of any conflict.

(i) For the purposes of this <u>Section 3.8</u>, Holders electing to have a Note purchased shall be required to surrender the Note, with an appropriate form duly completed, to the Company at the address specified in the notice at least three Business Days prior to the purchase date. Each Holder shall be entitled to withdraw its election if the Company receives, not later than one Business Day prior to the purchase date, a telegram, telex, facsimile transmission or letter from such Holder setting forth the name of such Holder, the principal amount of the Note or Notes which were delivered for purchase by such Holder and a statement that such Holder is withdrawing his election to have such Note or Notes purchased.

SECTION 3.9. Limitation on Transactions with Affiliates. (a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, enter into or conduct any transaction (including the purchase, sale, lease or exchange of any property or the rendering of any service) with any Affiliate of the Company (an "Affiliate Transaction") *unless*: (1) the terms of such Affiliate Transaction are no less favorable to the Company or such Restricted Subsidiary, as the case may be, than those that could be obtained in a comparable transaction at the time of such transaction in arm's-length dealings with a Person who is not such an Affiliate; (2) in the event such Affiliate Transaction involves an aggregate consideration in excess of \$5.0 million, the terms of such transaction have been approved by a majority of the members of the Board of Directors of the Company and either (x) a further resolution by a majority of the members of such Board having no personal stake in such transaction, if any (and such majority or majorities, as the case may be, determines that such Affiliate Transaction satisfies the criteria in clause (1) above); or (y) the Company shall have received a written opinion from an independent investment banking, accounting or appraisal firm of nationally recognized standing that such Affiliate Transaction is not materially less favorable than those that might reasonably have been obtained in a comparable transaction at such time on an arm's-length basis from a Person that is not an Affiliate; and (3) in the event such Affiliate Transaction involves an aggregate consideration in or a comparable transaction at such time on an arm's-length basis from a Person that is not an Affiliate.

(b) The provisions of paragraph (a) of this Section 3.9 shall not apply to: (1) any Restricted Payment permitted to be made pursuant to Section 3.4 or any Permitted Investment (other than Permitted Investments set forth under clauses (1)(b), (2), (11), (13) and (14) of the definition of Permitted Investments); (2) any issuance of securities, or other payments, awards or grants in cash, securities or otherwise pursuant to, or the funding of, employment agreements and other compensation arrangements, options to purchase Capital Stock of the Company, restricted stock plans, long-term incentive plans, stock appreciation rights plans, participation plans or similar employee benefits plans and/or indemnity provided on behalf of directors, officers and employees approved by the Board of Directors of the Company; (3) to the extent permitted by applicable law, loans or advances to employees, officers or directors in the ordinary course of business of the Company or any of its Restricted Subsidiaries but in any event not to exceed \$2.5 million in the aggregate outstanding at any one time (without giving effect to the forgiveness of any such loan) with respect to all loans or advances made since the Issue Date; (4) any transaction between the Company and a Restricted Subsidiary or between Restricted Subsidiaries and Guarantees issued by the Company or a Restricted Subsidiary for the benefit of the Company or a Restricted Subsidiary, as the case may be, in accordance with Section 3.3; (5) the payment of reasonable and customary fees paid to, and indemnity provided on behalf of, directors of the Company or any Restricted Subsidiary; (6) the existence of, and the performance of obligations of the Company or any of its Restricted Subsidiaries under the terms of any agreement to which the Company or any of its Restricted Subsidiaries is a party as of or on the Issue Date, as these agreements may be amended, modified, supplemented, extended or renewed from time to time; provided, however, that any future amendment, modification, supplement, extension or renewal entered into after the Issue Date shall be permitted to the extent that its terms are not more disadvantageous to the Holders in any material respect in the good faith judgment of the Board of Directors of the Company when taken as a whole than the terms of the agreements in effect on the Issue Date; (7) transactions with customers, clients, suppliers or purchasers or sellers of goods or services, in each case in the ordinary course of the business of the Company and its Restricted Subsidiaries and otherwise in compliance with the terms of this Indenture; provided that in the reasonable determination of the members of the Board of Directors or senior management of the Company, such transactions are on terms that are no less favorable to the Company or the relevant Restricted Subsidiary than those that would have been obtained in a comparable transaction by the Company or such Restricted Subsidiary with an unrelated Person; (8) any issuance or sale of Equity Interests (other than Disgualified Stock) to Affiliates of the Company and the granting of registration and other customary rights in connection therewith; (9) Permitted Holdings Payments; (10) any transaction on arm's length terms with non-affiliates that become Affiliates as a result of such transaction; and (11) transactions in which the Company or any Restricted Subsidiary delivers to the Trustee an opinion or appraisal issued by an accounting, appraisal or investment banking firm of national standing stating that such transaction is fair to the Company or such Restricted Subsidiary from a financial point of view or stating that the terms are not materially less favorable than those that might reasonably have been obtained by the Company or such Restricted Subsidiary in a comparable transaction at such time on an armslength basis from a Person that is not an Affiliate.

SECTION 3.10. <u>Change of Control</u>. (a) If a Change of Control occurs, each Holder shall have the right to require the Company to repurchase all or any part (equal to \$2,000 or integral multiple of \$1,000 in excess thereof) of such Holder's Notes at a purchase price in cash equal to 101% of the principal amount of the Notes, plus accrued and unpaid interest and additional interest, if any, to the date of purchase (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date); *provided*, *however* that notwithstanding the foregoing, the Company shall not be obligated to repurchase Notes pursuant to this <u>Section 3.10</u> if the Company has previously exercised its right to redeem Notes pursuant to <u>Section 5.1</u>.

(b) Within 30 days following any Change of Control, unless the Company has exercised its right to redeem all of the Notes as described under <u>Section 5.1</u>, the Company shall mail a notice (the "<u>Change of Control Offer</u>") to each Holder (with a copy to the Trustee) describing the transaction or transactions that constitute the Change of Control and offering to repurchase Notes on the Change of Control payment date specified in the notice, and such notice shall otherwise include:

(1) that a Change of Control has occurred and that such Holder has the right to require the Company to purchase such Holder's Notes at a purchase price in cash equal to 101% of the principal amount of such Notes plus accrued and unpaid interest, if any, to the date of purchase (subject to the right of Holders of record on a record date to receive interest on the relevant interest payment date) (the "<u>Change of Control Payment</u>");

(2) the repurchase date (which shall be no earlier than 30 days nor later than 60 days from the date such notice is mailed) (the "<u>Change of Control</u> <u>Payment Date</u>"); and

(3) the procedures determined by the Company, consistent with this <u>Section 3.10</u>, that a Holder must follow in order to have its Notes repurchased or to cancel such order of purchase.

(c) Holders electing to have a Note purchased shall be required to surrender the Note, with an appropriate form duly completed, to the Company at the address specified in the notice at least three Business Days prior to the purchase date. Each Holder shall be entitled to withdraw its election if the Company receives, not later than one Business Day prior to the purchase date, a telegram, telex, facsimile transmission or letter from such Holder setting forth the name of such Holder, the principal amount of the Note or Notes which were delivered for purchase by such Holder and a statement that such Holder is withdrawing his election to have such Note or Notes purchased.

(d) On the Change of Control Payment Date, the Company shall, to the extent lawful: (i) accept for payment all Notes or portions of Notes (of \$2,000 or integral multiples of \$1,000 in excess thereof) properly tendered pursuant to the Change of Control Offer; (ii) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions of Notes so tendered; and (iii) deliver or cause to be delivered to the Trustee the Notes so accepted together with an Officers' Certificate specifying the Notes or portions thereof accepted for payment by the Company. The Paying Agent shall promptly mail, to the Holders of Notes so accepted, payment in an amount equal to the purchase price, and the Trustee shall promptly authenticate and deliver (or cause to be transferred by book entry) to such Holders a new Note equal in principal amount to any unpurchased portion of the Notes surrendered; *provided* that each Note purchased and each new Note issued shall be in a principal amount of \$2,000 or integral multiple of \$1,000 in excess thereof.

(e) A Change of Control Offer may be made in advance of a Change of Control, conditioned upon consummation of the Change of Control, if a definitive agreement is in effect at the time of making such Change of Control offer that, when consummated in accordance with its terms, will result in a Change of Control, *provided* that such Change of Control Offer complies with all applicable securities laws or regulations.

(f) If the Change of Control Payment Date is on or after an interest record date and on or before the related interest payment date, any accrued and unpaid interest, if any, shall be paid to the Person in whose name a Note is registered at the close of business on such record date, and no additional interest shall be payable to Holders who tender pursuant to the Change of Control Offer.

(g) The Company shall publicly announce the results of the Change of Control Offer on or as soon as practicable after the Change of Control Payment Date.

(h) The Company shall not be required to make a Change of Control Offer upon a Change of Control if (i) a third party makes the Change of Control Offer in the manner, at the times and otherwise in compliance with the requirements set forth in this Indenture applicable to a Change of Control Offer made by the Company and purchases all Notes validly tendered and not withdrawn under such Change of Control Offer or (ii) notice of redemption has been given pursuant to <u>Section 5.1</u>, unless and until there is a default of the applicable redemption price.

(i) The Company shall comply, to the extent applicable, with the requirements under Rule 14e-1 of the Exchange Act and any other securities laws or regulations in connection with the repurchase of Notes pursuant to this <u>Section 3.10</u>. To the extent that the provisions of any securities laws or regulations conflict with provisions of this <u>Section 3.10</u>, the Company shall comply with the applicable securities laws and regulations and shall not be deemed to have breached its obligations under this Indenture by virtue of the conflict.

SECTION 3.11. <u>Future Guarantors</u>. (a) After the Issue Date, the Company will cause each Restricted Subsidiary, other than a Foreign Subsidiary, created or acquired by the Company or one or more of its Restricted Subsidiaries to execute and deliver to the Trustee a supplemental indenture to this Indenture, substantially in the form attached as Exhibit D hereto within 10 Business Days of the date on which it was acquired or created pursuant to which such Guarantor will unconditionally Guarantee, on a joint and several basis, the full and prompt payment of the principal of, premium, if any and interest (including additional interest, if any) on the Notes on a senior basis.

(b) The obligations of each Guarantor will be limited to the maximum amount as will, after giving effect to all other contingent and fixed liabilities of such Guarantor (including, without limitation, any guarantees under the Credit Facility) and after giving effect to any collections from or payments made by or on behalf of any other Guarantor in respect of the obligations of such other Guarantor under its Note Guarantee or pursuant to its contribution obligations under this Indenture, result in the obligations of such Guarantor under its Note Guarantee not constituting a fraudulent conveyance or fraudulent transfer under federal or state law.

(c) Each Note Guarantee shall be released in accordance with the provisions of Article X.

SECTION 3.12. Limitation on Lines of Business. The Company shall not, and shall not permit any Restricted Subsidiary to, engage in any business other than a Related Business, except to such extent as would not be material to the Company as a whole.

SECTION 3.13. <u>Payments for Consent</u>. Neither the Company nor any of the Company's Restricted Subsidiaries shall, directly or indirectly, pay or cause to be paid any consideration, whether by way of interest, fees or otherwise, to any Holder of any Notes for or as an inducement to any consent, waiver or amendment of any of the terms or provisions of this Indenture or the Notes unless such consideration is offered to be paid or is paid to all Holders that consent, waive or agree to amend in the time frame set forth in the solicitation documents relating to such consent, waiver or amendment.

SECTION 3.14. <u>Maintenance of Office or Agency</u>. The Company shall maintain in The City of New York, an office or agency where the Notes may be presented or surrendered for payment, where, if applicable, the Notes may be surrendered for registration of transfer or exchange and where notices and demands to or upon the Company in respect of the Notes and this Indenture may be served. The Corporate Trust Office of the Trustee shall be such office or agency of the Company for payment, unless the Company shall designate and maintain some other office or agency for one or more of such purposes. The Company shall give prompt written notice to the Trustee of any change in the location of any such office or agency. If at any time the Company shall fail to maintain any such required office or agency or shall fail to furnish the Trustee with the address thereof, such presentations, surrenders, notices and demands may be made or served at the Corporate Trust Office of the Trustee, and the Company hereby appoints the Trustee as its agent to receive all such presentations, surrenders, notices and demands.

The Company may also from time to time designate one or more other offices or agencies (in or outside of The City of New York) where the Notes may be presented or surrendered for any or all such purposes and may from time to time rescind any such designation (which at the Issue Date shall be the Corporate Trust Office of the Trustee); *provided, however*, that no such designation or rescission shall in any manner relieve the Company of its obligation to maintain an office or agency in the Borough of Manhattan, The City of New York for such purposes. The Company shall give prompt written notice to the Trustee of any such designation or rescission and any change in the location of any such other office or agency.

SECTION 3.15. <u>Money for Note Payments to Be Held in Trust</u>. If the Company shall at any time act as its own Paying Agent, it shall, on or before each due date of the principal of (or premium, if any) or interest on any of the Notes, segregate and hold in trust for the benefit of the Persons entitled thereto a sum sufficient to pay the principal of (or premium, if any) or interest so becoming due until such sums shall be paid to such Persons or otherwise disposed of as herein provided and shall promptly notify the Trustee in writing of its action or failure to so act.

Whenever the Company shall have one or more Paying Agents for the Notes, it shall, on or before each due date of the principal of (or premium, if any) or interest on any Notes, deposit with any Paying Agent a sum in same day funds (or New York Clearing House funds if such deposit is made prior to the date on which such deposit is required to be made) that shall be available to the Trustee by 10:00 a.m. New York City time on such due date sufficient to pay the principal (and premium, if any) or interest so becoming due, such sum to be held in trust for the benefit of the Persons entitled to such principal, premium or interest, and (unless such Paying Agent is the Trustee) the Company shall promptly notify the Trustee in writing of such action or any failure to so act.

The Company shall cause each Paying Agent (other than the Trustee) to execute and deliver to the Trustee an instrument in which such Paying Agent shall agree with the Trustee, subject to the provisions of this Section, that such Paying Agent shall:

(a) hold all sums held by it for the payment of the principal of (and premium, if any) or interest on Notes in trust for the benefit of the Persons entitled thereto until such sums shall be paid to such Persons or otherwise disposed of as herein provided;

(b) give the Trustee prompt written notice of any default by the Company (or any other obligor upon the Notes) in the making of any payment of principal (and premium, if any) or interest; and

(c) at any time during the continuance of any such default, upon the written request of the Trustee, forthwith pay to the Trustee all sums so held in trust by such Paying Agent.

The Company may at any time, for the purpose of obtaining the satisfaction and discharge of this Indenture or for any other purpose, pay, or by Company Order direct any Paying Agent to pay, to the Trustee all sums held in trust by the Company or such Paying Agent, such sums to be held by the Trustee upon the same trusts as those upon which such sums were held by the Company or such Paying Agent; and, upon such payment by any Paying Agent to the Trustee, such Paying Agent shall be released from all further liability with respect to such sums.

Any money deposited with the Trustee or any Paying Agent, or then held by the Company, in trust for the payment of the principal of (or premium, if any) or interest on any Note and remaining unclaimed for two years after such principal, premium or interest has become due and payable shall be paid to the Company on Company Order, or (if then held by the Company) shall be discharged from such trust; and the Holder of such Note shall thereafter, as an unsecured general creditor, look only to the Company for payment thereof, and all liability of the Trustee or such Paying Agent with respect to such trust money, and all liability of the Company as trustee thereof, shall thereupon cease.

SECTION 3.16. <u>Maintenance of Existence</u>. Subject to Article IV, the Company shall do or cause to be done all things necessary to preserve and keep in full force and effect its existence and that of each Restricted Subsidiary and the rights (charter and statutory) licenses and franchises of the Company and each Restricted Subsidiary; *provided, however*, that the Company shall not be required to preserve any such existence (except the Company), right, license or franchise if the Board of Directors of the Company shall determine that the preservation thereof is no longer desirable in the conduct of the business of the Company and each of its Restricted Subsidiaries, taken as a whole, and that the loss thereof is not, and shall not be, disadvantageous in any material respect to the Holders.

SECTION 3.17. <u>Payment of Taxes and Other Claims</u>. The Company shall pay or discharge or cause to be paid or discharged, before the same shall become delinquent, (i) all material taxes, assessments and governmental charges levied or imposed upon the Company or any Subsidiary or upon the income, profits or property of the Company or any Subsidiary and (ii) all lawful claims for labor, materials and supplies, which, if unpaid, might by law become a material liability or lien upon the property of the Company or any Subsidiary; *provided, however*, that the Company shall not be required to pay or discharge or cause to be paid or discharged any such tax, assessment, charge or claim whose amount, applicability or validity is being contested in good faith by appropriate proceedings and for which appropriate reserves, if necessary (in the good faith judgment of management of the Company) are being maintained in accordance with GAAP.

SECTION 3.18. <u>Maintenance of Properties</u>. The Company shall cause all material properties owned by the Company or any Restricted Subsidiary or used or held for use in the conduct of its business or the business of any Restricted Subsidiary to be maintained and kept in normal condition, repair and working order and shall cause to be made all necessary repairs, renewals, replacements, betterments and improvements thereof, all as in the judgment of the Company may be necessary so that the business carried on in connection therewith may be properly conducted at all times; *provided*, *however*, that nothing in this Section shall prevent the Company or any of its Restricted Subsidiaries from discontinuing the maintenance of any of such properties if such discontinuance is, in the judgment of the Company, desirable in the conduct of its business or the business of any Restricted Subsidiary and not adverse in any material respect to the Holders.

SECTION 3.19. <u>Compliance with Laws</u>. The Company shall comply, and shall cause each of its Restricted Subsidiaries to comply, with all applicable statutes, rules, regulations, orders and restrictions of the United States of America, all states and municipalities thereof, and of any governmental regulatory authority, in respect of the conduct of their respective businesses and the ownership of their respective properties, except for such noncompliances as would not in the aggregate have a material adverse effect on the financial condition or results of operations of the Company and its Restricted Subsidiaries, taken as a whole.

SECTION 3.20. <u>Compliance Certificate</u>. The Company shall deliver to the Trustee within 120 days after the end of each Fiscal Year of the Company a certificate executed by the Company's principal executive officer, principal accounting officer or principal financial officer stating that in the course of the performance by the signer of his or her duties as such officer he or she would normally have knowledge of any Default or Event of Default and whether or not the signer knows of any Default or Event of Default that occurred during such period. If he or she does, the certificate shall describe the Default or Event of Default, its status and what action the Company is taking or proposes to take with respect thereto. The Company also shall comply with TIA § 314(a)(4). An Officers' Certificate shall also notify the Trustee should the then current Fiscal Year be changed to end on any date other than on the date as herein defined.

SECTION 3.21. <u>Additional Interest Notices</u>. In the event that the Company is required to pay additional interest to Holders pursuant to the Registration Rights Agreement, the Company shall provide written notice ("<u>Additional Interest Notice</u>") to the Trustee of its obligation to pay additional interest no later than five Business Days prior to the proposed payment date set for the amount of additional interest, and the Additional Interest Notice shall set forth the amount of additional interest to be paid by the Company on such Payment Date. The Trustee shall not at any time be under any duty or responsibility to any Holder to determine the additional interest, or with respect to the nature, extent, or calculation of the amount of additional interest when made, or with respect to the method employed in such calculation of the additional interest.

#### SECTION 3.22. Effectiveness of Covenants.

- (a) Following the first day:
- (1) if the Notes have an Investment Grade Rating from both of the Rating Agencies; and
- (2) no Default has occurred and is continuing under this Indenture (the occurrence of the events described in the foregoing clauses (1) and
- (2) being collectively referred to as a "Covenant Suspension Event");
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the Company and its Restricted Subsidiaries shall not be subject to the provisions of Sections 3.3, 3.4, 3.7, 3.8, 3.9, and 4.1(iii) (collectively, the "Suspended Covenants").

(b) If at any time (i) the Notes' credit rating is downgraded from an Investment Grade Rating by any Rating Agency or (ii) a Default or Event of Default occurs and is continuing (the occurrence of the events described in the foregoing clauses (i) and (ii) being collectively referred to as a "<u>Reinstatement Event</u>"), then the Suspended Covenants shall thereafter be reinstated as if such covenants had never been suspended (the "<u>Reinstatement Date</u>") and be applicable pursuant to the terms of this Indenture (including in connection with performing any calculation or assessment to determine compliance with the terms of this Indenture), unless and until the Notes subsequently attain an Investment Grade Rating and no Default or Event of Default is in existence (in which event the Suspended Covenants shall no longer be in effect for such time that the Notes maintain an Investment Grade Rating and no Default or Event of Default or Event of Default is in existence); *provided*, *however*, that no Default, Event of Default or breach of any kind shall be deemed to exist under this Indenture, the Notes or the Guarantees with respect to the Suspended Covenants based on, and none of the Company or any of its Subsidiaries shall bear any liability for, any actions taken or events occurring during the Suspension Period (as defined below), regardless of whether such actions or events would have been permitted if the applicable Suspended Covenants remained in effect during such period. The period of time between the date of suspension of the covenants and the Reinstatement Date is referred to as the "<u>Suspension Period</u>."

(c) On the Reinstatement Date, all Indebtedness Incurred during the Suspension Period shall be classified to have been Incurred pursuant to <u>Section 3.3(a)</u> or one of the clauses set forth in <u>Section 3.3(b)</u> (to the extent such Indebtedness would be permitted to be Incurred thereunder as of the Reinstatement Date and after giving effect to Indebtedness Incurred prior to the Suspension Period and outstanding on the Reinstatement Date). To the extent such Indebtedness would not be so permitted to be Incurred pursuant to <u>Section 3.3(a)</u> or <u>3.3(b)</u>, such Indebtedness shall be deemed to have been outstanding on the Issue Date, so that it is classified pursuant to <u>Section 3.3(b)(4)</u>. Calculations made after the Reinstatement Date of the amount available to be made as Restricted Payments pursuant to <u>Section 3.4</u> shall be made as though <u>Section 3.4</u> had been in effect since the Issue Date and throughout the Suspension Period shall reduce the amount available to be made as Restricted Payments pursuant to <u>Section 3.4(a)</u>.

(d) During any period when the Suspended Covenants are suspended, the Board of Directors of the Company may not designate any of the Company's Subsidiaries as Unrestricted Subsidiaries pursuant to this Indenture.

(e) The Company shall give the Trustee prompt (and in any event not later than five Business Days after a Covenant Suspension Event) written notice of any Covenant Suspension Event. In the absence of such notice, the Trustee shall assume the Suspended Covenants apply and are in full force and effect. The Company shall give the Trustee prompt (and in any event not later than five Business Days after a Reinstatement Event) written notice of any occurrence of a Reinstatement Date. After any such notice of the occurrence of a Reinstatement Date, the Trustee shall assume the Suspended Covenants apply and are in full force and effect.

### Successor Company and Successor Guarantor

SECTION 4.1. <u>Merger and Consolidation</u>. The Company shall not consolidate with or merge with or into, or convey, transfer or lease all or substantially all its assets to, any Person, *unless*:

(i) the resulting, surviving or transferee Person (the "<u>Successor Company</u>") shall be a corporation or a limited liability company, *provided* that in the case of a merger with a limited liability company there shall be a corporate co-issuer, in each case organized and existing under the laws of the United States of America, any State of the United States or the District of Columbia and the Successor Company (if not the Company) shall expressly assume, by supplemental indenture, executed and delivered to the Trustee, in form satisfactory to the Trustee, all the obligations of the Company under the Notes, this Indenture and the Registration Rights Agreement;

(ii) immediately after giving effect to such transaction (and treating any Indebtedness that becomes an obligation of the Successor Company or any Subsidiary of the Successor Company as a result of such transaction as having been Incurred by the Successor Company or such Subsidiary at the time of such transaction), no Default or Event of Default shall have occurred and be continuing;

(iii) immediately after giving effect to such transaction, the Successor Company would be able to Incur at least an additional \$1.00 of Indebtedness pursuant to paragraph (a) of Section 3.3;

(iv) each Guarantor (unless it is the other party to the transactions above, in which case clause (i) shall apply) shall have by supplemental indenture confirmed that its Note Guarantee shall apply to such Person's obligations in respect of this Indenture and the Notes and its obligations under the Registration Rights Agreement shall continue to be in effect; and

(v) the Company shall have delivered to the Trustee an Officers' Certificate and an Opinion of Counsel, each stating that such consolidation, merger or transfer and such supplemental indenture (if any) comply with this Indenture.

For purposes of this <u>Article IV</u>, the sale, lease, conveyance, assignment, transfer, or other disposition of all or substantially all of the properties and assets of one or more Subsidiaries of the Company, which properties and assets, if held by the Company instead of such Subsidiaries, would constitute all or substantially all of the properties and assets of the Company on a consolidated basis, shall be deemed to be the transfer of all or substantially all of the properties and assets of the Company.

The predecessor Company shall be released from its obligations under this Indenture and the Successor Company shall succeed to, and be substituted for, and may exercise every right and power of, the Company under this Indenture, but, in the case of a lease of all or substantially all its assets, the predecessor Company shall not be released from the obligation to pay the principal of and interest on the Notes.

Notwithstanding the preceding clause (iii), (x) any Restricted Subsidiary may consolidate with, merge into or transfer all or part of its properties and assets to the Company and (y) the Company may merge with an Affiliate incorporated solely for the purpose of reincorporating the Company in another jurisdiction to realize tax benefits, so long as the amount of Indebtedness of the Company and its Restricted Subsidiary is not increased thereby; *provided* that, in the case of a Restricted Subsidiary that merges into the Company, the Company shall not be required to comply with the preceding clause (v).

In addition, the Company shall not permit any Guarantor to consolidate with, merge with or into any Person (other than another Guarantor) and shall not permit the conveyance, transfer or lease of all or substantially all of the assets of any Guarantor to any Person (other than to another Guarantor) *unless*: (i) (a) if such entity remains a Guarantor, the resulting, surviving or transferee Person (the "Successor Guarantor") shall be a corporation, partnership, trust or limited liability company organized and existing under the laws of the United States of America, any State of the United States or the District of Columbia; (b) the Successor Guarantor (if other than such Guarantor), expressly assumes, by supplemental indenture or other documentation or instruments, executed and delivered to the Trustee, all the obligations of such Guarantor under the Guarantee, this Indenture and the Registration Rights Agreement; (c) immediately after giving effect to such transaction (and treating any Indebtedness that becomes an obligation of the Successor Guarantor or any Restricted Subsidiary as a result of such transaction as having been Incurred by such Successor Guarantor or such Restricted Subsidiary at the time of such transaction), no Default of Event of Default shall have occurred and be continuing; and (d) the Company shall have delivered to the Trustee an Officers' Certificate and an Opinion of Counsel, each stating that such consolidation, merger or transfer and such supplemental indenture (if any) comply with this Indenture; and (ii) the transaction is made in compliance with <u>Section 3.8</u> (it being understood that only such portion of the Net Available Cash as is required to be applied on the date of such transaction in accordance with the terms of this Indenture needs to be applied in accordance therewith at such time) and this <u>Article IV</u>.

Notwithstanding the foregoing, any Guarantor may merge with or into or transfer all or part of its properties and assets to another Guarantor or the Company or merge with a Restricted Subsidiary of the Company solely for the purpose of reincorporating the Guarantor in a State of the United States, the District of Columbia or any territory thereof, as long as the amount of Indebtedness of such Guarantor and the Restricted Subsidiaries is not increased thereby.

## ARTICLE V

#### Redemption of Notes

SECTION 5.1. Optional Redemption. The Notes may be redeemed, as a whole or from time to time in part, subject to the conditions and at the redemption prices specified in paragraph 5 of the form of Notes set forth in Exhibit A and Exhibit B hereto, which are hereby incorporated by reference and made a part of this Indenture, together with accrued and unpaid interest to the Redemption Date (as defined below).

SECTION 5.2. <u>Applicability of Article</u>. Redemption of Notes at the election of the Company or otherwise, as permitted or required by any provision of this Indenture, shall be made in accordance with such provision and this Article.

SECTION 5.3. <u>Election to Redeem</u>. The election of the Company to redeem any Notes pursuant to <u>Section 5.1</u> shall be evidenced by a Board Resolution.

SECTION 5.4 Selection by Trustee of Notes to Be Redeemed. If less than all the Notes are to be redeemed at any time pursuant to an optional redemption, the particular Notes to be redeemed shall be selected not more than 60 days prior to the Redemption Date (as defined below) by the Trustee, from the outstanding Notes not previously called for redemption, in compliance with the requirements of the principal securities exchange, if any, on which such Notes are listed, or, if such Notes are not so listed, on a *pro rata* basis among the classes of Notes or by lot (and in any case as may be required by the rules and procedures of the applicable depositary) and which may provide for the selection for redemption of portions of the principal of the Notes; although no Note of \$2,000 in original principal amount or less will be redeemed in part. If any Note is to be redeemed in part only, the notice of redemption relating to such Note will state the portion of the principal amount thereof to be redeemed.

The Trustee shall promptly notify the Company in writing of the Notes selected for redemption and, in the case of any Notes selected for partial redemption, the method it has chosen for the selection of Notes and the principal amount thereof to be redeemed.

For all purposes of this Indenture, unless the context otherwise requires, all provisions relating to redemption of Notes shall relate, in the case of any Note redeemed only in part, to the portion of the principal amount of such Note which has been or is to be redeemed.

SECTION 5.5. Notice of Redemption. Notice of redemption shall be given in the manner provided for in Section 11.2 not less than 30 nor more than 60 days prior to the Redemption Date, to each Holder of Notes to be redeemed. At the Company's request, the Trustee shall give notice of redemption in the Company's name and at the Company's expense; *provided, however*, that the Company shall deliver to the Trustee, at least 15 days prior to the date on which notice is to be given to the Holders (or such shorter period of time as shall be satisfactory to the Trustee), an Officers' Certificate requesting that the Trustee give such notice at the Company's expense and setting forth the information to be stated in such notice as provided in the following items. Any such notice may be cancelled at any time prior to notice of such redemption being mailed to any Holder and shall thereby be void and of no effect.

All notices of redemption shall state:

(i) the Redemption Date,

(ii) the redemption price and the amount of accrued interest to, but excluding, the Redemption Date payable as provided in Section 5.7, if any,

(iii) if less than all outstanding Notes are to be redeemed, the method for selecting the Notes to be redeemed, as well as the aggregate principal amount of Notes to be redeemed and the aggregate principal amount of Notes to be outstanding after such partial redemption,

(iv) in case any Note is to be redeemed in part only, (a) the notice which relates to such Note shall state that on and after the Redemption Date, upon surrender of such Note, the Holder shall receive, without charge, a new Note or Notes of authorized denominations for the principal amount thereof remaining unredeemed and (b) such documentation and records as shall enable to Trustee to select the Notes to be redeemed pursuant to <u>Section 5.4</u>.

(v) that on the Redemption Date the redemption price (and accrued interest, if any, to, but excluding, the Redemption Date payable as provided in <u>Section 5.7</u>) shall become due and payable upon each such Note, or the portion thereof, to be redeemed, and, unless the Company defaults in making the redemption payment, that interest on Notes called for redemption (or the portion thereof) shall cease to accrue on and after said date,

(vi) the place or places where such Notes are to be surrendered for payment of the redemption price and accrued interest, if any,

(vii) the name and address of the Paying Agent,

(viii) that Notes called for redemption must be surrendered to the Paying Agent to collect the redemption price,

(ix) the CUSIP number and shall provide that no representation is made as to the accuracy or correctness of the CUSIP number, if any, listed in such notice or printed on the Notes, and any redemption shall not be affected by any defect in such CUSIP numbers, and

(x) the paragraph of the Notes pursuant to which the Notes are to be redeemed.

SECTION 5.6. Deposit of Redemption Price. By 10:00 a.m., New York City time, on any Redemption Date, the Company shall deposit with the Paying Agent (or, if the Company or a Wholly Owned Subsidiary that is a Domestic Subsidiary is a Paying Agent, shall segregate and hold in trust as provided in Section 2.4) an amount of money sufficient to pay the redemption price of, and accrued interest on, all the Notes which are to be redeemed on that date other than Notes or portions of Notes called for redemption that are beneficially owned by the Company and have been delivered by the Company to the Trustee for cancellation.

SECTION 5.7. Notes Payable on Redemption Date. Notice of redemption having been given as aforesaid, the Notes or portions of Notes so to be redeemed shall, on the Redemption Date, become due and payable at the redemption price therein specified (together with accrued interest, if any, to, but excluding, the Redemption Date), and from and after such date (unless the Company shall default in the payment of the redemption price and accrued interest) such Notes shall cease to bear interest. Upon surrender of any such Note for redemption in accordance with said notice, such Note shall be paid by the Company at the redemption price, together with accrued interest, if any, to, but excluding, the Redemption Date (subject to the rights of Holders of record on the relevant record date to receive interest due on the relevant interest payment date).

If any Note called for redemption shall not be so paid upon surrender thereof for redemption, the principal (and premium, if any) shall, until paid, bear interest from the Redemption Date at the rate borne by the Notes.

SECTION 5.8. <u>Notes Redeemed in Part</u>. Any Note which is to be redeemed only in part (pursuant to the provisions of this Article) shall be surrendered at the office or agency of the Company maintained for such purpose pursuant to <u>Section 3.14</u> (with, if the Company or the Trustee so requires, due endorsement by, or a written instrument of transfer in form satisfactory to the Company and the Trustee duly executed by, the Holder thereof or such Holder's attorney duly authorized in writing), and the Company shall execute, and the Trustee shall authenticate and make available for delivery to the Holder of such Note at the expense of the Company, a new Note or Notes, of any authorized denomination as requested by such Holder, in an aggregate principal amount equal to and in exchange for the unredeemed portion of the principal of the Note so surrendered, *provided*, that each such new Note will be issued in denominations of \$2,000 or integral multiples of \$1,000 in excess thereof.

SECTION 5.9 No Sinking Fund. The Company is not required to make any mandatory redemptions or sinking fund payments with respect to the Notes.

SECTION 5.10. <u>Purchases other than Redemptions</u>. The Company may, at any time, acquire Notes by means other than redemption, whether by tender offer, open market purchases, negotiated transactions or otherwise, in accordance with applicable securities laws, so long as such acquisition does not otherwise violate the terms of this Indenture.

### ARTICLE VI

#### Defaults and Remedies

## SECTION 6.1. Events of Default. Each of the following is an "Event of Default":

(1) default in any payment of interest or additional interest (as required by the Registration Rights Agreement) on any Note when due, that continues for 30 days;

(2) default in the payment of principal of or premium, if any, on any Note when due at its Stated Maturity, upon optional redemption, upon required repurchase, upon declaration or otherwise;

(3) failure by the Company or any Guarantor to comply with its obligations under Article IV;

(4) failure by the Company to comply for 30 days after notice as provided below with any of its obligations described under <u>Section 3.8</u> or <u>Section 3.10</u> (in each case, other than a failure to purchase Notes which shall constitute an Event of Default under clause (2) above;

(5) failure by the Company or any Restricted Subsidiary to comply for 60 days after notice as provided below with its other agreements in this Indenture or under the Notes (other than those referred to in (1), (2), (3) or (4) above);

(6) default under any mortgage, indenture or instrument under which there may be issued or by which there may be secured or evidenced any Indebtedness for money borrowed by the Company or any of its Restricted Subsidiaries (or the payment of which is Guaranteed by the Company or any of its Restricted Subsidiaries), other than Indebtedness owed to the Company or a Restricted Subsidiary, whether such Indebtedness or Guarantee now exists, or is created after the date of this Indenture, which default:

(a) is caused by a failure to pay principal of, or interest or premium, if any, on such Indebtedness prior to the expiration of the grace period provided in such Indebtedness ("payment default"); or

(b) results in the acceleration of such Indebtedness prior to its maturity (the "cross acceleration provision");

and, in each case, the principal amount of any such Indebtedness, together with the principal amount of any other such Indebtedness under which there has been a payment default or the maturity of which has been so accelerated, aggregates \$20.0 million or more;

(7) the Company or a Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary pursuant to or within the meaning of any Bankruptcy Law:

(A) commences a voluntary case or proceeding;

(B) consents to the entry of a judgment, decree or order for relief against it in an involuntary case or proceeding;

(C) consents to the appointment of a Custodian of it or for any substantial part of its property;

(D) makes a general assignment for the benefit of its creditors;

(E) consents to or acquiesces in the institution of a bankruptcy or an insolvency proceeding against it;

(F) takes any corporate action to authorize or effect any of the foregoing; or

(G) takes any comparable action under any foreign laws relating to insolvency;

(8) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that:

(A) is for relief in an involuntary case against the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary pursuant to or within the meaning of the Bankruptcy Law;

(B) appoints a Custodian for all or substantially all of the property of the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary pursuant to or within the meaning of the Bankruptcy Law;

(C) orders the winding up or liquidation of the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary pursuant to or within the meaning of the Bankruptcy Law; and

(D) in each case, the order, decree or relief remains unstayed and in effect for 60 days;

(9) failure by the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary to pay final judgments aggregating in excess of \$20.0 million (net of any amounts that a reputable and creditworthy insurance company has acknowledged liability for in writing), which judgments are not paid, discharged, waived or stayed for a period of 60 days (the "judgment default provision"); or

(10) any Note Guarantee ceases to be in full force and effect (except as contemplated by the terms of this Indenture) or is declared null and void in a judicial proceeding or any Guarantor denies or disaffirms its obligations under this Indenture or its Note Guarantee.

However, a default under clauses (4) and (5) of this paragraph shall not constitute an Event of Default until the Trustee or the Holders of 25% in principal amount of the outstanding Notes provide written notice to the Company of the default and the Company does not cure such default within the time specified in clauses (4) and (5) of this paragraph after receipt of such notice.

The foregoing shall constitute Events of Default whatever the reason for any such Event of Default and whether it is voluntary or involuntary or is effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body.

The Company shall deliver to the Trustee, promptly after, but in no event later than 30 days after, a senior officer of the Company becomes aware of any events which would constitute an Event of Default under clauses (3), (4), (5), (6), (7), (8), (9) or (10) of this <u>Section 6.1</u> in the form of an Officers' Certificate shall provide their status and what action the Company is taking or proposing to take in respect thereof.

SECTION 6.2. <u>Acceleration</u>. If an Event of Default (other than an Event of Default described in clauses (7) and (8) of <u>Section 6.1</u>) occurs and is continuing, the Trustee by notice to the Company, or the Holders of at least 25% in principal amount of the outstanding Notes by written notice to the Company and the Trustee, may, and the Trustee at the request of such Holders shall, declare the principal of, premium, if any, and accrued and unpaid interest, if any, on all the Notes to be due and payable. Upon such a declaration, such principal, premium and accrued and unpaid interest shall be due and payable immediately.

In the event of a declaration of acceleration of the Notes because an Event of Default described in clause (6) of Section 6.1 has occurred and is continuing, the declaration of acceleration of the Notes shall be automatically annulled if the event of default or payment default triggering such Event of Default pursuant to clause (6) of Section 6.1 shall be remedied or cured by the Company or a Restricted Subsidiary or waived by the holders of the relevant Indebtedness within 30 days after the declaration of acceleration with respect thereto and if (1) the annulment of the acceleration of the Notes would not conflict with any judgment or decree of a court of competent jurisdiction and (2) all existing Events of Default, except nonpayment of principal, premium or interest on the Notes that became due solely because of the acceleration of the Notes, have been cured or waived.

If an Event of Default described in clauses (7) and (8) of Section 6.1 occurs and is continuing, the principal of, premium, if any, and accrued and unpaid interest on all the Notes shall become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.

SECTION 6.3. Other Remedies. If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy by proceeding at law or in equity to collect the payment of principal of (or premium, if any) or interest on the Notes or to enforce the performance of any provision of the Notes or this Indenture.

The Trustee may maintain a proceeding even if it does not possess any of the Notes or does not produce any of them in the proceeding. A delay or omission by the Trustee or any Holder in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default. No remedy is exclusive of any other remedy. All available remedies are cumulative.

SECTION 6.4. <u>Waiver of Past Defaults</u>. Subject to <u>Section 9.2</u>, the Holders of a majority in principal amount of the outstanding Notes by notice to the Trustee may waive (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes) any continuing Default or Event of Default (except with respect to an Event of Default described in clauses (1) and (2) of Section 6.1) and rescind any such acceleration with regard to the Notes and its consequences *provided* that (1) such waiver would not conflict with any judgment or decree of a court of competent jurisdiction and (2) all existing Events of Default, other than the nonpayment of the principal of, premium, if any, and interest on the Notes that have become due solely by such declaration of acceleration, have been cured or waived. When a Default or Event of Default is waived, it is deemed cured, but no such waiver shall extend to any subsequent or other Default or Event of Default or impair any consequent right.

SECTION 6.5. <u>Control by Majority</u>. The Holders of a majority in principal amount of the outstanding Notes may direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or of exercising any trust or power conferred on the Trustee. However, the Trustee may refuse to follow any direction that conflicts with law or this Indenture or, subject to <u>Sections 7.1</u> and <u>7.2</u>, that the Trustee determines is unduly prejudicial to the rights of other Holders or would involve the Trustee in personal liability; *provided, however*, that the Trustee may take any other action deemed proper by the Trustee that is not inconsistent with such direction. Prior to taking any action hereunder, the Trustee shall be entitled to indemnification satisfactory to it in its sole discretion against all losses and expenses caused by taking or not taking such action.

SECTION 6.6. Limitation on Suits. Subject to the provisions of this Indenture relating to the duties of the Trustee, if an Event of Default occurs and is continuing, the Trustee shall be under no obligation to exercise any of the rights or powers under this Indenture at the request or direction of any of the Holders unless such Holders have offered to the Trustee indemnity or security satisfactory to the Trustee against any loss, liability or expense. Except to enforce the right to receive payment of principal, premium, if any, or interest when due, no Holder may pursue any remedy with respect to this Indenture or the Notes *unless*:

(1) such Holder has previously given the Trustee notice that an Event of Default is continuing;

(2) Holders of at least 25% in principal amount of the outstanding Notes have requested the Trustee to pursue the remedy;

(3) such Holders have offered the Trustee security or indemnity satisfactory to the Trustee against any loss, liability or expense;

(4) the Trustee has not complied with such request within 60 days after the receipt of the request and the offer of security or indemnity; and

(5) the Holders of a majority in principal amount of the outstanding Notes have not given the Trustee a direction that, in the opinion of the Trustee, is inconsistent with such request within such 60-day period.

SECTION 6.7. <u>Rights of Holders to Receive Payment</u>. Notwithstanding any other provision of this Indenture (including, without limitation, <u>Section 6.6</u>), the right of any Holder to receive payment of principal of, premium, if any, or interest on the Notes held by such Holder, on or after the respective due dates expressed in the Notes, or to bring suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such Holder.

SECTION 6.8. <u>Collection Suit by Trustee</u>. If an Event of Default specified in clauses (1) or (2) of <u>Section 6.1</u> occurs and is continuing, the Trustee may recover judgment in its own name and as trustee of an express trust against the Company for the whole amount then due and owing (together with interest on any unpaid interest to the extent lawful) and the amounts provided for in <u>Section 7.7</u>.

SECTION 6.9. <u>Trustee May File Proofs of Claim</u>. The Trustee may file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel) and the Holders allowed in any judicial proceedings relative to the Company, its Subsidiaries or its or their respective creditors or properties and, unless prohibited by law or applicable regulations, may be entitled and empowered to participate as a member of any official committee of creditors appointed in such matter and may vote on behalf of the Holders in any election of a trustee in bankruptcy or other Person performing similar functions, and any Custodian in any such judicial proceeding is hereby authorized by each Holder to make payments to the Trustee and, in the event that the Trustee shall consent to the making of such payments directly to the Holders, to pay to the Trustee any amount due it, its agents and its counsel pursuant to <u>Section 7.7</u> and any other amounts due the Trustee hereunder. Nothing herein contained shall be deemed to authorize the Trustee to authorize or consent to or accept or adopt on behalf of any Holder any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder thereof, or to authorize the Trustee to vote in respect of the claim of any Holder in any such proceeding.

SECTION 6.10. <u>Priorities</u>. If the Trustee collects any money or property pursuant to this <u>Article VI</u>, it shall pay out the money or property in the following order:

- First: to the Trustee for amounts due under <u>Section 7.7</u>;
- Second: to Holders for amounts due and unpaid on the Notes for principal and interest, ratably, without preference or priority of any kind, according to the amounts due and payable on the Notes for principal and interest, respectively; and
- Third: to the Company.

The Trustee may fix a record date and payment date for any payment to Holders pursuant to this Section. At least 15 days before such record date, the Company shall mail to each Holder and the Trustee a notice that states the record date, the payment date and amount to be paid.

SECTION 6.11. <u>Undertaking for Costs</u>. In any suit for the enforcement of any right or remedy under this Indenture or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court in its discretion may require the filing by any party litigant in the suit of an undertaking to pay the costs of the suit, and the court in its discretion may assess reasonable costs, including reasonable attorneys' fees and expenses, against any party litigant in the suit, having due regard to the merits and good faith of the claims or defenses made by the party litigant. This Section does not apply to a suit by the Trustee, a suit by the Company, a suit by a Holder pursuant to <u>Section 6.7</u> or a suit by Holders of more than 10% in outstanding principal amount of the Notes.

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## ARTICLE VII

## <u>Trustee</u>

SECTION 7.1. <u>Duties of Trustee</u>. (a) If an Event of Default has occurred and is continuing, the Trustee shall exercise the rights and powers vested in it by this Indenture and use the same degree of care and skill in their exercise as a prudent Person would exercise or use under the circumstances in the conduct of such Person's own affairs; *provided* that if an Event of Default occurs and is continuing, the Trustee shall be under no obligation to exercise any of the rights or powers under this Indenture at the request or direction of any of the Holders unless such Holders have offered the Trustee indemnity or security satisfactory to the Trustee against loss, liability or expense.

(b) Except during the continuance of an Event of Default:

(1) the Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Indenture and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(2) in the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture. However, in the case of any such certificates or opinions which by any provisions hereof are specifically required to be furnished to the Trustee, the Trustee shall examine such certificates and opinions to determine whether or not they conform to the requirements of this Indenture (but need not confirm or investigate the accuracy of mathematical calculations or otherwise verify the contents thereof).

(c) The Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act or its own willful misconduct, except that:

(1) this paragraph does not limit the effect of paragraph (b) of this Section;

(2) the Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer unless it is proved that the Trustee was negligent in ascertaining the pertinent facts; and

(3) the Trustee shall not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by it pursuant to Section 6.5 or Section 6.6.

(d) The Trustee shall not be liable for interest on any money received by it except as the Trustee may agree in writing with the Company.

(e) Money held in trust by the Trustee need not be segregated from other funds except to the extent required by law.

(f) No provision of this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties hereunder or in the exercise of any of its rights or powers, if it shall have reasonable grounds to believe that repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

(g) Every provision of this Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee shall be subject to the provisions of this Section and to the provisions of the TIA.

(h) The Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request or direction of any of the Holders unless such Holders shall have offered to the Trustee security or indemnity satisfactory to it against the costs, expenses (including reasonable attorneys' fees and expenses) and liabilities that might be incurred by it in compliance with such request or direction.

SECTION 7.2. <u>Rights of Trustee</u>. (a) The Trustee may conclusively rely and shall be protected in acting or refraining from acting upon any paper or document believed by it to be genuine and to have been signed or presented by the proper Person or Persons. The Trustee need not investigate any fact or matter stated in the document.

(b) Before the Trustee acts or refrains from acting, it may require an Officers' Certificate or an Opinion of Counsel or both. The Trustee shall not be liable for any action it takes or omits to take in good faith in reliance on the Officers' Certificate or Opinion of Counsel.

(c) The Trustee may act through its attorneys and agents and shall not be responsible for the misconduct or negligence of any attorney or agent appointed with due care.

(d) The Trustee shall not be liable for any action it takes or omits to take in good faith which it believes to be authorized or within its rights or powers; *provided*, *however*, that the Trustee's conduct does not constitute willful misconduct or negligence.

(e) The Trustee may consult with counsel of its selection, and the advice or opinion of counsel with respect to legal matters relating to this Indenture and the Notes shall be full and complete authorization and protection from liability in respect to any action taken, omitted or suffered by it hereunder in good faith and in accordance with the advice or opinion of such counsel.

(f) The Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, notice, request, direction, consent, order, bond or other paper or document; but the Trustee may make such further inquiry or investigation into such facts or matters as it may see fit and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine the books, records and premises of the Company and its Subsidiaries at reasonable times and in a reasonable manner, personally or by agent or attorney at the sole cost of the Company and shall incur no liability or additional liability of any kind by reason of such inquiry or investigation.

(g) The Trustee shall not be deemed to have knowledge of any Default or Event of Default except (i), during any period it is serving as Registrar and Paying Agent for the Notes, any Event of Default occurring pursuant to Section 6.1(1) and 6.1(2), or (ii) any Default or Event of Default of which a Responsible Officer shall have received written notification or obtained "actual knowledge." "Actual knowledge" shall mean the actual fact or statement of knowing by a Responsible Officer without independent investigation with respect thereto.

(h) Delivery of the reports, information and documents to the Trustee pursuant to <u>Section 3.2</u> is for informational purposes only and the Trustee's receipt of such shall not constitute constructive notice of any information contained therein or determinable from information contained therein, including the Company's compliance with any of its covenants hereunder (as to which the Trustee is entitled to rely exclusively on Officers' Certificates).

(i) In no event shall the Trustee be responsible or liable for special, indirect, or consequential loss or damage of any kind whatsoever (including, but not limited to, loss of profit) irrespective of whether the Trustee has been advised of the likelihood of such loss or damage and regardless of the form of action.

(j) The rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each agent, custodian and other Person employed to act hereunder.

(k) The Trustee may request that the Company deliver an Officers' Certificate setting forth the names of individuals and/or titles of officers authorized at such time to take specified actions pursuant to this Indenture, which Officers' Certificate may be signed by any person authorized to sign an Officers' Certificate, including any person specified as so authorized in any such certificate previously delivered and not superseded.

(1) Any request or direction of the Company mentioned herein shall be sufficiently evidenced by a written request from the Company, including, as the case may be, a Company Order, and any resolution of the Board of Directors may be sufficiently evidenced by a Board Resolution.

SECTION 7.3. <u>Individual Rights of Trustee</u>. The Trustee in its individual or any other capacity may become the owner or pledgee of Notes and may otherwise deal with the Company or its Affiliates with the same rights it would have if it were not Trustee. Any Paying Agent, Registrar or co-paying agent may do the same with like rights. However, the Trustee must comply with <u>Sections 7.10</u> and <u>7.11</u>. In addition, the Trustee shall be permitted to engage in transactions with the Company; *provided, however*, that if the Trustee acquires any conflicting interest the Trustee must (i) eliminate such conflict within 90 days of acquiring such conflicting interest, (ii) apply to the SEC for permission to continue acting as Trustee or (iii) resign.

SECTION 7.4. <u>Trustee's Disclaimer</u>. The Trustee shall not be responsible for and makes no representation as to the validity or adequacy of this Indenture or the Notes, it shall not be accountable for the Company's use of the Notes or the proceeds from the Notes, and it shall not be responsible for any statement of the Company in this Indenture or in any document

issued in connection with the sale of the Notes or in the Notes other than the Trustee's certificate of authentication or for the use or application of any funds received by any Paying Agent other than the Trustee.

SECTION 7.5. Notice of Defaults. If a Default or Event of Default occurs and is continuing and if a Responsible Officer has actual knowledge thereof, the Trustee shall mail to each Holder notice of the Default or Event of Default within 90 days after it occurs. Except in the case of a Default or Event of Default in payment of principal of, premium (if any), or interest on any Note (including payments pursuant to the required repurchase provisions of such Note, if any), the Trustee may withhold the notice if and so long as its board of directors, a committee of its board of directors or a committee of its Responsible Officer in good faith determines that withholding the notice is in the interests of Holders.

SECTION 7.6. <u>Reports by Trustee to Holders</u>. As promptly as practicable after each September 15 beginning with the September 15 following the date of this Indenture, and in any event prior to October 15 in each year, the Trustee shall mail to each Holder a brief report dated as of such September 15 that complies with TIA § 313(a), if and to the extent such report may be required by the TIA. The Trustee also shall comply with TIA § 313(b). The Trustee shall also transmit by mail all reports required by TIA § 313(c).

A copy of each report at the time of its mailing to Holders shall be filed with the SEC and each stock exchange (if any) on which the Notes are listed. The Company agrees to notify promptly the Trustee in writing whenever the Notes become listed on any stock exchange and of any delisting thereof.

SECTION 7.7. Compensation and Indemnity. The Company and the Guarantors, jointly and severally, shall pay to the Trustee from time to time such compensation for its services as the parties shall agree in writing from time to time. The Trustee's compensation shall not be limited by any law on compensation of a trustee of an express trust. The Company and the Guarantors, jointly and severally, shall reimburse the Trustee upon request for all reasonable out-of-pocket expenses, disbursements and advances incurred or made by it, including, but not limited to, costs of collection, costs of preparing and reviewing reports, certificates and other documents, costs of preparation and mailing of notices to Holders and reasonable costs of counsel retained by the Trustee in connection with the delivery of an Opinion of Counsel or otherwise, in addition to the compensation for its services. Such expenses shall include the reasonable compensation and expenses, disbursements and advances of the Trustee's agents, counsel, accountants and experts. The Company and the Guarantors, jointly and severally, shall indemnify the Trustee, and each of its officers, directors, employees, counsel and agents, against any and all loss, liability or expense (including, but not limited to, reasonable attorneys' fees and expenses) and taxes (other than those based upon or determined by the income of the Trustee) incurred by it in connection with the acceptance or administration of this trust and the performance of its duties hereunder, including the costs and expenses of enforcing this Indenture (including this Section 7.7) and the Notes and of defending itself against any claims (whether asserted by any Holder, the Company or otherwise). The Trustee shall notify the Company promptly of any claim for which it may seek indemnity. Failure by the Trustee to so notify the Company shall not relieve the Company of its obligations hereunder. The Company shall defend the claim and the Trustee may have separate counsel and the Company shall pay the fees and expenses of such counsel. The Company and the Guarantors need not reimburse any expense or indemnify against any loss, liability or expense incurred by the Trustee through the Trustee's own willful misconduct or negligence, subject to the exceptions contained in Section 7.1(c) hereof.

To secure the Company's and the Guarantors' payment obligations in this Section, the Trustee shall have a lien prior to the Notes on all money or property held or collected by the Trustee other than money or property held in trust to pay principal of and interest on particular Notes. The Trustee's right to receive payment of any amounts due under this <u>Section 7.7</u> shall not be subordinate to any other liability or indebtedness of the Company or the Guarantors.

The Company's payment obligations pursuant to this Section and any lien arising hereunder shall survive the discharge of this Indenture and the resignation or removal of the Trustee. When the Trustee incurs expenses after the occurrence of a Default specified in <u>Section 6.1(7)</u> or <u>(8)</u>, the expenses are intended to constitute expenses of administration under any Bankruptcy Law.

SECTION 7.8. <u>Replacement of Trustee</u>. The Trustee may resign at any time by so notifying the Company. The Holders of a majority in principal amount of the Notes may remove the Trustee by so notifying the Company and the Trustee in writing and may appoint a successor Trustee. The Company shall remove the Trustee if:

(1) the Trustee fails to comply with Section 7.10;

(2) the Trustee is adjudged bankrupt or insolvent;

(3) a receiver or other public officer takes charge of the Trustee or its property; or

(4) the Trustee otherwise becomes incapable of acting.

If the Trustee resigns or is removed by the Company or by the Holders of a majority in principal amount of the Notes and such Holders do not reasonably promptly appoint a successor Trustee, or if a vacancy exists in the office of Trustee for any reason (the Trustee in such event being referred to herein as the retiring Trustee), the Company shall promptly appoint a successor Trustee.

A successor Trustee shall deliver a written acceptance of its appointment to the retiring Trustee and to the Company. Thereupon the resignation or removal of the retiring Trustee shall become effective, and the successor Trustee shall have all the rights, powers and duties of the Trustee under this Indenture. The successor Trustee shall mail a notice of its succession to Holders. The retiring Trustee shall promptly transfer all property held by it as Trustee to the successor Trustee, *provided* that all sums owing to the Trustee hereunder have been paid and subject to the lien provided for in <u>Section 7.7</u>.

If a successor Trustee does not take office within 60 days after the retiring Trustee resigns or is removed, the retiring Trustee or the Holders of 10% in principal amount of the Notes may petition, at the expense of the Company, any court of competent jurisdiction for the appointment of a successor Trustee.

If the Trustee fails to comply with Section 7.10, unless the Trustee's duty to resign is stayed as provided in TIA § 310(b), any Holder may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

Notwithstanding the replacement of the Trustee pursuant to this Section 7.8, the Company's obligations under Section 7.7 shall continue for the benefit of the retiring Trustee.

SECTION 7.9. <u>Successor Trustee by Merger</u>. If the Trustee consolidates with, merges or converts into, or transfers all or substantially all its corporate trust business or assets to, another corporation, banking association or other entity, the resulting, surviving or transferee entity without any further act shall be the successor Trustee.

In case at the time such successor or successors by merger, conversion or consolidation to the Trustee shall succeed to the trusts created by this Indenture, any of the Notes shall have been authenticated but not delivered, any such successor to the Trustee may adopt the certificate of authentication of any predecessor trustee, and deliver such Notes so authenticated; and in case at that time any of the Notes shall not have been authenticated, any successor to the Trustee may authenticate such Notes either in the name of any predecessor hereunder or in the name of the successor to the Trustee; and in all such cases such certificates shall have the full force which it is anywhere in the Notes or in this Indenture provided that the certificate of the Trustee shall have.

SECTION 7.10. Eligibility: Disqualification. The Trustee shall at all times satisfy the requirements of TIA § 310(a). The Trustee shall have a combined capital and surplus of at least \$50 million as set forth in its most recent filed annual report of condition. The Trustee shall comply with TIA § 310(b).

SECTION 7.11. <u>Preferential Collection of Claims Against Company</u>. If and when the Trustee shall be or become a creditor of the Company, the Trustee shall comply with TIA § 311(a), excluding any creditor relationship listed in TIA § 311(b). A Trustee who has resigned or been removed shall be subject to TIA § 311(a) to the extent indicated.

# ARTICLE VIII

#### Discharge of Indenture; Defeasance

SECTION 8.1. Discharge of Liability on Notes; Defeasance. (a) Subject to Section 8.1(c), when (i)(x) the Company delivers to the Trustee all outstanding Notes (other than Notes replaced pursuant to Section 2.10) for cancellation or (y) all outstanding Notes not theretofore delivered for cancellation have become due and payable at maturity, whether at maturity or upon redemption or shall become due and payable within one year or are to be called for redemption within one year under arrangements satisfactory to the Trustee for the giving of notice of redemption pursuant to <u>Article V</u> hereof and the Company or any Guarantor irrevocably deposits or causes to be deposited with the Trustee as trust funds in trust solely for the benefit of the Holders money in U.S. dollars, non-callable U.S. Government Obligations, or a combination thereof, in such amounts as shall be sufficient without consideration of any reinvestment of interest to pay and discharge the entire indebtedness on such Notes not theretofore delivered to the Trustee for cancellation for principal, premium, if any, and accrued interest to the date of maturity or redemptior; (ii) no Default or Event of Default shall have occurred and be continuing on the date of such deposit or shall occur as a result of such deposit and such deposit shall not result in a breach or violation of, or constitute a default under, any other instrument to which the Company or any Guarantor is a party or by which the Company or any Guarantor is bound; (iii) the Company or any Guarantor is to the Trustee under this Indenture to apply the deposited money toward the payment of such Notes at maturity or the Redemption Date, as the case may be, then the Trustee shall acknowledge satisfaction and discharge of this Indenture on demand of the Company (accompanied by an Officers' Certificate and an Opinion of Counsel stating that all conditions precedent specified herein relating to the satisfaction and discharge of this Indenture have been complied with) at the cost and expense of the C

(b) Subject to Sections 8.1(c) and 8.2, the Company at its option and at any time may terminate (i) all the obligations of the Company and any Guarantor under the Notes, the Note Guarantees and this Indenture ("legal defeasance option"), and after giving effect to such legal defeasance, any omission to comply with such obligations shall no longer constitute a Default or Event of Default or (ii) the obligations of the Company and any Guarantor under Sections 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.18, 3.22 and 4.1(iii) and the Company may omit to comply with and shall have no liability in respect of any term, condition or limitation set forth in any such covenant or provision, whether directly or indirectly, by reason of any reference elsewhere herein to any such covenant or provision or by reason of any reference in any such covenant to any other provision herein or in any other document and such omission to comply with such covenants or provisions shall no longer constitute a Default or an Event of Default under Sections 6.1(4), 6.1(5), 6.1(6), 6.1(7), 6.1(8), 6.1(9) and 6.1(10) ("covenant defeasance option"), but except as specified above, the remainder of this Indenture and the Notes shall be unaffected thereby. The Company may exercise its legal defeasance option notwithstanding its prior exercise of its covenant defeasance option.

If the Company exercises its legal defeasance option, payment of the Notes may not be accelerated because of an Event of Default, and the Note Guarantees in effect at such time shall terminate. If the Company exercises its covenant defeasance option, payment of the Notes may not be accelerated because of an Event of Default specified in Sections 6.1(3) (but only as it relates to an Event of Default as a result of a default under Section 4.1(iii)), 6.1(4), 6.1(5) (as such Section relates to Sections 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.18 and 3.22), 6.1(6), 6.1(7) (but only with respect to a Significant Subsidiary or group of Restricted Subsidiaries that, taken together, would constitute a Significant Subsidiary), 6.1(9) and 6.1(10) or because of the failure to comply with clause (iii) of Article IV.

Upon satisfaction of the conditions set forth herein and upon request of the Company, the Trustee shall acknowledge in writing the discharge of those obligations that the Company terminates.

(c) Notwithstanding the provisions of <u>Sections 8.1(a)</u> and <u>(b)</u>, the Company's obligations in <u>Sections 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 7.1, 7.2, 7.7, 7.8, 8.4, 8.5</u> and <u>8.6</u> shall survive until the Notes have been paid in full. Thereafter, the Company's and the Guarantors' obligations in <u>Sections 7.7, 8.4</u> and <u>8.5</u> shall survive.

SECTION 8.2. Conditions to Defeasance. The Company may exercise its legal defeasance option or its covenant defeasance option only if:

(1) the Company irrevocably deposits in trust with the Trustee for the benefit of the Holders money in U.S. dollars or U.S. Government Obligations or a combination thereof ("Funds in Trust") the principal of and interest (without reinvestment) on which shall be sufficient, or a combination thereof sufficient, for the payment of principal, premium, if any, and interest on the Notes to redemption or maturity; *provided, however*, that with respect to a redemption of all of the outstanding Notes at any time prior to June 14, 2014 pursuant to paragraph 5 of the Notes and Section 5.1 hereof:

(a) the amount of Funds in Trust that the Company must irrevocably deposit or cause to be deposited shall be determined using an assumed Applicable Premium calculated as of the date of deposit of such Funds in Trust; and

(b) at the time of deposit of such Funds in Trust, the Funds in Trust would be sufficient to pay and discharge the principal, premium, if any, and interest on the Notes on the Redemption Date with an assumed Applicable Premium calculated as of the date of deposit of such Funds in Trust; and

(c) the Company must irrevocably deposit or cause to be deposited additional Funds in Trust, as necessary, on the Redemption Date, as required by Section 5.6 hereof, necessary to pay the Applicable Premium as determined on such date;

(2) the Company delivers to the Trustee a certificate from a nationally recognized firm of independent accountants, investment bank or appraisal firm expressing their opinion that the payments of principal and interest when due and without reinvestment on the deposited U.S. Government Obligations plus any deposited money without investment shall provide cash at such times and in such amounts as shall be sufficient to pay principal, premium, if any, and interest when due on all the Notes to redemption or maturity;

(3) no Default or Event of Default shall have occurred and be continuing on the date of such deposit (other than a Default or Event of Default with respect to this Indenture resulting from the incurrence of Indebtedness, all or a portion of which shall be used to defease the Notes concurrently with such incurrence);

(4) such legal defeasance or covenant defeasance shall not result in a breach or violation of, or constitute a Default under this Indenture or any other material agreement or instrument to which the Company or any of its Subsidiaries is a party or by which the Company or any of its Subsidiaries is bound;

(5) the Company shall have delivered to the Trustee an Officers' Certificate stating that the deposit was not made by the Company with the intent of preferring the holders of the Notes or any Guarantee over the other creditors of the Company or any Guarantor with the intent of defeating, hindering, delaying or defrauding creditors of the Company, any Guarantor or others;

(6) the deposit does not constitute a default under any other agreement binding on the Company;

(7) in the case of the legal defeasance option, the Company shall have delivered to the Trustee an Opinion of Counsel in the United States stating that (i) the Company has received from, or there has been published by, the Internal Revenue Service a ruling, or (ii) since the date of this Indenture there has been a change in the applicable federal income tax law, in either case to the effect that, and based thereon such Opinion of Counsel shall confirm that, the Holders shall not recognize income, gain or loss for federal income tax purposes as a result of such legal defeasance and shall be subject to federal income tax on the same amounts, in the same manner and at the same times as would have been the case if such legal defeasance had not occurred;

(8) in the case of the covenant defeasance option, the Company shall have delivered to the Trustee an Opinion of Counsel in the United States to the effect that the Holders shall not recognize income, gain or loss for federal income tax purposes as a result of such covenant defeasance and shall be subject to federal income tax on the same amounts, in the same manner and at the same times as would have been the case if such covenant defeasance had not occurred; and

(9) the Company delivers to the Trustee an Officers' Certificate and an Opinion of Counsel, each stating that all conditions precedent to the defeasance and discharge of the Notes and this Indenture as contemplated by this <u>Article VIII</u> have been complied with.

SECTION 8.3. <u>Application of Trust Money</u>. The Trustee shall hold in trust money or U.S. Government Obligations deposited with it pursuant to this <u>Article VIII</u>. It shall apply the deposited money and the money from U.S. Government Obligations through the Paying Agent and in accordance with this Indenture to the payment of principal of and interest on the Notes.

SECTION 8.4. <u>Repayment to Company</u>. Anything herein to the contrary notwithstanding, the Trustee shall deliver or pay to the Company from time to time upon receipt of written request from the Company in the form of an Officer's Certificate any money or U.S. Government Obligations held by it as provided in this <u>Article VIII</u> which, in the opinion of a nationally recognized firm of independent public accountants, investment bank or appraisal firm expressed in a written certification thereof delivered to the Trustee, are in excess of the amount thereof which would then be required to be deposited to effect legal defeasance or covenant

defeasance, as applicable, *provided* that the Trustee shall not be required to liquidate any U.S. Government Obligations in order to comply with the provisions of this paragraph.

Subject to any applicable abandoned property law, the Trustee and the Paying Agent shall pay to the Company upon written request any money held by them for the payment of principal of or interest on the Notes that remains unclaimed for two years, and, thereafter, Holders entitled to the money must look to the Company for payment as general creditors.

SECTION 8.5. Indemnity for U.S. Government Obligations. The Company shall pay and shall indemnify the Trustee against any tax, fee or other charge imposed on or assessed against deposited U.S. Government Obligations or the principal and interest received on such U.S. Government Obligations.

SECTION 8.6. <u>Reinstatement</u>. If the Trustee or Paying Agent is unable to apply any money or U.S. Government Obligations in accordance with this <u>Article VIII</u> by reason of any legal proceeding or by reason of any order or judgment of any court or governmental authority enjoining, restraining or otherwise prohibiting such application, the obligations of the Company under this Indenture and the Notes shall be revived and reinstated as though no deposit had occurred pursuant to this <u>Article VIII</u> until such time as the Trustee or Paying Agent is permitted to apply all such money or U.S. Government Obligations, in accordance with this <u>Article VIII</u>; *provided, however*, that, if the Company has made any payment of interest on or principal of any Notes because of the reinstatement of its obligations, the Company shall be subrogated to the rights of the Holders of such Notes to receive such payment from the money or U.S. Government Obligations held by the Trustee or Paying Agent.

# ARTICLE IX

### Amendments

SECTION 9.1. Without Consent of Holders. The Company, the Guarantors and the Trustee may amend or supplement this Indenture, a Note Guarantee or the Notes without notice to or consent of any Holder to:

(1) cure any ambiguity, omission, defect, mistake or inconsistency;

(2) provide for the assumption by a successor entity of the obligations of the Company or any Guarantor under this Indenture, the Notes and the Note Guarantees;

(3) provide for uncertificated Notes in addition to or in place of certificated Notes (*provided*, that the uncertificated Notes are issued in registered form for purposes of Section 163(f) of the Code);

(4) add Guarantees with respect to the Notes or release a Guarantor upon its designation as an Unrestricted Subsidiary; *provided*, *however*, that the designation is in accordance with the applicable provisions of this Indenture;

(5) secure the Notes;

(6) add to the covenants of the Company for the benefit of the Holders or surrender any right or power conferred upon the Company;

(7) provide additional rights or benefits of the Holders or make any change that does not adversely affect the rights of any Holder;

(8) comply with any requirement of the SEC in connection with the qualification of this Indenture under the TIA;

(9) release a Guarantor from its obligations under its Note Guarantee or this Indenture in accordance with the applicable provisions of this

Indenture;

(10) provide for the appointment of a successor trustee; *provided* that the successor trustee is otherwise qualified and eligible to act as such under the terms of this Indenture;

(11) provide for the issuance of the Exchange Notes which shall have terms substantially identical in all respects to the Notes (except that the transfer restrictions contained in the Notes shall be modified or eliminated, as appropriate) and which shall be treated, together with any outstanding Notes, as a single class of securities; or

(12) to conform the text of this Indenture, the Notes or the Note Guarantees to any provision of the "Description of notes" section of the Offering Memorandum was intended to be a verbatim recitation of a provision in this Indenture, the Notes or the Note Guarantees.

After an amendment or supplement under this Section becomes effective, the Company shall mail to Holders a notice briefly describing such amendment or supplement. The failure to give such notice to all Holders, or any defect therein, shall not impair or affect the validity of an amendment or supplement under this Section.

SECTION 9.2. With Consent of Holders. The Company, the Guarantors and the Trustee may amend or supplement this Indenture, a Note Guarantee or the Notes without notice to any Holder but with the written consent of the Holders of at least a majority in principal amount of the Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes). Any past default or compliance with any provision of this Indenture, a Note Guarantee or the Notes may be waived with the written consent of the Holders of a majority in principal amount of the Notes then outstanding (including, without limitation, consents obtained or the Notes may be waived with the written consent of the Holders of a majority in principal amount of the Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes). However, without the consent of each Holder affected, an amendment, supplement or waiver may not (with respect to any Notes held by a non-consenting Holder):

(1) reduce the principal amount of Notes outstanding whose Holders must consent to an amendment;

(2) reduce the stated rate of interest or extend the stated time for payment of interest or additional interest on any Note;

(3) reduce the principal of or extend the Stated Maturity of any Note;

(4) reduce the premium payable upon the redemption of any Note or change the time at which any Note may or shall be redeemed as described under <u>Section 3.8</u> or <u>Article V</u> or any similar provision, whether through an amendment or waiver of <u>Section 3.8</u> or <u>Article V</u>, related definitions or otherwise;

(5) make any Note payable in money other than that stated in the Note;

(6) impair the right of any Holder to receive payment of principal, premium, if any, and interest on such Holder's Notes on or after the due dates therefor or to institute suit for the enforcement of any payment on or with respect to such Holder's Notes;

(7) make any change to the amendment provisions of this Indenture which require each Holder's consent or to the waiver provisions of this Indenture; or

(8) modify the Note Guarantees in any manner adverse to the Holders.

It shall not be necessary for the consent of the Holders under this Section to approve the particular form of any proposed amendment, but it shall be sufficient if such consent approves the substance thereof. A consent to any amendment or waiver under this Indenture by any Holder given in connection with a tender of such Holder's Notes will not be rendered invalid by such tender. After an amendment under this Section becomes effective, the Company shall mail to Holders a notice briefly describing such amendment. The failure to give such notice to all Holders, or any defect therein, shall not impair or affect the validity of an amendment under this Section.

SECTION 9.3. <u>Compliance with Trust Indenture Act</u>. Every amendment or supplement to this Indenture, a Note Guarantee or the Notes shall comply with the TIA as then in effect.

SECTION 9.4. <u>Revocation and Effect of Consents and Waivers</u>. A consent to an amendment, supplement or a waiver by a Holder of a Note shall bind the Holder and every subsequent Holder of that Note or portion of the Note that evidences the same debt as the consenting Holder's Note, even if notation of the consent or waiver is not made on the Note. Any such Holder or subsequent Holder may revoke the consent or waiver as to such Holder's Note or portion of the Note if the Trustee receives the notice of revocation before the date the amendment, supplement or waiver becomes effective or otherwise in accordance with any related solicitation documents. After an amendment, supplement or waiver becomes effective, it shall bind every Holder unless it makes a change described in any of clauses (1) through (8) of Section 9.2, in which case the amendment, supplement, waiver or other action shall bind each Holder who has consented to it and every subsequent Holder that evidences the same debt as the consenting Holder's Notes. An amendment, supplement or waiver shall become effective upon receipt by the Trustee of the requisite number of written consents under Section 9.1 or 9.2 as applicable.

The Company may, but shall not be obligated to, fix a record date for the purpose of determining the Holders entitled to give their consent or take any other action described above or required or permitted to be taken pursuant to this Indenture. If a record date is fixed, then notwithstanding the immediately preceding paragraph, those Persons who were Holders at such record date (or their duly designated proxies), and only those Persons, shall be entitled to give such consent or to revoke any consent previously given or to take any such action, whether or not such Persons continue to be Holders after such record date. No such consent shall become valid or effective more than 120 days after such record date.

SECTION 9.5. Notation on or Exchange of Notes. If an amendment, supplement or waiver changes the terms of a Note, the Trustee may require the Holder of the Note to deliver it to the Trustee. The Trustee may place an appropriate notation on the Note regarding the changed terms and return it to the Holder. Alternatively, if the Company or the Trustee so determine, the Company in exchange for the Note shall issue and the Trustee shall authenticate a new Note that reflects the changed terms. Failure to make the appropriate notation or to issue a new Note shall not affect the validity of such amendment.

SECTION 9.6. <u>Trustee To Sign Amendments</u>. The Trustee shall sign any amendment, supplement or waiver authorized pursuant to this <u>Article IX</u> if the amendment, supplement or waiver does not adversely affect the rights, duties, liabilities or immunities of the Trustee. If it does, the Trustee may but need not sign it. In signing any amendment, supplement or waiver the Trustee shall be entitled to receive indemnity satisfactory to it and shall receive, and (subject to <u>Sections 7.1</u> and <u>7.2</u>) shall be fully protected in relying upon an Officers' Certificate and an Opinion of Counsel stating that such amendment, supplement or waiver is authorized or permitted by this Indenture and that such amendment, supplement or waiver is the legal, valid and binding obligation of the Company and any Guarantors, enforceable against them in accordance with its terms, subject to customary exceptions, and complies with the provisions hereof (including <u>Section 9.3</u>).

#### ARTICLE X

# Note Guarantees

SECTION 10.1. <u>Guarantees</u>. The Guarantors hereby unconditionally guarantee, on a senior unsecured basis and as primary obligor and not merely as surety, jointly and severally with each other Guarantor, to each Holder and the Trustee the full and punctual payment when due, whether at maturity, by acceleration, by redemption or otherwise, of the principal of, premium, if any, and interest on the Notes, all other obligations and liabilities of the Company under this Indenture (including without limitation interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, relating to the Company or any Guarantor whether or not a claim for post-filing or post-petition interest is allowed in such proceeding) and any and all costs (including reasonable counsel fees and expenses) Incurred by the trustee or the Holders in enforcing any rights under the Note Guarantees (all the foregoing being hereinafter collectively called the "<u>Obligations</u>"). The Obligations of Guarantors under the Note Guarantees shall rank equally in right of payment with other Indebtedness of such Guarantor, except to the extent such other Indebtedness is expressly subordinated to the obligations arising under the Note Guarantee. Each Guarantor further agrees

(to the extent permitted by law) that the Obligations may be extended or renewed, in whole or in part, without notice or further assent from it, and that it shall remain bound under this <u>Article X</u> notwithstanding any extension or renewal of any Obligation.

Each Guarantor waives presentation to, demand of payment from and protest to the Company of any of the Obligations and also waives notice of protest for nonpayment. Each Guarantor waives notice of any default under the Notes or the Obligations. The obligations of each Guarantor hereunder shall not be affected by (a) the failure of any Holder to assert any claim or demand or to enforce any right or remedy against the Company or any other person under this Indenture, the Notes or any other agreement or otherwise; (b) any extension or renewal of any thereof; (c) any rescission, waiver, amendment or modification of any of the terms or provisions of this Indenture, the Notes or any other agreement; (d) the release of any security held by any Holder or the Trustee for the Obligations or any of them; (e) the failure of any Holder to exercise any right or remedy against any other Guarantor; or (f) any change in the ownership of the Company.

Each Guarantor further agrees that its Guarantee herein constitutes a Guarantee of payment when due (and not a Guarantee of collection) and waives any right to require that any resort be had by any Holder to any security held for payment of the Obligations.

The obligations of each Guarantor hereunder shall not be subject to any reduction, limitation, impairment or termination for any reason (other than payment of the Obligations in full), including any claim of waiver, release, surrender, alteration or compromise, and shall not be subject to any defense of setoff, counterclaim, recoupment or termination whatsoever or by reason of the invalidity, illegality or unenforceability of the Obligations or otherwise. Without limiting the generality of the foregoing, the obligations of each Guarantor herein shall not be discharged or impaired or otherwise affected by the failure of any Holder to assert any claim or demand or to enforce any remedy under this Indenture, the Notes or any other agreement, by any waiver or modification of any thereof, by any default, failure or delay, willful or otherwise, in the performance of the Obligations, or by any other act or thing or omission or delay to do any other act or thing which may or might in any manner or to any extent vary the risk of any Guarantor or would otherwise operate as a discharge of such Guarantor as a matter of law or equity.

Each Guarantor agrees that its Guarantee herein shall remain in full force and effect until payment in full of all the Obligations or such Guarantor is released from its Guarantee upon the merger or the sale of all the Capital Stock or assets of the Guarantor in compliance with <u>Section 10.2</u> or otherwise in accordance with the terms of this Indenture. Each Guarantor further agrees that its Guarantee herein shall continue to be effective or be reinstated, as the case may be, if at any time payment, or any part thereof, of principal of or interest on any of the Obligations is rescinded or must otherwise be restored by any Holder upon the bankruptcy or reorganization of the Company or otherwise.

In furtherance of the foregoing and not in limitation of any other right which any Holder has at law or in equity against any Guarantor by virtue hereof, upon the failure of the Company to pay any of the Obligations when and as the same shall become due, whether at maturity, by acceleration, by redemption or otherwise, each Guarantor hereby promises to and shall, upon receipt of written demand by the Trustee, forthwith pay, or cause to be paid, in cash, to the Holders an amount equal to the sum of (i) the unpaid amount of such Obligations then due and owing and (ii) accrued and unpaid interest on such Obligations then due and owing (but only to the extent not prohibited by law).

Each Guarantor further agrees that, as between such Guarantor, on the one hand, and the Holders, on the other hand, (x) the maturity of the Obligations guaranteed hereby may be accelerated as provided in this Indenture for the purposes of its Guarantee herein, notwithstanding any stay, injunction or other prohibition preventing such acceleration in respect of the Obligations guaranteed hereby and (y) in the event of any such declaration of acceleration of such Obligations, such Obligations (whether or not due and payable) shall forthwith become due and payable by the Guarantor for the purposes of this Guarantee.

Each Guarantor also agrees to pay any and all reasonable costs and expenses (including reasonable attorneys' fees) incurred by the Trustee or the Holders in enforcing any rights under this Section.

### SECTION 10.2. Limitation on Liability; Termination, Release and Discharge.

(a) The obligations of each Guarantor hereunder shall be limited to the maximum amount as shall, after giving effect to all other contingent and fixed liabilities of such Guarantor (including, without limitation, any guarantees under the Senior Secured Credit Agreement) and after giving effect to any collections from or payments made by or on behalf of any other Guarantor in respect of the obligations of such other Guarantor under its Note Guarantee or pursuant to its contribution obligations under this Indenture, result in the obligations of such Guarantor under its Note Guarantee not constituting a fraudulent conveyance or fraudulent transfer under federal or state law and not otherwise being void or voidable under any similar laws affecting the rights of creditors generally.

(b) In the event a Guarantor is sold or disposed of (whether by merger, consolidation, the sale, exchange or transfer (whether by merger, consolidation or otherwise) of its Capital Stock or the sale of all or substantially all of its assets (other than by lease) and whether or not the Guarantor is the surviving corporation in such transaction) to a Person which is not the Company or a Restricted Subsidiary of the Company, such Guarantor shall be released (without any further action on the part of any Person) from all its obligations under this Indenture, its Note Guarantee and the Registration Rights Agreement if: (1) the sale or other disposition is in compliance with this Indenture, including Section 3.8 (it being understood that only such portion of the Net Available Cash as is required to be applied on or before the date of such release in accordance with the terms of this Indenture needs to be applied in accordance therewith at such time) and Article IV; and (2) all the obligations of such Guarantor under all Credit Facilities and related documentation and any other agreements relating to any other Indebtedness of the Company or its Restricted Subsidiaries terminate upon consummation of such transaction.

(c) Each Guarantor shall be deemed released from all its obligations under this Indenture, its Note Guarantee and the Registration Rights Agreement and such Note Guarantee shall terminate upon the satisfaction and discharge of this Indenture or upon the legal defeasance or covenant defeasance of the Notes, in each case, pursuant to the provisions of <u>Article VIII</u> hereof.

(d) A Guarantor shall be deemed released from all of its obligations under this Indenture, its Note Guarantee and the Registration Rights Agreement and such Note Guarantee shall terminate if the Company designates such Guarantor as an Unrestricted Subsidiary and such designation complies with the applicable provisions of this Indenture.

SECTION 10.3. <u>Right of Contribution</u>. Each Guarantor hereby agrees that to the extent that any Guarantor shall have paid more than its proportionate share of any payment made on the obligations under the Note Guarantees, such Guarantor shall be entitled to seek and receive contribution from and against the Company or any other Guarantor who has not paid its proportionate share of such payment. The provisions of this <u>Section 10.3</u> shall in no respect limit the obligations and liabilities of each Guarantor to the Trustee and the Holders, and each Guarantor shall remain liable to the Trustee and the Holders for the full amount guaranteed by such Guarantor hereunder.

SECTION 10.4. No Subrogation. Notwithstanding any payment or payments made by Guarantor hereunder, no Guarantor shall be entitled to be subrogated to any of the rights of the Trustee or any Holder against the Company or any other Guarantor or any collateral security or guarantee or right of offset held by the Trustee or any Holder for the payment of the Obligations, nor shall any Guarantor seek or be entitled to seek any contribution or reimbursement from the Company or any other Guarantor in respect of payments made by such Guarantor hereunder, until all amounts owing to the Trustee and the Holders by the Company on account of the Obligations are paid in full. If any amount shall be paid to any Guarantor on account of such subrogation rights at any time when all of the Obligations shall not have been paid in full, such amount shall be held by such Guarantor in trust for the Trustee and the Holders, segregated from other funds of such Guarantor, and shall, forthwith upon receipt by such Guarantor, be turned over to the Trustee in the exact form received by such Guarantor (duly indorsed by such Guarantor to the Trustee, if required), to be applied against the Obligations.

SECTION 10.5. Execution and Delivery of Note Guarantee. To evidence its Note Guarantee set forth in Section 10.1, each Guarantor hereby agrees that a notation of such Note Guarantee substantially in the form included in Exhibit C shall be endorsed by an Officer of such Guarantor on each Note authenticated and delivered by the Trustee and that this Indenture shall be executed on behalf of such Guarantor by an Officer.

Each Guarantor hereby agrees that its Note Guarantee set forth in <u>Section 10.1</u> shall remain in full force and effect notwithstanding any failure to endorse on each Note a notation of such Note Guarantee.

If an Officer whose signature is on this Indenture or on the Note Guarantee no longer holds that office at the time the Trustee authenticates the Note on which a Note Guarantee is endorsed, the Note Guarantee shall be valid nevertheless.

The delivery of any Note by the Trustee, after the authentication thereof hereunder, shall constitute due delivery of the Note Guarantee set forth in this Indenture on behalf of the Guaranters.

### ARTICLE XI

# Miscellaneous

SECTION 11.1. <u>Trust Indenture Act Controls</u>. If any provision of this Indenture limits, qualifies or conflicts with another provision which is required to be included in this Indenture by the TIA, the provision required by the TIA shall control.

SECTION 11.2. Notices. Any notice or communication shall be in writing and delivered in person, mailed by first-class mail or by a reputable overnight courier, or sent by facsimile transmission addressed as follows:

if to the Company:

Games Merger Corp. c/o Oak Hill Capital Partners III, L.P. 201 Main Street Fort Worth, Texas 76102 Attention: Corporate Counsel Facsimile No.: (817) 339-7350

if to the Trustee:

Wells Fargo Bank, National Association 45 Broadway, 14th Floor New York, New York 10006 Attention: Corporate Trust – Dave & Buster's Administrator Facsimile No.: (212) 515-1589

The Company or the Trustee by notice to the other may designate additional or different addresses for subsequent notices or communications.

Any notice or communication mailed to a Holder shall be mailed to the Holder at the Holder's address as it appears on the Note Register and shall be sufficiently given if so mailed within the time prescribed.

Failure to mail a notice or communication to a Holder or any defect in it shall not affect its sufficiency with respect to other Holders. If a notice or communication is mailed in the manner provided above, it is duly given, whether or not the addressee receives it.

SECTION 11.3. <u>Communication by Holders with other Holders</u>. Holders may communicate pursuant to TIA § 312(b) with other Holders with respect to their rights under this Indenture or the Notes. The Company, the Trustee, the Registrar and anyone else shall have the protection of TIA § 312(c).

SECTION 11.4. Certificate and Opinion as to Conditions Precedent. Upon any request or application by the Company to the Trustee to take or refrain from taking any action under this Indenture, except upon the initial issuance of Notes hereunder, the Company shall furnish to the Trustee:

(1) an Officers' Certificate in form and substance reasonably satisfactory to the Trustee stating that, in the opinion of the signers, all conditions precedent, if any, provided for in this Indenture relating to the proposed action have been complied with; and

(2) an Opinion of Counsel in form and substance reasonably satisfactory to the Trustee stating that, in the opinion of such counsel, all such conditions precedent have been complied with.

SECTION 11.5. <u>Statements Required in Certificate or Opinion</u>. Each certificate or opinion with respect to compliance with a covenant or condition provided for in this Indenture shall include:

(1) a statement that the individual making such certificate or opinion has read such covenant or condition;

(2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(3) a statement that, in the opinion of such individual, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(4) a statement as to whether or not, in the opinion of such individual, such covenant or condition has been complied with.

In giving such Opinion of Counsel, counsel may rely as to factual matters on an Officers' Certificate or on certificates of public officials.

SECTION 11.6. <u>When Notes Disregarded</u>. In determining whether the Holders of the required principal amount of Notes have concurred in any direction, waiver or consent, Notes owned by the Company or by any of its Affiliates (except that, for the purpose of determining whether the Trustee shall be protected in relying on any such direction, waiver or consent, only Notes which a Responsible Officer of the Trustee actually knows are so owned) shall be so disregarded. Also, subject to the foregoing, only Notes outstanding at the time shall be considered in any such determination.

SECTION 11.7. <u>Rules by Trustee, Paying Agent and Registrar</u>. The Trustee may make reasonable rules for action by, or a meeting of, Holders. The Registrar and the Paying Agent may make reasonable rules for their functions.

SECTION 11.8. Legal Holidays. A "Legal Holiday" is a Saturday, a Sunday or other day on which commercial banking institutions are authorized or required to be closed in New York City. If a payment date is a Legal Holiday, payment shall be made on the next succeeding day that is not a Legal Holiday, and no interest shall accrue for the intervening period. If a regular record date is a Legal Holiday, the record date shall not be affected.

SECTION 11.9. <u>GOVERNING LAW</u>. THIS INDENTURE, THE NOTE GUARANTEES AND THE NOTES SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK. EACH OF THE PARTIES HERETO AGREES TO SUBMIT TO THE JURISDICTION OF THE STATE COURTS OF, AND THE FEDERAL COURTS LOCATED IN, THE STATE OF NEW YORK IN ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE NOTES OR THE NOTE GUARANTEES. EACH OF THE PARTIES HERETO IRREVOCABLY CONSENTS THAT ALL SERVICE OF PROCESS MAY BE MADE BY REGISTERED MAIL DIRECTED TO SUCH PARTY AS PROVIDED IN SECTION 11.2 HEREOF FOR SUCH PARTY. SERVICE SO MADE SHALL BE DEEMED TO BE COMPLETED THREE (3) DAYS AFTER THE SAME SHALL BE POSTED AS AFORESAID. EACH OF THE PARTIES HERETO WAIVES ANY OBJECTION TO ANY ACTION INSTITUTED HEREUNDER BASED ON FORUM NON CONVENIENS, AND ANY OBJECTION TO THE VENUE OF ANY ACTION INSTITUTED HEREUNDER. EACH OF THE COMPANY, THE GUARANTORS AND THE TRUSTEE HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE SECURITIES OR THE TRANSACTION CONTEMPLATED HEREBY.

SECTION 11.10. No Recourse Against Others. An incorporator, director, officer, employee, stockholder or controlling person, as such, of the Company shall not have any liability for any obligations of the Company under the Notes or the Note Guarantees or this Indenture or for any claim based on, in respect of or by reason of such obligations or their creation. By accepting a Note, each Holder shall waive and release all such liability. The waiver and release shall be part of the consideration for the issue of the Notes.

SECTION 11.11. <u>Successors</u>. All agreements of the Company in this Indenture and the Notes shall bind their respective successors. All agreements of the Trustee in this Indenture shall bind its successors.

SECTION 11.12. <u>Multiple Originals</u>. The parties may sign any number of copies of this Indenture. Each signed copy shall be an original, but all of them together represent the same agreement. One signed copy is enough to prove this Indenture. The exchange of copies of this Indenture and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Indenture as to the parties hereto and may be used in lieu of the original Indenture for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

SECTION 11.13. Variable Provisions. The Company initially appoints the Trustee as Paying Agent and Registrar and custodian with respect to any Global Notes.

SECTION 11.14. <u>Qualification of Indenture</u>. The Company shall qualify this Indenture under the TIA in accordance with the terms and conditions of the Registration Rights Agreement and shall pay all reasonable costs and expenses (including attorneys' fees and expenses for the Company and the Trustee) incurred in connection therewith, including, but not limited to, costs and expenses of qualification of this Indenture and the Notes and printing this Indenture and the Notes. The Trustee shall be entitled to receive from the Company any such Officers' Certificates, Opinions of Counsel or other documentation as it may reasonably request in connection with any such qualification of this Indenture under the TIA.

SECTION 11.15. <u>Table of Contents</u>; <u>Headings</u>. The table of contents, cross-reference sheet and headings of the Articles and Sections of this Indenture have been inserted for convenience of reference only, are not intended to be considered a part hereof and shall not modify or restrict any of the terms or provisions hereof.

SECTION 11.16. Force Majeure. In no event shall the Trustee be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or acts of God, and interruptions, loss or malfunctions of utilities, or communications services; it being understood that the Trustee shall use reasonable efforts which are consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances.

SECTION 11.17. <u>U.S.A. Patriot Act</u>. The parties hereto acknowledge that in accordance with Section 326 of the U.S.A. Patriot Act, the Trustee, like all financial institutions and in order to help fight the funding of terrorism and money laundering, is required to obtain, verify, and record information that identifies each person or legal entity that establishes a relationship or opens an account with the Trustee. The parties to this Indenture agree that they will provide the Trustee with such information as it may request in order for the Trustee to satisfy the requirements of the U.S.A. Patriot Act.

IN WITNESS WHEREOF, the parties have caused this Indenture to be duly executed as of the date first written above.

# GAMES MERGER CORP.

By:

Name: Title:

# WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee

By:

Name:

Title:

# List of Initial Guarantors

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Sugarloaf Gwinnett Entertainment Company, L.P. Tango Acquisition, Inc. Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc. Tango License Corporation

# [FORM OF FACE OF SERIES A NOTE]

[Applicable Restricted Notes Legend] [Depositary Legend, if applicable] No. [\_\_\_\_]

Principal Amount \$[\_\_\_\_], as revised by the Schedule of Increases and Decreases in the Global Note attached hereto

CUSIP NO. 36467YAA3

# GAMES MERGER CORP. (to be merged with and into Dave & Buster's, Inc.)

11% Senior Note, Series A, due 2018

Games Merger Corp., a Missouri corporation, to be merged with and into Dave & Buster's, Inc., a Missouri corporation, promises to pay to Cede & Co., or registered assigns, the principal sum of  $[____]$ , as revised by the Schedule of Increases and Decreases in the Global Note attached hereto, on June 1, 2018.

Interest Payment Dates:

June 1 and December 1.

Record Dates:

S: May 15 and November 15

Additional provisions of this Note are set forth on the other side of this Note.

GAMES MERGER CORP.

By:

Name: Title:

By:

Name: Title:

### TRUSTEE'S CERTIFICATE OF AUTHENTICATION

Dated:

# WELLS FARGO BANK, NATIONAL ASSOCIATION

as Trustee, certifies that this is one of the Notes referred to in the Indenture.

By

Authorized Signatory

# [FORM OF REVERSE SIDE OF SERIES A NOTE]

#### 11% Senior Note, Series A, due 2018

# 1. Interest

Games Merger Corp., a Missouri corporation (to be merged with and into Dave & Buster's, Inc., a Missouri corporation) (such corporation, and its successors and assigns under the Indenture hereinafter referred to, being herein called the "Company"), promises to pay interest on the principal amount of this Note at the rate per annum shown above.

The Company shall pay interest semiannually on June 1 and December 1 of each year. Interest on the Notes shall accrue from the most recent date to which interest has been paid on the Notes or, if no interest has been paid, from June 1, 2010. The Company shall pay interest on overdue principal or premium, if any (plus interest on such interest to the extent lawful), at the rate borne by the Notes to the extent lawful. Interest shall be computed on the basis of a 360-day year of twelve 30-day months.

#### 2. Method of Payment

By no later than 10:00 a.m. (New York City time) on the date on which any principal of (premium, if any) or interest on any Note is due and payable, the Company shall irrevocably deposit with the Trustee or the Paying Agent money sufficient to pay such principal, premium, if any, and/or interest. The Company shall pay interest (except Defaulted Interest) to the Persons who are registered Holders at the close of business on May 15 and November 15 next preceding the interest payment date even if Notes are cancelled or repurchased after the record date and on or before the interest payment date. Holders must surrender Notes to a Paying Agent to collect principal payments. The Company shall pay principal, premium, if any, and interest in money of the United States that at the time of payment is legal tender for payment of public and private debts. Payments in respect of Notes represented by a Global Note (including principal, premium, if any, and interest) shall be made by the transfer of immediately available funds to the accounts specified by the Depositary. The Company shall make all payments in respect of a Definitive Note (including principal, premium, if any, and interest) by mailing a check to the registered address of each Holder thereof as such address shall appear on the Note Register; *provided*, *however*, that payments on the Notes represented by Definitive Notes may also be made, in the case of a Holder of at least \$1,000,000 aggregate principal amount of Notes represented by Definitive Notes, by wire transfer to a U.S. dollar account maintained by the payee with a bank in the United States if such Holder elects payment by wire transfer by giving written notice to the Trustee or the Paying Agent to such effect designating such account no later than 15 days immediately preceding the relevant due date for payment (or such other date as the Trustee may accept).

#### 3. Paying Agent and Registrar

Initially, Wells Fargo Bank, National Association, the trustee under the Indenture ("Trustee"), shall act as Paying Agent and Registrar. The Company may appoint and change any Paying Agent or Registrar without notice to any Holder. The Company or any Wholly Owned Subsidiary that is a Domestic Subsidiary may act as Paying Agent or Registrar.

#### 4. Indenture

The Company issued the Notes under an Indenture dated as of June 1, 2010 (as it may be amended or supplemented from time to time in accordance with the terms thereof, the "Indenture"), among the Company and the Trustee. The terms of the Notes include those stated in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act of 1939 (15 U.S.C. §§ 77aaa-77bbbb) as in effect from time to time (the "Act"). Capitalized terms used herein and not defined herein have the meanings ascribed thereto in the Indenture. The Notes are subject to all such terms, and Holders are referred to the Indenture and the Act for a statement of those terms.

The Notes are general unsecured senior obligations of the Company. The aggregate principal amount of Notes which may be authenticated and delivered under the Indenture is unlimited. This Note is one of the 11% Senior Notes, Series A, due 2018 referred to in the Indenture. The Notes include (i) \$200,000,000 aggregate principal amount of the Company's 11% Senior Notes, Series A, due 2018 issued under the Indenture on June 1, 2010 (herein called "Initial Notes"), (ii) if and when issued, additional 11% Senior Notes, Series A, due 2018 or 11% Senior Notes, Series B, due 2018 of the Company that may be issued from time to time under the Indenture subsequent to June 1, 2010, in each case having identical terms and conditions as the Notes other than the issue date, issue price and the first interest payment date (herein called "Additional Notes") and (iii) if and when issued, the Company's 11% Senior Notes, Series B, due 2018 that may be issued from time to time under the Indenture in exchange for Initial Notes or Additional Notes in an offer registered under the Securities Act as provided in a Registration Rights Agreement. The Initial Notes, Additional Notes and Exchange Notes are treated as a single class of securities under the Indenture. The Indenture imposes, among other things, certain limitations on the Incurrence of Indebtedness by the Company and its Restricted Subsidiaries, the payment of dividends and other distributions on the Capital Stock of the Company and its Restricted Subsidiaries, the purchase or redemption of Capital Stock of the Company and Capital Stock of such Restricted Subsidiaries, certain purchases or redemptions of Subordinated Obligations, the sale or transfer of assets and Capital Stock of Restricted Subsidiaries, certain Sale/Leaseback Transactions involving the Company or any Restricted Subsidiary, the incurrence of certain Liens, transactions with Affiliates, mergers and consolidations, payments for consent, the business activities and investments of the Company and its Restricted Subsidiaries and the sale of Capital Stock of Restricted Subsidiaries. In addition, the Indenture limits the ability of the Company and its Restricted Subsidiaries to enter into agreements that restrict distributions and dividends from Restricted Subsidiaries and requires the Company to make available SEC information to the Holders as well as requiring certain Restricted Subsidiaries to guarantee the obligations under the Notes and the Indenture.

#### 5. <u>Redemption</u>

Except as described below, the Notes are not redeemable until June 1, 2014. On and after June 1, 2014, the Company may redeem all or, from time to time, a part of the Notes upon not less than 30 nor more than 60 days' notice, at the following redemption prices (expressed as a percentage of principal amount) plus accrued and unpaid interest on the Notes, if any, to the applicable Redemption Date (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date), if redeemed during the twelve-month period beginning on June 1 of the years indicated below:

Year	Percentage
<u>Year</u> 2014	105.500%
2015	102.750%
2016 and thereafter	100.000%

Prior to June 1, 2013, the Company may on any one or more occasions redeem up to 40% of the original principal amount of the Notes (calculated after giving effect to any issuance of Additional Notes) and Exchange Notes with the Net Cash Proceeds of one or more Equity Offerings at a redemption price of 111.000% of the principal amount thereof, plus accrued and unpaid interest, if any, to the Redemption Date (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date); *provided* that:

- (1) at least 60% of the original principal amount of the Notes (calculated after giving effect to any issuance of Additional Notes) and Exchange Notes remains outstanding after each such redemption; and
- (2) the redemption occurs within 90 days after the closing of such Equity Offering.

In addition, at any time prior to June 1, 2014, upon not less than 30 nor more than 60 days' prior notice mailed by first-class mail to each holder's registered address, the Company may redeem the Notes, in whole but not in part, at a redemption price equal to 100% of the principal amount thereof plus the Applicable Premium plus accrued and unpaid interest, if any, to the redemption date (subject to the right of holders of record on the relevant record date to receive interest due on the relevant interest payment date).

If the optional Redemption Date is on or after a record date and on or before the related interest payment date, the accrued and unpaid interest, if any, shall be paid to the Person in whose name the Note is registered at the close of business, on such record date, and no additional interest shall be payable to Holders whose Notes shall be subject to redemption by the Company.

In the case of any partial redemption, selection of the Notes for redemption shall be made by the Trustee in compliance with the requirements of the principal national securities exchange, if any, on which the Notes are listed or, if the Notes are not listed, then on a pro rata basis or by lot (and in any case as may be required by the rules and regulations of the applicable depository) and which may provide for the selection for redemption of portions of the principal of the Notes, although no Note of \$2,000 in original principal amount or less may be redeemed in part. If any Note is to be redeemed in part only, the notice of redemption relating to such Note shall state the portion of the principal amount thereof to be redeemed. A new Note in principal amount equal to the unredeemed portion thereof shall be issued in the name of the Holder thereof upon cancellation of the original Note.

The Company is not required to make mandatory redemption payments or sinking fund payments with respect to the Notes. The Company may at any time and from time to time purchase Notes through open market purchases, negotiated purchases, tender offers or otherwise.

# 6. Change of Control Provisions

Upon the occurrence of a Change of Control, any Holder shall have the right to require the Company to repurchase all or any part of the Notes of such Holder at a purchase price in cash equal to 101% of the principal amount thereof, plus accrued and unpaid interest, if any, to the date of repurchase (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date) as provided in, and subject to the terms of, the Indenture. The Company shall be required to make an Asset Disposition Offer in certain circumstances described in the Indenture.

## 7. Denominations; Transfer; Exchange

The Notes are in registered form without coupons in denominations of principal amount of \$2,000 or integral multiples of \$1,000 in excess thereof. A Holder may transfer or exchange Notes in accordance with the Indenture. The Registrar may require a Holder, among other things, to furnish appropriate endorsements or transfer documents and to pay any taxes and fees required by law or permitted by the Indenture. The Registrar need not register the transfer of or exchange any Notes for a period beginning (1) 15 Business Days before the mailing of a notice of an offer to repurchase Notes and ending at the close of business on the day of such mailing, or (2) 15 days before an interest payment date and ending on such interest payment date.

## 8. <u>Persons Deemed Owners</u>

The registered Holder of this Note may be treated as the owner of it for all purposes.

# 9. <u>Unclaimed Money</u>

If money for the payment of the principal of or premium, if any, or interest remains unclaimed for two years, the Trustee or Paying Agent shall pay the money back to the Company at its written request unless an abandoned property law designates another person. After any such payment, Holders entitled to the money must look only to the Company and not to the Trustee for payment.

# 10. Defeasance

Subject to certain conditions set forth in the Indenture, the Company at any time may terminate some or all of its obligations under the Notes and the Indenture if the Company deposits with the Trustee money or U.S. Government Obligations for the payment of principal and interest on the Notes to maturity.

#### 11. Amendment, Waiver

Subject to certain exceptions set forth in the Indenture, (i) the Indenture, a Note Guarantee, and the Notes may be amended with the written consent of the Holders of at least a majority in principal amount of the then outstanding Notes (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes) and (ii) subject to certain exceptions, any past default (other than with respect to nonpayment of the principal of, premium, if any, and interest on the Notes) or noncompliance with any provision may be waived with the written consent of the Holders of a majority in principal amount of the Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes). Subject to certain exceptions set forth in the Indenture, without the consent of any Holder, the Company, the Guarantors and the Trustee may amend the Indenture or the Notes to cure any ambiguity, omission, defect, mistake or inconsistency, to comply with <u>Article IV</u> or <u>Article X</u> in respect of the assumption by a Successor Company of the obligations of the Company or any Guarantor under the Indenture, the Notes in addition to or in place of certificated Notes, to add Guarantees with respect to the Notes or release a Guarantor upon its designation as an Unrestricted Subsidiary or otherwise in accordance with the Indenture, to secure the Notes, to add to the covenants of the Company for the benefit of the Holders or surrender any right or power conferred upon the Company, to make any change that would provide any additional rights or benefits of the Holders or that does not adversely affect the rights under the Indenture of any Holder, to comply with any requirement of the SEC in connection with the qualification of the Indenture under the TIA, to provide for the issuance of the Exchange Notes, to provide for the appointment of a successor trustee or to conform the text of the Indenture, this Note or the Note Gua

#### 12. Defaults and Remedies

Under the Indenture, Events of Default include (each of which are more specifically described in the Indenture) (i) default for 30 days in any payment of interest or additional interest when due on the Notes; (ii) default in the payment of principal or premium, if any, on any Note when due at its Stated Maturity, upon required repurchase, upon optional redemption pursuant to paragraph 5 hereof, upon declaration or otherwise; (iii) failure by the Company or any Guarantor to comply with its obligations under Article IV of the Indenture; (iv) failure by the Company to comply for 30 days after written notice with any of its obligations under the covenants described under Sections 3.8 and 3.10 of the Indenture (in each case, other than a failure to purchase Notes when required under the Indenture, which failure shall constitute an Event of Default under clause (ii) above; (v) the failure by the Company or any Restricted Subsidiary to comply for 60 days after notice with their other agreements contained in the Indenture or under the Notes (other than those referred to in (i), (ii), (iii) or (iv) above); (vi) default under any mortgage, indenture or instrument under which there may be issued or by which there may be secured or evidenced any Indebtedness for money borrowed by the Company or any of its Restricted Subsidiaries (or the payment of which is Guaranteed by the Company or any of its Restricted Subsidiaries), other than Indebtedness owed to the Company or a Restricted Subsidiary, whether such Indebtedness or Guarantee now exists, or is created after the date of the Indenture, which default (a) is caused by a failure to pay principal of, or interest or premium, if any, on such Indebtedness prior to the expiration of the grace period provided in such Indebtedness ("payment default") or (b) results in the acceleration of such Indebtedness prior to its maturity (the "cross acceleration provision") and, in each case, the principal amount of any such Indebtedness, together with the principal amount of any other such Indebtedness under which there has been a payment default or the maturity of which has been so accelerated, aggregates \$20.0 million or more; (vii) certain events of bankruptcy, insolvency or reorganization of the Company or a Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary pursuant to or within the meaning of any Bankruptcy Law (the "bankruptcy provisions"); (viii) failure by the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary to pay final judgments aggregating in excess of \$20.0 million (net of any amounts that a reputable and creditworthy insurance company has acknowledged liability for in writing), which judgments are not paid, discharged, waived or stayed for a period of 60 days (the "judgment default provision"); or (ix) any Note Guarantee ceases to be in full force and effect (except as contemplated by the terms of the Indenture) or is declared null and void in a judicial proceeding or any Guarantor denies or disaffirms its obligations under the Indenture or its Note Guarantee. However, a default under clauses (iv) and (v) of this paragraph will not constitute an Event of Default until the Trustee or the Holders of at least 25% in principal amount of the outstanding Notes provide written notice to the Company of the default and the Company does not cure such default within the time specified in clauses (iv) and (v) of this paragraph after receipt of such notice.

If an Event of Default (other than an Event of Default described in clause (vii) above) occurs and is continuing, the Trustee by notice to the Company, or the Holders of at least 25% in principal amount of the outstanding Notes by written notice to the Company and the Trustee, may declare all the Notes to be due and payable immediately. If an Event of Default described in clause (vii) above occurs and is continuing, the principal of, premium, if any, and accrued and unpaid interest on all the Notes will become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.

Holders may not enforce the Indenture or the Notes except as provided in the Indenture. The Trustee may refuse to enforce the Indenture or the Notes unless it receives indemnity or security satisfactory to it. Subject to certain limitations, Holders of a majority in principal amount of the Notes may direct the Trustee in its exercise of any trust or power. The Trustee may withhold from Holders notice of any continuing Default or Event of Default (except a Default or Event of Default in payment of principal or interest) if it determines that withholding notice is in their interest.

## 13. Trustee Dealings with the Company

Subject to certain limitations set forth in the Indenture, the Trustee under the Indenture, in its individual or any other capacity, may become the owner or pledgee of Notes and may otherwise deal with and collect obligations owed to it by the Company or its Affiliates and may otherwise deal with the Company or its Affiliates with the same rights it would have if it were not Trustee.

### 14. No Recourse Against Others

A director, officer, employee or stockholder, as such, of the Company shall not have any liability for any obligations of the Company under the Notes or the Indenture or the Note Guarantee or for any claim based on, in respect of or by reason of such obligations or their creation. By accepting a Note, each Holder waives and releases all such liability. The waiver and release are part of the consideration for the issue of the Notes.

### 15. Authentication

This Note shall not be valid until an authorized signatory of the Trustee (or an authenticating agent acting on its behalf) manually signs the certificate of authentication on the other side of this Note.

## 16. Abbreviations

Customary abbreviations may be used in the name of a Holder or an assignee, such as TEN COM (=tenants in common), TEN ENT (=tenants by the entirety), JT TEN (=joint tenants with rights of survivorship and not as tenants in common), CUST (=custodian) and U/G/M/A (=Uniform Gift to Minors Act).

## 17. CUSIP Numbers

Pursuant to a recommendation promulgated by the Committee on Uniform Security Identification Procedures the Company has caused CUSIP numbers to be printed on the Notes. No representation is made as to the accuracy of such numbers as printed on the Notes and reliance may be placed only on the other identification numbers placed thereon.

# 18. Defined Terms

As used in this Note, terms defined in the Indenture are used herein as therein defined.

# 19. Governing Law

This Note shall be governed by, and construed in accordance with, the laws of the State of New York.

The Company shall furnish to any Holder upon written request and without charge to the Holder a copy of the Indenture, which has in it the text of this Note in larger type. Requests may be made to:

Games Merger Corp. c/o Oak Hill Capital Partners III, L.P. 201 Main Street Fort Worth, Texas 76102 Attention: Corporate Counsel Facsimile No.: (817) 339-7350

#### ASSIGNMENT FORM

To assign this Note, fill in the form below:

I or we assign and transfer this Note to

(Print or type assignee's name, address and zip code)

(Insert assignee's soc. sec. or tax I.D. No.)

and irrevocably appoint \_\_\_\_\_\_ agent to transfer this Note on the books of the Company. The agent may substitute another to act for him.

Date:\_

Your Signature:\_\_\_\_\_

Signature Guarantee:\_\_\_

(Signature must be guaranteed)

Sign exactly as your name appears on the other side of this Note.

The signature(s) should be guaranteed by an eligible guarantor institution (banks, stockbrokers, savings and loan associations and credit unions with membership in an approved signature guarantee medallion program), pursuant to S.E.C. Rule 17Ad-15.

In connection with any transfer or exchange of any of the Notes evidenced by this certificate occurring prior to the date that is one year after the later of the date of original issuance of such Notes and the last date, if any, on which such Notes were owned by the Company or any Affiliate of the Company, the undersigned confirms that such Notes are being:

# CHECK ONE BOX BELOW:

- 1 acquired for the undersigned's own account, without transfer; or
- 2  $\Box$  transferred to the Company; or
- 3 🔲 transferred pursuant to and in compliance with Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"); or
- 4 D transferred pursuant to an effective registration statement under the Securities Act; or
- 5 🔲 transferred pursuant to and in compliance with Regulation S under the Securities Act; or
- 6 🗆 transferred to an institutional "accredited investor" (as defined in Rule 501(a)(1), (2), (3) or (7) under the Securities Act), that has furnished to the Trustee a signed letter containing certain representations and agreements (the form of which letter appears as Section 2.8 of the Indenture); or
- 7 🔲 transferred pursuant to another available exemption from the registration requirements of the Securities Act of 1933.

Unless one of the boxes is checked, the Trustee shall refuse to register any of the Notes evidenced by this certificate in the name of any person other than the registered Holder thereof; *provided, however*, that if box (5), (6) or (7) is checked, the Trustee or the Company may require, prior to registering any such transfer of the Notes, in their sole discretion, such legal opinions, certifications and other information as the Trustee or the Company may reasonably request to confirm that such transfer is being made pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act, such as the exemption provided by Rule 144 under such Act.

Signature Guarantee:	Signature
(Signature must be guaranteed) Signature	Signature

The signature(s) should be guaranteed by an eligible guarantor institution (banks, stockbrokers, savings and loan associations and credit unions with membership in an approved signature guarantee medallion program), pursuant to S.E.C. Rule 17Ad-15.

# TO BE COMPLETED BY PURCHASER IF (1) OR (3) ABOVE IS CHECKED.

The undersigned represents and warrants that it is purchasing this Note for its own account or an account with respect to which it exercises sole investment discretion and that it and any such account is a "qualified institutional buyer" within the meaning of Rule 144A under the Securities Act, as amended, and is aware that the sale to it is being made in reliance on Rule 144A and acknowledges that it has received such information regarding the Company as the undersigned has requested pursuant to Rule 144A or has determined not to request such information and that it is aware that the transferor is relying upon the undersigned's foregoing representations in order to claim the exemption from registration provided by Rule 144A.

Dated:

NOTICE: To be executed by an executive officer

# [TO BE ATTACHED TO GLOBAL NOTES]

# SCHEDULE OF INCREASES OR DECREASES IN GLOBAL NOTE

The following increases or decreases in this Global Note have been made:

Date of Exchange	Amount of	Amount of	Principal Amount	Signature of
	decrease in	increase in	of this Global	authorized
	Principal Amount	Principal Amount	Note following	signatory of
	of this Global	of this Global	such decrease or	Trustee or Notes
	Note	Note	increase	Custodian

# OPTION OF HOLDER TO ELECT PURCHASE

If you want to elect to have this Note purchased by the Company pursuant to Section 3.8 or 3.10 of the Indenture, check the box:

If you want to elect to have only part of this Note purchased by the Company pursuant to Section 3.8 or 3.10 of the Indenture, state the amount in principal amount (must be denominations of \$2,000 or integral multiples of \$1,000 in excess thereof): \$

Date:

Your Signature:

(Sign exactly as your name appears on the other side of the Note)

Signature Guarantee:\_\_\_

(Signature must be guaranteed)

The signature(s) should be guaranteed by an eligible guarantor institution (banks, stockbrokers, savings and loan associations and credit unions with membership in an approved signature guarantee medallion program), pursuant to S.E.C. Rule 17Ad-15.

# [FORM OF FACE OF SERIES B NOTE]

[Depositary Legend, if applicable]

Principal Amount \$[\_ \_], as revised by the Schedule of Increases and Decreases in the Global Note attached hereto

CUSIP NO. U36325AA3

# GAMES MERGER CORP. (to be merged with and into Dave & Buster's, Inc.)

11% Senior Note, Series B, due 2018

Games Merger Corp., a Missouri corporation, to be merged with and into Dave & Buster's, Inc., a Missouri corporation, promises to pay to ] Dollars, as revised by the Schedule of Increases and Decreases in the Global Cede & Co., or registered assigns, the principal sum of [\_\_\_\_\_ Note attached hereto, on June 1, 2018.

Interest Payment Dates:

June 1 and December 1.

Record Dates:

May 15 and November 15. Additional provisions of this Note are set forth on the other side of this Note.

GAMES MERGER CORP.

By:

Name: Title:

Name: Title:

By:

TRUSTEE'S CERTIFICATE OF AUTHENTICATION

Dated:

WELLS FARGO BANK, NATIONAL ASSOCIATION

as Trustee, certifies that this is one of the Notes referred to in the Indenture.

By:

Authorized Signatory

# [FORM OF REVERSE SIDE OF SERIES B NOTE]

#### 11% Senior Note, Series B, due 2018

# 1. Interest

Games Merger Corp., a Missouri corporation (to be merged with and into Dave & Buster's, Inc., a Missouri corporation) (such corporation, and its successors and assigns under the Indenture hereinafter referred to, being herein called the "Company"), promises to pay interest on the principal amount of this Note at the rate per annum shown above.

The Company shall pay interest semiannually on June 1 and December 1 of each year. Interest on the Notes shall accrue from the most recent date to which interest has been paid on the Notes or, if no interest has been paid, from June 1, 2010. The Company shall pay interest on overdue principal or premium, if any (plus interest on such interest to the extent lawful), at the rate borne by the Notes to the extent lawful. Interest shall be computed on the basis of a 360-day year of twelve 30-day months.

# 2. Method of Payment

By no later than 10:00 a.m. (New York City time) on the date on which any principal of (premium, if any) or interest on any Note is due and payable, the Company shall irrevocably deposit with the Trustee or the Paying Agent money sufficient to pay such principal, premium, if any, and/or interest. The Company shall pay interest (except Defaulted Interest) to the Persons who are registered Holders at the close of business on May 15 and November 15 next preceding the interest payment date even if Notes are cancelled or repurchased after the record date and on or before the interest payment date. Holders must surrender Notes to a Paying Agent to collect principal payments. The Company shall pay principal, premium, if any, and interest in money of the United States that at the time of payment is legal tender for payment of public and private debts. Payments in respect of Notes represented by a Global Note (including principal, premium, if any, and interest) shall be made by the transfer of immediately available funds to the accounts specified by the Depositary. The Company shall make all payments in respect of a Definitive Note (including principal, premium, if any, and interest) by mailing a check to the registered address of each Holder thereof as such address shall appear on the Note Register; *provided*, *however*, that payments on the Notes represented by Definitive Notes may also be made, in the case of a Holder of at least \$1,000,000 aggregate principal amount of Notes represented by Definitive Notes, by wire transfer to a U.S. dollar account maintained by the payee with a bank in the United States if such Holder elects payment by wire transfer by giving written notice to the Trustee or the Paying Agent to such effect designating such account no later than 15 days immediately preceding the relevant due date for payment (or such other date as the Trustee may accept).

## 3. Paying Agent and Registrar

Initially, Wells Fargo Bank, National Association, the trustee under the Indenture ("Trustee"), shall act as Paying Agent and Registrar. The Company may appoint and change any Paying Agent or Registrar without notice to any Holder. The Company or any Wholly Owned Subsidiary that is a Domestic Subsidiary may act as Paying Agent or Registrar.

#### 4. Indenture

The Company issued the Notes under an Indenture dated as of June 1, 2010 (as it may be amended or supplemented from time to time in accordance with the terms thereof, the "Indenture"), among the Company, the Guarantors and the Trustee. The terms of the Notes include those stated in the Indenture and those made part of the Indenture by reference to the Trust Indenture Act of 1939 (15 <u>U.S.C.</u> §§ 77aaa-77bbbb) as in effect from time to time (the "Act"). Capitalized terms used herein and not defined herein have the meanings ascribed thereto in the Indenture. The Notes are subject to all such terms, and Holders are referred to the Indenture and the Act for a statement of those terms.

The Notes are general unsecured senior obligations of the Company. The aggregate principal amount of Notes which may be authenticated and delivered under the Indenture is unlimited. This Note is one of the 11% Senior Notes, Series A, due 2018 referred to in the Indenture. The Notes include (i) \$200,000,000 aggregate principal amount of the Company's 11% Senior Notes, Series A, due 2018 issued under the Indenture on June 1, 2010 (herein called "Initial Notes"), (ii) if and when issued, additional 11% Senior Notes, Series A, due 2018 or 11% Senior Notes, Series B, due 2018 of the Company that may be issued from time to time under the Indenture subsequent to June 1, 2010, in each case having identical terms and conditions as the Notes other than the issue date, issue price and the first interest payment date (herein called "Additional Notes") and (iii) if and when issued, the Company's 11% Senior Notes, Series B, due 2018 that may be issued from time to time under the Indenture in exchange for Initial Notes or Additional Notes in an offer registered under the Securities Act as provided in a Registration Rights Agreement. The Initial Notes, Additional Notes and Exchange Notes are treated as a single class of securities under the Indenture. The Indenture imposes, among other things, certain limitations on the Incurrence of Indebtedness by the Company and its Restricted Subsidiaries, the payment of dividends and other distributions on the Capital Stock of the Company and its Restricted Subsidiaries, the purchase or redemption of Capital Stock of the Company and Capital Stock of such Restricted Subsidiaries, certain purchases or redemptions of Subordinated Obligations, the sale or transfer of assets and Capital Stock of Restricted Subsidiaries, certain Sale/Leaseback Transactions involving the Company or any Restricted Subsidiary, the incurrence of certain Liens, transactions with Affiliates, mergers and consolidations, payments for consent, the business activities and investments of the Company and its Restricted Subsidiaries and the sale of Capital Stock of Restricted Subsidiaries. In addition, the Indenture limits the ability of the Company and its Restricted Subsidiaries to enter into agreements that restrict distributions and dividends from Restricted Subsidiaries and requires the Company to make available SEC information to the Holders as well as requiring certain Restricted Subsidiaries to guarantee the obligations under the Notes and the Indenture.

## 5. <u>Redemption</u>

Except as described below, the Notes are not redeemable until June 1, 2014. On and after June 1, 2014, the Company may redeem all or, from time to time, a part of the Notes upon not less than 30 nor more than 60 days' notice, at the following redemption prices (expressed as a percentage of principal amount) plus accrued and unpaid interest on the Notes, if any, to the applicable Redemption Date (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date), if redeemed during the twelve-month period beginning on June 1 of the years indicated below:

Year	Percentage
<u>Year</u> 2014	105.500%
2015	102.750%
2016 and thereafter	100.000%

Prior to June 1, 2013, the Company may on any one or more occasions redeem up to 40% of the original principal amount of the Notes (calculated after giving effect to any issuance of Additional Notes) and Exchange Notes with the Net Cash Proceeds of one or more Equity Offerings at a redemption price of 111.000% of the principal amount thereof, plus accrued and unpaid interest, if any, to the Redemption Date (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date); *provided* that:

- (1) at least 60% of the original principal amount of the Notes (calculated after giving effect to any issuance of Additional Notes) and Exchange Notes remains outstanding after each such redemption; and
- (2) the redemption occurs within 90 days after the closing of such Equity Offering.

In addition, at any time prior to June 1, 2014, upon not less than 30 nor more than 60 days' prior notice mailed by first-class mail to each holder's registered address, the Company may redeem the Notes, in whole but not in part, at a redemption price equal to 100% of the principal amount thereof plus the Applicable Premium plus accrued and unpaid interest, if any, to the redemption date (subject to the right of holders of record on the relevant record date to receive interest due on the relevant interest payment date).

If the optional Redemption Date is on or after a record date and on or before the related interest payment date, the accrued and unpaid interest, if any, shall be paid to the Person in whose name the Note is registered at the close of business, on such record date, and no additional interest shall be payable to Holders whose Notes shall be subject to redemption by the Company.

In the case of any partial redemption, selection of the Notes for redemption shall be made by the Trustee in compliance with the requirements of the principal national securities exchange, if any, on which the Notes are listed or, if the Notes are not listed, then on a pro rata basis or by lot (and in any case as may be required by the rules and regulations of the applicable depository) and which may provide for the selection for redemption of portions of the principal of the Notes, although no Note of \$2,000 in original principal amount or less shall be redeemed in part. If any Note is to be redeemed in part only, the notice of redemption relating to such Note shall state the portion of the principal amount thereof to be redeemed. A new Note in principal amount equal to the unredeemed portion thereof shall be issued in the name of the Holder thereof upon cancellation of the original Note.

The Company is not required to make mandatory redemption payments or sinking fund payments with respect to the Notes. The Company may at any time and from time to time purchase Notes through open market purchases, negotiated purchases, tender offers or otherwise.

# 6. Change of Control Provisions

Upon the occurrence of a Change of Control, any Holder shall have the right to require the Company to repurchase all or any part of the Notes of such Holder at a purchase price in cash equal to 101% of the principal amount thereof, plus accrued and unpaid interest, if any, to the date of repurchase (subject to the right of Holders of record on the relevant record date to receive interest due on the relevant interest payment date) as provided in, and subject to the terms of, the Indenture. The Company shall be required to make an Asset Disposition Offer in certain circumstances described in the Indenture.

# 7. Denominations; Transfer; Exchange

The Notes are in registered form without coupons in denominations of principal amount of \$2,000 or integral multiples of \$1,000 in excess thereof. A Holder may transfer or exchange Notes in accordance with the Indenture. The Registrar may require a Holder, among other things, to furnish appropriate endorsements or transfer documents and to pay any taxes and fees required by law or permitted by the Indenture. The Registrar need not register the transfer of or exchange any Notes for a period beginning (1) 15 Business Days before the mailing of a notice of an offer to repurchase Notes and ending at the close of business on the day of such mailing, or (2) 15 days before an interest payment date and ending on such interest payment date.

# 8. <u>Persons Deemed Owners</u>

The registered Holder of this Note may be treated as the owner of it for all purposes.

# 9. <u>Unclaimed Money</u>

If money for the payment of the principal of or premium, if any, or interest remains unclaimed for two years, the Trustee or Paying Agent shall pay the money back to the Company at its written request unless an abandoned property law designates another person. After any such payment, Holders entitled to the money must look only to the Company and not to the Trustee for payment.

# 10. Defeasance

Subject to certain conditions set forth in the Indenture, the Company at any time may terminate some or all of its obligations under the Notes and the Indenture if the Company deposits with the Trustee money or U.S. Government Obligations for the payment of principal and interest on the Notes to maturity.

#### 11. Amendment, Waiver

Subject to certain exceptions set forth in the Indenture, (i) the Indenture, a Note Guarantee, and the Notes may be amended with the written consent of the Holders of at least a majority in principal amount of the then outstanding Notes (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes) and (ii) subject to certain exceptions, any past default (other than with respect to nonpayment of the principal of, premium, if any, and interest on the Notes) or noncompliance with any provision may be waived with the written consent of the Holders of a majority in principal amount of the Notes then outstanding (including, without limitation, consents obtained in connection with a purchase of, or tender offer or exchange offer for, Notes). Subject to certain exceptions set forth in the Indenture, without the consent of any Holder, the Company, the Guarantors and the Trustee may amend the Indenture or the Notes to cure any ambiguity, omission, defect, mistake or inconsistency, to comply with <u>Article IV</u> or <u>Article X</u> in respect of the assumption by a Successor Company of the obligations of the Company or any Guarantor under the Indenture, the Notes in addition to or in place of certificated Notes, to add Guarantees with respect to the Notes or release a Guarantor upon its designation as an Unrestricted Subsidiary or otherwise in accordance with the Indenture, to secure the Notes, to add to the covenants of the Company for the benefit of the Holders or surrender any right or power conferred upon the Company, to make any change that would provide any additional rights or benefits of the Holders or started subsidiary or otherwise in accordance with the Indenture of any Holder, to comply with any requirement of the SEC in connection with the qualification of the Indenture under the TIA, to provide for the Exchange Notes, to provide for the appointment of a successor trustee or to conform the text of the Indenture, this Note or the Note Guarantees to an

#### 12. Defaults and Remedies

Under the Indenture, Events of Default include (each of which are more specifically described in the Indenture) (i) default for 30 days in any payment of interest or additional interest when due on the Notes; (ii) default in the payment of principal or premium, if any, on any Note when due at its Stated Maturity, upon required repurchase, upon optional redemption pursuant to paragraph 5 hereof, upon declaration or otherwise; (iii) failure by the Company or any Guarantor to comply with its obligations under Article IV of the Indenture; (iv) failure by the Company to comply for 30 days after written notice with any of its obligations under the covenants described under Sections 3.8 and 3.10 of the Indenture (in each case, other than a failure to purchase Notes when required under the Indenture, which failure shall constitute an Event of Default under clause (ii) above; (v) the failure by the Company or any Restricted Subsidiary to comply for 60 days after notice with their other agreements contained in the Indenture or under the Notes (other than those referred to in (i), (ii), (iii) or (iv) above); (vi) default under any mortgage, indenture or instrument under which there may be issued or by which there may be secured or evidenced any Indebtedness for money borrowed by the Company or any of its Restricted Subsidiaries (or the payment of which is Guaranteed by the Company or any of its Restricted Subsidiaries), other than Indebtedness owed to the Company or a Restricted Subsidiary, whether such Indebtedness or Guarantee now exists, or is created after the date of the Indenture, which default (a) is caused by a failure to pay principal of, or interest or premium, if any, on such Indebtedness prior to the expiration of the grace period provided in such Indebtedness ("payment default") or (b) results in the acceleration of such Indebtedness prior to its maturity (the "cross acceleration provision") and, in each case, the principal amount of any such Indebtedness, together with the principal amount of any other such Indebtedness under which there has been a payment default or the maturity of which has been so accelerated, aggregates \$20.0 million or more; (vii) certain events of bankruptcy, insolvency or reorganization of the Company or a Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary pursuant to or within the meaning of any Bankruptcy Law (the "bankruptcy provisions"); (viii) failure by the Company or any Significant Subsidiary or group of Restricted Subsidiaries that, taken together (as of the latest audited consolidated financial statements for the Company and its Restricted Subsidiaries), would constitute a Significant Subsidiary to pay final judgments aggregating in excess of \$20.0 million (net of any amounts that a reputable and creditworthy insurance company has acknowledged liability for in writing), which judgments are not paid, discharged, waived or stayed for a period of 60 days (the "judgment default provision"); or (ix) any Note Guarantee ceases to be in full force and effect (except as contemplated by the terms of the Indenture) or is declared null and void in a judicial proceeding or any Guarantor denies or disaffirms its obligations under the Indenture or its Note Guarantee. However, a default under clauses (iv) and (v) of this paragraph will not constitute an Event of Default until the Trustee or the Holders of at least 25% in principal amount of the outstanding Notes provide written notice to the Company of the default and the Company does not cure such default within the time specified in clauses (iv) and (v) of this paragraph after receipt of such notice.

If an Event of Default (other than an Event of Default described in clause (vii) above) occurs and is continuing, the Trustee by notice to the Company, or the Holders of at least 25% in principal amount of the outstanding Notes by written notice to the Company and the Trustee, may declare all the Notes to be due and payable immediately. If an Event of Default described in clause (vii) above occurs and is continuing, the principal of, premium, if any, and accrued and unpaid interest on all the Notes will become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.

Holders may not enforce the Indenture or the Notes except as provided in the Indenture. The Trustee may refuse to enforce the Indenture or the Notes unless it receives indemnity or security satisfactory to it. Subject to certain limitations, Holders of a majority in principal amount of the Notes may direct the Trustee in its exercise of any trust or power. The Trustee may withhold from Holders notice of any continuing Default or Event of Default (except a Default or Event of Default in payment of principal or interest) if it determines that withholding notice is in their interest.

# 13. Trustee Dealings with the Company

Subject to certain limitations set forth in the Indenture, the Trustee under the Indenture, in its individual or any other capacity, may become the owner or pledgee of Notes and may otherwise deal with and collect obligations owed to it by the Company or its Affiliates and may otherwise deal with the Company or its Affiliates with the same rights it would have if it were not Trustee.

#### 14. No Recourse Against Others

A director, officer, employee or stockholder, as such, of the Company shall not have any liability for any obligations of the Company under the Notes or the Indenture or the Note Guarantee or for any claim based on, in respect of or by reason of such obligations or their creation. By accepting a Note, each Holder waives and releases all such liability. The waiver and release are part of the consideration for the issue of the Notes.

### 15. Authentication

This Note shall not be valid until an authorized signatory of the Trustee (or an authenticating agent acting on its behalf) manually signs the certificate of authentication on the other side of this Note.

# 16. Abbreviations

Customary abbreviations may be used in the name of a Holder or an assignee, such as TEN COM (=tenants in common), TEN ENT (=tenants by the entirety), JT TEN (=joint tenants with rights of survivorship and not as tenants in common), CUST (=custodian) and U/G/M/A (=Uniform Gift to Minors Act).

## 17. CUSIP Numbers

Pursuant to a recommendation promulgated by the Committee on Uniform Security Identification Procedures the Company has caused CUSIP numbers to be printed on the Notes. No representation is made as to the accuracy of such numbers as printed on the Notes and reliance may be placed only on the other identification numbers placed thereon.

# 18. Defined Terms

As used in this Note, terms defined in the Indenture are used herein as therein defined.

# 19. Governing Law

This Note shall be governed by, and construed in accordance with, the laws of the State of New York.

The Company shall furnish to any Holder upon written request and without charge to the Holder a copy of the Indenture, which has in it the text of this Note in larger type. Requests may be made to:

Dave & Buster's, Inc. 2481 Mañana Drive Dallas, Texas 75220 Attention: Chief Financial Officer Facsimile No.: (214) 357-1536

To assign this Note, fill in the form below:

I or we assign and transfer this Note to

(Print or type assignee's name, address and zip code)

ASSIGNMENT FORM

(Insert assignee's soc. sec. or tax I.D. No.)

and irrevocably appoint \_\_\_\_\_\_ agent to transfer this Note on the books of the Company. The agent may substitute another to act for him.

Date:

Your Signature:\_\_

Signature Guarantee:

(Signature must be guaranteed)

Sign exactly as your name appears on the other side of this Note.

The signature(s) should be guaranteed by an eligible guarantor institution (banks, stockbrokers, savings and loan associations and credit unions with membership in an approved signature guarantee medallion program), pursuant to S.E.C. Rule 17Ad-15.

# [TO BE ATTACHED TO GLOBAL NOTES]

# SCHEDULE OF INCREASES OR DECREASES IN GLOBAL NOTE

The following increases or decreases in this Global Note have been made:

Date of Exchange	Amount of	Amount of	Principal Amount	Signature of
	decrease in	increase in	of this Global	authorized
	Principal Amount	Principal Amount	Note following	signatory of
	of this Global	of this Global	such decrease or	Trustee or Notes
	Note	<u>Note</u>	increase	Custodian

# OPTION OF HOLDER TO ELECT PURCHASE

If you want to elect to have this Note purchased by the Company pursuant to Section 3.8 or 3.10 of the Indenture, check the box:

If you want to elect to have only part of this Note purchased by the Company pursuant to Section 3.8 or 3.10 of the Indenture, state the amount in principal amount (must be denominations of \$2,000 or integral multiples of \$1,000 in excess thereof): \$

Date:

Your Signature:

(Sign exactly as your name appears on the other side of the Note)

Signature Guarantee:\_\_\_

(Signature must be guaranteed)

The signature(s) should be guaranteed by an eligible guarantor institution (banks, stockbrokers, savings and loan associations and credit unions with membership in an approved signature guarantee medallion program), pursuant to S.E.C. Rule 17Ad-15.

# FORM OF NOTATION OF GUARANTEE

For value received, each Guarantor (which term includes any successor Person under the Indenture) has, jointly and severally, unconditionally guaranteed, to the extent set forth in the Indenture and subject to the provisions in the Indenture dated as of June 1, 2010 (the "<u>Indenture</u>") between Games Merger Corp., a Missouri corporation (the "<u>Acquisition Sub</u>"), and Wells Fargo Bank, National Association, as trustee (the "<u>Trustee</u>"), as supplemented by the Successor Supplemental Indenture between Dave & Buster's, Inc., a Missouri corporation (the "<u>Company</u>") and the Trustee (a) the full and punctual payment when due, whether at maturity, by acceleration, by redemption or otherwise, of the principal of, premium, if any, and interest (including additional interest, if any) on the Notes and all other obligations and liabilities of the Company to the Holders or the Trustee under the Indenture (including without limitation interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceedings, relating to the Company or any Guarantor whether or not a claim for post-filing or post-petition interest is allowed in such proceeding). The obligations of the Guarantees to the Holders and to the Trustee pursuant to the Note Guarantee and the Indenture are expressly set forth in Article X of the Indenture and reference is hereby made to the Indenture for the precise terms of the Guarantee, which terms are incorporated herein by reference.

[Guarantor]

By:

Name: Title:

## FORM OF SUCCESSOR SUPPLEMENTAL INDENTURE

This First Supplemental Indenture (this "<u>Supplemental Indenture</u>") is entered into as of June 1, 2010 by and between Dave & Buster's Inc., a Missouri corporation ("<u>Successor</u>"), and Wells Fargo Bank, National Association (the "<u>Trustee</u>"), as Trustee under the Indenture referred to below.

# WITNESSETH:

WHEREAS, Games Merger Corp., a Missouri corporation (the "Issuer"), and the Trustee entered into that certain Indenture, dated as of June 1, 2010 (the "<u>Indenture</u>"), and the Issuer issued pursuant to the Indenture \$200.0 million aggregate principal amount of its 11% Senior Notes due 2018 (the "<u>Notes</u>");

WHEREAS, the Issuer and the Successor have entered into an Agreement and Plan of Merger, dated as of June 1, 2010 (the "Merger Agreement"), which provides for the merger of the Issuer with and into the Successor (the "Merger"), with the Successor continuing its existence under Missouri law;

WHEREAS, the Merger shall become effective upon the filing of the Articles of Merger with the Secretary of State of the State of Missouri;

WHEREAS, <u>Section 4.1</u> of the Indenture provides, among other things, that the Issuer shall not be prevented from merging with or into the Successor, <u>provided</u> that, among other things, the Successor shall expressly assume upon any such merger, by supplemental indenture, all of the obligations of the Issuer under the Notes and the Indenture;

WHEREAS, <u>Section 9.1</u> of the Indenture provides that the Issuer and the Trustee may, without notice to or consent of any Holder of the Notes provide for the assumption by a successor entity of the obligations of the Issuer under the Indenture and the Notes;

WHEREAS, the Issuer and the Successor have been duly authorized to enter into this Supplemental Indenture; and

WHEREAS, all acts, conditions, proceedings and requirements necessary to make this Supplemental Indenture a valid, binding and legal agreement enforceable in accordance with its terms for the purposes expressed herein, have been duly done and performed.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Successor and the Trustee mutually covenant and agree for the equal and ratable benefit of the Holders as follows:

#### ARTICLE I

# Definitions

1.1 As used in this Supplemental Indenture, terms defined in the Indenture or in the preamble or recital hereto are used herein as therein defined, except that the term "Holders" in this Supplemental Indenture shall refer to the term "Holders" as defined in the Indenture and the Trustee acting on behalf or for the benefit of such Holders. The words "herein," "hereof" and "hereby" and other words of similar import used in this Supplemental Indenture refer to this Supplemental Indenture as a whole and not to any particular section hereof.

### ARTICLE II

# Representations of the Successor

2.1 The Successor represents and warrants to the Trustee as follows:

It is a Missouri corporation duly organized, validly existing and in good standing under the laws of the State of Missouri.

The execution, delivery and performance by it of this Supplemental Indenture have been authorized and approved by all necessary corporate action on its part.

2.2 The Successor represents and warrants to the Trustee that upon the filing and acceptance for record of the Articles of Merger by the Secretary of State of the State of Missouri or at such other time thereafter as is provided in the Articles of Merger (the "Merger Effective Time"), the Merger will be effective in accordance with the terms of the Merger Agreement and Missouri law.

#### ARTICLE III

#### Assumption and Agreements of Successor

3.1 In accordance with Sections 4.1 and 9.1 of the Indenture, the Successor hereby expressly assumes all of the obligations of the Issuer under the Notes and the Indenture.

3.2 The Successor shall succeed to, and be substituted for, and may exercise every right and power of, the Issuer under the Indenture and the Notes with the same effect as if the Successor had been named as "Issuer" in the Indenture and the Notes; and thereafter the Issuer shall be fully released from its obligations under the Indenture and the Notes.

## ARTICLE IV

### Miscellaneous

4.1 This Supplemental Indenture shall become effective as of the Merger Effective Time.

4.2 Nothing expressed or mentioned herein is intended or shall be construed to give any Person, firm or corporation, other than the Holders and the Trustee, any legal or equitable right, remedy or claim under or in respect of this Supplemental Indenture or the Indenture or any provision herein or therein contained.

4.3 This Supplemental Indenture shall be governed by, and construed in accordance with, the laws of the State of New York.

4.4 In case any provision in this Supplemental Indenture shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and such provision shall be ineffective only to the extent of such invalidity, illegality or unenforceability.

4.5 Except as expressly amended hereby, the Indenture and the Notes are in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder heretofore or hereafter authenticated and delivered shall be bound hereby. The Trustee makes no representation or warranty as to the validity or sufficiency of this Supplemental Indenture or with respect to the recitals contained herein, all of which recitals are made solely by the other parties hereto.

4.6 The parties hereto may sign one or more copies of this Supplemental Indenture in counterparts, all of which together shall constitute one and the same agreement.

4.7 The headings of the Articles and the sections in this Supplemental Indenture are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed as of the date first above written.

# DAVE & BUSTER'S, INC.

By Name: Title:

# WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee

By:

Name: Title:

## FORM OF INITIAL GUARANTOR SUPPLEMENTAL INDENTURE

This Second Supplemental Indenture, dated as of June 1, 2010 (this "<u>Supplemental Indenture</u>" or "<u>Guarantee</u>"), among the guarantors listed on Schedule 1 hereto (the "<u>Guarantors</u>"), Dave & Buster's, Inc. (together with its successors and assigns, the "<u>Company</u>"), and Wells Fargo Bank, National Association (the "Trustee"), as Trustee under the Indenture referred to below.

### WITNESSETH:

WHEREAS, Games Merger Corp., a Missouri corporation (the "<u>Issuer</u>"), and the Trustee have heretofore executed and delivered an Indenture, dated as of June 1, 2010 (the "<u>Base Indenture</u>"), and the Issuer issued pursuant to the Indenture \$200.0 million aggregate principal amount of its 11% Senior Notes due 2018 (the "<u>Notes</u>");

WHEREAS, the Company and the Trustee have heretofore executed and delivered a First Supplemental Indenture, dated as of June 1, 2010 (the "<u>First Supplemental Indenture</u>," and together with the Base Indenture, the "<u>Indenture</u>"), pursuant to which the Company expressly assumed all of the obligations of the Issuer under the Notes and the Indenture;

WHEREAS, <u>Section 3.11</u> of the Indenture provides that the Company is required to cause each Restricted Subsidiary, other than a Foreign Subsidiary created or acquired by the Company or one or more of its Restricted Subsidiaries to execute and deliver to the Trustee a Supplemental Indenture and Note Guarantee pursuant to which such Guarantors shall unconditionally Guarantee, on a joint and several basis, the full and prompt payment of the principal of, premium, if any and interest (including additional interest, if any) on the Notes on a senior basis; and

WHEREAS, Section 9.1 of the Indenture provides that the Company and the Trustee may, without notice to or consent of any Holder of the Notes, add Guarantees with respect to the Notes;

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Guarantors, the Company and the Trustee mutually covenant and agree for the equal and ratable benefit of the Holders as follows:

## ARTICLE I

## Definitions

1.1 As used in this Supplemental Indenture, terms defined in the Indenture or in the preamble or recital hereto are used herein as therein defined, except that the term "Holders" in this Supplemental Indenture shall refer to the term "Holders" as defined in the Indenture and the Trustee acting on behalf or for the benefit of such Holders. The words "herein," "hereof" and "hereby" and other words of similar import used in this Supplemental Indenture refer to this Supplemental Indenture as a whole and not to any particular section hereof.

## ARTICLE II

## Agreement to be Bound; Guarantee

2.1 Each of the Guarantors hereby agrees to become a party to the Indenture as a Guarantor and as such shall have all of the rights and be subject to all of the obligations and agreements of a Guarantor under the Indenture, including, without limitation, <u>Article X</u> thereof. Each of the Guarantors agrees to be bound by all of the provisions of the Indenture applicable to a Guarantor and to perform all of the obligations and agreements of a Guarantor under the Indenture.

2.2 Each of the Guarantors hereby fully, unconditionally and irrevocably guarantees, as primary obligor and not merely as a surety, jointly and severally with each other Guarantor, to each Holder and the Trustee, the full and punctual payment when due, whether at maturity, by acceleration, by redemption or otherwise, of the Obligations pursuant to <u>Article X</u> of the Indenture.

### ARTICLE III

## Miscellaneous

3.1 All notices and other communications to the Guarantors shall be given as provided in the Indenture to the Guarantors c/o Dave & Buster's, Inc., 2481 Mañana Drive, Dallas, Texas 75220 (fax: (214) 357-1536; Attention: Jay L. Tobin, and a copy to Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (fax: (212) 310-8007); Attention: Corey Chivers, Esq.

3.2 Nothing expressed or mentioned herein is intended or shall be construed to give any Person, firm or corporation, other than the Holders and the Trustee, any legal or equitable right, remedy or claim under or in respect of this Supplemental Indenture or the Indenture or any provision herein or therein contained.

3.3 This Supplemental Indenture shall be governed by, and construed in accordance with, the laws of the State of New York.

3.4 In case any provision in this Supplemental Indenture shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and such provision shall be ineffective only to the extent of such invalidity, illegality or unenforceability.

3.5 Except as expressly amended hereby, the Indenture and the Notes are in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder heretofore or hereafter authenticated and delivered shall be bound hereby. The Trustee makes no representation or warranty as to the validity or sufficiency of this Supplemental Indenture or with respect to the recitals contained herein, all of which recitals are made solely by the other parties hereto.

3.6 The parties hereto may sign one or more copies of this Supplemental Indenture in counterparts, all of which together shall constitute one and the same agreement.

3.7 The headings of the Articles and the sections in this Supplemental Indenture are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed as of the date first above written.

# DAVE & BUSTER'S, INC.

By Name: Title:

**D&B LEASING, INC. D&B MARKETING COMPANY, LLC D&B REALTY HOLDING, INC.** DANB TEXAS, INC. DAVE & BUSTER'S I, L.P. DAVE & BUSTER'S MANAGEMENT CORPORATION, INC. DAVE & BUSTER'S OF CALIFORNIA, INC. DAVE & BUSTER'S OF COLORADO, INC. DAVE & BUSTER'S OF FLORIDA, INC. DAVE & BUSTER'S OF GEORGIA, INC. DAVE & BUSTER'S OF HAWAII, INC. DAVE & BUSTER'S OF ILLINOIS, INC. DAVE & BUSTER'S OF INDIANA, INC. DAVE & BUSTER'S OF KANSAS, INC. DAVE & BUSTER'S OF MARYLAND, INC. DAVE & BUSTER'S OF MASSACHUSETTS, INC. DAVE & BUSTER'S OF NEBRASKA, INC. DAVE & BUSTER'S OF NEW YORK, INC. DAVE & BUSTER'S OF OKLAHOMA, INC. DAVE & BUSTER'S OF OREGON, INC. DAVE & BUSTER'S OF PENNSYLVANIA, INC. DAVE & BUSTER'S OF PITTSBURGH, INC. DAVE & BUSTER'S OF VIRGINIA, INC. DAVE & BUSTER'S OF WASHINGTON, INC. DAVE & BUSTER'S OF WISCONSIN, INC. SUGARLOAF GWINNETT ENTERTAINMENT COMPANY, L.P. TANGO ACQUISITION, INC. TANGO OF ARIZONA, INC. TANGO OF ARUNDEL, INC. TANGO OF FARMINGDALE, INC. TANGO OF FRANKLIN, INC. TANGO OF HOUSTON, INC. TANGO OF NORTH CAROLINA, INC. TANGO OF SUGARLOAF, INC. TANGO OF TENNESSEE, INC. TANGO OF WESTBURY, INC. TANGO LICENSE CORPORATION

By Name: Title:

# WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee

By:

Name: Title:

## List of Guarantors

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Sugarloaf Gwinnett Entertainment Company, L.P. Tango Acquisition, Inc. Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc. Tango License Corporation

## FORM OF INDENTURE SUPPLEMENT TO ADD GUARANTORS TO GUARANTEE NOTES

This Supplemental Indenture and Note Guarantee, dated as of [\_\_\_\_\_], 20\_\_ (this "<u>Supplemental Indenture</u>" or "<u>Guarantee</u>"), among [*name of future Guarantor*] (the "<u>Guarantor</u>"), Dave & Buster's, Inc. (together with its successors and assigns, the "<u>Company</u>"), each other then existing Guarantor under the Indenture referred to below, and Wells Fargo Bank, National Association, as Trustee under the Indenture referred to below.

## WITNESSETH:

WHEREAS, the Company, the Guarantors and the Trustee have heretofore executed and delivered an Indenture, dated as of June 1, 2010 (as amended, supplemented, waived or otherwise modified, the "<u>Indenture</u>"), providing for the issuance of an unlimited aggregate principal amount of 11% Senior Notes due 2018 of the Company (the "<u>Notes</u>");

WHEREAS, <u>Section 3.11</u> of the Indenture provides that the Company is required to cause each Restricted Subsidiary, other than a Foreign Subsidiary created or acquired by the Company or one or more of its Restricted Subsidiaries, to execute and deliver to the Trustee a Supplemental Indenture and Note Guarantee pursuant to which such Guarantor shall unconditionally Guarantee, on a joint and several basis, the full and prompt payment of the principal of, premium, if any and interest (including additional interest, if any) on the Notes on a senior basis; and

WHEREAS, Section 9.1 of the Indenture provides that the Company and the Trustee may, without notice to or consent of any Holder of the Notes, add Guarantees with respect to the Notes;

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Guarantor, the Company and the Trustee mutually covenant and agree for the equal and ratable benefit of the Holders as follows:

## ARTICLE I

## Definitions

1.1 As used in this Supplemental Indenture, terms defined in the Indenture or in the preamble or recital hereto are used herein as therein defined, except that the term "Holders" in this Supplemental Indenture shall refer to the term "Holders" as defined in the Indenture and the Trustee acting on behalf or for the benefit of such Holders. The words "herein," "hereof" and "hereby" and other words of similar import used in this Supplemental Indenture refer to this Supplemental Indenture as a whole and not to any particular section hereof.

## ARTICLE II

## Agreement to be Bound; Guarantee

2.1 The Guarantor hereby agrees to become a party to the Indenture as a Guarantor and as such shall have all of the rights and be subject to all of the obligations and agreements of a Guarantor under the Indenture. The Guarantor agrees to be bound by all of the provisions of the Indenture applicable to a Guarantor and to perform all of the obligations and agreements of a Guarantor under the Indenture.

2.2 The Guarantor hereby fully, unconditionally and irrevocably guarantees, as primary obligor and not merely as a surety, jointly and severally with each other Guarantor, to each Holder and the Trustee, the full and punctual payment when due, whether at maturity, by acceleration, by redemption or otherwise, of the Obligations pursuant to <u>Article X</u> of the Indenture.

#### ARTICLE III

### Miscellaneous

3.1 All notices and other communications to the Guarantor shall be given as provided in the Indenture to the Guarantor, at its address set forth below, with a copy to the Company as provided in the Indenture for notices to the Company.

[Name of future C	ћиа	rantor]	
[		]	
[		]	
[Attention:			]
[Facsimile No.: (	)	-	]

3.2 Nothing expressed or mentioned herein is intended or shall be construed to give any Person, firm or corporation, other than the Holders and the Trustee, any legal or equitable right, remedy or claim under or in respect of this Supplemental Indenture or the Indenture or any provision herein or therein contained.

3.3 This Supplemental Indenture shall be governed by, and construed in accordance with, the laws of the State of New York.

3.4 In case any provision in this Supplemental Indenture shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and such provision shall be ineffective only to the extent of such invalidity, illegality or unenforceability.

3.5 Except as expressly amended hereby, the Indenture and the Notes are in all respects ratified and confirmed and all the terms, conditions and provisions thereof shall remain in full force and effect. This Supplemental Indenture shall form a part of the Indenture for all purposes, and every Holder heretofore or hereafter authenticated and delivered shall be bound hereby. The Trustee makes no representation or warranty as to the validity or sufficiency of this Supplemental Indenture or with respect to the recitals contained herein, all of which recitals are made solely by the other parties hereto.

3.6 The parties hereto may sign one or more copies of this Supplemental Indenture in counterparts, all of which together shall constitute one and the same agreement.

3.7 The headings of the Articles and the sections in this Supplemental Indenture are for convenience of reference only and shall not be deemed to alter or affect the meaning or interpretation of any provisions hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Indenture to be duly executed as of the date first above written.

[GUARANTOR], as a Guarantor

By:

Name: Title:

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee

By:

Name: Title:

DAVE & BUSTERS, INC.

By:

Name: Title:

This REGISTRATION RIGHTS AGREEMENT dated June 1, 2010 (the "<u>Agreement</u>") is entered into by and among Dave & Buster's Inc., a Missouri corporation (the "<u>Company</u>"), the guarantors listed in Schedule 1 hereto (the "<u>Guarantors</u>"), and J.P. Morgan Securities Inc. and Jefferies & Company, Inc. as the initial purchasers (the "<u>Initial Purchasers</u>").

The Company, the Guarantors and the Initial Purchasers are parties to the Purchase Agreement dated May 19, 2010 (the "<u>Purchase Agreement</u>"), which provides for the sale by the Company to the Initial Purchasers of \$200,000,000 aggregate principal amount of the Company's 11% Senior Notes due 2018 (the "<u>Securities</u>") which will be guaranteed on an unsecured senior basis by each of the Guarantors. As an inducement to the Initial Purchasers to enter into the Purchase Agreement, the Company and the Guarantors have agreed to provide to the Initial Purchasers and their direct transferees the registration rights set forth in this Agreement. The execution and delivery of this Agreement is a condition to the closing under the Purchase Agreement.

In consideration of the foregoing, the parties hereto agree as follows:

1. Definitions. As used in this Agreement, the following terms shall have the following meanings:

"Additional Guarantor" shall mean any subsidiary of the Company that executes a Subsidiary Guarantee under the Indenture after the date of this Agreement.

"Base Interest" shall mean the interest that would otherwise accrue on the securities under the terms thereof and the Indenture, without giving effect to the provisions of this Registration Rights Agreement.

"Business Day" shall mean 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.

"Company" shall have the meaning set forth in the preamble and shall also include the Company's successors.

"Exchange Act" shall mean the Securities Exchange Act of 1934, as amended from time to time.

"Exchange Dates" shall have the meaning set forth in Section 2(a) hereof.

"Exchange Offer" shall mean the exchange offer by the Company and the Guarantors of Exchange Securities for Registrable Securities pursuant to Section 2(a) hereof.

"Exchange Offer Registration" shall mean a registration under the Securities Act effected pursuant to Section 2(a) hereof.

"Exchange Offer Registration Statement" shall mean an exchange offer registration statement on Form S-4 (or, if applicable, on another appropriate form) and all amendments and supplements to such registration statement, in each case including the Prospectus contained therein or deemed a part thereof, all exhibits thereto and any document incorporated by reference therein.

"Exchange Securities" shall mean senior notes issued by the Company and guaranteed by the Guarantors under the Indenture containing terms identical to the Securities (except that the Exchange Securities will not be subject to restrictions on transfer or to any increase in annual interest rate for failure to comply with this Agreement) and to be offered to Holders of Securities in exchange for Securities pursuant to the Exchange Offer.

"Free Writing Prospectus" means each free writing prospectus (as defined in Rule 405 under the Securities Act) prepared by or on behalf of the Company or used or referred to by the Company in connection with the sale of the Securities, or the Exchange Securities.

"Guarantors" shall have the meaning set forth in the preamble and shall also include any Guarantor's successors and any Additional Guarantors.

"<u>Holders</u>" shall mean the Initial Purchasers, for so long as they own any Registrable Securities, and each of their successors, assigns and direct and indirect transferees who become owners of Registrable Securities under the Indenture; provided that for purposes of Sections 4 and 5 of this Agreement, the term "Holders" shall include Participating Broker-Dealers.

"Indemnified Person" shall have the meaning set forth in Section 5(c) hereof.

"Indemnifying Person" shall have the meaning set forth in Section 5(c) hereof.

"Indenture" shall mean the Indenture relating to the Securities dated as of June 1, 2010 among the Company, the Guarantors and Wells Fargo Bank, National Association, as trustee, and as the same may be amended from time to time in accordance with the terms thereof.

"Initial Purchasers" shall have the meaning set forth in the preamble.

"Inspector" shall have the meaning set forth in Section 3(a)(xiii) hereof.

"Issuer Information" shall have the meaning set forth in Section 5(a) hereof.

"<u>Majority Holders</u>" shall mean the Holders of a majority of the aggregate principal amount of the outstanding Registrable Securities; provided that whenever the consent or approval of Holders of a specified percentage (less than 100%) of Registrable Securities is required hereunder, any Registrable Securities owned directly or indirectly by the Company or any of its affiliates shall not be counted in determining whether such consent or approval was given by the Holders of such required percentage or amount; and provided, further, that if the Company shall issue any additional Securities under the Indenture prior to consummation of the Exchange Offer or, if applicable, the effectiveness of any Shelf Registration Statement, such additional Securities and the Registrable Securities to which this Agreement relates shall be treated together as one class for purposes of determining whether the consent or approval of Holders of a specified percentage of Registrable Securities has been obtained.

### "Participating Broker-Dealers" shall have the meaning set forth in Section 4(a) hereof.

"Person" shall mean an individual, partnership, limited liability company, corporation, trust or unincorporated organization, or a government or agency or political subdivision thereof.

"Prospectus" shall mean the prospectus included in, or, pursuant to the rules and regulations of the Securities Act deemed a part of, a Registration Statement, including any preliminary prospectus, and any such prospectus as amended or supplemented by any prospectus supplement, including a prospectus supplement with respect to the terms of the offering of any portion of the Registrable Securities covered by a Shelf Registration Statement, and by all other amendments and supplements to such prospectus, and in each case including any document incorporated by reference therein.

"Purchase Agreement" shall have the meaning set forth in the preamble.

"<u>Registrable Securities</u>" shall mean the Securities; provided that the Securities shall cease to be Registrable Securities (i) when a Registration Statement with respect to such Securities has become effective under the Securities Act and such Securities have been exchanged or disposed of pursuant to such Registration Statement or (ii) when such Securities cease to be outstanding.

"Registration Expenses" shall mean any and all expenses incident to performance of or compliance by the Company and the Guarantors with this Agreement, including without limitation: (i) all SEC, stock exchange or Financial Industry Regulatory Authority ("FINRA") registration and filing fees, (ii) all fees and expenses incurred in connection with compliance with state securities or blue sky laws (including reasonable fees and disbursements of not more than one counsel for any Underwriters or Holders (whose counsel shall be selected by the Holders of a majority in aggregate principal amount of Registrable Securities to be registered in the applicable Registration Statement) in connection with blue sky qualification of any Exchange Securities or Registrable Securities), (iii) all expenses of any Persons in preparing or assisting in preparing, word processing, printing and distributing any Registration Statement, any Prospectus and any amendments or supplements thereto, any underwriting agreements, securities sales agreements or other similar agreements and any other documents relating to the performance of and compliance with this Agreement, (iv) all rating agency fees, (v) all fees and disbursements relating to the qualification of the Indenture under applicable securities laws, (vi) the fees and disbursements of the Trustee and its counsel, (vii) the fees and disbursements of counsel for the Company and the Guarantors and, in the case of a Shelf Registration Statement, the fees and disbursements of one counsel for the Holders (which counsel shall be selected by the Majority Holders and which counsel may also be counsel for the Initial Purchasers) and (viii) the fees and disbursements of the independent public accountants of the Company and the Guarantors, including any and all fees and expenses of advisors or counsel to the Underwriters (other than fees and expenses set forth in clause (ii) above) or the Holders and underwriting discounts and commissions, brokerage commissions and transfer taxes, if any, relatin

"<u>Registration Statement</u>" shall mean any registration statement of the Company and the Guarantors that covers any of the Exchange Securities or Registrable Securities pursuant to the provisions of this Agreement and all amendments and supplements to any such registration statement, including posteffective amendments, in each case including the Prospectus contained therein or deemed a part thereof, all exhibits thereto and any document incorporated by reference therein.

"SEC" shall mean the United States Securities and Exchange Commission.

"Securities" shall have the meaning set forth in the preamble.

"Securities Act" shall mean the Securities Act of 1933, as amended from time to time.

"Shelf Additional Interest Date" shall have the meaning set forth in Section 2(d) hereof.

"Shelf Effectiveness Period" shall have the meaning set forth in Section 2(b) hereof.

"Shelf Registration" shall mean a registration effected pursuant to Section 2(b) hereof.

"Shelf Registration Statement" shall mean a "shelf" registration statement of the Company and the Guarantors that covers all or a portion of the Registrable Securities (but no other securities unless approved by a majority of the Holders whose Registrable Securities are to be covered by such Shelf Registration Statement) on an appropriate form under Rule 415 under the Securities Act, or any similar rule that may be adopted by the SEC, and all amendments and supplements to such registration statement, including post-effective amendments, in each case including the Prospectus contained therein or deemed a part thereof, all exhibits thereto and any document incorporated by reference therein.

"Shelf Request" shall have the meaning set forth in Section 2(b) hereof.

"Subsidiary Guarantee" shall mean the guarantees of the Securities and Exchange Securities by the Guarantors under the Indenture.

"Staff" shall mean the staff of the SEC.

"Target Registration Date" shall have the meaning set forth in Section 2(d) hereof.

"Trust Indenture Act" shall mean the Trust Indenture Act of 1939, as amended from time to time.

"<u>Trustee</u>" shall mean the trustee with respect to the Securities under the Indenture.

"<u>Underwriter</u>" shall have the meaning set forth in Section 3(e) hereof.

"Underwritten Offering" shall mean an offering in which Registrable Securities are sold to one or more Underwriters for reoffering to the public.

2. Registration Under the Securities Act. (a) To the extent not prohibited by any applicable law or applicable interpretations of the Staff, the Company and the Guarantors shall use their reasonable best efforts to (i) cause to be filed with the SEC an Exchange Offer Registration Statement covering an offer to the Holders to exchange all the Registrable Securities for Exchange Securities, (ii) cause such Registration Statement to become effective not later than 210 days after the date hereof and (iii) to the extent necessary to ensure that the Prospectus contained in any Exchange Offer Registration Statement is available for sales of Registrable Securities by any Participating Broker-Dealers, have such Registration Statement remain effective until 210 days after the last Exchange Date for use by one or more Participating Broker-Dealers. The Company and the Guarantors shall commence the Exchange Offer not later than 45 days after such effective date.

The Company and the Guarantors shall commence the Exchange Offer by causing the mailing of the related Prospectus, appropriate letters of transmittal and other accompanying documents, if any, to each Holder stating, in addition to such other disclosures as are required by applicable law, substantially the following:

- (i) that the Exchange Offer is being made pursuant to this Agreement and that all Registrable Securities validly tendered and not properly withdrawn will be accepted for exchange;
- (ii) the dates of acceptance for exchange (which shall be a period of at least 20 Business Days from the date such notice is mailed) (the "Exchange Dates");
- that any Registrable Security not tendered will remain outstanding and continue to accrue interest but will not retain any rights under this Agreement, except as otherwise specified herein;
- (iv) that any Holder electing to have a Registrable Security exchanged pursuant to the Exchange Offer will be required to (A) surrender such Registrable Security, together with the appropriate letters of transmittal, to the institution and at the address (located in the Borough of Manhattan, The City of New York) and in the manner specified in the notice, or (B) effect such exchange otherwise in compliance with the applicable procedures of the depositary for such Registrable Security, in each case prior to the close of business on the last Exchange Date; and
- (v) that any Holder will be entitled to withdraw its election, not later than the close of business on the last Exchange Date, by (A) sending to the institution and at the address (located in the Borough of Manhattan, The City of New York) specified in the notice, a telegram, telex, facsimile transmission or letter setting forth the name of such Holder, the principal amount of Registrable Securities delivered for exchange and a statement that such Holder is withdrawing its election to have such Securities exchanged or (B) effecting such withdrawal in compliance with the applicable procedures of the depositary for the Registrable Securities.

As a condition to participating in the Exchange Offer, each Holder will be required to represent in writing to the Company and the Guarantors prior to the consummation of the Exchange Offer (which representation may be contained in the letter of transmittal contemplated by the Exchange Offer Registration Statement) that (i) any Exchange Securities to be received by it will be acquired in the ordinary course of its business, (ii) at the time of the commencement of the Exchange Offer it is not engaged in, and does not intend to engage in, and has no arrangement or understanding with any Person to participate in, the distribution (within the meaning of the Securities Act) of the Exchange Securities in violation of the provisions of the Securities Act, (iii) it is not an "affiliate" (within the meaning of Rule 405 under the Securities Act) of the Company or any Guarantor and (iv) if such Holder is a broker-dealer that will receive Exchange Securities for its own account in exchange for Registrable Securities that were acquired as a result of market-making or other trading activities, then such Holder will comply with the applicable provisions of the Securities.

As soon as practicable after the last Exchange Date, the Company and the Guarantors shall use their reasonable best efforts to:

- (i) accept for exchange Registrable Securities or portions thereof validly tendered and not properly withdrawn pursuant to the Exchange Offer; and
- deliver, or cause to be delivered, to the Trustee for cancellation all Registrable Securities or portions thereof so accepted for exchange by the Company and issue, and cause the Trustee to promptly authenticate and deliver to each Holder, Exchange Securities in principal amount equal to the principal amount of the Registrable Securities validly tendered by such Holder and accepted for exchange pursuant to the Exchange Offer.

The Company and the Guarantors shall use their reasonable best efforts to complete the Exchange Offer as provided above and shall comply with the applicable requirements of the Securities Act, the Exchange Act and other applicable laws and regulations in connection with the Exchange Offer. The Exchange Offer shall not be subject to any conditions, other than that the Exchange Offer does not violate any applicable law or applicable interpretations of the Staff.

(b) In the event that (i) the Company and the Guarantors determine that the Exchange Offer Registration provided for in Section 2(a) above is not available or may not be completed as soon as practicable after the last Exchange Date, in each case because it would violate any applicable law or applicable interpretations of the Staff, (ii) the Exchange Offer is not for any other reason completed by [December 28], 2010 or (iii) upon receipt of a written request (a "<u>Shelf Request</u>") from any Initial Purchaser representing that it holds Registrable Securities that are or were ineligible to be exchanged in the Exchange Offer, the Company and the Guarantors shall, in lieu of (or, in the case of clause (ii) or (iii), in addition to) conducting the Exchange Offer as contemplated by Section 2(a), use their reasonable best efforts to cause to be filed as soon as practicable after such determination, date or Shelf Registration Statement providing for the sale of all the Registrable Securities by the Holders thereof and to have such Shelf Registration Statement become effective. As soon as practicable after the obligation to file a Shelf Registration Statement arise pursuant to this Section 2(b), the Company shall give notice (a "<u>Shelf Notice</u>") of such fact to the Holders and to the Initial Purchasers, if applicable.

In the event that the Company and the Guarantors are required to file a Shelf Registration Statement pursuant to clauses (ii) or (iii) of the preceding sentence, the Company and the Guarantors shall use their reasonable best efforts to file and have become effective both an Exchange Offer Registration Statement pursuant to Section 2(a) with respect to all Registrable Securities and a Shelf Registration Statement (which may be a combined Registration Statement with the Exchange Offer Registration Statement) with respect to offers and sales of Registrable Securities held by the Initial Purchasers after completion of the Exchange Offer.

The Company and the Guarantors agree to use their reasonable best efforts to keep the Shelf Registration Statement continuously effective until the expiration of the time period referred to in Rule 144(k) (or any similar rule then in force, but not Rule 144A) under the Securities Act with respect to the Registrable Securities or such shorter period that will terminate when all the Registrable Securities covered by the Shelf Registration Statement have been sold pursuant to the Shelf Registration Statement (the "<u>Shelf Effectiveness Period</u>"). The Company and the Guarantors further agree to supplement or amend the Shelf Registration Statement and the related Prospectus if required by the rules, regulations or instructions applicable to the registration form used by the Company for such Shelf Registration Statement or by the Securities Act or by any other rules and regulations thereunder or if reasonably requested by a Holder of Registratioe such shelf Registration Statement and Prospectus to become usable as soon as thereafter practicable. The Company and the Guarantors agree to furnish to the Holders of Registrable Securities copies of any such supplement or amendment as promptly as practicable after its being used or filed with the SEC.

(c) The Company and the Guarantors shall pay all Registration Expenses in connection with any registration pursuant to Section 2(a) or Section 2(b) hereof. Each Holder shall pay all underwriting discounts and commissions, brokerage commissions and transfer taxes, if any, relating to the sale or disposition of such Holder's Registrable Securities pursuant to the Shelf Registration Statement.

(d) An Exchange Offer Registration Statement pursuant to Section 2(a) hereof will not be deemed to have become effective unless it has been declared effective by the SEC. A Shelf Registration Statement pursuant to Section 2(b) hereof will not be deemed to have become effective unless it has been declared effective by the SEC or is automatically effective upon filing with the SEC as provided by Rule 462 under the Securities Act.

In the event that either the Exchange Offer is not completed or the Shelf Registration Statement, if required pursuant to Section 2(b)(i) or 2(b)(ii) hereof, has not become effective on or prior to [December 28], 2010 (the "<u>Target Registration Date</u>"), the interest rate on the Registrable Securities will be increased by (i) 0.25% per annum for the first 90-day period commencing from one day after the Target Registration Date and (ii) an additional 0.25% per annum with respect to the subsequent 90-day period, in each case until the Exchange Offer is completed or the Shelf Registration Statement, if required hereby, becomes effective or the Securities covered by such registration statement on which additional interest is being paid cease to be Registrable Securities; provided that the interest rate on the Registrable Securities at which such additional interest accrues may in no event exceed 0.50% per annum. In the event that the Company receives a Shelf Request from any Initial Purchaser pursuant to Section 2(b)(iii), and the Shelf Reguest (such later date, the "<u>Shelf Additional</u> Interest Date"), then the interest rate on the Registrable Securities held by the Initial Purchaser becomes effective by (i) 0.25% per annum for the first 90-day period, again the Shelf Additional Interest Date"), the interest securities and the Shelf Registration Statement required to be filed thereby has not become effective by the later of (x) [November 28], 2010 or (y) 90 days after delivery of such Shelf Request (such later date, the "<u>Shelf Additional</u> Interest Date"), then the interest rate on the Registration Statement becomes effective or the Registrable Securities held by the Initial Purchaser become freely tradable under the Shelf Registration Statement becomes effective or the Registrable Securities held by the Initial Purchaser become freely tradable under the Shelf Registration Statement becomes effective or the Registrable Securities held by the Initial Purchaser become freely tradable under the Shelf Registration State

If the Shelf Registration Statement, if required hereby, has become effective and thereafter either ceases to be effective or the Prospectus contained therein ceases to be usable, in each case whether or not permitted by this Agreement, at any time during the Shelf Effectiveness Period, and such failure to remain effective or usable exists for more than 75 days (whether or not consecutive) in any 12-month period, then the interest rate on the Registrable Securities will be increased by (i) 0.25% per annum for the first 90-day period commencing on the 76<sup>th</sup> day and (ii) an additional 0.25% per annum for the subsequent 90-day period, in each case ending on such date that the Shelf Registration Statement has again become effective or the Prospectus again becomes usable, up to a maximum increase of 0.50% per annum. Notwithstanding anything to the contrary in this Agreement, in connection with a Shelf Registration Statement, additional interest on the Registrable Securities shall not accrue and be payable to any Holder if the failure of the Company and/or the Guarantors to comply with their obligations hereunder is a result of the failure of such Holder to fulfill its obligations hereunder.

(e) Without limiting the remedies available to the Initial Purchasers and the Holders, the Company and the Guarantors acknowledge that any failure by the Company or the Guarantors to comply with their obligations under Section 2(a) and Section 2(b) hereof may result in material irreparable injury to the Initial Purchasers or the Holders for which there is no adequate remedy at law, that it will not be possible to measure damages for such injuries precisely and that, in the event of any such failure, the Initial Purchasers or any Holder may obtain such relief as may be required to specifically enforce the Company's and the Guarantors' obligations under Section 2(b) hereof.

(f) The Company represents, warrants and covenants that it (including its agents and representatives) will not prepare, make, use, authorize, approve or refer to any Free Writing Prospectus in connection with the Securities or the Exchange Securities, other than any communication pursuant to Rule 134 under the Securities Act or any document constituting an offer to sell or solicitation of an offer to buy the Securities or the Exchange Securities that falls within the exception from the definition of prospectus in Section 2(a)(10)(a) of the Securities Act.

3. Registration Procedures. (a) In connection with their obligations pursuant to Section 2(a) and Section 2(b) hereof, the Company and the Guarantors shall as soon as practicable (unless otherwise stated below):

- (i) prepare and file with the SEC a Registration Statement on the appropriate form under the Securities Act, which form (x) shall be selected by the Company and the Guarantors, (y) shall, in the case of a Shelf Registration, be available for the sale of the Registrable Securities by the Holders thereof and (z) shall comply as to form in all material respects with the requirements of the applicable form and include all financial statements required by the SEC to be filed therewith; and use their reasonable best efforts to cause such Registration Statement to become effective and remain effective for the applicable period in accordance with Section 2 hereof;
- (ii) prepare and file with the SEC such amendments and post-effective amendments to the applicable Registration Statement as may be necessary to keep such Registration Statement effective for the applicable period in accordance with Section 2 hereof and cause each Prospectus to be supplemented by any required prospectus supplement and, as so supplemented, to be filed pursuant to Rule 424 under the Securities Act; and keep each Prospectus current during the period described in Section 4(3) of and Rule 174 under the Securities Act that is applicable to transactions by brokers or dealers with respect to the Registrable Securities or Exchange Securities;
- (iii) in the case of a Shelf Registration, furnish to each Holder of Registrable Securities, to counsel for the Initial Purchasers (if any Registrable Securities held by the Initial Purchasers are included in such registration statement), to one firm of counsel retained by such Holders, if any, and to each Underwriter of an Underwritten Offering of Registrable Securities, if any, without charge, as many copies of each Prospectus or preliminary prospectus, and any amendment or supplement thereto, as such Holder, counsel or Underwriter may reasonably request in order to facilitate the sale or other disposition of the Registrable Securities thereunder; and the Company and the Guarantors consent to the use of such Prospectus, preliminary prospectus and any amendment or supplement thereto in accordance with applicable law by each of the Holders of Registrable Securities and any such Underwriters in connection with the offering and sale of the Registrable Securities covered by and in the manner described in such Prospectus, preliminary prospectus or any amendment or supplement thereto in accordance with applicable law;

(iv) use their reasonable best efforts to register or qualify the Registrable Securities under all applicable state securities or blue sky laws of such jurisdictions as any Holder of Registrable Securities covered by a Registration Statement shall reasonably request in writing by the time the applicable Registration Statement becomes effective; cooperate with such Holders in connection with any filings required to be made with FINRA; and use reasonable best efforts to do any and all other acts and things that may be reasonably necessary or advisable to enable each Holder to complete the disposition in each such jurisdiction of the Registrable Securities owned by such Holder; provided that neither the Company nor any Guarantor shall be required to (1) qualify as a foreign corporation or other entity or as a dealer in securities in any such jurisdiction, (3) subject itself to taxation in any such jurisdiction if it is not so subject or (4) make any changes to its incorporating or organizational documents or limited liability agreement, if applicable, or any other agreement between it and its stockholders or members, if any;

(v) if the Initial Purchasers hold any Registrable Securities, notify counsel for the Initial Purchasers and, in the case of a Shelf Registration, notify each Holder of Registrable Securities and counsel for such Holders, if any, promptly and, if requested by any such Holder or counsel, confirm such advice in writing (1) when a Registration Statement has become effective, when any post-effective amendment thereto has been filed and becomes effective and when the Prospectus or any amendment or supplement to the Prospectus has been filed, (2) of any request by the SEC or any state securities authority for amendments and supplements to a Registration Statement or Prospectus or for additional information after the Registration Statement has become effective, (3) of the issuance by the SEC or any state securities authority of any stop order suspending the effectiveness of a Registration Statement or the initiation of any proceedings for that purpose, including the receipt by the Company of any notice of objection of the SEC to the use of a Shelf Registration Statement or any posteffective amendment thereto pursuant to Rule 401(g)(2) under the Securities Act, (4) if, between the applicable effective date of a Shelf Registration Statement and the closing of any sale of Registrable Securities covered thereby, the representations and warranties of the Company or any Guarantor contained in any underwriting agreement, securities sales agreement or other similar agreement, if any, relating to an offering of such Registrable Securities cease to be true and correct in all material respects or if the Company or any Guarantor receives any notification with respect to the suspension of the qualification of the Registrable Securities for sale in any jurisdiction or the initiation of any proceeding for such purpose, (5) of the happening of any event during the period a Registration Statement is effective that makes any statement made in such Registration Statement or the related Prospectus untrue in any material respect or that requires the making of any changes in such Registration Statement or Prospectus in order to make the statements therein, with respect to a Prospectus, in the light of the circumstances under which such statements were made, not misleading, (6) of any determination by the Company or any Guarantor that a post-effective amendment to a Registration Statement or any amendment or supplement to the Prospectus would be appropriate; and (7) of any occurrence or existence of any corporate development that, in the reasonable judgment of the Company or any Guarantor, would have a material adverse effect on the business or operations of the Company or any of its subsidiaries; provided, however, subject to Section 3(d), that in the case of a Shelf Registration, upon the occurrence of any event of the kind described in this Section 3(a)(v)(3), (5), (6) or (7), the Company and the Guarantors shall be entitled to suspend their obligation to file any amendment to the Shelf Registration Statement, furnish any supplement or amendment to a Prospectus included in the Shelf Registration Statement, make any other filing with the SEC, cause the Shelf Registration Statement or other filing with the SEC to remain effective or take any similar action (collectively, "Registration Actions"). Upon the termination of such condition, the Company shall give prompt notice thereof to the Holders and shall as promptly as practicable proceed with all Registration Actions that were suspended pursuant to this paragraph.

- (vi) use their reasonable best efforts to obtain the withdrawal of any order suspending the effectiveness of a Registration Statement or, in the case of a Shelf Registration, the resolution of any objection of the SEC pursuant to Rule 401(g)(2), including by promptly filing an amendment to such Shelf Registration Statement on the proper form, and provide notice promptly to each Holder of the withdrawal of any such order or such resolution;
- (vii) in the case of a Shelf Registration, furnish to each Holder of Registrable Securities, without charge, at least one conformed copy of each Registration Statement and any post-effective amendment thereto (without any documents incorporated therein by reference or exhibits thereto, unless requested);
- (viii) in the case of a Shelf Registration, cooperate with the Holders of Registrable Securities to facilitate the timely preparation and delivery of certificates representing Registrable Securities to be sold and not bearing any restrictive legends and enable such Registrable Securities to be issued in such denominations and registered in such names (consistent with the provisions of the Indenture) as such Holders may reasonably request three Business Days prior to the closing of any sale of Registrable Securities made by such Holders;
- (ix) in the case of a Shelf Registration, upon the occurrence of any event contemplated by Section 3(a)(v)(5) hereof, use their reasonable best efforts to prepare and file with the SEC a supplement or post-effective amendment to such Shelf Registration Statement or the related Prospectus or any document incorporated therein by reference or file any other required document so that, as thereafter delivered (or, to the extent permitted by law, made available) to purchasers of the Registrable Securities, such Prospectus will not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and the Company shall notify the Holders of Registrable Securities to suspend use of the Prospectus as promptly as practicable after the occurrence of such an event, and such Holders hereby agree to suspend use of the Prospectus until the Company and the Guarantors have amended or supplemented the Prospectus to correct such misstatement or omission;

- a reasonable time prior to the filing of any Registration Statement, any Prospectus, any amendment to a Registration Statement or (x) amendment or supplement to a Prospectus or of any document that is to be incorporated by reference into a Registration Statement or a Prospectus after initial filing of a Registration Statement, provide copies of such document to the Initial Purchasers and their counsel (if the Initial Purchasers hold any Registrable Securities) (and, in the case of a Shelf Registration Statement, to the Holders of Registrable Securities and their counsel, if any) and make such of the representatives of the Company and the Guarantors as shall be reasonably requested by the Initial Purchasers or their counsel (if the Initial Purchasers hold any Registrable Securities) (and, in the case of a Shelf Registration Statement, the Holders of Registrable Securities covered by the Registration Statement or their counsel, if any) available for discussion of such document; and the Company and the Guarantors shall not, at any time after initial filing of a Registration Statement, use or file any Prospectus, any amendment of or supplement to a Registration Statement or a Prospectus, or any document that is to be incorporated by reference into a Registration Statement or a Prospectus, of which the Initial Purchasers and their counsel (if the Initial Purchasers hold any Registrable Securities) (and, in the case of a Shelf Registration Statement, the Holders of Registrable Securities covered by the Registration Statement and their counsel, if any) shall not have previously been advised and furnished a copy or to which the Initial Purchasers or its counsel (if the Initial Purchasers hold any Registrable securities) (and, in the case of a Shelf Registration Statement, the Holders of Registrable Securities covered by the Registration Statement or their counsel, if any) shall reasonably object within five Business Days after receipt thereof, unless the Company believes such Prospectus, amendment or supplement to a Prospectus or document that is to be incorporated by reference into a Registration Statement or Prospectus is required by applicable law;
- (xi) obtain a CUSIP number for all Exchange Securities or Registrable Securities, as the case may be, not later than the initial effective date of a Registration Statement covering such Exchange Securities or Registrable Securities;
- (xii) cause the Indenture to be qualified under the Trust Indenture Act in connection with the registration of the Exchange Securities or Registrable Securities, as the case may be; cooperate with the Truste and the Holders to effect such changes to the Indenture as may be required for the Indenture to be so qualified in accordance with the terms of the Trust Indenture Act; and execute, and use their reasonable best efforts to cause the Trustee to execute, all documents as may be required to effect such changes and all other forms and documents required to be filed with the SEC to enable the Indenture to be so qualified in a timely manner;



- (xiii) in the case of a Shelf Registration, make available for inspection by a representative of the Holders of a majority of the outstanding aggregate principal amount of the Registrable Securities to be included in such Shelf Registration (an "Inspector"), any Underwriter participating in any disposition pursuant to such Shelf Registration Statement, any attorneys and accountants designated by such Holders (but not more than one firm of counsel acting for all such Holders) and any attorneys and accountants designated by such Underwriter, at reasonable times and in a reasonable manner, all pertinent financial and other records, documents and properties of the Company and its subsidiaries, and cause the respective officers, directors and employees of the Company and the Guarantors to supply all information reasonably requested by any such Inspector, Underwriter, attorney or accountant to conduct reasonable investigation within the meaning of Section 11 of the Securities Act in connection with a Shelf Registration Statement; provided that that foregoing investigation and information gathering shall be coordinated on behalf of such parties by one firm of counsel designated by and on behalf of such parties; and provided further that if any such information is identified by the Company or any Guarantor as being confidential or proprietary, each Person receiving such information shall take such actions as are reasonably necessary to protect the confidentiality of such information to the extent such action is otherwise not inconsistent with, an impairment of or in derogation of the rights and interests of any Inspector, Holder or Underwriter;
- (xiv) in the case of a Shelf Registration, use their reasonable best efforts to cause all Registrable Securities to be listed on any securities exchange or any automated quotation system on which similar securities issued or guaranteed by the Company or any Guarantor are then listed if requested by the Majority Holders, to the extent such Registrable Securities satisfy applicable listing requirements;
- (xv) if reasonably requested by any Holder of Registrable Securities covered by a Shelf Registration Statement, promptly include in a Prospectus supplement or post-effective amendment such information with respect to such Holder as such Holder reasonably requests to be included therein and make all required filings of such Prospectus supplement or such post-effective amendment promptly after the Company has received notification of the matters to be so included in such filing;

- in the case of a Shelf Registration, enter into such customary agreements, including, but not limited to, an underwriting agreement which (xvi) contains indemnities substantially similar to those contained herein, and take all such other actions in connection therewith (including those requested by the Holders of a majority in principal amount of the Registrable Securities covered by the Shelf Registration Statement) in order to expedite or facilitate the disposition of such Registrable Securities including, but not limited to, an Underwritten Offering and in such connection, (1) to the extent possible, make such representations and warranties to any Underwriters of such Registrable Securities with respect to the business of the Company and its subsidiaries and the Registration Statement, Prospectus and documents incorporated by reference or deemed incorporated by reference, if any, in each case, in form, substance and scope as are customarily made by issuers to underwriters in underwritten offerings and confirm the same if and when required by the applicable underwriting agreement, (2) obtain opinions of counsel to the Company and the Guarantors (which counsel and opinions, in form, scope and substance, shall be reasonably satisfactory to such Underwriters and their respective counsel) addressed to the Underwriters of Registrable Securities, in customary form subject to customary limitations, assumptions and exclusions and covering the matters customarily covered in opinions requested in underwritten offerings, (3) obtain "comfort" letters from the independent certified public accountants of the Company and the Guarantors (and, if necessary, any other certified public accountant of any subsidiary of the Company or any Guarantor, or of any business acquired by the Company or any Guarantor for which financial statements and financial data are or are required to be included in the Registration Statement) addressed to the Underwriter of the Registrable Securities, such letters to be in customary form and covering matters of the type customarily covered in "comfort" letters in connection with underwritten offerings, including but not limited to financial information contained in any preliminary prospectus or Prospectus and (4) deliver such documents and certificates as may be reasonably requested by the Underwriters, and which are customarily delivered in underwritten offerings, to evidence the continued validity of the representations and warranties of the Company and the Guarantors made pursuant to clause (1) above and to evidence compliance with any customary conditions contained in the applicable underwriting agreement; and
- (xvii) so long as any Registrable Securities remain outstanding, cause each Additional Guarantor upon the creation or acquisition by the Company of such Additional Guarantor, to execute a counterpart to this Agreement in the form attached hereto as Annex A and to deliver such counterpart to the Initial Purchasers no later than five Business Days following the execution thereof.

(b) In the case of a Shelf Registration Statement, the Company may require each Holder of Registrable Securities to furnish to the Company such information regarding such Holder and the proposed disposition by such Holder of such Registrable Securities as the Company and the Guarantors may from time to time reasonably request in writing. The Company and the Guarantors shall be entitled to refuse to include for registration the Registrable Securities held by any Holder who fails to comply with such request and provide the requested information to the extent such information is required by applicable law to be included in the Shelf Registration Statement, and such Holder shall not be entitled to the benefits of any provision of this Agreement.

(c) In the case of a Shelf Registration Statement, each Holder of Registrable Securities covered in such Shelf Registration Statement agrees that, upon receipt of any notice from the Company and the Guarantors of the happening of any event of the kind described in Section 3(a)(v)(2), (3), (5), (6) or (7) hereof, such Holder will forthwith discontinue disposition of Registrable Securities pursuant to the Shelf Registration Statement until such Holder's receipt of the copies of the supplemented or amended Prospectus contemplated by Section 3(a)(ix) hereof, or until it is advised in writing by the Company that the use of the Prospectus may be resumed, and, if so directed by the Company and the Guarantors, such Holder will deliver to the Company and the Guarantors all copies in its possession, other than permanent file copies then in such Holder's possession, of the Prospectus covering such Registrable Securities that is current at the time of receipt of such notice.

(d) If the Company and the Guarantors shall give any notice pursuant to Section 3(a)(v) hereof to suspend the disposition of Registrable Securities pursuant to a Shelf Registration Statement, the Company and the Guarantors shall extend the period during which such Shelf Registration Statement shall be maintained effective pursuant to this Agreement by the number of days equal to the number of days in the period from and including the date of the giving of such notice to and including the date when the Holders of such Registrable Securities shall have received copies of the supplemented or amended Prospectus necessary to resume such dispositions. The Company and the Guarantors may give any such notice (pursuant to Section 3(a)(v)(4), (5), (6) or (7) only twice during any 365-day period and any such suspensions shall not exceed an aggregate of 75 days in any 365-day period and there shall not be more than two suspensions in effect during any 365-day period.

(e) The Holders of a majority of the outstanding aggregate principal amount of Registrable Securities to be included in a Shelf Registration Statement shall be entitled to give the Company a written request requesting that the sale of Registrable Securities covered by such registration statement be made in an Underwritten Offering. In any such Underwritten Offering, the investment bank or investment banks and manager or managers (each an "<u>Underwriter</u>") that will administer the offering will be selected by the Holders of a majority of the outstanding aggregate principal amount of the Registrable Securities included in such offering, subject to the consent of the Company (not to be unreasonably withheld). Such Holders shall be responsible for all underwriting commissions and discounts in connection therewith. No Holder of Registrable Securities may participate in any Underwritten Offering unless such Holder (i) agrees to sell such Holder's Registrable Securities on the basis provided in any underwriting arrangements approved by the Persons entitled hereunder to approve such arrangements and (ii) completes and executes all questionnaires, powers of attorney, indemnities, underwriting agreements and other documents required under the terms of such underwriting arrangements.

4. Participation of Broker-Dealers in Exchange Offer. (a) The Staff has taken the position that any broker-dealer that receives Exchange Securities for its own account in the Exchange Offer in exchange for Securities that were acquired by such broker-dealer as a result of market-making or other trading activities (a "<u>Participating Broker-Dealer</u>") may be deemed to be an "underwriter" within the meaning of the Securities Act and must deliver a prospectus meeting the requirements of the Securities Act in connection with any resale of such Exchange Securities.

The Company and the Guarantors understand that it is the Staff's position that if the Prospectus contained in the Exchange Offer Registration Statement includes a plan of distribution containing a statement to the above effect and the means by which Participating Broker-Dealers may resell the Exchange Securities, without naming the Participating Broker-Dealers or specifying the amount of Exchange Securities owned by them, such Prospectus may be delivered by Participating Broker-Dealers (or, to the extent permitted by law, made available to purchasers) to satisfy their prospectus delivery obligation under the Securities Act in connection with resales of Exchange Securities for their own accounts, so long as the Prospectus otherwise meets the requirements of the Securities Act.

(b) In light of the above, and notwithstanding the other provisions of this Agreement, the Company and the Guarantors agree to use their reasonable best efforts to amend or supplement the Prospectus contained in the Exchange Offer Registration Statement for a period ending on the earlier of (i) 210 days after the last Exchange Date (as such period may be extended pursuant to Section 3(d) of this Agreement), (ii) the date on which a Participating Broker-Dealer is no longer required to deliver a prospectus in connection with market-making or other trading activities, if requested by the Initial Purchaser or by one or more Participating Broker-Dealers, in order to expedite or facilitate the disposition of any Exchange Securities by Participating Broker-Dealers consistent with the positions of the Staff recited in Section 4(a) above. The Company and the Guarantors further agree that Participating Broker-Dealers shall be authorized to deliver such Prospectus (or, to the extent permitted by law, make available) during such period in connection with the resales contemplated by this Section 4. The Participating Broker-Dealers shall not be authorized by the Company to deliver and shall not deliver such Prospectus after such period in connection with the resales contemplated by this Section 4.

(c) The Initial Purchasers shall have no liability to the Company, any Guarantor or any Holder with respect to any request that they may make pursuant to Section 4(b) above.

5. Indemnification and Contribution. (a) The Company and each Guarantor, jointly and severally, agree to indemnify and hold harmless each Initial Purchaser and each Holder, their respective affiliates, directors and officers and each Person, if any, who controls any Initial Purchaser or any Holder within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, from and against any and all losses, claims, damages and liabilities (including, without limitation, reasonable and documented legal fees and other expenses reasonably incurred in connection with any suit, action or proceeding or any claim asserted, as such fees and expenses are incurred), joint or several, that arise out of, or are based upon, (1) any untrue statement or alleged untrue statement of a material fact contained in any Registration Statement or any omission or alleged omission to state therein a material fact required to be stated therein or necessary in order to make the statements therein not misleading, or (2) any untrue statement or alleged untrue statement of a material fact contained in any Prospectus, any Free Writing Prospectus used in violation of this Agreement or any "issuer information" ("Issuer Information") filed or required to be filed pursuant to Rule 433(d) under the Securities Act, or any omission or alleged omission to state therein a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, in each case except insofar as such losses, claims, damages or liabilities arise out of, or are based upon, any untrue statement or omission or alleged untrue statement or omission made in reliance upon and in conformity with any information relating to any Initial Purchaser or information relating to any Holder furnished to the Company in writing by such Initial Purchaser or any selling Holder expressly for use therein. In connection with any Underwritten Offering permitted by Section 3, the Company and the Guarantors, jointly and severally, will also indemnify the Underwriters, if any, selling brokers, dealers and similar securities industry professionals participating in the distribution, their respective affiliates and each Person who controls such Persons (within the meaning of the Securities Act and the Exchange Act) to the same extent as provided above with respect to the indemnification of the Holders, if requested in connection with any Registration Statement, any Prospectus, any Free Writing Prospectus or any Issuer Information.

(b) Each Holder agrees, severally and not jointly, to indemnify and hold harmless the Company, the Guarantors, the Initial Purchasers and the other selling Holders, the directors of the Company and the Guarantors, each officer of the Company and the Guarantors who signed the Registration Statement and each Person, if any, who controls the Company, the Guarantors, the Initial Purchasers and any other selling Holder within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act to the same extent as the indemnity set forth in paragraph (a) above, but only with respect to any losses, claims, damages or liabilities that arise out of, or are based upon, any untrue statement or omission or alleged untrue statement or omission made in reliance upon and in conformity with any information relating to such Holder furnished to the Company in writing by or on behalf of such Holder expressly for use in any Registration Statement and any Prospectus.

(c) If any suit, action, proceeding (including any governmental or regulatory investigation), claim or demand shall be brought or asserted against any Person in respect of which indemnification may be sought pursuant to either paragraph (a) or (b) above, such Person (the "Indemnified Person") shall promptly notify the Person against whom such indemnification may be sought (the "Indemnifying Person") in writing; provided that the failure to notify the Indemnifying Person shall not relieve it from any liability that it may have under paragraph (a) or (b) above, except to the extent that it has been materially prejudiced (through the forfeiture of substantive rights or defenses) by such failure; and provided, further, that the failure to notify the Indemnifying Person shall not relieve it from any liability that it may have to an Indemnified Person otherwise than under paragraph (a) or (b) above. If any such proceeding shall be brought or asserted against an Indemnified Person and it shall have notified the Indemnifying Person thereof, the Indemnifying Person shall retain counsel reasonably satisfactory to the Indemnified Person (who shall not, without the consent of the Indemnified Person, be counsel to the Indemnifying Person) to represent the Indemnified Person and any others entitled to indemnification pursuant to this Section 5 that the Indemnifying Person may designate in such proceeding and shall pay the fees and expenses of such proceeding and shall pay the fees and expenses of such counsel related to such proceeding, as incurred. In any such proceeding, any Indemnified Person shall have the right to retain its own counsel, but the fees and expenses of such counsel shall be at the expense of such Indemnified Person unless (i) the Indemnifying Person and the Indemnified Person shall have mutually agreed to the contrary; (ii) the Indemnifying Person has failed within a reasonable time to retain counsel reasonably satisfactory to the Indemnified Person; (iii) the Indemnified Person shall have reasonably concluded that there may be legal defenses available to it that are different from or in addition to those available to the Indemnifying Person; or (iv) the named parties in any such proceeding (including any impleaded parties) include both the Indemnifying Person and the Indemnified Person and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them. It is understood and agreed that the Indemnifying Person shall not, in connection with any proceeding or related proceeding in the same jurisdiction, be liable for the fees and expenses of more than one separate firm (in addition to any local counsel) for all Indemnified Persons, and that all such fees and expenses shall be reimbursed as they are incurred. Any such separate firm (x) for any Initial Purchaser, its affiliates, directors and officers and any control Persons of such Initial Purchaser shall be designated in writing by such Initial Purchaser, (y) for any Holder, its directors and officers and any control Persons of such Holder shall be designated in writing by the Majority Holders and (z) in all other cases shall be designated in writing by the Company. The Indemnifying Person shall not be liable for any settlement of any proceeding effected without its written consent, but if settled with such consent or if there be a final judgment for the plaintiff, the Indemnifying Person agrees to indemnify each Indemnified Person from and against any loss or liability by reason of such settlement or judgment. No Indemnifying Person shall, without the written consent of the Indemnified Person, effect any settlement of any pending or threatened proceeding in respect of which any Indemnified Person is or could have been a party and indemnification could have been sought hereunder by such Indemnified Person, unless such settlement (A) includes an unconditional release of such Indemnified Person, in form and substance reasonably satisfactory to such Indemnified Person, from all liability on claims that are the subject matter of such proceeding and (B) does not include any statement as to or any admission of fault, culpability or a failure to act by or on behalf of any Indemnified Person.

(d) If the indemnification provided for in paragraphs (a) and (b) above is unavailable to an Indemnified Person or insufficient in respect of any losses, claims, damages or liabilities referred to therein, then each Indemnifying Person under such paragraph, in lieu of indemnifying such Indemnified Person thereunder, shall contribute to the amount paid or payable by such Indemnified Person as a result of such losses, claims, damages or liabilities (i) in such proportion as is appropriate to reflect the relative benefits received by the Company and the Guarantors from the offering of the Securities and the Exchange Securities, on the one hand, and by the Holders from receiving Securities or Exchange Securities registered under the Securities Act, on the other hand, or (ii) if the allocation provided by clause (i) is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) but also the relative fault of the Company and the Guarantors on the one hand and the Holders on the other shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by the Company and the Guarantors on the one hand or by the Holders on the other and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

(e) The Company, the Guarantors and the Holders agree that it would not be just and equitable if contribution pursuant to this Section 5 were determined by <u>pro rata</u> allocation (even if the Holders were treated as one entity for such purpose) or by any other method of allocation that does not take account of the equitable considerations referred to in paragraph (d) above. The amount paid or payable by an Indemnified Person as a result of the losses, claims, damages and liabilities referred to in paragraph (d) above shall be deemed to include, subject to the limitations set forth above, any legal or other expenses reasonably incurred by such Indemnified Person in connection with investigating or defending any such action or claim. Notwithstanding the provisions of this Section 5, in no event shall a Holder be required to contribute any amount in excess of the amount by which the total price at which the Securities or Exchange Securities sold by such Holder exceeds the amount of any damages that such Holder has otherwise been required to pay by reason of Section 11(f) of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentation. The Holders' obligations to contribute pursuant to this Section 5 are several in proportion to the respective principal amount of the Registrable Securities held by each Holder and not joint.

(f) The remedies provided for in this Section 5 are not exclusive and shall not limit any rights or remedies that may otherwise be available to any Indemnified Person at law or in equity.

(g) The indemnity and contribution provisions contained in this Section 5 shall remain operative and in full force and effect regardless of (i) any termination of this Agreement, (ii) any investigation made by or on behalf of the Initial Purchasers or any Holder or any Person controlling the Initial Purchasers or any Holder, or by or on behalf of the Company or the Guarantors or the officers or directors of or any Person controlling the Company or the Guarantors, (iii) acceptance of any of the Exchange Securities and (iv) any sale of Registrable Securities pursuant to a Shelf Registration Statement.

#### 6. General.

(a) No Inconsistent Agreements. The Company and the Guarantors represent, warrant and agree that (i) the rights granted to the Holders hereunder do not in any way conflict with and are not inconsistent with the rights granted to the holders of any other outstanding securities issued or guaranteed by the Company or any Guarantor under any other agreement and (ii) neither the Company nor any Guarantor has entered into, or on or after the date of this Agreement will enter into, any agreement that is inconsistent with the rights granted to the Holders of Registrable Securities in this Agreement or otherwise conflicts with the provisions hereof.

(b) <u>Amendments and Waivers</u>. The provisions of this Agreement, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from the provisions hereof may not be given unless the Company has obtained the written consent of Holders of at least a majority of the aggregate principal amount of the outstanding Registrable Securities (excluding any Registrable Securities owned directly or indirectly by the Company or any of its affiliates) affected by such amendment, modification, supplement, waiver or consent to any departure from the provisions of Section 5 hereof shall be effective as against any Holder of Registrable Securities unless consented to in writing by such Holder. Any amendments, modifications, supplements, waivers or consents pursuant to this Section 6(b) shall be by a writing executed by each of the parties hereto.

(c) Notices. All notices and other communications provided for or permitted hereunder shall be made in writing by hand-delivery, registered first-class mail, telex, telecopier, or any courier guaranteeing overnight delivery (i) if to a Holder, at the most current address given by such Holder to the Company by means of a notice given in accordance with the provisions of this Section 6(c), which address initially is, with respect to the Initial Purchasers, the address set forth in the Purchase Agreement; (ii) if to the Company and the Guarantors, initially at the Company's address set forth in the Purchase Agreement and thereafter at such other address, notice of which is given in accordance with the provisions of this Section 6(c); and (iii) to such other persons at their respective addresses as provided in the Purchase Agreement and thereafter at such other address, notice of which is given in accordance with the grovisions of this Section 6(c). All such notices and communications shall be deemed to have been duly given: at the time delivered by hand, if personally delivered; five Business Days after being deposited in the mail, postage prepaid, if mailed; when answered back, if telexed; when receipt is acknowledged, if telecopied; and on the next Business Day if timely delivered to an air courier guaranteeing overnight delivery. Copies of all such notices, demands or other communications shall be concurrently delivered by the Person giving the same to the Trustee, at the address specified in the Indenture.

(d) <u>Successors and Assigns</u>. This Agreement shall inure to the benefit of and be binding upon the successors, assigns and transferees of each of the parties, including, without limitation and without the need for an express assignment, subsequent Holders; <u>provided</u> that nothing herein shall be deemed to permit any assignment, transfer or other disposition of Registrable Securities in violation of the terms of the Purchase Agreement or the Indenture. If any transfere of any Holder shall acquire Registrable Securities in any manner, whether by operation of law or otherwise, such Registrable Securities shall be held subject to all the terms of this Agreement, and by taking and holding such Registrable Securities such Person shall be conclusively deemed to have agreed to be bound by and to perform all of the terms and provisions of this Agreement and such Person shall be entitled to receive the benefits hereof. The Initial Purchasers (in their capacity as Initial Purchasers) shall have no liability or obligation to the Company or the Guarantors with respect to any failure by a Holder to comply with, or any breach by any Holder of, any of the obligations of such Holder under this Agreement.

(e) <u>Third Party Beneficiaries</u>. Each Holder shall be a third party beneficiary to the agreements made hereunder between the Company and the Guarantors, on the one hand, and the Initial Purchasers, on the other hand, and shall have the right to enforce such agreements directly to the extent it deems such enforcement necessary or advisable to protect its rights or the rights of other Holders hereunder.

(f) <u>Counterparts</u>. This Agreement may be executed in any number of counterparts and by the parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

(g) <u>Headings</u>. The headings in this Agreement are for convenience of reference only, are not a part of this Agreement and shall not limit or otherwise affect the meaning hereof.

(h) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

(i) Entire Agreement; Severability. This Agreement contains the entire agreement between the parties relating to the subject matter hereof and supersedes all oral statements and prior writings with respect thereto. If any term, provision, covenant or restriction contained in this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable or against public policy, the remainder of the terms, provisions, covenants and restrictions contained herein shall remain in full force and effect and shall in no way be affected, impaired or invalidated. The Company, the Guarantors and the Initial Purchasers shall endeavor in good faith negotiations to replace the invalid, void or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the invalid, void or unenforceable provisions.

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

## DAVE & BUSTERS, INC.

By:

Name: Title:

D&B LEASING, INC. D&B MARKETING COMPANY, LLC D&B REALTY HOLDING, INC. DANB TEXAS, INC. DAVE & BUSTER'S I, L.P. DAVE & BUSTER'S MANAGEMENT CORPORATION, INC. DAVE & BUSTER'S OF CALIFORNIA, INC. DAVE & BUSTER'S OF COLORADO, INC. DAVE & BUSTER'S OF FLORIDA, INC. DAVE & BUSTER'S OF GEORGIA, INC. DAVE & BUSTER'S OF HAWAII, INC. DAVE & BUSTER'S OF ILLINOIS, INC. DAVE & BUSTER'S OF INDIANA, INC. DAVE & BUSTER'S OF KANSAS, INC. DAVE & BUSTER'S OF MARYLAND, INC. DAVE & BUSTER'S OF MASSACHUSETTS, INC. DAVE & BUSTER'S OF NEBRASKA, INC. DAVE & BUSTER'S OF NEW YORK, INC. DAVE & BUSTER'S OF OKLAHOMA, INC. DAVE & BUSTER'S OF OREGON, INC. DAVE & BUSTER'S OF PENNSYLVANIA, INC. DAVE & BUSTER'S OF PITTSBURGH, INC. DAVE & BUSTER'S OF VIRGINIA, INC. DAVE & BUSTER'S OF WASHINGTON, INC. DAVE & BUSTER'S OF WISCONSIN, INC. TANGO ACQUISITION, INC. TANGO OF ARIZONA, INC. TANGO OF ARUNDEL, INC. TANGO OF FARMINGDALE, INC. TANGO OF FRANKLIN, INC. TANGO OF HOUSTON, INC. TANGO OF NORTH CAROLINA, INC. TANGO OF SUGARLOAF, INC. TANGO OF TENNESSEE, INC. TANGO OF WESTBURY, INC. TANGO LICENSE CORPORATION

By:

Name: Title:

Confirmed and accepted as of the Date set forth on the first page hereof

J.P. MORGAN SECURITIES INC. JEFFERIES & COMPANY, INC.

By: J.P. MORGAN SECURITIES INC.

By:

Authorized Signatory

### \$200,000,000

## GAMES MERGER CORP. (to be merged with and into DAVE & BUSTER'S, INC.)

### 11% Senior Notes due 2018

#### Purchase Agreement

May 19, 2010

J.P. Morgan Securities Inc. 383 Madison Avenue New York, New York 10179

Jefferies & Company, Inc. 520 Madison Avenue New York, New York 10022

## Ladies and Gentlemen:

Games Merger Corp., a Missouri corporation (the "Acquisition Sub"), to be merged with and into Dave & Buster's, Inc., a Missouri corporation (the "Company"), upon the completion of such merger, proposes that immediately following such merger the Company will issue and sell to the several initial purchasers listed in Schedule 3 hereto (the "Initial Purchasers"), \$200,000,000 principal amount of its 11% Senior Notes due 2018 (the "Securities"). The Securities will be issued pursuant to an Indenture to be dated as of June 1, 2010 (the "Indenture") among the Company, the guarantors listed in Schedule 1 hereto (the "Guarantors") and Wells Fargo Bank, National Association, as trustee (the "Trustee"), and will be guaranteed on an unsecured senior basis by each of the Guarantors (the "Guarantees").

Games Acquisition Corp., a Delaware corporation and the direct parent of the Acquisition Sub ("Parent"), and the seller parties thereto have entered into a Stock Purchase Agreement dated as of May 2, 2010 (the "Stock Purchase Agreement"), pursuant to which the Parent will acquire (the "Acquisition"), through a stock purchase transaction, Dave & Buster's Holdings, Inc. (the "Target") and in connection therewith the Parent and the seller parties shall cause the Acquisition Sub and the Company, respectively, to enter into a certain Agreement and Plan of Merger (the "Merger Agreement), providing that the Acquisition Sub shall merge (the "Merger") with and into the Company with the Company being the surviving corporation. For purposes of this Agreement, the term "Transactions" is used in the same way as such term is used in the Preliminary Offering Memorandum (as defined below) and means, collectively, the Acquisition and the related financings in connection therewith and all other transactions related to the Acquisition, in each case as described in the Preliminary Offering Memorandum. The net proceeds of the offering of the Securities will be used, together with borrowings under the Company's new senior secured credit facility and funds received from the equity investments made by affiliates of Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management of the Company to finance a portion of the Acquisition, to refinance existing indebtedness and to pay an estimated \$22.8 million of related fees and expenses. The Transactions are expected to be consummated on a substantially concurrent basis on the Closing Date (as defined in Section 2(a) hereof).

Upon consummation of the Transactions, the Company and each Guarantor will enter a joinder agreement to this Agreement, the form of which is attached hereto as Exhibit A (the "Joinder Agreement"), pursuant to which they will become a party to this Agreement. Notwithstanding anything in this Agreement to the contrary, the representations, warranties and agreements of each of the Company and the Guarantors contained in this Agreement shall not become effective until the consummation of the Transactions, at which time such representations, warranties and agreements shall become effective as of the date hereof pursuant to the terms of the Joinder Agreement and thereafter all representations, warranties, agreements and obligations of the Company and the Guarantors shall be joint and several.

In accordance with the Indenture, upon the consummation of the Merger, (i) the Company will be required to execute and deliver a supplemental indenture to the Indenture, substantially in the form attached to the Indenture (the "Successor Supplemental Indenture"), pursuant to which it will assume all the obligations of the Acquisition Sub under the Notes and the Indenture as successor in the Merger, and (ii) the Guarantors will be required to execute and deliver a supplemental indenture to the Indenture, substantially in the form attached to the Indenture (the "Guarantor Supplemental Indenture" and, together with the Successor Supplemental Indenture, the "Supplemental Indentures"), pursuant to which each of the Guarantors will guarantee all the obligations of the Company under the Notes and the Indenture.

The Securities will be sold to the Initial Purchasers without being registered under the Securities Act of 1933, as amended (the "Securities Act"), in reliance upon an exemption therefrom. The Acquisition Sub and the Company have prepared a preliminary offering memorandum dated May 13, 2010 (the "Preliminary Offering Memorandum") and will prepare an offering memorandum dated the date hereof (the "Offering Memorandum") setting forth information concerning the Acquisition Sub, the Company and the Securities. Copies of the Preliminary Offering Memorandum have been, and copies of the Offering Memorandum will be, delivered by the Acquisition Sub to the Initial Purchasers pursuant to the terms of this Agreement. The Acquisition Sub hereby confirms that it has authorized the use of the Preliminary Offering Memorandum, the other Time of Sale Information, if any (as defined below) and the Offering Memorandum in connection with the offering and resale of the Securities by the Initial Purchasers in the manner contemplated by this Agreement. Capitalized terms used but not defined herein shall have the meanings given to such terms in the Preliminary Offering Memorandum.

At or prior to the time when sales of the Securities were first made (the "Time of Sale"), the following information shall have been prepared (collectively, the "Time of Sale Information"): the Preliminary Offering Memorandum as supplemented or amended by the written communications listed on Annex A hereto.

Holders of the Securities (including the Initial Purchasers and their direct and indirect transferees) will be entitled to the benefits of a Registration Rights Agreement, to be dated the Closing Date (as defined below) and substantially in the form attached hereto as Exhibit B (the "Registration Rights Agreement"), pursuant to which the Company and the Guarantors will agree to file one or more registration statements with the Securities and Exchange Commission (the "Commission") providing for the registration under the Securities Act of the Securities or the Exchange Securities referred to (and as defined) in the Registration Rights Agreement.

The Acquisition Sub, the Company and the Guarantors hereby confirm their agreement with the several Initial Purchasers concerning the purchase and resale of the Securities, as follows:

### 1. Purchase and Resale of the Securities.

(a) The Acquisition Sub and the Company agree that upon the consummation of the Merger, the Company will issue and sell the Securities to the several Initial Purchasers as provided in this Agreement, and each Initial Purchaser, on the basis of the representations, warranties and agreements set forth herein and subject to the conditions set forth herein, agrees, severally and not jointly, to purchase from the Company the respective principal amount of Securities set forth opposite such Initial Purchaser's name in Schedule 3 hereto at a price equal to 97.50% of the principal amount thereof plus accrued interest, if any, from June 1, 2010 to the Closing Date, payable on the Closing Date. The Company will not be obligated to deliver any of the Securities except upon payment for all the Securities to be purchased as provided herein.

(b) The Company understands that the Initial Purchasers intend to offer the Securities for resale on the terms set forth in the Time of Sale Information. Each Initial Purchaser, severally and not jointly, represents, warrants and agrees that:

(i) it is a qualified institutional buyer within the meaning of Rule 144A under the Securities Act (a "QIB") and an accredited investor within the meaning of Rule 501(a) of Regulation D under the Securities Act ("Regulation D");

(ii) it has not solicited offers for, or offered or sold, and will not solicit offers for, or offer or sell, the Securities by means of any form of general solicitation or general advertising within the meaning of Rule 502(c) of Regulation D or in any manner involving a public offering within the meaning of Section 4(2) of the Securities Act; and

(iii) it has not solicited offers for, or offered or sold, and will not solicit offers for, or offer or sell, the Securities as part of their initial offering except:

(A) within the United States to persons whom it reasonably believes to be QIBs in transactions pursuant to Rule 144A under the Securities Act ("Rule 144A") and in connection with each such sale, it has taken or will take reasonable steps to ensure that the purchaser of the Securities is aware that such sale is being made in reliance on Rule 144A; or

(B) in accordance with the restrictions set forth in Annex C hereto.

(c) Each Initial Purchaser acknowledges and agrees that the Acquisition Sub (and from and after the execution of the Joinder Agreement, the Company and the Guarantors), and for purposes of the opinions to be delivered to the Initial Purchasers pursuant to Sections 6(h) and 6(j), counsel for the Acquisition Sub, the Company and the Guarantors and counsel for the Initial Purchasers, respectively, may rely upon the accuracy of the representations and warranties of the Initial Purchasers, and compliance by the Initial Purchasers with their agreements, contained in paragraph (b) above (including Annex C hereto), and each Initial Purchaser hereby consents to such reliance.

(d) The Acquisition Sub, and upon execution and delivery of the Joinder Agreement, the Company and the Guarantors acknowledge and agree that the Initial Purchasers may offer and sell Securities to or through any affiliate of an Initial Purchaser and that any such affiliate may offer and sell Securities purchased by it to or through any Initial Purchaser.

(e) The Acquisition Sub, and upon execution and delivery of the Joinder Agreement, the Company and the Guarantors acknowledge and agree that the Initial Purchasers are acting solely in the capacity of an arm's length contractual counterparty to the Acquisition Sub, the Company and the Guarantors with respect to the offering of Securities contemplated hereby (including in connection with determining the terms of the offering) and not as financial advisors or fiduciaries to, or agents of, the Acquisition Sub, the Company, the Guarantors or any other person. Additionally, no Initial Purchaser is advising the Acquisition Sub, the Company, the Guarantors or any other person as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Acquisition Sub, the Company and the Guarantors shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and no Initial Purchaser shall have any responsibility or liability to the Acquisition Sub, the Company or the Guarantors with respect thereto. Any review by any Initial Purchaser of the Acquisition Sub, the Company, the Guarantors, and the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of such Initial Purchaser, as the case may be, and shall not be on behalf of the Acquisition Sub, the Company, the Guarantors or any other person.

2. <u>Payment and Delivery</u>. (a) Payment for and delivery of certificates for the Securities will be made at the offices of Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, New York at 10:00 A.M., New York City time, on June 1, 2010, or at such other time or place on the same or such other date, not later than the fifth business day thereafter, as the Initial Purchasers and the Company may agree upon in writing. The time and date of such payment and delivery is referred to herein as the "Closing Date."

(b) Payment for the Securities shall be made by wire transfer in immediately available funds to the account(s) specified by the Company to the Initial Purchasers against delivery to the nominee of The Depository Trust Company, for the account of the Initial Purchasers, of one or more global notes representing the Securities (collectively, the "Global Note"), with any transfer taxes payable in connection with the sale of the Securities duly paid by the Company. The Global Note will be made available for inspection by the Initial Purchasers not later than 1:00 P.M., New York City time, on the business day prior to the Closing Date.

3. <u>Representations and Warranties of the Acquisition Sub, the Company and the Guarantors</u>. As of the date hereof and at the Closing Date, the Acquisition Sub represents and warrants, and the Company and the Guarantors jointly and severally represent and warrant at the Closing Date upon the execution and delivery of the Joinder Agreement, in each case, to each Initial Purchaser that:

(a) *Preliminary Offering Memorandum, Time of Sale Information and Offering Memorandum.* The Preliminary Offering Memorandum, as of its date, did not, the Time of Sale Information, at the Time of Sale, did not, and at the Closing Date, will not, and the Offering Memorandum, as of its date, did not and, as of the Closing Date, will not, contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; <u>provided</u> that the Acquisition Sub, the Company and the Guarantors make no representation or warranty with respect to any statements or omissions made in reliance upon and in conformity with information relating to the Initial Purchaser furnished to the Acquisition Sub in writing by such Initial Purchaser expressly for use in the Preliminary Offering Memorandum, the Time of Sale Information or the Offering Memorandum (or any amendment or supplement thereto).

(b) Additional Written Communications. The Company and the Guarantors (including their respective agents and representatives, other than the Initial Purchasers in their capacity as such) have not prepared, made, used, authorized, approved or referred to and will not prepare, make, use, authorize, approve or refer to any written communication that constitutes an offer to sell or solicitation of an offer to buy the Securities (each such communication by the Company or its agents and representatives (other than a communication referred to in clauses (i), (ii) and (iii) below) an "Issuer Written Communication") other than (i) the Preliminary Offering Memorandum, (ii) the Offering Memorandum, (iii) the documents listed on Annex A hereto, including a term sheet substantially in the form of Annex B hereto, which constitute part of the Time of Sale Information, and (iv) any electronic road show or other written communications, in each case used in accordance with Section 4(c). Each such Issuer Written Communication, when taken together with the Time of Sale Information, did not, and at the Closing Date will not, contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided that none of the Acquisition Sub, the Company or the Guarantors makes any representation and warranty with respect to any statements or omissions made in each such Issuer Written Communication in reliance upon and in conformity with information relating to any Initial Purchaser furnished to the Company in writing by such Initial Purchaser expressly for use in any Issuer Written Communication.

(c) *Financial Statements.* The financial statements and the related notes thereto included in each of the Time of Sale Information and the Offering Memorandum present fairly in all material respects the consolidated financial position of the Company and the Company's subsidiaries as of and at the dates indicated and the results of their operations and the changes in their cash flows for the periods specified; such financial statements have been prepared in conformity with generally accepted accounting principles applied on a consistent basis throughout the periods covered thereby except as may be expressly stated otherwise in the related notes thereto; the other financial information included in each of the Time of Sale Information and the Offering Memorandum has been derived from the accounting records of the Company and the related notes thereto included in each of the Time of Sale Information and the Offering Memorandum has been prepared in accordance with the Commission's rules and guidance with respect to pro forma consolidated financial information, and the assumptions used in the preparation of such pro forma consolidated financial information and the Offering Memorandum.

(d) *No Material Adverse Change*. Since the date of the most recent financial statements of the Company included in each of the Time of Sale Information and the Offering Memorandum, (i) there has not been any change in the long term-debt or any material change in the capital stock of the Acquisition Sub, the Company or any of the Company's subsidiaries, or any dividend or distribution of any kind declared, set aside for payment, paid or made by the Acquisition Sub or the Company on any class of capital stock, or any material adverse change, or any development involving a prospective material adverse change, in or affecting the business, properties, management, financial position or results of operations of the Acquisition Sub, the Company and the Company's subsidiaries taken as a whole; (ii) none of the Acquisition Sub, the Company or any of the Company's subsidiaries has entered into any transaction or agreement that is material to the Acquisition Sub, the Company and the Company's subsidiaries taken as a whole, other than in the ordinary course of business, or incurred any liability or obligation, direct or contingent, that is material to the Acquisition Sub, the Company and the Company's subsidiaries taken as a whole, other than in the ordinary course of business; and (iii) none of the Acquisition Sub, the Company or any of the Company's subsidiaries taken as a whole, other than in the ordinary course of business; and (iii) none of the Acquisition Sub, the Company or any of the Company's subsidiaries has sustained any material loss or interference with its business from fire, explosion, flood or other calamity, whether or not covered by insurance, or from any labor disturbance or dispute or any action, order or decree of any court or arbitrator or governmental or regulatory authority, except in each case as otherwise disclosed in the Time of Sale Information.

(e) Organization and Good Standing. The Acquisition Sub, the Company and each of the Company's subsidiaries have been duly organized and are validly existing and in good standing under the laws of their respective jurisdictions of organization, are duly qualified to do business and are in good standing in each jurisdiction in which their respective ownership or lease of property or the conduct of their respective businesses requires such qualification, and have all power and authority necessary to own or hold their respective properties and to conduct the businesses in which they are engaged, except where the failure to be so qualified, in good standing or have such power or authority would not, individually or in the aggregate, have a material adverse effect on the business, properties, management, financial position or results of operations of the Acquisition Sub, the Company and the Company's subsidiaries taken as a whole or on the performance by the Acquisition Sub, the Company and the Guarantees (a "Material Adverse Effect"). The Company does not own or control, directly or indirectly, any corporation, association or other entity other than the subsidiaries listed in Schedule 2 to this Agreement.

(f) Activities of the Acquisition Sub. The Acquisition Sub is a newly-formed corporation that does not conduct or engage in any business or hold or acquire any assets other than the undertaking of any actions required by law, regulation or order, including to maintain its existence, and as necessary to consummate the Merger.

(g) *Capitalization*. The Company has an authorized capitalization as set forth in each of the Time of Sale Information and the Offering Memorandum under the heading "Capitalization"; and all the outstanding shares of capital stock or other equity interests of each subsidiary of the Company have been duly authorized and validly issued, are fully paid and non-assessable (except as otherwise described in each of the Time of Sale Information and the Offering Memorandum) and are owned directly or indirectly by the Company, free and clear of any lien, charge, encumbrance, security interest, restriction on voting or transfer or any other claim of any third party, except for those created pursuant to the Senior Credit Facility Documentation (as defined below) or any documentation governing outstanding indebtedness of the Company or any of its subsidiaries that will be repaid or redeemed upon consummation of the Transactions.

(h) *Due Authorization*. The Acquisition Sub, the Company and each of the Guarantors have all power and authority to execute and deliver this Agreement, the Joinder Agreement (only with respect to the Company and the Guarantors), the Securities (only with respect to the Acquisition Sub and the Company), the Indenture (including each Guarantee set forth therein) (only with respect to the Acquisition Sub), the Supplemental Indentures (only with respect to the Company and the Guarantors), the Exchange Securities (only with respect to the Company and the Guarantors), the Registration Rights Agreement (only with respect to the Company and the Guarantors), the Guarantors), the Merger Agreement (only with respect to the Acquisition Sub and the Company) and the new senior secured credit agreement to be entered into in connection with the Transactions, together with any other documents, agreement or instruments delivered in connection therewith (the "Senior Credit Facility Documentation") (only with respect to the Company and the Guarantors to the extent a party thereto) (collectively, the "Transaction Documents"), as applicable, and to perform their respective obligations hereunder and thereunder, as applicable; and all action required to be taken for the due and proper authorization, execution and delivery of each of the Transaction Documents and the consummation of the transactions contemplated thereby, including the Transactions, have been duly or validly taken by the Acquisition Sub (to the extent it is a party thereto) or, will be duly or validly taken by the Company and the Guarantors at or prior to the Closing Date.

(i) *The Indenture*. The Indenture has been duly authorized by the Acquisition Sub, the Company and each of the Guarantors and, when duly executed and delivered in accordance with its terms by each of the parties thereto (i) will constitute a valid and legally binding agreement of the Acquisition Sub and (ii) upon the consummation of the Merger, with the Company continuing as the surviving corporation, will constitute a valid and legally binding agreement of the Company and each of the Guarantors, enforceable against the Acquisition Sub, the Company and each of the Guarantors, as applicable, in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, fraudulent conveyance or transfer, moratorium or other similar laws relating to or affecting the enforcement of creditors' rights generally or by general equitable principles relating to enforceability (collectively, the "Enforceability Exceptions"); and on the Closing Date, the Indenture will conform in all material respects to the requirements of the Trust Indenture Act of 1939, as amended (the "Trust Indenture Act"), and the rules and regulations of the Commission applicable to an indenture that is qualified thereunder.

(j) *The Supplemental Indentures.* The Supplemental Indentures have been duly authorized by the Company and each of the Guarantors, as applicable, and, when duly executed and delivered in accordance with their terms by each of the parties thereto and upon the consummation of the Merger will constitute valid and legally binding agreements of the Company and each of the Guarantors, as applicable, enforceable against the Company and each of the Guarantors, as applicable, in accordance with their terms, subject to the Enforceability Exceptions.

(k) *The Securities and the Guarantees.* The Securities have been duly authorized by the Acquisition Sub and the Company and, when duly executed, authenticated, issued and delivered as provided in the Indenture and paid for as provided herein, (i) will be duly and validly issued and outstanding and will constitute valid and binding obligations of the Acquisition Sub and (ii) upon the consummation of the Merger, will be duly and validly issued and outstanding and will constitute valid and binding obligations of the Company, enforceable against the Acquisition Sub and the Company, as applicable, in accordance with their terms, subject to the Enforceability Exceptions, and will be entitled to the benefits of the Indenture; and the Guarantees have been duly authorized by each of the Guarantors and, when the Securities have been duly executed, authenticated, issued and delivered by the Company as provided in the Indenture and paid for as provided herein, will be valid and binding obligations of each of the Guarantors, enforceable against each of the Guarantors in accordance with their terms, subject to the Enforceability Exceptions, and will be entitled to the benefits of the Indenture.

(1) *The Exchange Securities*. On the Closing Date, the Exchange Securities (including the related guarantees) will have been duly authorized for issuance by the Company and each of the Guarantors and, when duly executed, authenticated, issued and delivered as contemplated by the Indenture and the Registration Rights Agreement, will be duly and validly issued and outstanding and will constitute valid and binding obligations of the Company, as issuer, and each of the Guarantors, as guarantor, enforceable against the Company and each of the Guarantors in accordance with their terms, subject to the Enforceability Exceptions, and will be entitled to the benefits of the Indenture.

(m) Purchase Agreement, Joinder Agreement and Registration Rights Agreement. This Agreement has been duly authorized, executed and delivered by the Acquisition Sub. At or prior to the Closing Date, the Joinder Agreement will have been duly authorized, executed and delivered by the Company and each of the Guarantors. At or prior to the Closing Date, the Registration Rights Agreement will have been duly authorized, executed and delivered by the Company and each of the Guarantors and, when duly executed and delivered in accordance with its terms by each of the parties thereto, will constitute a valid and binding agreement of the Company and each of the Guarantors in accordance with its terms, subject to the Enforceability Exceptions, and except that rights to indemnity and contribution thereunder may be limited by applicable law and public policy.

(n) *Other Transaction Documents.* The Merger Agreement has been duly authorized, executed and delivered by the Acquisition Sub and the Company and constitutes a valid and binding agreement of the Acquisition Sub and the Company enforceable against each of the Acquisition Sub and the Company in accordance with its terms, subject to the Enforceability Exceptions. The Senior Credit Facility Documentation has been duly authorized by the Company and, to the extent a party thereto, the Company's subsidiaries and, when executed and delivered in accordance with its terms by each of the parties thereto, will constitute a valid and binding agreement of the Company and, to the extent a party thereto, the Company's subsidiaries in accordance with its terms, subject to the Enforceable against the Company and, to the extent a party thereto, the Company's subsidiaries in accordance with its terms, subject to the Enforceability Exceptions.

(o) Description of the Transaction Documents. Each Transaction Document (other than the Merger Agreement) conforms in all material respects to the description thereof contained in each of the Time of Sale Information and the Offering Memorandum.

(p) *No Violation or Default.* None of the Acquisition Sub, the Company or any of the Company's subsidiaries is (i) in violation of its charter or by-laws or similar organizational documents; (ii) in default, and no event has occurred that, with notice or lapse of time or both, would constitute such a default, in the due performance or observance of any term, covenant or condition contained in any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Acquisition Sub, the Company or any of the Company's subsidiaries is a party or by which the Acquisition Sub, the Company or any of the Company or to which any of the property or assets of the Acquisition Sub, the Company or any of the Company's subsidiaries is subject; or (iii) in violation of any applicable law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory authority, except, in the case of clauses (ii) and (iii) above, for any such default or violation that could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(q) *No Conflicts.* The execution, delivery and performance by the Acquisition Sub, the Company and each of the Guarantors of each of the Transaction Documents to which each is a party, the issuance and sale of the Securities (including the Guarantees) and compliance by the Acquisition Sub, the Company and each of the Guarantors with the terms thereof and the consummation of the transactions contemplated by the Transaction Documents will not (i) conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, or, except for those created under the Senior Credit Facility Documentation, result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of the Acquisition Sub, the Company or any of the Company's subsidiaries pursuant to, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Company, the Acquisition Sub or any of the Company's subsidiaries is a party or by which the Acquisition Sub, the Company or subsidiaries is bound or to which any of the property or assets of the Company or any of the Company's subsidiaries or by-laws or similar organizational documents of the Company, the Acquisition Sub or any of the Company or any of the Company's subsidiaries is subject, (ii) result in any violation of the provisions of the charter or by-laws or similar organizational documents of the company, the Acquisition Sub or any of the Offering Memorandum, result in the violation of any applicable law or statute or any judgment, order, rule or regulator or arbitrator or governmental or regulatory authority, except, in the case of clauses (i) and (iii) above, for any such conflict, breach, violation or default that could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(r) *No Consents Required*. Assuming the accuracy of, and the Initial Purchasers' compliance with, the representations, warranties and agreements of the Initial Purchasers herein, and the compliance by the holders of the Securities with the offering and transfer restrictions set forth in the Offering Memorandum, no consent, approval, authorization, order, registration or qualification of or with any court or arbitrator or governmental or regulatory authority is required for the execution, delivery and performance by the Acquisition Sub, the Company and each of the Guarantors of each of the Transaction Documents to which each is a party, the issuance and sale of the Securities (including the Guarantees) and compliance by the Acquisition Sub, the Company and each of the Guarantors with the terms thereof and the consummation of the transactions contemplated by the Transaction Documents, including the Transactions, except for such consents, approvals, authorizations, orders and registrations or qualifications as have been obtained or as may be required (i) under the Securities Act and applicable state securities laws in connection with the purchase and resale of the Securities by the Initial Purchasers and (ii) with respect to the Exchange Securities (including the related guarantees), under the Securities Act, the Trust Indenture Act and applicable state securities laws as contemplated by the Registration Rights Agreement.

(s) *Legal Proceedings.* Except as described in each of the Time of Sale Information and the Offering Memorandum, there are no legal, governmental or regulatory investigations, actions, suits or proceedings pending, or to the best knowledge of the Acquisition Sub and the Company threatened, to which the Acquisition Sub, the Company or any of the Company's subsidiaries is or may be a party or to which any property of the Acquisition Sub, the Company or any of the Company's subsidiaries, could reasonably be expected to have a Material Adverse Effect; and no such investigations, actions, suits or proceedings are threatened or, to the best knowledge (without having undertaken any independent inquiry) of the Acquisition Sub, the Company and each of the Guarantors, contemplated by any governmental or regulatory authority or by others, except which, individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect.

(t) *Independent Accountants*. Ernst & Young LLP, who have certified certain financial statements of the Company and the Company's subsidiaries, are independent public accountants with respect to the Company and the Company's subsidiaries within the applicable rules and regulations adopted by the Commission and the Public Company Accounting Oversight Board (United States) and as required by the Securities Act.

(u) *Title to Real and Personal Property.* Except as described in each of the Time of Sale Information and the Offering Memorandum, the Company and the Company's subsidiaries have good and marketable title in fee simple to, or have valid rights to lease or otherwise use, all items of real and personal property that are material to the respective businesses of the Company and the Company's subsidiaries, in each case free and clear of all liens, encumbrances, claims and defects and imperfections of title except those that (i) are permitted under the Senior Credit Facility Documentation, (ii) do not materially and adversely affect the value of such property, (iii) do not materially interfere with the use made and proposed to be made of such property by the Acquisition Sub, the Company and the Company's subsidiaries or (iv) could not reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect.

(v) *Title to Intellectual Property*. The Company and the Company's subsidiaries own, possess or license adequate rights to use any patents, patent applications, trademarks, service marks, trade names, trademark registrations, service mark registrations, copyrights, licenses and know-how (including trade secrets and other unpatented and/or unpatentable proprietary or confidential information, systems or procedures) reasonably necessary for the conduct of their respective businesses as described in each of the Time of Sale Information and the Offering Memorandum, except where the failure to own or possess such rights could not reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect; and the conduct of their respective businesses will not conflict with any such rights of others, except which, individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect; and the Company and the Company's subsidiaries have not received any notice of any claim of infringement of or conflict with any such rights of others, which infringement or conflict, if the subject of an unfavorable decision, ruling or finding, would have a Material Adverse Effect.

(w) *No Undisclosed Relationships*. No relationship, direct or indirect, exists between or among the Acquisition Sub, the Company or any of the Company's subsidiaries, on the one hand, and the directors, officers, stockholders or other affiliates of the Acquisition Sub, the Company or any of the Company's subsidiaries, on the other, that is required by the Securities Act to be described in a registration statement on Form S-1 to be filed with the Commission and that is not so described in each of the Time of Sale Information and the Offering Memorandum.

(x) *Investment Company Act.* None of the Acquisition Sub, the Company or any of the Company's subsidiaries is, and after giving effect to the offering and sale of the Securities and the application of the proceeds thereof as described in each of the Time of Sale Information and the Offering Memorandum none of the Company or any of the Company's subsidiaries will be, an "investment company" within the meaning of the Investment Company Act of 1940, as amended, and the rules and regulations of the Commission thereunder (collectively, the "Investment Company Act").

(y) *Taxes.* Except as would not, individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect, the Acquisition Sub, the Company and the Company's subsidiaries have paid all federal, state, local and foreign taxes and filed all tax returns required to be paid or filed through the date hereof; and except as otherwise disclosed in each of the Time of Sale Information and the Offering Memorandum, there is no tax deficiency that has been, or could reasonably be expected to be, asserted against the Acquisition Sub, the Company or any of the Company's subsidiaries or any of their respective properties or assets except which, individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect.

(z) *Licenses and Permits*. The Acquisition Sub, the Company and the Company's subsidiaries possess any licenses, certificates, permits and other authorizations issued by, and have made any declarations and filings with, the appropriate federal, state, local or foreign governmental or regulatory authorities that are reasonably necessary for the ownership or lease of their respective properties or the conduct of their respective businesses as described in each of the Time of Sale Information and the Offering Memorandum, except where the failure to possess or make the same could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect; and except as described in each of the Time of Sale Information and the Company nor any of the Company's subsidiaries has received notice of any revocation or modification of any such license, certificate, permit or authorization or has any reason to believe that any such license, certificate, permit or authorization will not be renewed in the ordinary course which, if the subject of an unfavorable decision, ruling, or finding would have a Material Adverse Effect.

(aa) *No Labor Disputes*. No labor disturbance by or dispute with employees of the Acquisition Sub, the Company or any of the Company's subsidiaries exists or, to the best knowledge (without having undertaken any independent inquiry) of the Acquisition Sub, the Company and each of the Guarantors, is contemplated or to the best knowledge of the Acquisition Sub, the Company and each of the Acquisition Sub, the Company or any Guarantor is aware of any existing or imminent labor disturbance by, or dispute with, the employees of any of the Acquisition Sub's, the Company's or any of the Company's subsidiaries' principal suppliers, contractors or customers, except as would not have a Material Adverse Effect.

(bb) Compliance With Environmental Laws. (i) The Company and the Company's subsidiaries (x) are, and at all prior times were, in compliance with any and all applicable federal, state, local and foreign laws, rules, regulations, requirements, decisions and orders relating to the protection of human health or safety, the environment, natural resources, hazardous or toxic substances or wastes, pollutants or contaminants (collectively, "Environmental Laws"), (y) have received and are in compliance with all permits, licenses, certificates or other authorizations or approvals required of them under applicable Environmental Laws to conduct their respective businesses, and (z) have not received notice of any actual or potential liability under or relating to any Environmental Laws, including for the investigation or remediation of any disposal or release of hazardous or toxic substances or wastes, pollutants or contaminants, and have no knowledge of any event or condition that would reasonably be expected to result in any such notice, and (ii) there are no costs or liabilities associated with Environmental Laws of or relating to the Company or the Company's subsidiaries, except in the case of each of (i) and (ii) above, for any such failure to comply, or failure to receive required permits, licenses or approvals, or cost or liability, as could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect; and (iii) except as described in each of the Time of Sale Information and the Offering Memorandum, (x) there are no proceedings that are pending, or that are known to be contemplated, against the Company or any of the Company's subsidiaries under any Environmental Laws in which a governmental entity is also a party, other than such proceedings regarding which it is reasonably believed no monetary sanctions of \$100,000 or more will be imposed, (y) the Company and the Company's subsidiaries are not aware of any issues regarding compliance with Environmental Laws, or liabilities or other obligations under Environmental Laws or concerning hazardous or toxic substances or wastes, pollutants or contaminants, that would have a Material Adverse Effect, and (z) none of the Company or the Company's subsidiaries anticipates material capital expenditures relating to any Environmental Laws.

(cc) *Compliance With ERISA*. (i) Each employee benefit plan, within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for which the Company or any member of its "Controlled Group" (defined as any organization which is a member of a controlled group of corporations within the meaning of Section 414 of the Internal Revenue Code of 1986, as amended (the "Code")) would have any liability (each, a "Plan") has been maintained in compliance in all material respects with its terms and the requirements of any applicable statutes, orders, rules and regulations, including but not limited to ERISA and the Code; (ii) no prohibited transaction, within the meaning of Section 406 of ERISA or Section 4975 of the Code, has occurred with respect to any Plan excluding transactions effected pursuant to a statutory or administrative exemption; (iii) for each Plan that is subject to the funding rules of Section 412 of the Code or Section 302 of ERISA, no "accumulated funding deficiency" as defined in Section 412 of the Code, the assets of each such Plan is not less than the present value of the assets of each such Plan is not less than the present value of all benefits accrued under such Plan (determined based on those assumptions used to fund such Plan); (v) no "reportable event" (within the meaning of Section 4043(c) of ERISA) has occurred or is reasonably expected to octor; (within the meaning of Section 4043(c) of ERISA) has occurred or is reasonably expected to incur, any liability under Title IV of ERISA (other than contributions to the Plan or the Pension Benefit Guaranty Corporation (the "PBGC"), in the ordinary course and without default) in respect of a Plan (including a "multiemployer plan", within the meaning of Section 4001(a)(3) of ERISA).

(dd) Disclosure Controls. The Company and the Company's subsidiaries, on a consolidated basis, maintain an effective system of "disclosure controls and procedures" (as defined in Rule 13a-15(e) of the Exchange Act) that is designed to ensure that information required to be disclosed by the Company in reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the Commission's rules and forms, including controls and procedures designed to ensure that such information is accumulated and communicated to the Company's management as appropriate to allow timely decisions regarding required disclosure. The Company and the Company's subsidiaries, on a consolidated basis, have carried out evaluations of the effectiveness of their disclosure controls and procedures as required by Rule 13a-15 of the Exchange Act.

(ee) Accounting Controls. The Company and the Company's subsidiaries maintain systems of "internal control over financial reporting" (as defined in Rule 13a-15(f) of the Exchange Act) that comply with the requirements of the Exchange Act and have been designed by, or under the supervision of, their respective principal executive and principal financial officers, or persons performing similar functions, 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. The Company and the Company's subsidiaries maintain internal accounting controls sufficient to provide reasonable assurance that (i) transactions are executed in accordance with management's general or specific authorizations; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain asset accountability; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. Except as disclosed in each of the Time of Sale Information and the Offering Memorandum, there are no material weaknesses or significant deficiencies in the Company's internal controls.

(ff) *Insurance*. The Company and the Company's subsidiaries have insurance in amounts and against such losses and risks as such party believes to be customary for companies engaged in similar business in similar industries and markets; and neither the Company nor any of the Company's subsidiaries has (i) received written notice from any insurer or agent of such insurer that capital improvements or other expenditures are required or necessary to be made in order to continue such insurance or (ii) any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be reasonably necessary to continue its business as described in each of the Time of Sale Information and the Offering Memorandum and at a cost that could not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(gg) *No Unlawful Payments.* None of the Acquisition Sub, the Company or any of the Company's subsidiaries nor, to the best knowledge of the Acquisition Sub, the Company and each of the Guarantors, any director, officer, agent, employee or other person associated with or acting on behalf of the Acquisition Sub, the Company or any of the Company's subsidiaries has (i) used any corporate funds for any unlawful contribution, gift, entertainment or other unlawful expense relating to political activity; (ii) made any direct or indirect unlawful payment to any foreign or domestic government official or employee from corporate funds; (iii) violated or is in violation of any provision of the Foreign Corrupt Practices Act of 1977; or (iv) made any bribe, rebate, payoff, influence payment, kickback or other unlawful payment.

(hh) Compliance with Money Laundering Laws. The operations of the Company and the Company's subsidiaries are and have been conducted at all times in compliance with applicable financial recordkeeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, the money laundering statutes of all jurisdictions, the rules and regulations thereunder and any related or similar rules, regulations or guidelines, issued, administered or enforced by any governmental agency (collectively, the "Money Laundering Laws") and no action, suit or proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company or any of the Company's subsidiaries with respect to the Money Laundering Laws is pending or, to the best knowledge of the Company and the Guarantors, threatened.

(ii) Solvency. On and immediately after the Closing Date, the Company (on a consolidated basis after giving effect to the issuance of the Securities and the other Transactions as described in each of the Time of Sale Information and the Offering Memorandum) will be Solvent. As used in this paragraph, the term "Solvent" means, with respect to a particular date, that on such date (i) the present fair market value (or present fair saleable value) of the assets of the Company is not less than the total amount required to pay the liabilities of the Company on its total existing debts and liabilities (including contingent liabilities) as they become absolute and matured; (ii) the Company is able to realize upon its assets and pay its debts and other liabilities, contingent obligations and commitments as they mature and become due in the normal course of business; (iii) assuming consummation of the issuance of the Securities as contemplated by this Agreement, the Time of Sale Information and the Offering Memorandum, the Company is not incurring debts or liabilities beyond its ability to pay as such debts and liabilities mature; (iv) the Company is not engaged in any business or transaction, and does not propose to engage in any business or transaction, for which its property would constitute unreasonably small capital after giving due consideration to the prevailing practice in the industry in which the Company is engaged; and (v) the Company is not a defendant in any civil action that would result in a judgment that the Company is or would become unable to satisfy.

(jj) No Restrictions on Subsidiaries. No subsidiary of the Company is currently prohibited, directly or indirectly, under any agreement or other instrument to which it is a party or is subject, from paying any dividends to the Company, from making any other distribution on such subsidiary's capital stock, from repaying to the Company any loans or advances to such subsidiary from the Company or from transferring any of such subsidiary's properties or assets to the Company or any other subsidiary of the Company.

(kk) *No Broker's Fees.* None of the Acquisition Sub, the Company or any of the Company's subsidiaries is a party to any contract, agreement or understanding with any person (other than this Agreement) that would give rise to a valid claim against any of them or the Initial Purchaser for a brokerage commission, finder's fee or like payment in connection with the offering and sale of the Securities.

(ll) *Rule 144A Eligibility*. On the Closing Date, the Securities will not be of the same class as securities listed on a national securities exchange registered under Section 6 of the Exchange Act or quoted in an automated inter-dealer quotation system; and each of the Time of Sale Information and the Offering Memorandum, as of its respective date, contains or will contain all the information that, if requested by a prospective purchaser of the Securities, would be required to be provided to such prospective purchaser pursuant to Rule 144A(d)(4) under the Securities Act.

(mm) *No Integration*. None of the Acquisition Sub, the Company or any of its affiliates (as defined in Rule 501(b) of Regulation D) has, directly or through any agent, sold, offered for sale, solicited offers to buy or otherwise negotiated in respect of, any security (as defined in the Securities Act), that is or will be integrated with the sale of the Securities in a manner that would require registration of the Securities under the Securities Act.

(nn) *No General Solicitation or Directed Selling Efforts.* None of the Acquisition Sub, the Company or any of their respective affiliates (as defined in Rule 501(b) of Regulation D) or any other person acting on its or their behalf (other than the Initial Purchasers, as to which no representation or warranty is made) has (i) solicited offers for, or offered or sold, the Securities by means of any form of general solicitation or general advertising within the meaning of Rule 502(c) of Regulation D or in any manner involving a public offering within the meaning of Section 4(2) of the Securities Act or (ii) with respect to those Securities offered or sold in reliance upon Regulation S under the Securities Act ("Regulation S"), engaged in any directed selling efforts within the meaning of Regulation S, and all such persons have complied with the offering restrictions requirement of Regulation S.

(oo) Securities Law Exemptions. Assuming the accuracy of the representations and warranties of the Initial Purchasers contained herein and their compliance with their agreements set forth herein, and the compliance by the holders of the Securities with the offering and transfer restrictions set forth in the Offering Memorandum, it is not necessary, in connection with the issuance and sale of the Securities to the Initial Purchasers and the offer, resale and delivery of the Securities by the Initial Purchasers in the manner contemplated by this Agreement, the Time of Sale Information and the Offering Memorandum, to register the Securities under the Securities Act or, until such time as the Exchange Securities are issued pursuant to an effective registration statement, to qualify the Indenture under the Trust Indenture Act of 1939, as amended ("the Trust Indenture Act"), and the rules and regulations of the Commission applicable to an indenture that is qualified thereunder.

(pp) No Stabilization. None of the Acquisition Sub, the Company or any of the Guarantors has taken, directly or indirectly, any action designed to or that could reasonably be expected to cause or result in any stabilization or manipulation of the price of the Securities.

(qq) *Margin Rules*. Neither the issuance, sale and delivery of the Securities nor the application of the proceeds thereof by the Company as described in each of the Time of Sale Information and the Offering Memorandum will violate Regulation T, U or X of the Board of Governors of the Federal Reserve System or any other regulation of such Board of Governors.

(rr) Forward-Looking Statements. No forward-looking statement (within the meaning of Section 27A of the Securities Act and Section 21E of the Exchange Act) included in any of the Time of Sale Information or the Offering Memorandum has been made or reaffirmed without a reasonable basis or has been disclosed other than in good faith.

(ss) Statistical and Market Data. Nothing has come to the attention of the Company that has caused the Company to believe that the statistical and market-related data included in each of the Time of Sale Information and the Offering Memorandum is not based on or derived from sources that are reliable and accurate in all material respects.

(tt) Sarbanes-Oxley Act. To the Company's knowledge, there is and has been no failure on the part of the Company or any of the Company's directors or officers, in their capacities as such, to comply with any provision of the Sarbanes-Oxley Act of 2002 and the rules and regulations promulgated in connection therewith, including Section 402 related to loans and Sections 302 and 906 related to certifications.

4. Further Agreements of the Acquisition Sub, the Company and the Guarantors. The Acquisition Sub, the Company and each of the Guarantors jointly and severally covenant and agree with each Initial Purchaser that:

(a) *Delivery of Copies.* The Acquisition Sub and the Company, as applicable, will deliver, without charge, to the Initial Purchasers as many copies of the Preliminary Offering Memorandum, any other Time of Sale Information, any Issuer Written Communication and the Offering Memorandum (including all amendments and supplements thereto) as the Initial Purchasers may reasonably request.

(b) Offering Memorandum, Amendments or Supplements. Before finalizing the Offering Memorandum or making or distributing any amendment or supplement to any of the Time of Sale Information or the Offering Memorandum, the Acquisition Sub and the Company, as applicable, will furnish to the Initial Purchasers and counsel for the Initial Purchasers a copy of the proposed Offering Memorandum or such proposed amendment or supplement for review, and will not distribute any such proposed Offering Memorandum, amendment or supplement to which the Initial Purchasers reasonably object.

(c) Additional Written Communications. Before using, authorizing, approving or referring to any Issuer Written Communication, the Acquisition Sub, the Company, and the Guarantors, as applicable, will furnish to the Initial Purchasers and counsel for the Initial Purchasers a copy of such written communication for review and will not use, authorize, approve or refer to any such written communication to which the Initial Purchasers reasonably object.

(d) *Notice to the Initial Purchasers.* The Acquisition Sub and the Company, as applicable, will advise the Initial Purchasers promptly and confirm such advice in writing, (i) of the issuance by any governmental or regulatory authority of any order preventing or suspending the use of any of the Time of Sale Information, any Issuer Written Communication or the Offering Memorandum or the initiation or threatening of any proceeding for that purpose; (ii) of the occurrence of any event at any time prior to the completion of the initial offering of the Securities by the Initial Purchasers as notified by the Initial Purchasers to the Company as a result of which any of the Time of Sale Information, any Issuer Written Communication or the Offering Memorandum as then amended or supplemented would include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances existing when such Time of Sale Information, Issuer Written Communication or the Company of any notice with respect to any suspension of the qualification of the Securities for offer and sale in any jurisdiction or the initiation or the receipt by the Acquisition sub or the issuance of any proceeding for such purpose; and the Acquisition Sub and the Company will use their reasonable best efforts to prevent the issuance of any suspending the use of any of the Time of Sale Information, any Issuer Written Communication or the Offering Memorandum is delivered to a purchaser, not misleading; and (iii) of the receipt by the Acquisition or the initiation or threatening of any proceeding for such purpose; and the Acquisition Sub and the Company will use their reasonable best efforts to prevent the issuance of any such order preventing or suspending the use of any of the Time of Sale Information, any Issuer Written Communication or the Offering Memorandum or suspending any such qualification of the Securities and, if any such order is issued, will obtain as soon as possibl

(e) *Time of Sale Information*. If at any time prior to the Closing Date (i) any event shall occur or condition shall exist as a result of which any of the Time of Sale Information as then amended or supplemented would include any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading or (ii) it is necessary to amend or supplement any of the Time of Sale Information to comply with law, the Acquisition Sub and the Company will promptly notify the Initial Purchasers thereof and forthwith prepare and, subject to paragraph (b) above, furnish to the Initial Purchasers such amendments or supplements to any of the Time of Sale Information (or any document to be filed with the Commission) as may be necessary so that the statements in any of the Time of Sale Information as so amended or supplemented will not, in light of the circumstances under which they were made, be misleading or so that any of the Time of Sale Information will comply with law.

(f) Ongoing Compliance of the Offering Memorandum. If at any time prior to the completion of the initial offering of the Securities (i) any event shall occur or condition shall exist as a result of which the Offering Memorandum as then amended or supplemented would include any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances existing when the Offering Memorandum is delivered to a purchaser, not misleading or (ii) it is necessary to amend or supplement the Offering Memorandum to comply with law, the Acquisition Sub and the Company will promptly notify the Initial Purchasers thereof and forthwith prepare and, subject to paragraph (b) above, furnish to the Initial Purchasers such amendments or supplements to the Offering Memorandum (or any document to be filed with the Commission) as may be necessary so that the statements in the Offering Memorandum as so amended or supplemented will not, in the light of the circumstances existing when the Offering Memorandum is delivered to a purchaser, be misleading or so that the Offering Memorandum will comply with law.

(g) *Blue Sky Compliance*. Each of the Acquisition Sub and the Company will cooperate with the Initial Purchasers and counsel for the Initial Purchasers to qualify or register (or to obtain exemptions from qualifying or registering) the Securities for offer and sale under the securities laws or Blue Sky laws of such jurisdictions as the Initial Purchasers shall reasonably request and will continue such qualifications, registrations and exemptions in effect so long as required for the offering and resale of the Securities; <u>provided</u> that none of the Acquisition Sub, the Company or any of the Guarantors shall be required to (i) qualify as a foreign corporation or other entity or as a dealer in securities in any such jurisdiction where it would not otherwise be required to so qualify, (ii) file any general consent to service of process in any such jurisdiction or (iii) subject itself to taxation in any such jurisdiction if it is not otherwise so subject.

(h) *Clear Market.* During the period from the date hereof through and including the date that is 90 days after the date hereof, the Acquisition Sub, the Company and each of the Guarantors will not, without the prior written consent of the Initial Purchasers, offer, sell, contract to sell or otherwise dispose of any debt securities issued or guaranteed by the Acquisition Sub, the Company or any of the Guarantors and having a tenor of more than one year.

(i) Use of Proceeds. The Company will apply the net proceeds from the sale of the Securities as described in each of the Time of Sale Information and the Offering Memorandum under the heading "Use of proceeds."

(j) Supplying Information. While the Securities remain outstanding and are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act, the Acquisition Sub, the Company and each of the Guarantors will, during any period in which the Acquisition Sub or the Company is not subject to and in compliance with Section 13 or 15(d) of the Exchange Act, furnish to holders of the Securities and prospective purchasers of the Securities designated by such holders, upon the request of such holders or such prospective purchasers, the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act.

(k) DTC. The Acquisition Sub and the Company will assist the Initial Purchasers in arranging for the Securities to be eligible for clearance and settlement through The Depository Trust Company ("DTC").

(1) No Resales by the Acquisition Sub and the Company. The Acquisition Sub and the Company will not, and will not permit any of their respective affiliates (as defined in Rule 144 under the Securities Act) to, resell any of the Securities that have been reacquired by any of them, except for Securities purchased by the Acquisition Sub or the Company or any of their respective affiliates and resold in a transaction registered under the Securities Act.

(m) *No Integration*. None of the Acquisition Sub, the Company or any of their respective affiliates (as defined in Rule 501(b) of Regulation D) will, directly or through any agent, sell, offer for sale, solicit offers to buy or otherwise negotiate in respect of, any security (as defined in the Securities Act), that is or will be integrated with the sale of the Securities in a manner that would require registration of the Securities under the Securities Act.

(n) *No General Solicitation or Directed Selling Efforts.* None of the Acquisition Sub, the Company or any of the Company's affiliates (as defined in Rule 144 under the Securities Act) or any other person acting on its or their behalf (other than the Initial Purchasers, as to which no covenant is given) will (i) solicit offers for, or offer or sell, the Securities by means of any form of general solicitation or general advertising within the meaning of Rule 502(c) of Regulation D or in any manner involving a public offering within the meaning of Section 4(2) of the Securities Act or (ii) engage in any directed selling efforts within the meaning of Regulation S, and all such persons will comply with the offering restrictions requirement of Regulation S.

(o) *No Stabilization*. None of the Acquisition Sub, the Company or any of the Guarantors will take, directly or indirectly, any action designed to or that could reasonably be expected to cause or result in any stabilization or manipulation of the price of the Securities.

5. Certain Agreements of the Initial Purchasers. Each Initial Purchaser hereby represents and agrees that it has not and will not use, authorize use of, refer to, or participate in the planning for use of, any written communication that constitutes an offer to sell or the solicitation of an offer to buy the Securities other than (i) the Preliminary Offering Memorandum and the Offering Memorandum (ii) a written communication that contains no "issuer information" (as defined in Rule 433(h)(2) under the Securities Act) that was not included in the Preliminary Offering Memorandum or the Offering Memorandum, (iii) any written communication listed on Annex A or prepared pursuant to Section 4(c) above including any electronic road show, (iv) any written communication prepared by such Initial Purchaser and approved by the Company in advance in writing or (v) any written communication relating to or that contains the terms of the Securities and/or other information that was included in the Preliminary Offering Memorandum or the Offering Memorandum.

6. <u>Conditions of Initial Purchasers' Obligations</u>. The obligation of each Initial Purchaser to purchase and pay for the Securities on the Closing Date as provided herein is subject to the performance by the Acquisition Sub, the Company and each of the Guarantors of their respective covenants and other obligations hereunder and to the following additional conditions:

(a) *Documentation*. On the Closing Date, (i) the Company shall have entered into the Senior Credit Facility Documentation on substantially the terms described in each of the Time of Sale Information and the Offering Memorandum and otherwise in form and substance reasonably satisfactory to the Initial Purchasers, all conditions precedent to borrowings thereunder shall be satisfied or waived (with any such waiver reasonably satisfactory to the Initial Purchasers), no default shall exist thereunder and the Initial Purchasers shall have received conformed counterparts thereof and all other documents and agreements entered into and received thereunder in connection with the closing of the Senior Credit Facility.

(b) *Transactions*. On or prior to the Closing Date, each of the Transactions shall have been consummated in a manner consistent in all material respects with the description thereof in each of the Time of Sale Information and the Offering Memorandum (including, without limitation, the consummation of the Merger) (without giving effect to any waivers of material terms or conditions to which the Initial Purchaser has reasonably withheld its consent).

(c) *Representations and Warranties.* The representations and warranties of the Acquisition Sub, the Company and the Guarantors contained herein shall be true and correct on the date hereof and on and as of the Closing Date; and the statements of the Acquisition Sub, the Company, the Guarantors and their respective officers made in any certificates delivered pursuant to this Agreement shall be true and correct on and as of the Closing Date.

(d) *No Downgrade*. For the period from and after the Time of Sale and prior to the Closing Date, (i) no downgrading shall have occurred in the rating accorded the Securities or any other debt securities or preferred stock issued or guaranteed by the Acquisition Sub, the Company or any of the Company's subsidiaries by any "nationally recognized statistical rating organization", as such term is defined by the Commission for purposes of Rule 436(g)(2) under the Securities Act; and (ii) no such organization shall have publicly announced that it has under surveillance or review, or has changed its outlook with respect to, its rating of the Securities or of any other debt securities or preferred stock issued or guaranteed by the Acquisition Sub, the Company or any of the Company's subsidiaries (other than an announcement with positive implications of a possible upgrading).

(e) *No Material Adverse Change*. For the period from and after the Time of Sale and prior to the Closing Date, no event or condition of a type described in Section 3(d) hereof shall have occurred or shall exist, which event or condition is not described in each of the Time of Sale Information (excluding any amendment or supplement thereto) and the Offering Memorandum (excluding any amendment or supplement thereto) the effect of which in the judgment of the Initial Purchasers, makes it impracticable or inadvisable to proceed with the offering, sale or delivery of the Securities on the terms and in the manner contemplated by this Agreement, the Time of Sale Information and the Offering Memorandum.

(f) Officer's Certificates. The Initial Purchasers shall have received on and as of the Closing Date a certificate of an executive officer of each of the Acquisition Sub, the Company and of each Guarantor who has specific knowledge of the Acquisition Sub's, the Company's or such Guarantor's financial matters and is satisfactory to the Initial Purchasers (i) confirming that such officer has carefully reviewed the Time of Sale Information and the Offering Memorandum and, to the best knowledge of such officer, the representations set forth in Sections 3(a) and 3(b) hereof are true and correct, (ii) confirming that the other representations and warranties of the Acquisition Sub, the Company and the Guarantors in this Agreement are true and correct and that the Acquisition Sub, the Company and the Guarantors have complied with all agreements and satisfied all conditions on their part to be performed or satisfied hereunder at or prior to the Closing Date and (iii) to the effect set forth in paragraphs (d) and (e) above. The Initial Purchasers shall have also received on and as of the Closing Date a certificate of the secretary or assistant secretary of each of the Acquisition Sub, the Company and each of the Guarantors, such certificate in form and substance reasonably satisfactory to the Initial Purchasers.

(g) Comfort Letters. On the date of this Agreement and on the Closing Date, Ernst & Young LLP shall have furnished to the Initial Purchasers, at the request of the Company, letters, dated the respective dates of delivery thereof and addressed to the Initial Purchasers, in form and substance reasonably satisfactory to the Initial Purchasers, containing statements and information of the type customarily included in accountants' "comfort letters" to underwriters with respect to the financial statements and certain financial information contained in each of the Time of Sale Information and the Offering Memorandum; provided that the letter delivered on the Closing Date shall use a "cut-off" date no more than three business days prior to the Closing Date.

(h) Opinion of Counsel for the Company and the Guarantors. Weil, Gotshal & Manges LLP, counsel for the Company and certain of the Guarantors, shall have furnished to the Initial Purchasers, at the request of the Company and such Guarantors, their written opinion, dated the Closing Date and addressed to the Initial Purchasers, in form and substance reasonably satisfactory to the Initial Purchasers, to the effect set forth in Annex D hereto.

(i) *Opinion of Local Counsel for the Acquisition Sub, the Company and the Guarantors.* Each of (i) Lewis, Rice & Fingersh, L.C., Missouri counsel for the Acquisition Sub, the Company and certain of the Guarantors and (ii) Hallett and Perrin, P.C., Texas counsel for certain of the Guarantors, shall have furnished to the Initial Purchasers, at the request of the Acquisition Sub, the Company and such Guarantors, their respective written opinions dated the Closing Date and addressed to the Initial Purchasers, in form and substance reasonably satisfactory to the Initial Purchasers, to the effect set forth in Annex E and Annex F hereto, respectively.

(j) Opinion and 10b-5 Statement of Counsel for the Initial Purchasers. The Initial Purchasers shall have received on and as of the Closing Date an opinion and 10b-5 statement of Simpson Thacher & Bartlett LLP, counsel for the Initial Purchasers, with respect to such matters as the Initial Purchasers may reasonably request, and such counsel shall have received such documents and information as they may reasonably request to enable them to pass upon such matters.

(k) No Legal Impediment to Issuance. No action shall have been taken and no statute, rule, regulation or order shall have been enacted, adopted or issued by any federal, state or foreign governmental or regulatory authority that would, as of the Closing Date, prevent the issuance or sale of the Securities or the issuance of the Guarantees; and no injunction or order of any federal, state or foreign court shall have been issued that would, as of the Closing Date, prevent the issuance or sale of the Securities or the issuance or sale of the Securities or the issuance of the Guarantees.

(1) Good Standing. The Initial Purchasers shall have received on and as of the Closing Date satisfactory evidence of the good standing of the Acquisition Sub, the Company and the Guarantors in their respective jurisdictions of organization and their good standing in such other jurisdictions as the Initial Purchasers may reasonably request, in each case in writing or any standard form of telecommunication, from the appropriate governmental authorities of such jurisdictions.

(m) Registration Rights Agreement. The Initial Purchasers shall have received a counterpart of the Registration Rights Agreement that shall have been executed and delivered by a duly authorized officer of the Company and each of the Guarantors.

(n) Joinder Agreement. The Initial Purchasers shall have received a counterpart of the Joinder Agreement that shall have been executed and delivered by a duly authorized officer of each of the Company and the Guarantors.

(o) *Indenture*. The Indenture shall have been duly executed and delivered by a duly authorized officer of each of the Acquisition Sub and the Trustee, and the certificates for the Securities shall have been duly executed and delivered by a duly authorized officer of the Acquisition Sub and duly authenticated by the Trustee.

(p) Supplemental Indentures. The Supplemental Indentures shall have been duly executed and delivered by a duly authorized officer of each of the Company and the Guarantors, as applicable.

(q) DTC. The Securities shall be eligible for clearance and settlement through DTC.

(r) Additional Documents. On or prior to the Closing Date, the Acquisition Sub, the Company and the Guarantors shall have furnished to the Initial Purchasers such further certificates and documents as the Initial Purchasers may reasonably request.

All opinions, letters, certificates and evidence mentioned above or elsewhere in this Agreement shall be deemed to be in compliance with the provisions hereof only if they are in form and substance reasonably satisfactory to counsel for the Initial Purchasers.

## 7. Indemnification and Contribution.

(a) *Indemnification of the Initial Purchasers*. The Acquisition Sub agrees, and upon and from the execution and delivery of the Joinder Agreement, the Company and each of the Guarantors jointly and severally agree, to indemnify and hold harmless each Initial Purchaser, its affiliates, directors and officers and each person, if any, who controls such Initial Purchaser within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, from and against any and all losses, claims, damages and liabilities (including, without limitation, reasonable and documented legal fees and other expenses incurred in connection with any suit, action or proceeding or any claim asserted, as such fees and expenses are incurred), joint or several, that arise out of, or are based upon, any untrue statement or alleged untrue statement of a material fact contained in the Preliminary Offering Memorandum, any of the other Time of Sale Information, any Issuer Written Communication or the Offering Memorandum (or any amendment or supplement thereto) or any omission or alleged omission to state therein a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, in each case except insofar as such losses, claims, damages or liabilities arise out of, or are based upon, any untrue statement or omission made in reliance upon and in conformity with any information relating to any Initial Purchaser furnished to the Acquisition Sub or the Company in writing by such Initial Purchaser expressly for use therein.

(b) Indemnification of the Acquisition Sub, the Company and the Guarantors. Each Initial Purchaser agrees, severally and not jointly, to indemnify and hold harmless (i) as of and from the date hereof, the Acquisition Sub; (ii) upon and from the execution and delivery of the Joinder Agreement, the Company and each of the Guarantors; and (iii) each of the respective directors and officers and each person, if any, who controls the Acquisition Sub within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, and upon the execution and delivery of the Joinder Agreement, each of the respective directors and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company and the Guarantors within the meaning of Section 15 of the Securities and each person, if any, who controls the Company in true statement or omission or alleged un

(c) Notice and Procedures. If any suit, action, proceeding (including any governmental or regulatory investigation), claim or demand shall be brought or asserted against any person in respect of which indemnification may be sought pursuant to either paragraph (a) or (b) above, such person (the "Indemnified Person") shall promptly notify the person against whom such indemnification may be sought (the "Indemnifying Person") in writing; provided that the failure to notify the Indemnifying Person shall not relieve it from any liability that it may have under paragraph (a) or (b) above except to the extent that it has been materially prejudiced (through the forfeiture of substantive rights or defenses) by such failure: and provided, further, that the failure to notify the Indemnifying Person shall not relieve it from any liability that it may have to an Indemnified Person otherwise than under this paragraph (a) or (b) above. If any such proceeding shall be brought or asserted against an Indemnified Person and it shall have notified the Indemnifying Person thereof, the Indemnifying Person shall retain counsel reasonably satisfactory to the Indemnified Person (who shall not, without the consent of the Indemnified Person, be counsel to the Indemnifying Person) to represent the Indemnified Person and any others entitled to indemnification pursuant to this Section 7 that the Indemnifying Person may designate in such proceeding and shall pay the fees and expenses of such proceeding and shall pay the fees and expenses of such counsel related to such proceeding, as incurred. In any such proceeding, any Indemnified Person shall have the right to retain its own counsel, but the fees and expenses of such counsel shall be at the expense of such Indemnified Person unless (i) the Indemnifying Person and the Indemnified Person shall have mutually agreed to the contrary; (ii) the Indemnifying Person has failed within a reasonable time to retain counsel reasonably satisfactory to the Indemnified Person; (iii) the Indemnified Person shall have reasonably concluded that there may be legal defenses available to it that are different from or in addition to those available to the Indemnifying Person; or (iv) the named parties in any such proceeding (including any impleaded parties) include both the Indemnifying Person and the Indemnified Person and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them. It is understood and agreed that the Indemnifying Person shall not, in connection with any proceeding or related proceeding in the same jurisdiction, be liable for the fees and expenses of more than one separate firm (in addition to any local counsel) for all Indemnified Persons, and that all such fees and expenses shall be reimbursed as they are incurred. Any such separate firm for any Initial Purchaser, its affiliates, directors and officers and any control persons of such Initial Purchaser shall be designated in writing by the Initial Purchasers and any such separate firm for the Acquisition Sub, the Company, the Guarantors, their respective directors and officers and any control persons of the Acquisition Sub, the Company and the Guarantors shall be designated in writing by the Company. The Indemnifying Person shall not be liable for any settlement of any proceeding effected without its written consent, but if settled with such consent or if there be a final judgment for the plaintiff, the Indemnifying Person agrees to indemnify each Indemnified Person from and against any loss or liability by reason of such settlement or judgment. No Indemnifying Person shall, without the written consent of the Indemnified Person, effect any settlement of any pending or threatened proceeding in respect of which any Indemnified Person is or could have been a party and indemnification is or could have been sought hereunder by such Indemnified Person, unless such settlement (x) includes an unconditional release of such Indemnified Person, in form and substance reasonably satisfactory to such Indemnified Person, from all liability on claims that are the subject matter of such proceeding and (y) does not include any statement as to or any admission of fault, culpability or a failure to act by or on behalf of any Indemnified Person.

(d) Contribution. If the indemnification provided for in paragraphs (a) and (b) above is unavailable to an Indemnified Person or insufficient in respect of any losses, claims, damages or liabilities referred to therein, then each Indemnifying Person under such paragraph, in lieu of indemnifying such Indemnified Person thereunder, shall contribute to the amount paid or payable by such Indemnified Person, as incurred as a result of such losses, claims, damages or liabilities (i) in such proportion as is appropriate to reflect the relative benefits received by the Acquisition Sub, the Company and the Guarantors on the one hand and the Initial Purchasers on the other from the offering of the Securities or (ii) if the allocation provided by clause (i) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of the Acquisition Sub, the Company and the Guarantors on the one hand and the Initial Purchasers on the other in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations. The relative benefits received by the Acquisition Sub, the Company and the Guarantors on the one hand and the Initial Purchasers on the other shall be deemed to be in the same respective proportions as the net proceeds (before deducting expenses) received by the Company from the sale of the Securities and the total discounts and commissions received by the Initial Purchasers in connection therewith, as provided in this Agreement, bear to the aggregate initial offering price of the Securities. The relative fault of the Acquisition Sub, the Company and the Guarantors on the one hand and the Initial Purchasers on the other shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by the Acquisition Sub, the Company or any Guarantor or by the Initial Purchasers and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

(e) *Limitation on Liability.* The Acquisition Sub, the Company, the Guarantors and the Initial Purchasers agree that it would not be just and equitable if contribution pursuant to this Section 7 were determined by <u>pro rata</u> allocation (even if the Initial Purchasers were treated as one entity for such purpose) or by any other method of allocation that does not take account of the equitable considerations referred to in paragraph (d) above. The amount paid or payable by an Indemnified Person as a result of the losses, claims, damages and liabilities referred to in paragraph (d) above shall be deemed to include, subject to the limitations set forth above, any legal or other expenses reasonably incurred by such Indemnified Person in connection with any such action or claim. Notwithstanding the provisions of this Section 7, in no event shall an Initial Purchaser be required to offering of the Securities exceeds the amount by which the total discounts and commissions received by such Initial Purchaser with respect to the offering of the Securities exceeds the amount of any damages that such Initial Purchaser has otherwise been required to pay by reson of such untrue or alleged untrue statement or omission or alleged omission. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The Initial Purchasers' obligations to contribute pursuant to this Section 7 are several in proportion to their respective obligations hereunder and not joint.

(f) Non-Exclusive Remedies. The remedies provided for in this Section 7 are not exclusive and shall not limit any rights or remedies that may otherwise be available to any Indemnified Person at law or in equity.

8. Termination. This Agreement may be terminated in the absolute discretion of the Initial Purchasers, by written notice to the Acquisition Sub, if after the execution and delivery of this Agreement and on or prior to the Closing Date (i) trading generally shall have been suspended or materially limited on the New York Stock Exchange or the over-the-counter market; (ii) trading of any securities issued or guaranteed by the Acquisition Sub, the Company or any of the Guarantors shall have been suspended on any exchange or in any over-the-counter market as applicable; (iii) a general moratorium on commercial banking activities shall have been declared by federal or New York State authorities; or (iv) there shall have occurred any outbreak or escalation of hostilities or any change in financial markets or any calamity or crisis, either within or outside the United States, that, in the judgment of the Initial Purchasers is material and adverse and makes it impracticable or inadvisable to proceed with the offering, sale or delivery, of the Securities on the terms and in the manner contemplated by this Agreement, the Time of Sale Information and the Offering Memorandum or (v) the representation in Section 3(a) is incorrect in any respect.

9. Defaulting Initial Purchaser. (a) If, on the Closing Date, any Initial Purchaser defaults on its obligation to purchase the Securities that it has agreed to purchase hereunder, the non-defaulting Initial Purchasers may in their discretion arrange for the purchase of such Securities by other persons satisfactory to the Acquisition Sub and the Company on the terms contained in this Agreement. If, within 36 hours after any such default by any Initial Purchaser, the non-defaulting Initial Purchasers do not arrange for the purchase of such Securities, then the Acquisition Sub and the Company shall be entitled to a further period of 36 hours within which to procure other persons satisfactory to the non-defaulting Initial Purchasers to purchase such Securities on such terms. If other persons become obligated or agree to purchase the Securities of a defaulting Initial Purchaser, any of the non defaulting Initial Purchasers, the Acquisition Sub or the Company may postpone the Closing Date for up to five full business days in order to effect any changes that in the opinion of counsel for the Initial Purchasers may be necessary in the Time of Sale Information, the Offering Memorandum or in any other document or arrangement, and the Acquisition Sub and the Company agrees to promptly prepare any amendment or supplement to the Time of Sale Information or the Offering Memorandum that effects any such changes. As used in this Agreement, the term "Initial Purchaser" includes, for all purposes of this Agreement unless the context otherwise requires, any person not listed in Schedule 3 hereto that, pursuant to this Section 9, purchases Securities that a defaulting Initial Purchaser agreed but failed to purchase.

(b) If, after giving effect to any arrangements for the purchase of the Securities of a defaulting Initial Purchaser or Initial Purchasers by the nondefaulting Initial Purchasers and the Acquisition Sub or the Company as provided in paragraph (a) above, the aggregate principal amount of such Securities that remains unpurchased does not exceed one-eleventh of the aggregate principal amount of all the Securities, then the Acquisition Sub and the Company shall have the right to require each non-defaulting Initial Purchaser to purchase the principal amount of Securities that such Initial Purchaser agreed to purchase hereunder plus such Initial Purchaser's pro rata share (based on the principal amount of Securities that such Initial Purchaser agreed to purchase hereunder) of the Securities of such defaulting Initial Purchaser or Initial Purchasers for which such arrangements have not been made.

(c) If, after giving effect to any arrangements for the purchase of the Securities of a defaulting Initial Purchaser or Initial Purchasers by the nondefaulting Initial Purchasers and the Acquisition Sub or the Company as provided in paragraph (a) above, the aggregate principal amount of such Securities that remains unpurchased exceeds one-eleventh of the aggregate principal amount of all the Securities, or if the Acquisition Sub or the Company shall not exercise the right described in paragraph (b) above, then this Agreement shall terminate without liability on the part of the nondefaulting Initial Purchasers. Any termination of this Agreement pursuant to this Section 9 shall be without liability on the part of the Acquisition Sub, the Company or the Guarantors, except that the Acquisition Sub, the Company and each of the Guarantors will continue to be liable for the payment of expenses as set forth in Section 10 hereof and except that the provisions of Section 7 hereof shall not terminate and shall remain in effect.

(d) Nothing contained herein shall relieve a defaulting Initial Purchaser of any liability it may have to the Acquisition Sub or the Company, the Guarantors or any non-defaulting Initial Purchaser for damages caused by its default.

10. Payment of Expenses. (a) Whether or not the transactions contemplated by this Agreement are consummated or this Agreement is terminated, the Acquisition Sub, the Company and each of the Guarantors jointly and severally agree to pay or cause to be paid all costs and expenses incident to the performance of their respective obligations hereunder, including without limitation, (i) the costs incident to the authorization, issuance, sale, preparation and delivery of the Securities and any taxes payable in that connection; (ii) the costs incident to the preparation and printing of the Preliminary Offering Memorandum, any other Time of Sale Information, any Issuer Written Communication and the Offering Memorandum (including any amendment or supplement thereto) and the distribution thereof; (iii) the costs of reproducing and distributing each of the Transaction Documents; (iv) the fees and expenses of the Acquisition Sub's, the Company's and the Guarantors' counsel and independent accountants; (v) the fees and expenses incurred in connection with the registration or qualification and determination of eligibility for investment of the Securities under the laws of such jurisdictions as the Initial Purchasers may designate and the preparation, printing and distribution of a Blue Sky Memorandum (including the related fees and expenses of counsel for the Initial Purchasers); (vi) any fees charged by rating agencies for rating the Securities; (vii) the fees and expenses of the Trustee and any paying agent (including related fees and expenses of any counsel to such parties); (viii) all expenses and application fees incurred in connection with the approval of the Securities for book-entry transfer by DTC; and (ix) all expenses incurred by the Acquisition Sub and the Company in connection with any "road show" presentation to potential investors; *provided* that the Initial Purchaser will pay 50% of the cost of any chartered aircraft jointly used in connection with such "road show" presentation.

(b) If (i) this Agreement is terminated pursuant to Section 8 (other than pursuant to clause (v) of Section 8 if the Acquisition Sub and the Initial Purchasers subsequently enter into another agreement for the Initial Purchasers to purchase the same or substantially similar securities of the Company), (ii) the Company for any reason fails to tender the Securities for delivery to the Initial Purchasers or (iii) the Initial Purchasers decline to purchase the Securities for any reason permitted under this Agreement, the Acquisition Sub, the Company and each of the Guarantors jointly and severally agree to reimburse the Initial Purchasers for all out-of-pocket costs and expenses (including the fees and expenses of their counsel) reasonably incurred by the Initial Purchasers in connection with this Agreement and the offering contemplated hereby.

11. <u>Persons Entitled to Benefit of Agreement</u>. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and any controlling persons referred to herein, and the affiliates, officers and directors of each Initial Purchaser referred to in Section 7 hereof. Nothing in this Agreement is intended or shall be construed to give any other person any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision contained herein. No purchaser of Securities from the Initial Purchaser shall be deemed to be a successor merely by reason of such purchase.

12. <u>Survival</u>. The respective indemnities, rights of contribution, representations, warranties and agreements of the Acquisition Sub, the Company, the Guarantors and the Initial Purchasers contained in this Agreement or made by or on behalf of the Acquisition Sub, the Company, the Guarantors or the Initial Purchasers pursuant to this Agreement or any certificate delivered pursuant hereto shall survive the delivery of and payment for the Securities and shall remain in full force and effect, regardless of any termination of this Agreement or any investigation made by or on behalf of the Acquisition Sub, the Company, the Guarantors or the Initial Purchasers.

13. <u>Certain Defined Terms</u>. For purposes of this Agreement, (a) except where otherwise expressly provided, the term "affiliate" has the meaning set forth in Rule 405 under the Securities Act; (b) the term "business day" means any day other than a day on which banks are permitted or required to be closed in New York City; (c) the term "Exchange Act" means the Securities Exchange Act of 1934, as amended; (d) the term "subsidiary" has the meaning set forth in Rule 405 under the Securities Act; and (e) the term "written communication" has the meaning set forth in Rule 405 under the Securities Act.

14. <u>Miscellaneous</u>. (a) *Notices*. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if mailed or transmitted and confirmed by any standard form of telecommunication. Notices to the Initial Purchasers shall be given to the Initial Purchasers c/o J.P. Morgan Securities Inc., 383 Madison Avenue, New York, New York 10179 (fax: (212) 270-1063); Attention: Gerry Murray, and c/o Jefferies & Company, Inc., 520 Madison Avenue, New York, New York 10022 (fax: (646) 786-5061); Attention: General Counsel. Notices to the Acquisition Sub shall be given to them c/o Oak Hill Capital Partners III, L.P., 201 Main Street, Fort Worth, Texas 76102 (fax: (817) 339-7350); Attention: Corporate Counsel, with a copy to Oak Hill Capital Management, LLC, 65 East 55th Street, 32nd Floor, New York, New York 10022 (fax: (212) 527-8450); Attention: Tyler Wolfram and John R. Monsky, Esq., and a copy to Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (fax: (212) 310-8007); Attention: Corey Chivers, Esq. Notices to the Company or the Guarantors shall be given to them c/o Dave & Buster's, Inc., 2481 Mañana Drive, Dallas, Texas 75220 (fax: (214) 357-1536; Attention: Jay L. Tobin, and a copy to Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York, New York 10153 (fax: (212) 310-8007); Attention: Corey Chivers, Esq.

(b) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

(c) *Counterparts*. This Agreement may be signed in counterparts (which may include counterparts delivered by any standard form of telecommunication), each of which shall be an original and all of which together shall constitute one and the same instrument.

(d) Amendments or Waivers. No amendment or waiver of any provision of this Agreement, nor any consent or approval to any departure therefrom, shall in any event be effective unless the same shall be in writing and signed by the parties hereto.

(e) *Headings*. The headings herein are included for convenience of reference only and are not intended to be part of, or to affect the meaning or interpretation of, this Agreement.

(Signature page follows)

If the foregoing is in accordance with your understanding, please indicate your acceptance of this Agreement by signing in the space provided below.

Very truly yours,

# GAMES MERGER CORP.

Ву

Title:

Accepted: May 19, 2010

J.P. MORGAN SECURITIES INC.

By:

Authorized Signatory

JEFFERIES & COMPANY, INC.

By:

Authorized Signatory

[Purchase Agreement Signature Page]

# List of Guarantors

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Tango Acquisition, Inc. Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc. Tango License Corporation

# List of Subsidiaries

6131646 Canada Inc. D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Tango Acquisition, Inc. Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc. Tango License Corporation

# SCHEDULE 3

Initial Purchaser	Principal Amount
J.P. Morgan Securities Inc.	\$ 100,000,000
Jefferies & Company, Inc.	100,000,000
Total	\$ 200,000,000

# Additional Time of Sale Information

1. Term sheet containing the terms of the securities in the form of Annex B.

Annex A-1

## Games Merger Corp. (to be merged with and into Dave & Buster's, Inc.)

## **Pricing Term Sheet**

Issuer: Security description: Distribution: Size: Gross proceeds: Maturity: Coupon: Price: Yield to maturity: Spread to Benchmark Treasury: Benchmark Treasury: Interest Payment Dates: Clawback: Until: Optional redemption:

Make-whole: Change of control: Trade date: Settlement: CUSIP:

ISIN:

Denominations/Multiple: Ratings: Bookrunners: Games Merger Corp. (to be merged with and into Dave & Buster's, Inc.) Senior Notes 144A/RegS with registration rights \$200,000,000 \$200,000,000 June 1, 2018 11.000% 100.000% of face amount 11.000% +798bps UST 3.875% May 15, 2018 June 1 and December 1, commencing December 1, 2010 Up to 40% at 111.000% June 1, 2013

On or after:	Price:	
June 1, 2014	105.500%	
June 1, 2015	102.750%	
June 1, 2016 and thereafter	100.000%	

Make-whole call @ T+50 prior to June 1, 2014 Putable at 101% of principal plus accrued interest May 19, 2010 T+8; June 1, 2010 144A: 36467YAA3 Reg S: U36325AA3 144A: US36467YAA38 Reg S: USU36325AA37 2,000 x 1,000 B3/B-J.P. Morgan Jefferies & Company

Annex B-1

Other information presented in the Preliminary Offering Memorandum is deemed to have changed to the extent affected by the changes described herein.

This material is confidential and is for your information only and is not intended to be used by anyone other than you. This information does not purport to be a complete description of these securities or the offering. Please refer to the offering memorandum for a complete description.

This communication is being distributed in the United States solely to qualified institutional buyers, as defined in Rule 144A under the Securities Act of 1933, and outside the United States solely to non-U.S. persons as defined under Regulation S.

This communication does not constitute an offer to sell or the solicitation of an offer to buy any securities in any jurisdiction to any person to whom it is unlawful to make such offer or solicitation in such jurisdiction.

#### Restrictions on Offers and Sales Outside the United States

In connection with offers and sales of Securities outside the United States:

(a) Each Initial Purchaser acknowledges that the Securities have not been registered under the Securities Act and may not be offered or sold within the United States or to, or for the account or benefit of, U.S. persons except pursuant to an exemption from, or in transactions not subject to, the registration requirements of the Securities Act.

(b) Each Initial Purchaser, severally and not jointly, represents, warrants and agrees that:

(i) Such Initial Purchaser has offered and sold the Securities, and will offer and sell the Securities, (A) as part of their distribution at any time and (B) otherwise until 40 days after the later of the commencement of the offering of the Securities and the Closing Date, only in accordance with Regulation S under the Securities Act ("Regulation S") or Rule 144A or any other available exemption from registration under the Securities Act.

(ii) None of such Initial Purchaser or any of its affiliates or any other person acting on its or their behalf has engaged or will engage in any directed selling efforts with respect to the Securities, and all such persons have complied and will comply with the offering restrictions requirement of Regulation S.

(iii) At or prior to the confirmation of sale of any Securities sold in reliance on Regulation S, such Initial Purchaser will have sent to each distributor, dealer or other person receiving a selling concession, fee or other remuneration that purchases Securities from it during the distribution compliance period a confirmation or notice to substantially the following effect:

"The Securities covered hereby have not been registered under the U.S. Securities Act of 1933, as amended (the "Securities Act"), and may not be offered or sold within the United States or to, or for the account or benefit of, U.S. persons (i) as part of their distribution at any time or (ii) otherwise until 40 days after the later of the commencement of the offering of the Securities and the date of original issuance of the Securities, except in accordance with Regulation S or Rule 144A or any other available exemption from registration under the Securities Act. Terms used above have the meanings given to them by Regulation S."

(iv) Such Initial Purchaser has not and will not enter into any contractual arrangement with any distributor with respect to the distribution of the Securities, except with its affiliates or with the prior written consent of the Company.

Terms used in paragraph (a) and this paragraph (b) and not otherwise defined in this Agreement have the meanings given to them by Regulation S.

Annex C-1

(c) Each Initial Purchaser, severally and not jointly, represents, warrants and agrees that:

(i) it has only communicated or caused to be communicated and will only communicate or cause to be communicated any invitation or inducement to engage in investment activity (within the meaning of Section 21 of the United Kingdom Financial Services and Markets Act 2000 (the "FSMA")) received by it in connection with the issue or sale of any Securities in circumstances in which Section 21(1) of the FSMA does not apply to the Acquisition Sub, the Company or the Guarantors; and

(ii) it has complied and will comply with all applicable provisions of the FSMA with respect to anything done by it in relation to the Securities in, from or otherwise involving the United Kingdom.

(d) Each Initial Purchaser acknowledges that no action has been or will be taken by the Acquisition Sub or the Company that would permit a public offering of the Securities, or possession or distribution of any of the Time of Sale Information, the Offering Memorandum, any Issuer Written Communication or any other offering or publicity material relating to the Securities, in any country or jurisdiction where action for that purpose is required.

Annex C-2

#### June 1, 2010

J.P. Morgan Securities Inc. 383 Madison Avenue New York, New York 10179

Jefferies & Company, Inc. 520 Madison Avenue New York, New York 10022

## Ladies and Gentlemen:

We have acted as New York counsel to Games Merger Corp., a Missouri corporation (the "Acquisition Sub"), in connection with the issuance and sale by the Acquisition Sub of \$200.0 million aggregate principal amount of its 11% Senior Notes due 2018 (the "Notes"), pursuant to a Purchase Agreement, dated as of May 19, 2010 (the "Purchase Agreement"), between Acquisition Sub and the several Initial Purchasers (the "Initial Purchasers") listed in Schedule 3 to the Purchase Agreement. The Notes are to be issued pursuant to an indenture, dated as of the date hereof (the "Indenture"), between Acquisition Sub and Wells Fargo Bank, National Association, as trustee (the "Trustee"). Following the consummation of the merger (the "Merger") of Acquisition Sub with and into Dave & Buster's Inc., a Missouri corporation (the "Company"), pursuant to the Agreement and Plan of Merger (the "Merger Agreement"), dated as of the date hereof, between Acquisition Sub and the Company, (i) the Company will succeed to the obligations of Acquisition Sub under the Notes and the Indenture, subject to and in accordance with the terms and conditions of a supplemental indenture, to be dated as of the date hereof (the "Successor Supplemental Indenture"), among the Company and the Trustee, and (ii) the Company's obligations under the Notes and the Indenture will be unconditionally guaranteed (the "Guarantees") by the subsidiaries of the Company listed on Schedule I hereto (collectively, the "Guarantees"), subject to and in accordance with the terms and conditions of a supplemental indenture, to be dated as of the date hereof (the "Guarantor Supplemental Indenture"), among the Company, the Guarantors and the Trustee. In addition, following the consummation of the Merger, the Company and the Guarantors will succeed to the obligations of Acquisition Sub under the Purchase Agreement, subject to and in accordance with the terms and conditions of a Joinder Agreement, to be dated as of the date hereof (the "Joinder Agreement"), among the Company and the Guarantors. This opinion is being rendered to you pursuant to Section 6(h) of the Purchase Agreement. Capitalized terms defined in the Purchase Agreement and used (but not otherwise defined) herein are used herein as so defined.

The Notes may be exchanged for new notes (the "*Exchange Securities*") in accordance with the terms and conditions of the Registration Rights Agreement, dated as of June 1, 2010 (the "*Registration Rights Agreement*"), among the Company, the Guarantors and the Initial Purchasers.

In so acting, we have examined originals or copies (certified or otherwise identified to our satisfaction) of the Preliminary Offering Memorandum, dated May 13, 2010, relating to the offer and sale of the Notes (the "*Preliminary Offering Memorandum*"), the pricing term sheet, dated May 19, 2010, the Offering Memorandum, dated May 19, 2010 (the "*Offering Memorandum*"), the Purchase Agreement, the Indenture, the Successor Supplemental Indenture, the Guarantor Supplemental Indenture, the Notes, the Guarantees, the Joinder Agreement, the Registration Rights Agreement, and such corporate and limited partnership records, agreements, documents and other instruments, and such certificates or comparable documents of public officials and of officers and representatives of Acquisition Sub, the Company and the Guarantors, as the case may be, and have made such inquiries of such officers and representatives, as we have deemed relevant and necessary as a basis for the opinions hereinafter set forth. The Purchase Agreement, the Indenture, the Successor Supplemental Indenture, the Guarantor Supplemental Indenture, the Notes, the Guarantees, the Joinder Agreement and the Registration Rights Agreement are sometimes referred to herein collectively as the "*Operative Documents*."

In such examination, we have assumed the genuineness of all signatures, the legal capacity of all natural persons, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as certified, conformed or photostatic copies and the authenticity of the originals of such latter documents. As to all questions of fact material to these opinions that have not been independently established, we have relied upon certificates or comparable documents of officers and representatives of Acquisition Sub, the Company and the Guarantors, as the case may be, and upon the representations and warranties of Acquisition Sub, the Company and the Guarantors, as the case may be, contained in the Purchase Agreement and in the Joinder Agreement.

We have also assumed for Acquisition Sub, the Company and the Guarantors listed on Schedule II hereto (i) the valid existence of Acquisition Sub, the Company, the Guarantors listed on Schedule II hereto, you and the Trustee, you and the Trustee, (ii) that Acquisition Sub, the Company, the Guarantors listed on Schedule II hereto, you and the Trustee have the requisite corporate or limited partnership power and authority, as the case may be, to enter into and perform the Operative Documents, as applicable, (iii) the due authorization, execution and delivery of the Operative Documents by Acquisition Sub, the Company, the Guarantors listed on Schedule II hereto, you and the Trustee, as applicable, following the consummation of the Merger, (iv) that each of the Operative Documents to which you or the Trustee is a party has been duly and validly executed and delivered by you and/or the Trustee, as applicable, and constitutes a legal, valid and binding obligation, enforceable against you and/or the Trustee, as applicable, in accordance with its terms, and (v) that the Trustee is in compliance, generally and with respect to acting as Trustee under the Indenture, with all applicable laws and regulations. As used herein, "to our knowledge" and "of which we are aware" mean the conscious awareness of facts or other information by any lawyer in our firm actively involved in the transactions contemplated by the Purchase Agreement and the Merger Agreement and related transactions, after consultation with such other lawyers in our firm and reviewing such documents in our possession, as each such actively involved lawyer has deemed appropriate.

Based on the foregoing, and subject to the qualifications stated herein, we are of the opinion that:

1. Each of the Guarantors listed on Schedule III hereto is a corporation or limited partnership, as the case may be, validly existing and in good standing under the laws of its respective jurisdiction of organization and has all requisite corporate or limited partnership power and authority, as the case may be, to own, lease and operate its properties and to carry on its business as described in the Time of Sale Information and the Offering Memorandum. Each of the Guarantors listed on Schedule III hereto is duly qualified to transact business and is in good standing as a foreign corporation in each jurisdiction identified in Schedule III hereto.

2. Each of the Guarantors listed on Schedule III hereto has all requisite corporate or limited partnership power and authority, as the case may be, to execute and deliver the Purchase Agreement and to perform its obligations thereunder.

3. Each of the Guarantors listed on Schedule III hereto has all requisite corporate or limited partnership power and authority, as the case may be, to execute and deliver the Joinder Agreement and to perform their respective obligations thereunder. The execution, delivery and performance of the Joinder Agreement by each of the Guarantors listed on Schedule III hereto has been duly authorized by all necessary corporate or limited partnership action, as the case may be, on the part of each of the Guarantors listed on Schedule III hereto.

4. Assuming the due authorization, execution and delivery of the Indenture by Acquisition Sub and the Trustee, the Indenture constitutes the legal, valid and binding obligation of Acquisition Sub, enforceable against Acquisition Sub in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

5. Following the consummation of the Merger (and assuming the due authorization, execution and delivery thereof by the Company and the Trustee), the Indenture, as supplemented by the Successor Supplemental Indenture, will constitute the legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

6. Each of the Guarantors listed on Schedule III hereto has all requisite corporate or limited partnership power and authority, as the case may be, to execute and deliver the Guarantor Supplemental Indenture and to perform their respective obligations thereunder. The execution, delivery and performance of the Guarantor Supplemental Indenture by each of the Guarantors listed on Schedule III hereto has been duly authorized by all necessary corporate or limited partnership action, as the case may be, on the part of each of the Guarantors listed on Schedule III hereto. Following the consummation of the Merger, when duly and validly executed and delivered by each of the Guarantors listed on Schedule III hereto (and assuming the due authorization, execution and delivery thereof by each of the Guarantors listed on Schedule III hereto (and assuming the Guarantor Supplemental Indenture, will constitute the legal, valid and binding obligation of each of the Guarantors, enforceable against each of them in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

7. When delivered to and paid for by the Initial Purchasers in accordance with the Purchase Agreement (assuming the due authentication thereof by the Trustee), the Notes will constitute the legal, valid and binding obligations of Acquisition Sub, enforceable against it in accordance with their terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

8. Following the consummation of the Merger, when the Successor Supplemental Indenture is duly and validly executed and delivered by the Company, the Notes will constitute the legal, valid and binding obligations of the Company, enforceable against it in accordance with their terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

9. Each of the Guarantors listed on Schedule III hereto has all requisite corporate or limited partnership power and authority, as the case may be, to execute and deliver the Guarantees and to perform its obligations thereunder. The execution and delivery of the Guarantees by each of the Guarantors listed on Schedule III hereto has been duly authorized by all necessary corporate or limited partnership action, as the case may be, on the part of each of the Guarantors listed on Schedule III hereto. Following the consummation of the Merger, when the Guarantor Supplemental Indenture is duly and validly executed and delivered by each of the Guarantors listed on Schedule III hereto and the Trustee), the Guarantees will constitute the legal, valid and binding obligations of each Guarantor, enforceable against it in accordance with their terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

10. Each of the Guarantors listed on Schedule III hereto has all requisite corporate or limited partnership power and authority, as the case may be, to execute and deliver the Registration Rights Agreement and to perform their respective obligations thereunder. The execution, delivery and performance of the Registration Rights Agreement by each of the Guarantors listed on Schedule III hereto has been duly authorized by all necessary corporate or limited partnership action, as the case may be, on the part of each of the Guarantors listed on Schedule III hereto. Following the consummation of the Merger, when duly and validly executed and delivered by each of the Guarantors listed on Schedule III hereto (and assuming the due authorization, execution and delivery thereof by the Company, each of the Guarantors, enforceable against each of them in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity) and except that rights to indemnification and contribution thereunder may be limited by federal or state securities laws or public policy relating thereto.

11. Following the consummation of the Merger, when duly and validly executed and delivered by each of the Guarantors listed on Schedule III hereto in accordance with the terms of the Indenture and the Registration Rights Agreement (and assuming the due authorization, execution and delivery thereof by the Company and each of the Guarantors listed on Schedule II hereto in accordance with the terms of the Indenture and the Registration Rights Agreement), the Exchange Securities (including the related guarantees) will constitute the legal, valid and binding obligations of the Company and each Guarantor, as applicable, enforceable against each of them in accordance with their terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

12. The statements in the Time of Sale Information and the Offering Memorandum under the captions "Summary—The transaction," "Certain relationships and transactions," "Description of other indebtedness," "Description of notes," "Exchange offer; registration rights," "Transfer restrictions" and "ERISA considerations," in each case insofar as such statements constitute summaries of the legal matters, documents or proceedings referred to therein, fairly present the information called for with respect to such legal matters, documents and proceedings and fairly summarize the matters referred to therein in all material respects. The statements in the Time of Sale Information and the Offering Memorandum under the caption "Certain United States federal income tax considerations," insofar as such statements constitute summaries of U.S. federal income tax law and regulations or legal conclusions with respect thereto, constitute accurate summaries of the matters described therein in all material respects.

13. No consent, approval, waiver, license or authorization or other action by or filing with or order of any New York state, Delaware corporate or federal governmental authority (i) is required in connection with the execution and delivery by Acquisition Sub, and (ii) following the consummation of the Merger, will be required in connection with the execution and delivery by the Company and the Guarantors, of the Operative Documents, as applicable, the consummation by Acquisition Sub, the Company and the Guarantors, as the case may be, of the transactions contemplated thereby or the performance by each of Acquisition Sub, the Company and the Guarantors, as the case may be, of its obligations thereunder, except for such as may be required under (a) federal and state securities or blue sky laws, (b) federal, state and local alcoholic beverage control laws or regulations or any related laws or regulations regulations in this paragraph, and those already obtained.

14. Assuming the proceeds from the sale of the Notes are applied as set forth in the Time of Sale Information and Offering Memorandum, the execution and delivery by (A) Acquisition Sub and (B) the Company and the Guarantors following the consummation of the Merger, as the case may be, of the Operative Documents, to the extent a party thereto, the issue and sale of the Notes and the Guarantees and the performance by each of (A) Acquisition Sub and (B) the Company and the Guarantors following the consummation of the Merger, as the case may be, of its respective obligations thereunder will not conflict with, constitute a default under or violate, or cause the imposition of any lien, charge or encumbrance upon any asset of Acquisition Sub, the Company or Guarantors pursuant to, (i) following the consummation of the Merger, any of the terms, conditions or provisions of the [certificate of incorporation or formation, as the case may be, and by-laws or limited partnership agreement], as the case may be, of each of the Guarantors listed on Schedule III hereto, (ii) any of the terms, conditions or provisions of any document, agreement or instrument listed on Schedule IV hereto, (iii) Delaware corporate, New York state or federal law or regulation (other than (a) federal and state securities or blue sky laws, (b) federal, state and local alcoholic beverage control laws or regulations or any related laws or regulations regulating liquor licenses and (c) federal, state and local franchising or similar laws or regulations, as to which we express no opinion in this paragraph), or (iv) any judgment, writ, injunction, decree, order or ruling of any court or governmental authority binding on Acquisition Sub, the Company or any of the Guarantors of which we are aware; except, in the case of clauses (ii), (iii) and (iv), for such conflicts, defaults, violations, liens, charges or encumbrances which, in the aggregate, would not result in a Material Adverse Effect.

15. The Company is not, and after giving effect to the Merger and the offering and sale of the Notes and the application of the proceeds thereof as described in the Time of Sale Information and the Offering Memorandum will not be, required to register as an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

16. Assuming (i) the representations of the Initial Purchasers and Acquisition Sub contained in the Purchase Agreement are true, correct and complete and (ii) compliance by the Initial Purchasers and Acquisition Sub with their respective covenants set forth in the Purchase Agreement, it is not necessary in connection with the offer, sale and delivery of the Notes to the Initial Purchasers pursuant to the Purchase Agreement or the offer and resales of the Notes by the Initial Purchasers, in the manner contemplated by the Purchase Agreement and described in the Time of Sale Information and the Offering Memorandum, to register the Notes under the Securities Act of 1933, as amended, or to qualify the Indenture under the Trust Indenture Act of 1939, as amended.

The opinions expressed herein are limited to the laws of the State of California, the State of New York, the corporate laws of the State of Delaware and the federal laws of the United States, and we express no opinion as to the effect on the matters covered by this letter of the laws of any other jurisdiction.

The opinions expressed herein are rendered solely for your benefit in connection with the transactions described herein. Those opinions may not be used or relied upon by any other person, nor may this letter or any copies hereof be furnished to a third party, filed with a governmental agency, quoted, cited or otherwise referred to without our prior written consent.

Very truly yours,

# SCHEDULE I

#### **Guarantors**

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Tango Acquisition, Inc. Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc. Tango License Corporation

## SCHEDULE II

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc.

# SCHEDULE III1

Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of New York, Inc. Tango Acquisition, Inc. Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Framingdale, Inc. Tango of Franklin, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Sugarloaf, Inc. Tango of Westbury, Inc. Tango of Westbury, Inc.

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To be revised to reflect jurisdictions of organization and foreign qualifications.

# SCHEDULE V

# **Material Instruments**

Indenture, dated as of March 8, 2006, among the Company, certain of its subsidiaries party thereto, as guarantors, and The Bank of New York Trust Company, N.A., as Trustee.

[New Senior Secured Credit Facility]

# June 1, 2010

J.P. Morgan Securities Inc. 383 Madison Avenue New York, New York 10179

Jefferies & Company, Inc. 520 Madison Avenue New York, New York 10022

Ladies and Gentlemen:

Reference is made to the preliminary offering memorandum, dated May 13, 2010 (the "*Preliminary Offering Memorandum*"), and the offering memorandum, dated May 19, 2010 (the "*Offering Memorandum*"), relating to the sale of \$200,000,000 aggregate principal amount of 11% Senior Notes due 2018 (the "*Notes*") of Games Merger Corp. (the "*Acquisition Sub*"), as to which we have acted as counsel to the Acquisition Sub.

We refer to the Preliminary Offering Memorandum, taken together with the pricing term sheet set forth in Annex B to the Purchase Agreement (as defined below), as the "*Time of Sale Information*." We refer to the Time of Sale Information and the Offering Memorandum as the "*Offering Documents*." This letter is furnished to you pursuant to Section 6(h) of the Purchase Agreement, dated as of May 19, 2010, between the Acquisition Sub and you, as representative of the initial purchasers named therein (the "*Purchase Agreement*"). Capitalized terms defined in the Purchase Agreement and used (but not otherwise defined) herein are used herein as so defined.

The primary purpose of our professional engagement was not to establish or confirm factual matters or financial or quantitative information, and many determinations involved in the preparation of the Offering Documents are of a non-legal character. In addition, we have not undertaken any obligation to verify independently any of the factual matters set forth in the Offering Documents. Consequently, in this letter we are not passing upon and do not assume any responsibility for the accuracy, completeness or fairness of the statements contained in the Offering Documents. Also, we do not make any statement herein with respect to any of the financial statements and related notes thereto or the financial or accounting data contained in the Offering Documents.

We have reviewed the Offering Documents and we have participated in conferences with representatives of the Acquisition Sub, its independent public accountants, you and your counsel, at which conferences the contents of the Offering Documents and related matters were discussed.

Subject to the foregoing, we confirm to you that, on the basis of the information we gained in the course of performing the services referred to above, no facts have come to our attention which cause us to believe that (a) the Time of Sale Information, as of 2:15 p.m. (New York City time) on May 19, 2010, contained any untrue statement of a material fact or omitted to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, or (b) the Offering Memorandum, as of its date or as of the date hereof, contained or contains any untrue statement of a material fact or omitted or omits to state any material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

The statements made herein are set forth solely for your benefit and are addressed to you solely in your capacity as the representative of the initial purchasers of the Notes. Neither this letter nor any of such statements may be used or relied upon by, or assigned to, any other person (including any subsequent purchaser or transferee of the Notes), and neither this letter nor any copies hereof may be furnished to any other person, filed with a governmental agency, quoted, cited or otherwise referred to without our prior written consent.

Very truly yours,

#### [Form of Opinion of Counsel for the Acquisition Sub, the Company and the Missouri Guarantor]

(a) The Acquisition Sub, the Company and the Missouri Guarantor have been duly organized and are validly existing and in good standing under the laws of the State of Missouri, are duly qualified to do business and are in good standing in each jurisdiction in which their respective ownership or lease of property or the conduct of their respective businesses requires such qualification, and have all power and authority necessary to own or hold their respective properties and to conduct the businesses in which they are engaged, except where the failure to be so qualified or have such power or authority would not, individually or in the aggregate, have a Material Adverse Effect.

(b) The Company has an authorized capitalization as set forth in each of the Time of Sale Information and the Offering Memorandum under the heading "Capitalization"; and all the outstanding shares of capital stock or other equity interests of each subsidiary of the Company have been duly and validly authorized and issued, are fully paid and non-assessable (except as otherwise described in each of the Time of Sale Information and the Offering Memorandum).

(c) The Acquisition Sub, the Company and the Missouri Guarantor have full right, power and authority to execute and deliver each of the Transaction Documents to which each is a party and to perform their respective obligations thereunder; and all action required to be taken for the due and proper authorization, execution and delivery of each of the Transaction Documents and the consummation of the transactions contemplated thereby has been duly and validly taken.

(d) The Indenture has been duly authorized, executed and delivered by the Acquisition Sub.

(e) The Supplemental Indentures have been duly authorized, executed and delivered by the Company and the Missouri Guarantor, as applicable.

(f) The Securities have been duly authorized, executed and delivered by the Acquisition Sub and the Company, as applicable; and the Guarantees have been duly authorized by the Missouri Guarantor.

(g) The Exchange Securities (including the related guarantees) have been duly authorized for issuance by the Company and the Missouri Guarantor.

(h) This Agreement has been duly authorized, executed and delivered by the Acquisition Sub; the Joinder Agreement has been duly authorized, executed and delivered by the Company and the Missouri Guarantor; and the Registration Rights Agreement has been duly authorized, executed and delivered by the Company and the Missouri Guarantor.

(i) The Merger Agreement has been duly authorized, executed and delivered by the Acquisition Sub and the Company and constitutes a valid and binding agreement of the Acquisition Sub and the Company enforceable against each of the Acquisition Sub and the Company in accordance with its terms, subject to the Enforceability Exceptions.

(j) The execution, delivery and performance by the Acquisition Sub, the Company and the Missouri Guarantor of each of the Transaction Documents to which each is a party, the issuance and sale of the Securities (including the Guarantees) and compliance by the Acquisition Sub, the Company and the Missouri Guarantor with the terms thereof and the consummation of the transactions contemplated by the Transaction Documents will not (i) conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, or, except for those created under the Senior Credit Facility Documentation, result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of the Acquisition Sub, the Company, or the Missouri Guarantor pursuant to, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Company, the Acquisition Sub or the Missouri Guarantor is a party or by which the Company or the Missouri Guarantor is subject, (ii) result in any violation of the provisions of the charter or by-laws or similar organizational documents of the Company, the Acquisition Sub or the Missouri Guarantor or (iii) result in the violation of any applicable law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory authority, except, in the case of clauses (i) and (iii) above, for any such conflict, breach, violation or default that would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(k) No consent, approval, authorization, order, registration or qualification of or with any court or arbitrator or governmental or regulatory authority is required for the execution, delivery and performance by the Acquisition Sub, the Company and the Missouri Guarantor of each of the Transaction Documents to which each is a party, the issuance and sale of the Securities (including the Guarantees) and compliance by the Acquisition Sub, the Company and the Missouri Guarantor with the terms thereof and the consummation of the transactions contemplated by the Transaction Documents, including the Transactions, except for such consents, approvals, authorizations, orders and registrations or qualifications as have been obtained or as may be required (i) under applicable state securities laws in connection with the purchase and resale of the Securities by the Initial Purchasers and (ii) with respect to the Exchange Securities (including the related guarantees) under the Securities Act and applicable state securities laws as contemplated by the Registration Rights Agreement.

(1) To the best knowledge of such counsel, except as described in each of the Time of Sale Information and the Offering Memorandum, there are no legal, governmental or regulatory investigations, actions, suits or proceedings pending or threatened to which the Acquisition Sub, the Company or any of the Company's subsidiaries is or may be a party or to which any property of the Acquisition Sub, the Company or any of the Company's subsidiaries is or may be the subject that, individually or in the aggregate, if determined adversely to the Acquisition Sub, the Company or any of the Company's subsidiaries, could reasonably be expected to have a Material Adverse Effect; and no such investigations, actions, suits or proceedings are threatened or, to the best knowledge of such counsel, contemplated by any governmental or regulatory authority or threatened by others.

## [Form of Opinion of Counsel for the Texas Guarantors]

(a) Each of the Texas Guarantors have been duly organized and are validly existing and in good standing under the laws of the State of Texas, are duly qualified to do business and are in good standing in each jurisdiction in which their respective ownership or lease of property or the conduct of their respective businesses requires such qualification, and have all power and authority necessary to own or hold their respective properties and to conduct the businesses in which they are engaged, except where the failure to be so qualified or have such power or authority would not, individually or in the aggregate, have a Material Adverse Effect.

(b) Each of the Texas Guarantors have full right, power and authority to execute and deliver each of the Transaction Documents to which each is a party and to perform their respective obligations thereunder; and all action required to be taken for the due and proper authorization, execution and delivery of each of the Transaction Documents and the consummation of the transactions contemplated thereby has been duly and validly taken.

(c) The Guarantor Supplemental Indenture has been duly authorized, executed and delivered by each of the Texas Guarantors, as applicable.

(d) The Guarantees have been duly authorized by each of the Texas Guarantors.

(e) The Exchange Securities (including the related guarantees) have been duly authorized for issuance by each of the Texas Guarantors.

(f) The Joinder Agreement has been duly authorized, executed and delivered by each of the Texas Guarantors; and the Registration Rights Agreement has been duly authorized, executed and delivered by each of the Texas Guarantors.

(g) The execution, delivery and performance by each of the Texas Guarantors of each of the Transaction Documents to which each is a party, the issuance and sale of the Securities (including the Guarantees) and compliance by each of the Texas Guarantors with the terms thereof and the consummation of the transactions contemplated by the Transaction Documents will not (i) conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, or, except for those created under the Senior Credit Facility Documentation, result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of any of the Texas Guarantors pursuant to, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which any of the Texas Guarantors is a party or by which any of the Texas Guarantors is bound or to which any of the property or assets of any of the Texas Guarantors of the provisions of the charter or by-laws or similar organizational documents of any of the Texas Guarantors or (iii) result in the violation of any applicable law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory authority, except, in the case of clauses (i) and (ii) above, for any such conflict, breach, violation or default that would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(h) No consent, approval, authorization, order, registration or qualification of or with any court or arbitrator or governmental or regulatory authority is required for the execution, delivery and performance by each of the Texas Guarantors of each of the Transaction Documents to which each is a party, the issuance and sale of the Securities (including the Guarantees) and compliance by each of the Texas Guarantors with the terms thereof and the consummation of the transactions contemplated by the Transaction Documents, including the Transactions, except for such consents, approvals, authorizations, orders and registrations or qualifications as have been obtained or as may be required (i) under applicable state securities laws in connection with the purchaser and resale of the Securities by the Initial Purchasers and (ii) with respect to the Exchange Securities (including the related guarantees) under the Securities Act and applicable state securities laws as contemplated by the Registration Rights Agreement.

EXHIBIT A

June 1, 2010

#### [Form of Joinder Agreement]

J.P. Morgan Securities Inc. 383 Madison Avenue New York, New York 10179

Jefferies & Company, Inc. 520 Madison Avenue New York, New York 10022

#### Ladies and Gentlemen:

Reference is made to the Purchase Agreement (the "*Purchase Agreement*") dated May 19, 2010, initially between Games Merger Corp., a Missouri corporation (the "*Acquisition Sub*"), to be merged with and into Dave & Buster's, Inc., a Missouri corporation (the "*Company*"), and the several initial purchasers listed in Schedule 3 thereto (the "*Initial Purchasers*"), concerning the purchase of the Securities (as defined in the Purchase Agreement) from the Company by the Initial Purchasers. Capitalized terms used herein but not defined herein shall have the meanings assigned to such terms in the Purchase Agreement.

The Company and each of the Guarantors listed on Schedule 2 to the Purchase Agreement, hereby agree that this letter agreement is being executed and delivered in connection with the issue and sale of the Securities pursuant to the Purchase Agreement and to induce the Initial Purchasers to purchase the Securities thereunder and is being executed concurrently with the consummation of the Acquisition.

1. Joinder. Each of the parties hereto hereby agrees to be bound by the terms, conditions and other provisions of the Purchase Agreement with all attendant rights, duties and obligations stated therein, with the same force and effect as if originally named, in the case of the Company, as the issuer, and in the case of a Guarantor, as a Guarantor therein and as if such party executed the Purchase Agreement on the date thereof.

2. <u>Representations, Warranties and Agreements of each of the Company and the Guarantors</u>. Each of the Company and the Guarantors represents and warrants to, and agrees with, each Initial Purchaser on and as of the date hereof that:

(a) the Company or such Guarantor, as the case may be, has the corporate power to execute and deliver this letter agreement and all corporate action required to be taken by each of them for the due and proper authorization, execution, delivery and performance of this letter agreement and the consummation of the transactions contemplated hereby has been duly and validly taken; this letter agreement has been duly authorized, executed and delivered by such Company or Guarantor, as the case may be.

(b) the representations, warranties and agreements of the Company or such Guarantor, as the case may be, set forth in the Purchase Agreement are true and correct on and as of the date hereof.

3. <u>GOVERNING LAW</u>. THIS LETTER AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

4. <u>Counterparts</u>. This letter agreement may be signed in counterparts (which may include counterparts delivered by any standard form of telecommunication), each of which shall be an original and all of which together shall constitute one and the same instrument.

5. <u>Amendments</u>. No amendment or waiver of any provision of this Agreement, nor any consent or approval to any departure therefrom, shall in any event be effective unless the same shall be in writing and signed by the parties hereto.

6. <u>Headings</u>. The headings herein are included for convenience of reference only and are not intended to be part of, or to affect the meaning or interpretation of, this Agreement.

(Signature pages follow)

If the foregoing is in accordance with your understanding of our agreement, please indicate your acceptance of this letter agreement by signing in the space provided below, whereupon this letter agreement will become a binding agreement between the Company, the Guarantors party hereto and the Initial Purchasers in accordance with its terms.

DAVE & BUSTER'S, INC.

By

Title:

D&B LEASING, INC. D&B MARKETING COMPANY, LLC D&B REALTY HOLDING, INC. DANB TEXAS, INC. DAVE & BUSTER'S I, L.P. DAVE & BUSTER'S MANAGEMENT CORPORATION, INC. DAVE & BUSTER'S OF CALIFORNIA, INC. DAVE & BUSTER'S OF COLORADO, INC. DAVE & BUSTER'S OF FLORIDA, INC. DAVE & BUSTER'S OF GEORGIA, INC. DAVE & BUSTER'S OF HAWAII, INC. DAVE & BUSTER'S OF ILLINOIS, INC. DAVE & BUSTER'S OF INDIANA, INC. DAVE & BUSTER'S OF KANSAS, INC. DAVE & BUSTER'S OF MARYLAND, INC. DAVE & BUSTER'S OF MASSACHUSETTS, INC. DAVE & BUSTER'S OF NEBRASKA, INC. DAVE & BUSTER'S OF NEW YORK, INC. DAVE & BUSTER'S OF OKLAHOMA, INC. DAVE & BUSTER'S OF OREGON, INC. DAVE & BUSTER'S OF PENNSYLVANIA, INC. DAVE & BUSTER'S OF PITTSBURGH, INC. DAVE & BUSTER'S OF VIRGINIA, INC. DAVE & BUSTER'S OF WASHINGTON, INC. DAVE & BUSTER'S OF WISCONSIN, INC. TANGO ACQUISITION, INC. TANGO OF ARIZONA, INC. TANGO OF ARUNDEL, INC. TANGO OF FARMINGDALE, INC. TANGO OF FRANKLIN, INC. TANGO OF HOUSTON, INC. TANGO OF NORTH CAROLINA, INC. TANGO OF SUGARLOAF, INC. TANGO OF TENNESSEE, INC. TANGO OF WESTBURY, INC. TANGO LICENSE CORPORATION

By Title:

[Form of Registration Rights Agreement]

#### [Letterhead of Hallett & Perrin]

#### August 10, 2010

Dave & Buster's, Inc. 2481 Manana Drive Dallas, Texas 75220

Re: Registration Statement on Form S-4 Filed by Dave & Buster's, Inc. and the Guarantors (defined below) relating to the Exchange Offer (defined below)

#### Ladies and Gentlemen:

We have acted as counsel to Dave & Buster's, Inc., a Missouri corporation (the "Company"), in connection with the issuance and exchange (the "Exchange Offer") of up to \$200,000,000 aggregate principal amount of the Company's 11% Senior Notes due 2018 (the "Exchange Notes") for an equal principal amount of the Company's 11% Senior Notes due 2018 outstanding on the date hereof (the "Restricted Notes") and the guarantee of the Exchange Notes by the companies listed on Schedule I hereto (collectively the "Guarantors"). The Exchange Notes will be issued pursuant to the Indenture, dated as of June 1, 2010 (the "Indenture"), among the Company, the Guarantors and Wells Fargo National Association., as Trustee, (the "Trustee"). The Restricted Notes are, and the Exchange Notes will be, guaranteed (each, a "Guarantee") on a joint and several basis by the Guarantors.

In connection with the opinions expressed herein, we have examined such documents, records and matters of law as we have deemed relevant or necessary. Based upon the foregoing, and subject to the further assumptions, qualifications and limitations set forth herein, we are of the opinion that:

1. The Exchange Notes, when they are executed by the Company, authenticated by the Trustee in accordance with the Indenture and delivered in exchange for the Restricted Notes in accordance with the terms of the Exchange Offer, will be validly issued by the Company and will constitute valid and binding obligations of the Company.

2. The Guarantees of the Exchange Notes (the "Exchange Guarantees") of the Guarantors, when they are executed and delivered in accordance with the terms of the Exchange Offer in exchange for the Guarantees of the Restricted Notes (the "Outstanding Guarantees") of the Guarantors, will be validly issued by the respective Guarantor and will constitute a valid and binding obligation of the respective Guarantor.

Our opinions with respect to the Exchange Notes and Exchange Guarantees are subject to (i) bankruptcy, insolvency, reorganization, fraudulent transfer and fraudulent conveyance, voidable preference, moratorium or other similar laws, and related regulations and judicial doctrines from time to time in effect relating to or affecting creditors' rights and remedies generally, and (ii) general equitable principles, whether such principles are considered in a proceeding at law or in equity.

We hereby consent to the filing of this opinion as Exhibit 5.1 to the Registration Statement and to the reference to us under the caption "Legal Matters" in the prospectus constituting a part of the Registration Statement.

Very truly yours,

/s/ HALLETT & PERRIN

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Sugarloaf Gwinnett Entertainment Company, L.P. Tango Acquisition, Inc. **Tango License Corporation** Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of Minnesota, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc.

#### \$200,000,000

## CREDIT AGREEMENT

among

GAMES INTERMEDIATE MERGER CORP. (to be merged with and into DAVE & BUSTER'S HOLDINGS, INC., with DAVE & BUSTER'S HOLDINGS, INC. as the surviving entity),

GAMES MERGER CORP. (to be merged with and into DAVE & BUSTER'S, INC., with DAVE & BUSTER'S, INC. as the surviving entity),

as Borrower,

6131646 CANADA INC.,

as Canadian Borrower,

The Several Lenders from Time to Time Parties Hereto,

GENERAL ELECTRIC CAPITAL CORPORATION,

as Documentation Agent,

JPMORGAN CHASE BANK, N.A. AND JEFFERIES FINANCE LLC,

as Co-Syndication Agents,

and

JPMORGAN CHASE BANK, N.A.,

as Administrative Agent

Dated as of June 1, 2010

J.P. MORGAN SECURITIES INC. and JEFFERIES FINANCE LLC,

as Joint Lead Arrangers and Joint Bookrunners

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# EXHIBITS:

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- В Form of Compliance Certificate
- C D Form of Closing Certificate
- Form of Mortgage
- Е Form of Assignment and Assumption
- F Form of Legal Opinion of Weil, Gotshal & Manges LLP
- G Form of U.S. Tax Compliance Certificate
- Η Form of Addendum
- I Form of Incremental Facility Activation Notice

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CREDIT AGREEMENT (this "<u>Agreement</u>"), dated as of June 1, 2010, among GAMES INTERMEDIATE MERGER CORP., a Delaware corporation (to be merged with and into Dave & Buster's Holdings, Inc., with Dave & Buster's Holdings, Inc. as the surviving entity) ("<u>Holdings</u>"), GAMES MERGER CORP., a Missouri corporation (to be merged with and into Dave & Buster's, Inc., with Dave & Buster's, Inc. as the surviving entity) (the "<u>Borrower</u>"), 6131646 CANADA INC., a Canadian corporation (the "<u>Canadian Borrower</u>"), the several banks and other financial institutions or entities from time to time parties to this Agreement (the "<u>Lenders</u>"), GENERAL ELECTRIC CAPITAL CORPORATION, as documentation agent (in such capacity, the "<u>Documentation Agent</u>"), JPMORGAN CHASE BANK, N.A and JEFFERIES FINANCE LLC, as co-syndication agents (in such capacity, the "Co-<u>Syndication Agents</u>"), and JPMORGAN CHASE BANK, N.A., as administrative agent.

The parties hereto hereby agree as follows:

## SECTION 1. DEFINITIONS

1.1 Defined Terms. As used in this Agreement, the terms listed in this Section 1.1 shall have the respective meanings set forth in this Section 1.1.

"<u>ABR</u>": for any day, a rate per annum (rounded upwards, if necessary, to the next 1/16 of 1%) equal to the greatest of (a) the Prime Rate in effect on such day, (b) the Federal Funds Effective Rate in effect on such day <u>plus</u> 1/2 of 1% and (c) the Eurodollar Rate that would be calculated as of such day (or, if such day is not a Business Day, as of the next preceding Business Day) in respect of a proposed Eurodollar Loan with a one-month Interest Period <u>plus</u> 1.0%; <u>provided</u>, that for purposes of determining the interest rate applicable to Term Loans, the ABR shall not be less than 2.75%. Any change in the ABR due to a change in the Prime Rate, the Federal Funds Effective Rate or such Eurodollar Rate shall be effective as of the opening of business on the day of such change in the Prime Rate, the Federal Funds Effective Rate or such Eurodollar Rate, respectively.

"ABR Loans": Loans the rate of interest applicable to which is based upon the ABR.

"Acquisition": as defined in Section 5.1.

"Acquisition Documentation": collectively, the Purchase Agreement and all schedules, exhibits and annexes thereto and all side letters and agreements affecting the terms thereof or entered into in connection therewith.

"Addendum": an instrument, substantially in the form of Exhibit H, by which a Lender becomes a party to this Agreement as of the Closing Date.

"Additional Revolving Loans": as defined in Section 2.4A.

"<u>Adjusted Debt</u>": at any date, the sum of (a) Consolidated Total Debt at such date <u>plus</u> (b) an amount equal to (i) eight times (ii)(A) the Consolidated Lease Expense for the four most recent fiscal quarters ending not less than 45 days prior to the Closing Date less (B) any such Consolidated Lease Expense for the period set out in (A) above with respect to any location made prior to the opening of the Unit at such location.

"<u>Adjusted EBITDAR</u>": for any period, the sum of (a) Consolidated EBITDA for such period, subject to adjustments permitted by Regulation S-X and such other adjustments as the Administrative Agent reasonably determines reflect the pro forma financial condition of the Borrower and may be used in the offering memorandum or prospectus for the Senior Notes, <u>plus</u> (b)(i) the Consolidated Lease Expense for the four most recent fiscal quarters ending not less than 45 days prior to the Closing Date less (ii) any such Consolidated Lease Expense for the period set out in (i) above with respect to any location made prior to the opening of the Unit at such location.

1

"Adjustment Date": as defined in the definition of Pricing Grid.

"<u>Administrative Agent</u>": JPMorgan Chase Bank, N.A., together with its affiliates, as the arranger of the Commitments and as the administrative agent for the Lenders under this Agreement and the other Loan Documents, together with any of its successors (it being understood that, with respect to the Canadian Revolving Loans, the Administrative Agent shall be JPMorgan Chase Bank, N.A., Toronto Branch).

"<u>Affiliate</u>": as to any Person, any other Person that, directly or indirectly, is in control of, is controlled by, or is under common control with, such Person. For purposes of this definition, "control" of a Person means the power, directly or indirectly, either to (a) vote 10% or more of the securities having ordinary voting power for the election of directors (or persons performing similar functions) of such Person or (b) direct or cause the direction of the management and policies of such Person, whether by contract or otherwise.

"Agents": the collective reference to the Co-Syndication Agents, the Documentation Agent and the Administrative Agent.

"<u>Aggregate Exposure</u>": with respect to any Lender at any time, an amount equal to (a) until the Closing Date, the aggregate amount of such Lender's Commitments at such time and (b) thereafter, the sum of (i) the aggregate then unpaid principal amount of such Lender's Term Loans, (ii) the amount of such Lender's Revolving Commitment then in effect or, if the Revolving Commitments have been terminated, the amount of such Lender's Revolving Extensions of Credit then outstanding and (iii) the amount of such Lender's Canadian Revolving Commitment then in effect or, if the Canadian Revolving Commitments have been terminated, the amount of such Lender's Canadian Revolving Extensions of Credit then outstanding.

"<u>Aggregate Exposure Percentage</u>": with respect to any Lender at any time, the ratio (expressed as a percentage) of such Lender's Aggregate Exposure at such time to the Aggregate Exposure of all Lenders at such time.

"Agreement": as defined in the preamble hereto.

"Applicable Margin": for each Type of Loan, the rate per annum set forth under the relevant column heading below:

	ABR Loans	Eurodollar Loans
Revolving Loans, Additional		
Revolving Loans and		
Swingline Loans	3.00%	4.00%
Term Loans	3.25%	4.25%
	Canadian Prime Rate Loans	<b>Canadian Cost of Funds Loans</b>
Canadian Revolving Loans	3.00%	4.00%

; provided, that on and after the first Adjustment Date occurring after the completion of the first full fiscal quarter of the Borrower after the Closing Date, the Applicable Margin with respect to the Loans (other than Term Loans) will be determined pursuant to the Pricing Grid.

"<u>Application</u>": an application, in such form as the Issuing Lender may specify from time to time, requesting the Issuing Lender to open a Letter of Credit.

"<u>Approved Fund</u>": as defined in Section 10.6(b).

"Asset Sale": any Disposition of property or series of related Dispositions of property (excluding any such Disposition permitted by clause (a), (b), (c), (d), (e), (g), (h) or (i) of Section 7.5) that yields gross proceeds to any Group Member (valued at the initial principal amount thereof in the case of noncash proceeds consisting of notes or other debt securities and valued at fair market value in the case of other non-cash proceeds) in excess of \$1,000,000.

"Assignee": as defined in Section 10.6(b).

"Assignment and Assumption": an Assignment and Assumption, substantially in the form of Exhibit E.

"<u>Available Canadian Revolving Commitment</u>": as to any Canadian Revolving Lender at any time, an amount equal to the excess, if any, of (a) such Canadian Revolving Commitment then in effect <u>over</u> (b) such Lender's Canadian Revolving Extensions of Credit then outstanding.

"<u>Available Revolving Commitment</u>": as to any Revolving Lender at any time, an amount equal to the excess, if any, of (a) such Lender's Revolving Commitment then in effect <u>over</u> (b) such Lender's Revolving Extensions of Credit then outstanding; <u>provided</u>, that in calculating any Lender's Revolving Extensions of Credit for the purpose of determining such Lender's Available Revolving Commitment pursuant to Section 2.8(a), the aggregate principal amount of Swingline Loans then outstanding shall be deemed to be zero.

"Benefitted Lender": as defined in Section 10.7(a).

"Board": the Board of Governors of the Federal Reserve System of the United States (or any successor).

"Borrower": as defined in the preamble hereto.

"Borrowing Date": any Business Day specified by the Borrower or the Canadian Borrower as a date on which such Borrower or Canadian Borrower requests the relevant Lenders to make Loans hereunder.

"Business": as defined in Section 4.17(b).

"Business Day": a day other than a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by law to close, <u>provided</u>, that with respect to notices and determinations in connection with, and payments of principal and interest on, Eurodollar Loans, such day is also a day for trading by and between banks in Dollar deposits in the interbank eurodollar market.

"<u>Calculation Date</u>": (a) the last calendar day of each month (or, if such day is not a Canadian Business Day, the next succeeding Canadian Business Day) and (b) at any time when a Default or Event of Default shall have occurred and be continuing, any other Canadian Business Day which the Administrative Agent may determine in its sole discretion to be a Calculation Date.

"Canadian Borrower": as defined in the preamble hereto.

"Canadian Business Day": a Business Day and a day other than a Saturday, Sunday or other day on which commercial banks in Toronto, Ontario are authorized or required by law to close.

"<u>Canadian Cost of Funds Loan</u>": a Canadian Revolving Loan funded in Canadian Dollars, bearing interest calculated by reference to the Canadian Cost of Funds Rate.

"<u>Canadian Cost of Funds Rate</u>": the fixed rate of interest determined by JPMorgan Chase Bank, N.A., Toronto Branch at or about 10:00 a.m., New York City time, on the first day of an Interest Period in respect of a Canadian Cost of Funds Loan as being sufficient to compensate JPMorgan Chase Bank, N.A., Toronto Branch for its cost of funds for funding a Canadian Cost of Funds Loan in an aggregate amount equal to the Canadian Cost of Funds Loan and having a maturity comparable to the Interest Period relating to said Canadian Costs of Funds Loan.

"Canadian Dollars" or "C\$": dollars designated as lawful currency of Canada.

"<u>Canadian Prime Rate</u>": the higher of (a) the annual rate of interest announced from time to time by JPMorgan Chase Bank, N.A., Toronto Branch at its head office as its "prime rate" for C\$ denominated commercial loans to borrowers in Canada (it being understood that such rate is a reference rate and not necessarily the lowest rate of interest charged by JPMorgan Chase Bank, N.A., Toronto Branch) and (b) the sum of (i) the CDOR Rate and (ii) 1% per annum.

"Canadian Prime Rate Loan": a Canadian Revolving Loan funded in Canadian Dollars that accrues interest calculated by reference to the Canadian Prime Rate.

"<u>Canadian Revolving Commitment</u>": as to any Canadian Revolving Lender, the obligation of such Lender, if any, to make Canadian Revolving Loans and Additional Revolving Loans in an aggregate principal amount not to exceed the amount set forth under the heading "Canadian Revolving Commitment" opposite such Lender's name on Schedule 1.1C or in the Assignment and Assumption pursuant to which such Lender became a party hereto, as the same may be changed from time to time pursuant to the terms hereof. The original amount of the Total Canadian Revolving Commitments is \$1,000,000.

"<u>Canadian Revolving Extensions of Credit</u>": as to any Canadian Revolving Lender at any time, an amount equal to the aggregate principal amount (USD Equivalent) of all Canadian Revolving Loans and Additional Revolving Loans held by such Lender then outstanding.

"<u>Canadian Revolving Lender</u>": the Lender set forth on Schedule 1.1C and any other Eligible Canadian Assignee who becomes an assignee of any rights and obligations of a Canadian Revolving Lender pursuant to Section 10.6, acting in their role as makers of Canadian Revolving Loans and Additional Revolving Loans, none of which lenders shall be a non-resident of Canada for purposes of the Income Tax Act (Canada), except as otherwise provided under the definition of Eligible Canadian Assignee.

"Canadian Revolving Loans": as defined in Section 2.4A.

"<u>Canadian Revolving Percentage</u>": as to any Canadian Revolving Lender at any time, the percentage which such Lender's Canadian Revolving Commitment then constitutes of the Total Canadian Revolving Commitments or, at any time after the Canadian Revolving Commitments shall have expired or terminated, the percentage which the aggregate principal amount of such Lender's Canadian Revolving Loans and Additional Revolving Loans then outstanding constitutes of the aggregate principal amount of the Canadian Revolving Loans and Additional Revolving Loans then outstanding constitutes of the aggregate principal amount of the Canadian Revolving Loans and Additional Revolving Loans then outstanding; provided that, in the case of Section 2.23 when a Defaulting Lender shall exist, any such Defaulting Lender's Canadian Revolving Commitment shall be disregarded in such calculations.

"<u>Capital Expenditures</u>": for any period, with respect to any Person, the aggregate of all expenditures by such Person and its Subsidiaries for the acquisition or leasing (pursuant to a capital lease) of fixed or capital assets or additions to equipment (including replacements, capitalized repairs and improvements during such period) that should be capitalized under GAAP on a consolidated balance sheet of such Person and its Subsidiaries; <u>provided</u> that capital expenditures shall not include any such expenditures that constitute (a) Permitted Acquisitions or (b) Reinvestment Deferred Amounts, and <u>provided</u>, <u>further</u>, that any Capital Expenditures shall be reduced by amounts received by the Borrower or any of its Subsidiaries from any landlord or similar party in such period in respect of contributions, as specified in the applicable lease with such landlord or similar party, if and to the extent that the expenditures in respect of which such contributions were made would otherwise be treated as Capital Expenditures hereunder.

"<u>Capital Lease Obligations</u>": as to any Person, 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, for the purposes of this Agreement, the amount of such obligations at any time shall be the capitalized amount thereof at such time determined in accordance with GAAP.

"<u>Capital Stock</u>": any and all shares, interests, participations or other equivalents (however designated) of capital stock of a corporation, any and all equivalent ownership interests in a Person (other than a corporation) and any and all warrants, rights or options to purchase any of the foregoing.

"<u>Card Programs</u>": (i) purchasing card programs offered by any Lender or any affiliate of a Lender established to enable the Borrower or any Subsidiary to purchase goods and supplies from vendors and (ii) any travel and entertainment card program offered by any Lender or any Affiliate of any Lender established to enable the Borrower or any Subsidiary to make payments for expenses incurred related to travel and entertainment.

\*Cash Equivalents": (a) marketable direct obligations issued by, or unconditionally guaranteed by, the United States Government or issued by any agency thereof and backed by the full faith and credit of the United States, in each case maturing within one year from the date of acquisition; (b) certificates of deposit, time deposits, eurodollar time deposits or overnight bank deposits having maturities of six months or less from the date of acquisition issued by any Lender or by any commercial bank organized under the laws of the United States or any state thereof having combined capital and surplus of not less than \$500,000,000; (c) commercial paper of an issuer rated at least A-1 by S&P or P-1 by Moody's, or carrying an equivalent rating by a nationally recognized rating agency, if both of the two named rating agencies cease publishing ratings of commercial paper issuers generally, and maturing within six months from the date of acquisition; (d) repurchase obligations of any Lender or of any commercial bank satisfying the requirements of clause (b) of this definition, having a term of not more than 30 days, with respect to securities issued or fully guaranteed or insured by the United States government; (e) securities with maturities of one year or less from the date of acquisition issued or fully guaranteed by any state, commonwealth or territory of the United States, by any political subdivision or taxing authority of any such state, commonwealth or territory or by any foreign government, the securities of which state, commonwealth, territory, political subdivision, taxing authority or foreign government (as the case may be) are rated at least A by S&P or A by Moody's; (f) securities with maturities of six months or less from the date of acquisition backed by standby letters of credit issued by any Lender or any commercial bank satisfying the requirements of clause (b) of this definition; (g) money market mutual or similar funds that invest exclusively in assets satisfying the requirements of clauses (a) through (f) of this definition; or (h) money market funds that (i) comply with the criteria set forth in SEC Rule 2a-7 under the Investment Company Act of 1940, as amended, (ii) are rated AAA by S&P and Aaa by Moody's and (iii) have portfolio assets of at least \$5,000,000,000.

"<u>CCOF Tranche</u>": the collective reference to Canadian Cost of Funds Loans the then current Interest Periods with respect to all of which begin on the same date and end on the same later date (whether or not such Loans shall originally have been made on the same day).

"<u>CDOR Rate</u>": the annual rate of interest equal to the average 30 day rate applicable to Canadian bankers' acceptances appearing on the "Reuters Screen CDOR Page" (as defined in the International Swaps and Derivatives Association, Inc. 1991 ISDA definitions, as modified and amended from time to time) as of 10:00 a.m., New York City time, on such day, or if such day is not a Canadian Business Day, then on the immediately preceding Canadian Business Day; <u>provided</u> that if such rate does not appear on the Reuters Screen CDOR Page as contemplated, then the CDOR Rate on any day shall be calculated as the arithmetic mean of the 30 day rates applicable to Canadian Business Day, then on the immediately preceding Canadian Business Day. New York City time, on such day, or if such day is not a Canadian Business Day, then on the immediately preceding Canadian Business Day.

### "Change of Control":

(a) at any time prior to the consummation of a Qualifying IPO (i) the Permitted Investors shall cease to have the power to vote or direct the voting of securities having a majority of the ordinary voting power for the election of directors of Holdings (determined on a fully diluted basis); or (ii) the Permitted Investors shall cease to own of record and beneficially, directly or indirectly, a majority of the outstanding common stock of Holdings;

(b) at any time following the consummation of a Qualifying IPO, any "person" or "group" (as such terms are used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, as amended, excluding the Permitted Investors, shall acquire or otherwise obtain the power, or rights (whether by means or warrants, options or otherwise) to obtain the power, directly or indirectly, to vote or direct the voting of Capital Stock having more than 35% of the ordinary voting power for the election of directors of Holdings, unless the Permitted Investors have the power, directly or indirectly, to vote or direct the voting of Capital Stock having a greater percentage of the ordinary voting power for the election of directors of Holdings than such "person" or "group";

(c) the board of directors of Holdings shall cease to consist of a majority of Continuing Directors;

(d) Holdings shall cease to own and control, of record and beneficially, directly, 100% of each class of outstanding Capital Stock of the Borrower free and clear of all Liens (except Liens created by the Guarantee and Collateral Agreement or Liens permitted pursuant to Section 7.3(a)); or

(e) a Specified Change of Control shall occur.

"Closing Date": the date on which the conditions precedent set forth in Section 5.1 shall have been satisfied, which date is June 1, 2010.

"Code": the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Collateral": all property of the Loan Parties, now owned or hereafter acquired, upon which a Lien is purported to be created by any Security Document.

"<u>Commitment</u>": as to any Lender, the sum of the Term Commitment, the Revolving Commitment and the Canadian Revolving Commitment of such Lender.

"Commitment Fee Rate": 0.75% per annum.

"<u>Commonly Controlled Entity</u>": an entity, whether or not incorporated, that is under common control with the Borrower or the Canadian Borrower within the meaning of Section 4001 of ERISA, or is part of a group that includes the Borrower or the Canadian Borrower and that is treated as a single employer under Section 414 of the Code.

"Compliance Certificate": a certificate duly executed by a Responsible Officer substantially in the form of Exhibit B.

"<u>Conduit Lender</u>": any special purpose corporation organized and administered by any Lender for the purpose of making Loans otherwise required to be made by such Lender and designated by such Lender in a written instrument; <u>provided</u>, that the designation by any Lender of a Conduit Lender shall not relieve the designating Lender of any of its obligations to fund a Loan under this Agreement if, for any reason, its Conduit Lender fails to fund any such Loan, and the designating Lender (and not the Conduit Lender) shall have the sole right and responsibility to deliver all consents and waivers required or requested under this Agreement with respect to its Conduit Lender, and <u>provided</u>, <u>further</u>, that no Conduit Lender shall (a) be entitled to receive any greater amount pursuant to Section 2.18, 2.19, 2.20 or 10.5 than the designating Lender would have been entitled to receive in respect of the extensions of credit made by such Conduit Lender or (b) be deemed to have any Commitment.

"Confidential Information Memorandum": the Confidential Information Memorandum dated May 6, 2010 and furnished to certain Lenders.

"<u>Consolidated Current Assets</u>": at any date, all amounts (other than cash and Cash Equivalents) that would, in conformity with GAAP, be set forth opposite the caption "total current assets" (or any like caption) on a consolidated balance sheet of the Borrower and its Subsidiaries at such date.

"<u>Consolidated Current Liabilities</u>": at any date, all amounts that would, in conformity with GAAP, be set forth opposite the caption "total current liabilities" (or any like caption) on a consolidated balance sheet of the Borrower and its Subsidiaries at such date, but excluding (a) the current portion of any Funded Debt of the Borrower and its Subsidiaries and (b) without duplication of clause (a) above, all Indebtedness consisting of Revolving Loans, Canadian Revolving Loans, Additional Revolving Loans or Swingline Loans to the extent otherwise included therein.

"Consolidated EBITDA": for any period, Consolidated Net Income for such period plus, without duplication and to the extent reflected as a charge in the statement of such Consolidated Net Income for such period, the sum of (a) income tax expense, (b) interest expense, amortization or write-off of debt discount and debt issuance costs and commissions, discounts and other fees and charges associated with Indebtedness (including the Loans), (c) depreciation and amortization expense, (d) amortization or impairment of intangibles (including, but not limited to, goodwill) and organization costs, (e) any extraordinary, unusual or non-recurring non-cash expenses or losses (including, whether or not otherwise includable as a separate item in the statement of such Consolidated Net Income for such period, losses on the sales of assets outside of the ordinary course of business), (f) any extraordinary, unusual or non-recurring cash expenses or losses in an aggregate amount not to exceed \$5,000,000 in any Fiscal Year of the Borrower (including, without duplication of amounts referred to in clause (e) above, and whether or not otherwise includable as a separate item in the statement of such Consolidated Net Income for such period, losses on the sales of assets outside of the ordinary course of business), (g) non-cash expenses resulting from any employee benefit or management compensation plan or the grant of stock and stock options to employees of the Borrower or any of its Subsidiaries pursuant to a written plan or agreement, (h) cash and non-cash expenses incurred in connection with the Transactions in an aggregate amount not to exceed \$26,000,000 (including a \$9,000,000 premium relating to the redemption of the Existing Notes). (i) cash expenses related to officers and employees of the Borrower in connection with the Transactions relating to the cancellation of equity-related options, (j) Consolidated Start-up Costs for such period in an aggregate amount not to exceed \$5,000,000 in any Fiscal Year of the Borrower, (k) other non-cash charges reducing Consolidated Net Income (including any net change in deferred amusement revenue and ticket liability reserves, but excluding any other non-cash charge to the extent it represents an accrual of or reserve for cash charges in any future period or amortization of a prepaid cash expense that was paid in a prior period not included in the calculation), (1) fees and expenses permitted by Section 7.10, and (m) payments relating to change of control contracts for key management employees of the Borrower in an aggregate amount not to exceed \$5,000,000 during the term of this Agreement, minus, (a) without duplication and to the extent included in the statement of such Consolidated Net Income for such period, the sum of (i) interest income, (ii) any extraordinary, unusual or non-recurring income or gains (including, whether or not otherwise includable as a separate item in the statement of such Consolidated Net Income for such period, gains on the sales of assets outside of the ordinary course of business), (iii) income tax credits (to the extent not netted from income tax expense) and (iv) any other non-cash income and (b) any cash payments made during such period in respect of items described in clause (e) or (k) above subsequent to the fiscal quarter in which the relevant non-cash expenses or losses were reflected as a charge in the statement of Consolidated Net Income, all as determined on a consolidated basis. For the avoidance of doubt, if the proceeds of business interruption insurance would, because included in the net income (or loss) of the Borrower and its Subsidiaries as determined on a consolidated basis in accordance with GAAP, be included in the definition of Consolidated Net Income, in no event will such amounts be subsequently excluded from Consolidated EBITDA by the operation of any of the foregoing adjustments pursuant to this definition. For the purposes of calculating Consolidated EBITDA for any period of four consecutive fiscal quarters (each, a "Reference Period") pursuant to any determination of the Consolidated Leverage Ratio, (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 assets comprising all or substantially all of an operating unit of a business or constitutes all or substantially all of the common stock of a Person and (b) involves the payment of consideration by the Borrower and its Subsidiaries in excess of \$1,000,000; and "Material Disposition" means any Disposition of property or series of related Dispositions of property that yields gross proceeds to the Borrower or any of its Subsidiaries in excess of \$1,000,000. Notwithstanding the foregoing, (x) Consolidated EBITDA for the period of four consecutive fiscal quarters of the Borrower ended January 31, 2010, shall be deemed to equal \$83,145,000 and (y) Consolidated EBITDA for the quarterly period of the Borrower ended January 31, 2010, shall be deemed to equal \$24,901,000.

"Consolidated EBITDAR": for any period, Consolidated EBITDA for such period, plus Consolidated Lease Expense for such period.

"<u>Consolidated Fixed Charge Coverage Ratio</u>": for any period, the ratio of (a) Consolidated EBITDAR for such period less the aggregate amount actually paid by the Borrower and its Subsidiaries during such period on account of Maintenance Capital Expenditures (excluding (i) the principal amount of Indebtedness (other than any Loans) incurred in connection with such expenditures and (ii) any Reinvestment Deferred Amount) to (b) Consolidated Fixed Charges for such period.

"<u>Consolidated Fixed Charges</u>": for any period, the sum (without duplication) of (a) Consolidated Interest Expense for such period, (b) Consolidated Lease Expense for such period and (c) scheduled payments made during such period on account of principal of Indebtedness of the Borrower or any of its Subsidiaries (including scheduled principal payments in respect of the Term Loans).

"<u>Consolidated Interest Expense</u>": for any period, total cash interest expense (including that attributable to Capital Lease Obligations) of the Borrower and its Subsidiaries for such period with respect to all outstanding Indebtedness of the Borrower and its Subsidiaries.

"<u>Consolidated Lease Expense</u>": for any period, the aggregate amount of fixed and contingent rental expense of the Borrower and its Subsidiaries for such period with respect to leases of real and personal property, determined on a consolidated basis in accordance with GAAP.

"<u>Consolidated Leverage Ratio</u>": as at the last day of any period, the ratio of (a) Consolidated Total Debt on such day to (b) Consolidated EBITDA for such period.

"<u>Consolidated Net Income</u>": for any period, the consolidated net income (or loss) of the Borrower and its Subsidiaries, determined on a consolidated basis in accordance with GAAP; <u>provided</u> that there shall be excluded (a) the income (or deficit) of any Person accrued prior to the date it becomes a Subsidiary of the Borrower or is merged into or consolidated with the Borrower or any of its Subsidiaries, (b) the income (or deficit) of any Person (other than a Subsidiary of the Borrower) in which the Borrower or any of its Subsidiaries has an ownership interest, except to the extent that any such income is actually received by the Borrower or such Subsidiary in the form of dividends or similar distributions and (c) the undistributed earnings of any Subsidiary of the Borrower to the extent that the declaration or payment of dividends or similar distributions by such Subsidiary is not at the time permitted by the terms of any Contractual Obligation (other than under any Loan Document) or Requirement of Law applicable to such Subsidiary.

"<u>Consolidated Start-up Costs</u>": consolidated "start-up costs" (as such term is defined in SOP 98-5 published by the American Institute of Certified Public Accountants) of the Borrower and its Subsidiaries related to the acquisition, opening and organizing of new Units or conversion of existing Units, including, without limitation, rental payments with respect to any location made prior to the opening of the Unit at such location, the cost of feasibility studies, staff-training and recruiting and travel costs for employees engaged in such start-up activities, in each case net of landlord reimbursements for such costs.

"<u>Consolidated Total Debt</u>": at any date, the aggregate principal amount of all Indebtedness (other than Indebtedness arising under Card Programs incurred pursuant to Section 7.2(r)) of the Borrower and its Subsidiaries at such date, determined on a consolidated basis in accordance with GAAP; <u>provided</u> that obligations described in clause (f) of the definition of "Indebtedness" shall not constitute "Consolidated Total Debt" to the extent such obligations are not drawn and unreimbursed.

# "Consolidated Working Capital": at any date, the excess of Consolidated Current Assets on such date over Consolidated Current Liabilities on

such date.

### "Co-Syndication Agents": as defined in the preamble hereto.

"<u>Continuing Directors</u>": (a) the directors of Holdings on the Closing Date, after giving effect to the Acquisition and the other transactions contemplated hereby, and (b) each other director if (i) such other director's nomination for election to the board of directors of Holdings is recommended by at least 66<sup>2/3</sup>% of the then Continuing Directors or (ii) such other director receives the indirect vote of the Permitted Investors in his or her election by the shareholders of Holdings.

"<u>Contractual Obligation</u>": as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its property is bound.

"<u>Control Investment Affiliate</u>": as to any Person, any other Person that (a) directly or indirectly, is in control of, is controlled by, or is under common control with, such Person and (b) is organized by primarily for the purpose of making equity or debt investments in one or more companies. For purposes of this definition, "control" of a Person means the power, directly or indirectly, to direct or cause the direction of the management and policies of such Person whether by contract or otherwise.

"<u>Cumulative Credit</u>": as of any period beginning on the Closing Date and ending at any time of determination thereafter, with respect to any proposed use of the Cumulative Credit, an amount equal to (a) the sum of (i) the amount of Excess Cash Flow minus the ECF Application Amount, in each case, for each Fiscal Year of the Borrower for which the financial statements required to be delivered under Section 6.1(a) have been delivered and any prepayment that may be required pursuant to Section 2.11(c) with respect to the ECF Application Amount for such Fiscal Year has been made plus (ii) the amount of Net Cash Proceeds of any issuance of Capital Stock issued by Holdings that have been contributed to the Borrower as common equity <u>minus</u> (b) the aggregate amount of (i) Capital Expenditures made utilizing the Cumulative Credit and (ii) Permitted Acquisitions and Investments made under Sections 7.8(l) and 7.8(p) respectively, in each case to the extent made during such period through utilization of the Cumulative Credit (but including any other simultaneous proposed use of the Cumulative Credit)).

"Cure Amount": as defined in Section 8.2.

"Cure Date": as defined in Section 8.2.

"Cure Right": as defined in Section 8.2.

"Default": any of the events specified in Section 8.1, whether or not any requirement for the giving of notice, the lapse of time, or both, has been satisfied.

"Defaulting Lender": any Lender, as determined by the Administrative Agent, that has (a) failed to fund any portion of its Loans or participations in Letters of Credit or Swingline Loans within three Business Days of the date required to be funded by it hereunder, (b) notified the Borrower, the Administrative Agent, the Issuing Lender, the Swingline Lender or any Lender in writing that it does not intend to comply with any of its funding obligations under this Agreement or has made a public statement to the effect that it does not intend to comply with its funding obligations under this Agreement or under other agreements in which it commits to extend credit, (c) failed, within three Business Days after request by the Administrative Agent, to confirm that it will comply with the terms of this Agreement relating to its obligations to fund prospective Loans and participations in then outstanding Letters of Credit and Swingline Loans, (d) otherwise failed to pay over to the Administrative Agent or any other Lender any other amount required to be paid by it hereunder within three Business Days of the date when due, unless the subject of a good faith dispute, or (e) (i) become or is insolvent or has a parent company that has become or is insolvent or (ii) become the subject of a bankruptcy or insolvency proceeding, or has had a receiver, conservator, trustee or custodian appointed for it, or has taken any action in furtherance of, or indicating its consent to, approval of or acquiescence in any such proceeding or appointment or has a parent company that has become the subject of a bankruptcy or insolvency proceeding, or has had a receiver, conservator, trustee or custodian appointed for it, or has taken any action in furtherance of, or indicating its consent to, approval of or acquiescence in any such proceeding or appointment or has a parent company that has become the subject of a bankruptcy or insolvency proceeding, or has had a receiver, conservator, trustee or custodian appointed for it, or has taken any action

"Disposition": with respect to any property, any sale, lease, sale and leaseback (including, without limitation, any Permitted Sale-Leaseback), assignment, conveyance, transfer or other disposition thereof. The terms "Dispose" and "Disposed of" shall have correlative meanings.

"Documentation Agent": as defined in the preamble hereto.

"Dollars" and "§": dollars in lawful currency of the United States.

"Domestic Subsidiary": any Subsidiary of the Borrower organized under the laws of any jurisdiction within the United States.

"ECF Application Amount": as defined in Section 2.11(c).

"<u>ECF Percentage</u>": 50%; <u>provided</u>, that, with respect to each Fiscal Year of the Borrower ending on or after January 29, 2012, the ECF Percentage shall be reduced to (a) 25% if the Consolidated Leverage Ratio as of the last day of such Fiscal Year is not greater than 3.25 to 1.0 and (b) 0% if the Consolidated Leverage Ratio as of the last day of such Fiscal Year is not greater than 2.5 to 1.0.

"Eligible Canadian Assignee": any institutional lender which is (i) a lender named in Schedule I, Schedule II or Schedule III to the Bank Act (Canada) having total assets in excess of C\$500,000,000, (ii) any other lender approved by the Administrative Agent and the Canadian Borrower, which approval shall not be unreasonably withheld or (iii) if, but only if, an Event of Default has occurred and is continuing, any other bank, insurance company, commercial finance company or other financial institution or other Person approved by the Administrative Agent, such approval not to be unreasonably withheld, or any Approved Fund.

"<u>Environmental Laws</u>": any and all applicable foreign, Federal, state, provincial, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees, requirements of any Governmental Authority or other Requirements of Law (including common law) regulating, relating to or imposing liability or standards of conduct concerning protection of the environment, preservation or reclamation of natural resources, the management, release or threatened release of any Materials of Environmental Concern or occupational safety and health matters (as such matters relate to Materials of Environmental Concern or exposure thereto), as now or may at any time hereafter be in effect.

"Equity Contribution": as defined in Section 5.1(b).

"ERISA": the Employee Retirement Income Security Act of 1974, as amended from time to time.

"ERISA Event": (a) any Reportable Event; (b) the existence with respect to any Plan of a non-exempt Prohibited Transaction; (c) any failure by any Single Employer Plan to satisfy the minimum funding standards (within the meaning of Sections 412 or 430 of the Code or Section 302 of ERISA) applicable to such Single Employer Plan, whether or not waived; (d) the filing pursuant to Section 412(c) of the Code or Section 302(c) of ERISA of an application for a waiver of the minimum funding standard with respect to any Single Employer Plan, the failure to make by its due date a required installment under Section 430(j) of the Code with respect to any Single Employer Plan or the failure by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities to make any required contribution to a Multiemployer Plan; (e) the incurrence by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities of any liability under Title IV of ERISA, other than for PBGC premiums due but not delinquent under Section 4007 of ERISA, with respect to the termination of any Single Employer Plan, including but not limited to the imposition of any Lien in favor of the PBGC; (f) a determination that any Single Employer Plan is in "at risk" status (within the meaning of Section 430 of the Code or Section 303 of ERISA); (g) the receipt by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities from the PBGC or a plan administrator of any notice relating to an intention to terminate any Single Employer Plan under Section 4041 of ERISA or to appoint a trustee to administer any Single Employer Plan under Section 4042 of ERISA; (h) the incurrence by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities of any liability with respect to the withdrawal or partial withdrawal from any Single Employer Plan subject to Section 4063 of ERISA during a plan year it was a substantial employer (as defined in Section 4001(a)(2) of ERISA) or Multiemployer Plan; or (i) the receipt by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities of any notice, or the receipt by any Multiemployer Plan from a the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities of any notice, concerning the imposition of Withdrawal Liability or a determination that a Multiemployer Plan is Insolvent, in Reorganization, or in "endangered" or "critical" status (within the meaning of Section 432 of the Code or Section 305 of ERISA; and (j) with respect to any Foreign Plan, (A) the failure by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities to make, or if applicable, accrue in accordance with normal accounting practices, any employer or employee contributions required by applicable law or by the terms of such Foreign Plan; (B) the failure by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities to register or loss of good standing with applicable regulatory authorities of any such Foreign Plan required to be registered; or (C) the failure of any Foreign Plan to comply with any material provisions of applicable law and regulations or with the material terms of such Foreign Plan.

"Eurocurrency Reserve Requirements": for any day as applied to a Eurodollar Loan, the aggregate (without duplication) of the maximum rates (expressed as a decimal fraction) of reserve requirements in effect on such day (including basic, supplemental, marginal and emergency reserves) under any regulations of the Board or other Governmental Authority having jurisdiction with respect thereto dealing with reserve requirements prescribed for eurocurrency funding (currently referred to as "Eurocurrency Liabilities" in Regulation D of the Board) maintained by a member bank of the Federal Reserve System.

"Eurodollar Base Rate": with respect to each day during each Interest Period pertaining to a Eurodollar Loan, the rate per annum determined on the basis of the rate for deposits in Dollars for a period equal to such Interest Period commencing on the first day of such Interest Period appearing on the Reuters Screen LIBOR01 Page as of 11:00 a.m., London time, two Business Days prior to the beginning of such Interest Period. In the event that such rate does not appear on such page (or otherwise on such screen), the "Eurodollar Base Rate" shall be determined by reference to such other comparable publicly available service for displaying eurodollar rates as may be selected by the Administrative Agent or, in the absence of such availability, by reference to the rate at which the Administrative Agent is offered Dollar deposits at or about 11:00 a.m., New York City time, two Business Days prior to the beginning of such Interest Period in the interbank eurodollar market where its eurodollar and foreign currency and exchange operations are then being conducted for delivery on the first day of such Interest Period for the number of days comprised therein; provided, that for purposes of determining the interest rate applicable to Term Loans, the Eurodollar Base Rate shall not be less than 1.75%.

"Eurodollar Loans": Loans the rate of interest applicable to which is based upon the Eurodollar Rate.

"<u>Eurodollar Rate</u>": with respect to each day during each Interest Period pertaining to a Eurodollar Loan, a rate per annum determined for such day in accordance with the following formula (rounded upward to the nearest 1/100<sup>th</sup> of 1%):

### Eurodollar Base Rate

## 1.00 - Eurocurrency Reserve Requirements

"Eurodollar Tranche": the collective reference to Eurodollar Loans under a particular Facility the then current Interest Periods with respect to all of which begin on the same date and end on the same later date (whether or not such Loans shall originally have been made on the same day).

"Event of Default": any of the events specified in Section 8.1, provided that any requirement for the giving of notice, the lapse of time, or both, has been satisfied.

"Excess Cash Flow": for any Fiscal Year of the Borrower, the excess, if any, of (a) the sum, without duplication, of (i) Consolidated Net Income for such Fiscal Year, (ii) the amount of all non-cash charges (including depreciation and amortization) deducted in arriving at such Consolidated Net Income, (iii) decreases in Consolidated Working Capital for such Fiscal Year, (iv) the aggregate net amount of non-cash loss on the Disposition of property by the Borrower and its Subsidiaries during such Fiscal Year (other than sales of inventory in the ordinary course of business), to the extent deducted in arriving at such Consolidated Net Income and (v) income tax expenses for such Fiscal Year <u>over</u> (b) the sum, without duplication, of (i) the amount of all non-cash credits included in arriving at such Consolidated Net Income, (ii) the aggregate amount actually paid by the Borrower and its Subsidiaries in cash during such Fiscal Year on account of Capital Expenditures (excluding the principal amount of Indebtedness incurred in connection with such expenditures and any such expenditures financed with the proceeds of any Reinvestment Deferred Amount) to the extent permitted to be made under this Agreement, (iii) the aggregate amount of all regularly scheduled principal payments of Funded Debt (including the Term Loans) of the Borrower and its Subsidiaries made during such Fiscal Year (other than in respect of any revolving credit facility to the extent there is not an equivalent permanent reduction in commitments thereunder) to the extent permitted to be paid under this Agreement, (iv) increases in Consolidated Working Capital for such Fiscal Year, (v) the aggregate net amount of non-cash gain on the Disposition of property by the Borrower and its Subsidiaries during such Fiscal Year (other than sales of inventory in the ordinary course of business), to the extent included in arriving at such Consolidated Net Income, (vi) Restricted Payments paid in cash pursuant to Section 7.6(b)(ii) and (c), in each case to a Person

"Excess Cash Flow Application Date": as defined in Section 2.11(c).

"Exchange Rate": with respect to Canadian Dollars on a particular date, the rate at which such currency may be exchanged into Dollars, as set forth on such date as determined by the Administrative Agent on the applicable Reuters currency page with respect to such currency. In the event that such rate does not appear on the applicable Reuters currency page, the Exchange Rate with respect to such currency shall be determined by reference to such other publicly available service for displaying exchange rates as may be agreed upon by the Administrative Agent and the Borrower or, in the absence of such agreement, such Exchange Rate shall instead be JPMorgan Chase Bank, N.A., Toronto Branch's spot rate of exchange in the London interbank or other market where its foreign currency exchange operations in respect of such currency are then being conducted, at or about 10:00 a.m., local time, at such date for the purchase of Dollars with Canadian Dollars, for delivery two Business Days later; <u>provided</u>, that if at the time of any such determination, for any reason, no such spot rate is being quoted, the Administrative Agent may use any reasonable method it deems appropriate to determine such rate, and such determination shall be conclusive absent manifest error.

"Excluded Foreign Subsidiary": the Canadian Borrower and any other Foreign Subsidiary in respect of which either (a) the pledge of any of the Capital Stock or any of the assets of such Subsidiary as Collateral or (b) the guaranteeing by such Subsidiary of the Obligations, would, in the good faith judgment of the Borrower, result in adverse tax consequences to the Borrower.

"Excluded Taxes": as defined in Section 2.19(a).

"Existing Credit Agreement": as defined in Section 5.1(b)(iv).

"Existing Letter of Credit Issuer": JPMorgan Chase Bank, N.A.

"Existing Letters of Credit": the letters of credit set forth on Schedule 1.1D.

"Existing Notes": the 11.25% Senior Notes due March 15, 2014 of the Borrower.

"Facility": each of (a) the Term Commitments and the Term Loans made thereunder (the "Term Facility"), (b) the Revolving Commitments and the extensions of credit made thereunder (the "Revolving Facility") and (c) the Canadian Revolving Commitments and the extensions of credit made thereunder (the "Canadian Revolving Facility").

"<u>Federal Funds Effective Rate</u>": for any day, 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 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 of the quotations for the day of such transactions received by JPMorgan Chase Bank, N.A. from three federal funds brokers of recognized standing selected by it.

"Fee Payment Date": (a) the third Business Day following the last day of each March, June, September and December and (b) the last day of the Revolving Commitment Period.

"Financial Condition Covenants": the covenants set forth in Section 7.1.

"Fiscal Year": the 12 monthly fiscal accounting periods described in Section 7.13.

"Foreign Plan": each "employee pension benefit plan" (within the meaning of Section 3(2) of ERISA, whether or not subject to ERISA) that is not subject to U.S. law and is maintained or contributed to by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities.

"Foreign Subsidiary": any Subsidiary of the Borrower that is not a Domestic Subsidiary.

"<u>Funded Debt</u>": as to any Person, all Indebtedness of such Person that matures more than one year from the date of its creation or matures within one year from such date but is renewable or extendible, at the option of such Person, to a date more than one year from such date or arises under a revolving credit or similar agreement that obligates the lender or lenders to extend credit during a period of more than one year from such date, including all current maturities and current sinking fund payments in respect of such Indebtedness whether or not required to be paid within one year from the date of its creation and, in the case of the Borrower or the Canadian Borrower, Indebtedness in respect of the Loans.

"<u>Funding Office</u>": with respect to the Borrower, the office of the Administrative Agent specified in Section 10.2 or such other office as may be specified from time to time by the Administrative Agent as its funding office by written notice to the Borrower or the Canadian Borrower, as the case may be, and the Lenders, and with respect to the Canadian Borrower, the office of the Canadian Revolving Lender set forth on Schedule 1.1C or, as relevant, the office of each Eligible Canadian Assignee set out in the Assignment and Assumption pursuant to which such Lender became a party hereto, as the same may be changed from time to time pursuant to the terms hereof.

"GAAP": generally accepted accounting principles in the United States as in effect from time to time, except that for purposes of Section 7.1, GAAP shall be determined on the basis of such principles in effect on the date hereof and consistent with those used in the preparation of the most recent audited financial statements referred to in Section 4.1(b). In the event that any "Accounting Change" (as defined below) shall occur and such change results in a change in the method of calculation of financial covenants, standards or terms in this Agreement, then the Borrower, the Canadian Borrower and the Administrative Agent agree to enter into negotiations in order to amend such provisions of this Agreement so as to reflect equitably such Accounting Changes with the desired result that the criteria for evaluating the Borrower's financial condition shall be the same after such Accounting Changes as if such Accounting Changes had not been made. Until such time as such an amendment shall have been executed and delivered by the Borrower, the Canadian Borrower, the Administrative Agent and the Required Lenders, all financial covenants, standards and terms in this Agreement shall continue to be calculated or construed as if such Accounting Changes had not occurred. "Accounting Changes" refers to changes in accounting principles required by the promulgation of any rule, regulation, pronouncement or opinion by the Financial Accounting Standards Board of the American Institute of Certified Public Accountants or, if applicable, the SEC.

"Governmental Authority": any nation or government, any state, province or other political subdivision thereof, any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government.

"Group Members": the collective reference to Holdings, the Borrower, the Canadian Borrower and their respective Subsidiaries.

"Guarantee and Collateral Agreement": the Guarantee and Collateral Agreement to be executed and delivered by Holdings, the Borrower and each Subsidiary Guarantor, substantially in the form of Exhibit A.

"<u>Guarantee Obligation</u>": as to any Person (the "<u>guaranteeing person</u>"), any obligation, including a reimbursement, counter-indemnity or similar obligation, of the guaranteeing Person that guarantees or in effect guarantees, or which is given to induce the creation of a separate obligation by another Person (including any bank under any letter of credit) that guarantees or in effect guarantees, any Indebtedness, leases, dividends or other obligations (the "<u>primary obligations</u>") of any other third Person (the "<u>primary obligor</u>") in any manner, whether directly or indirectly, including any obligation of the guaranteeing person, whether or not contingent, (i) to purchase any such primary obligation or any property constituting direct or indirect security therefor, (ii) to advance or supply funds (1) for the purchase or payment of any such primary obligot or (2) to maintain working capital or equity capital of the primary obligor or otherwise to maintain the net worth or solvency of the primary obligor (iii) to purchase property, securities or services primarily for the purpose of assuring the owner of any such primary obligation against loss in respect thereof; <u>provided</u>, <u>however</u>, that the term Guarantee Obligation of any guaranteeing person shall be deemed to be the lower of (a) an amount equal to the stated or determinable amount of the primary obligation in respect of which such Guarantee Obligation is made and (b) the maximum amount for which such guaranteeing person may be liable pursuant to the terms of the instrument embodying such Guarantee Obligation, and the terms obligation and the maximum amount for which such guaranteeing person as be liable pursuant to the terms of the instrument embodying such Guarantee Obligation, unless such primary obligation and the maximum amount for which such guaranteeing person's maximum reasonably anticipated liability in respect thereof as determinable, in which case the amount of such Guarantee Obligation shall be such guaranteeing person's maximum reasonably antic

"Guarantors": the collective reference to Holdings and the Subsidiary Guarantors.

"Holdings": as defined in the preamble hereto.

"Increased Amount Date": as defined in Section 2.24(a).

"Incremental Amount": at any time, the excess, if any, of (a) \$50,000,000 over (b) the aggregate amount of all Incremental Term Loans.

"Incremental Assumption Agreement": an Incremental Assumption Agreement in form and substance reasonably satisfactory to the Administrative Agent, among the Borrower, the Administrative Agent and one or more Incremental Term Lenders.

"Incremental Facility Activation Notice": a notice substantially in the form of Exhibit I.

"Incremental Term Lender": each Lender which holds an Incremental Term Loan.

"Incremental Term Loans": the term loans made by one or more Lenders to the Borrower pursuant to Section 2.24.

"<u>Incurrence Ratio</u>": as at the last day of any period of four consecutive fiscal quarters, the maximum permitted Consolidated Leverage Ratio for such period as set forth in Section 7.1(a), with the numerator of such ratio decreased by 0.25.

"Indebtedness": of any Person at any date, without duplication, (a) all indebtedness of such Person for borrowed money, (b) all obligations of such Person for the deferred purchase price of property or services (other than current trade payables incurred in the ordinary course of such Person's business) which purchase price is due more than six months after the date of placing such property in service or taking delivery and title thereto, (c) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments, (d) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to property acquired by such Person (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (e) all Capital Lease Obligations of such Person, (f) all obligations of such Person, contingent or otherwise, as an account party or applicant under or in respect of acceptances, letters of credit, surety bonds or similar arrangements, (g) the liquidation value of all redeemable preferred Capital Stock of such Person, (h) all Guarantee Obligations of such Person in respect of obligations of the kind referred to in clauses (a) through (b) above, (i) all obligations of the kind referred to in clauses (a) through (b) above secured by (or for which the holder of such obligation has an existing right, contingent or otherwise, to be secured by) any Lien on property (including accounts and contract rights) owned by such Person, whether or not such Person has assumed or become liable for the payment of such obligation, and (j) for the purposes of Saction 8.1(e) only, all obligations of 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 expressly provide that such Person is not liable therefor.

"Insolvent": with respect to any Multiemployer Plan, the condition that such Multiemployer Plan is insolvent within the meaning of Section 4245 of ERISA.

"Intellectual Property": the collective reference to all rights, priorities and privileges relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including all copyrights and any registrations and applications for registration thereof, copyright licenses, patents and patent applications, patent licenses, trademarks and any registrations and applications for registration thereof, trademark licenses, trade names, domain names, technology, know-how and processes, and all rights to sue at law or in equity for any infringement or other impairment thereof, including the right to receive all proceeds and damages therefrom.

"Interest Payment Date": (a) as to any ABR Loan (other than any Swingline Loan) or any Canadian Prime Rate Loan, the last day of each March, June, September and December to occur while such Loan is outstanding and the final maturity date of such Loan, (b) as to any Eurodollar Loan having an Interest Period of three months or less, the last day of such Interest Period, (c) as to any Eurodollar Loan having an Interest Period longer than three months, each day that is three months, or a whole multiple thereof, after the first day of such Interest Period and the last day of such Interest Period, (d) as to any Canadian Cost of Funds Loan having an Interest Period of 90 days or less, the last day of such Interest Period, (e) as to any Canadian Cost of Funds Loan having an Interest Period longer than 90 days, each day that is three months, or a whole multiple thereof, after the first day of such Interest Period and the last day of such Interest Period, (f) as to any Loan (other than any Revolving Loan or Additional Revolving Loan that is an ABR Loan, any Swingline Loan and any Canadian Prime Rate Loan), the date of any repayment or prepayment made in respect thereof and (g) as to any Swingline Loan, the day that such Loan is required to be repaid.

"Interest Period": (a) as to any Eurodollar Loan, (i) initially, the period commencing on the borrowing or conversion date, as the case may be, with respect to such Eurodollar Loan and ending one, two, three or six (or, if agreed to by all Lenders under the relevant Facility, nine or twelve) months thereafter, as selected by the Borrower in its notice of borrowing or notice of conversion, as the case may be, given with respect thereto; and (ii) thereafter, each period commencing on the last day of the next preceding Interest Period applicable to such Eurodollar Loan and ending one, two, three or six (or, if agreed to by all Lenders under the relevant Facility, nine or twelve) months thereafter, as selected by the Borrower by irrevocable notice to the Administrative Agent not later than 11:00 a.m., New York City time, on the date that is three Business Days prior to the last day of the then current Interest Period with respect to such Canadian Cost of Funds Loan, (i) initially, the period commencing on the Canadian Borrower in its notice of borrowing 30, 60, 90 or 180 days thereafter, as selected by the Canadian Borrower in its notice of borrowing and ending 30, 60, 90 or 180 days thereafter, each period commencing on the last day of the next preceding Interest Period applicable to such Canadian Cost of Funds Loan and ending 30, 60, 90 or 180 days thereafter, as selected by the Canadian Borrower in its notice of borrowing or notice of conversion, as the case may be, given with respect thereto; and (ii) thereafter, each period commencing on the last day of the next preceding Interest Period applicable to such Canadian Cost of Funds Loan and ending 30, 60, 90 or 180 days thereafter, each period commencing on the last day of the next preceding Interest Period applicable to such Canadian Cost of Funds Loan and ending 30, 60, 90 or 180 days thereafter, each period applicable to the Canadian Borrower in its notice of borrower by irrevocable notice to the Administrative Agent not later than 11:00 a.m., New York City ti

(i) if any Interest Period with respect to a Eurodollar Loan would otherwise end on a day that is not a Business Day, or if any Interest Period with respect to a Canadian Cost of Funds Loan would otherwise end on a day that is not a Canadian Business Day, such Interest Period shall be extended to the next succeeding Business Day or Canadian Business Day, as applicable, unless the result of such extension would be to carry such Interest Period into another calendar month in which event such Interest Period shall end on the immediately preceding Business Day or Canadian Business Day, as applicable;

(ii) neither the Borrower nor the Canadian Borrower may select an Interest Period under a particular Facility that would extend beyond the Revolving Termination Date or beyond the date final payment is due on the Term Loans, as the case may be;

(iii) any Interest Period that begins on the last Business Day or Canadian Business Day, as applicable, of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall end on the last Business Day or Canadian Business Day, as applicable, of a calendar month; and

(iv) the Borrower and the Canadian Borrower shall select Interest Periods so as not to require a payment or prepayment of any Eurodollar Loan or any Canadian Cost of Funds Loan, as the case may be, during an Interest Period for such Loan.

"Investments": as defined in Section 7.8.

"Issuing Lender": JPMorgan Chase Bank, N.A. or any affiliate thereof, in its capacity as issuer of any Letter of Credit, and any other Lender selected by the Borrower to be an Issuing Lender with the consent of the Administrative Agent and such Lender, in such capacity.

"L/C Commitment": \$20,000,000.

"<u>L/C Exposure</u>": at any time, the total L/C Obligations. The L/C Exposure of any Revolving Lender at any time shall be its Revolving Percentage of the total L/C Exposure at such time.

"<u>L/C Obligations</u>": at any time, an amount equal to the sum of (a) the aggregate then undrawn and unexpired amount of the then outstanding Letters of Credit and (b) the aggregate amount of drawings under Letters of Credit that have not then been reimbursed pursuant to Section 3.5.

"L/C Participants": the collective reference to all the Revolving Lenders other than the Issuing Lender.

"Lead Arrangers": J.P. Morgan Securities Inc. and Jefferies Finance LLC, in their capacities as joint lead arrangers of the Facilities.

"Lenders": as defined in the preamble hereto and shall include each Term Lender, Revolving Lender, Canadian Revolving Lender and Swingline Lender; provided, that unless the context otherwise requires, each reference herein to the Lenders shall be deemed to include any Conduit Lender.

"Letters of Credit": as defined in Section 3.1(a).

"Lien": with respect to any asset, any mortgage, pledge, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or other), charge or other security interest or any preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever (including the interest of a vendor or a lessor under any conditional sale or other title retention agreement and any capital lease having substantially the same economic effect as any of the foregoing).

"Loan": any loan made by any Lender pursuant to this Agreement.

"Loan Documents": this Agreement, the Security Documents, the Notes and any amendment, waiver, supplement or other modification to any of the foregoing.

"Loan Parties": each Group Member that is a party to a Loan Document.

"Maintenance Capital Expenditures": Capital Expenditures that are not New Unit Capital Expenditures.

"<u>Majority Facility Lenders</u>": with respect to any Facility, the holders of more than 50% of the aggregate unpaid principal amount of the Term Loans, the Total Revolving Extensions of Credit or the Total Canadian Revolving Extensions of Credit, as the case may be, outstanding under such Facility (or, in the case of the Revolving Facility and the Canadian Revolving Facility, prior to any termination of the Revolving Commitments or the Canadian Revolving Commitments, as the case may be, the holders of more than 50% of the Total Revolving Commitments or the Total Canadian Revolving Commitments, as the case may be).

"<u>Material Adverse Effect</u>": a material adverse effect on (a) the business, property, operations, condition (financial or otherwise) or prospects of the Borrower and its Subsidiaries taken as a whole or (b) the validity or enforceability of this Agreement or any of the other Loan Documents or the rights or remedies of the Administrative Agent or the Lenders hereunder or thereunder.

"<u>Materials of Environmental Concern</u>": any gasoline or petroleum (including crude oil or any fraction thereof) or petroleum products or any hazardous or toxic substances, materials or wastes, defined or regulated as such in or under any Environmental Law, including asbestos, polychlorinated biphenyls and urea-formaldehyde insulation.

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

"<u>Mortgaged Properties</u>": the real properties listed on Schedule 1.1B-1 and 1.1B-2, and any other leasehold real property held by any Loan Party with respect to which landlord consent to the granting of a leasehold mortgage thereon is obtained pursuant to Section 6.10.

"<u>Mortgages</u>": each of the mortgages and deeds of trust made by any Loan Party in favor of, or for the benefit of, the Administrative Agent for the benefit of the Lenders, substantially in the form of Exhibit D (with such changes thereto as shall be advisable under the law of the jurisdiction in which such mortgage or deed of trust is to be recorded).

"Multiemployer Plan": a Plan that is a multiemployer plan as defined in Section 4001(a)(3) of ERISA.

"Net Cash Proceeds": (a) in connection with any Asset Sale or any Recovery Event, the proceeds thereof in the form of cash and Cash Equivalents (including any such proceeds received by way of deferred payment of principal pursuant to a note or installment receivable or purchase price adjustment receivable or otherwise, but only as and when received), net of attorneys' fees, accountants' fees, investment banking fees, amounts required to be applied to the repayment of Indebtedness that is secured by a Lien expressly permitted hereunder on any asset that is the subject of such Asset Sale or Recovery Event (other than any Lien pursuant to a Security Document) or that is otherwise subject to mandatory prepayment, and other customary fees and expenses actually incurred in connection therewith and net of taxes paid or reasonably estimated to be payable as a result thereof (after taking into account any available tax credits or deductions and any tax sharing arrangements) and net of the amount of any reserves established to fund contingent liabilities estimated in good faith to be payable and that are directly attributable to such event (as determined reasonably and in good faith by the Chief Financial Officer of the Borrower), <u>provided</u>, that upon any termination of any such reserve, all amounts not paid-out in connection therewith shall be deemed to be "Net Cash Proceeds" of such Asset Sale, and (b) in connection with any issuance or sale of Capital Stock or any incurrence of Indebtedness, the cash proceeds (net of any Indebtedness to be refinanced with such proceeds) received from such issuance or incurrence, net of attorneys' fees, investment banking fees, accountants' fees, underwriting discounts and commissions and other customary fees and expenses actually incurred in connection therewith.

"<u>New Unit Capital Expenditures</u>": Capital Expenditures related to the construction, acquisition or opening of new Units net of landlord reimbursements.

"Non-Consenting Lender": as defined in Section 2.22(b).

"Non-Excluded Taxes": as defined in Section 2.19(a).

"Non-U.S. Person": as defined in Section 2.19(d).

"Notes": the collective reference to any promissory note evidencing Loans.

"Obligations": the unpaid principal of and interest on (including interest accruing after the maturity of the Loans and Reimbursement Obligations and interest accruing after the filing of any petition or assignment in bankruptcy, or the commencement of any insolvency, reorganization, plan of arrangement or like proceeding, relating to the Borrower or the Canadian Borrower, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding) the Loans and all other obligations and liabilities of the Borrower and the Canadian Borrower to the Administrative Agent or to any Lender (or, in the case of Specified Swap Agreements and Specified Cash Management Agreements, any affiliate of any Lender), whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with, this Agreement, any other Loan Document, the Letters of Credit, any Specified Swap Agreement, any Specified Cash Management Agreement or any other document made, delivered or given in connection herewith or therewith, whether on account of principal, interest, Reimbursement Obligations, fees, indemnities, costs, expenses (including all fees, charges and disbursements of counsel to the Administrative Agent or to any Lender that are required to be paid by the Borrower or the Canadian Borrower pursuant hereto) or otherwise.

"<u>Other Taxes</u>": any and all present or future stamp or documentary taxes or any other similar 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, excluding, however, such amounts imposed as a result of an assignment.

"Participant": as defined in Section 10.6(c).

"<u>PATRIOT Act</u>": Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107- 56.

"PBGC": the Pension Benefit Guaranty Corporation established pursuant to Subtitle A of Title IV of ERISA (or any successor).

"Permitted Acquisition": the acquisition by the Borrower (whether of stock or of substantially all of the assets of a business or business division as a going concern or by means of a merger or consolidation) of a 100% interest in any other Person, provided that all of the following conditions shall have been satisfied: (a) such other Person shall operate a similar business to that of the Borrower's, (b) no Default or Event of Default shall have occurred and be continuing and none shall exist after giving effect thereto, (c) if the Borrower shall merge or amalgamate with such other Person, the Borrower shall be the surviving party of such merger or amalgamation, (d) if such Person shall become a Subsidiary of the Borrower, such new Subsidiary shall become a Subsidiary Guarantor pursuant to, and take all other actions required by, Section 6.9 hereof, (e) the Borrower shall have delivered to the Administrative Agent a Compliance Certificate (such Compliance Certificate to be distributed to the Lenders by the Administrative Agent) demonstrating, both immediately prior to and immediately after such acquisition, compliance on a pro forma basis with the covenants set forth in Section 7.1 hereof and (f) the aggregate amount expended by the Borrower and its Subsidiaries for all Permitted Acquisition shall not exceed the sum of (i) \$15,000,000 <u>plus</u> (ii) the then available Cumulative Credit; <u>provided</u> that to the extent consideration for a Permitted Acquisition consists of Capital Stock issued by Holdings or any direct or indirect parent of Holdings, the amount of such Capital Stock shall not, in any case, be counted towards the restriction in this clause (f).

"<u>Permitted Cure Securities</u>": (a) any common equity security of Holdings and/or (b) any equity security of Holdings having no mandatory redemption, repurchase or similar requirements prior to 91 days after the date final payment is due on the Term Loans, and upon which all dividends or distributions (if any) shall be payable solely in additional shares of such equity security.

"Permitted Investors": the collective reference to the Sponsor and the Control Investment Affiliates in relation thereto.

"Permitted Sale-Leaseback": as defined in Section 7.11.

"<u>Permitted Senior Indebtedness</u>": unsecured senior (or subordinated) Indebtedness of the Borrower (i) the terms of which do not provide for any scheduled repayment, mandatory redemption or sinking fund obligation prior to the date on which the final maturity of the Senior Notes issued on the Closing Date occurs (as in effect on the Closing Date) and (ii) the covenant, default and remedy provisions of which are not materially more restrictive, and the mandatory prepayment provisions and repurchase and redemption provisions of which are not materially more onerous or expansive in scope, taken as a whole, than those set forth in the Senior Note Indenture.

"Person": an individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity of whatever nature.

"<u>Plan</u>": any employee pension benefit plan (within in the meaning of Section 3(2) of ERISA) in respect of which the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities is (or, if such plan were terminated at such time, would under Section 4062 or 4069 of ERISA be deemed to be) an "employer" as defined in Section 3(5) of ERISA.

"Pricing Grid": the table set forth below.

Consolidated Leverage Ratio	Applicable Margin for Eurodollar Loans	Applicable Margin for <u>ABR Loans</u>
Greater than or equal to 4.50:1.00	4.50%	3.50%
Less than 4.50:1.00 but greater than or equal to 4.00:1.00	4.25%	3.25%
Less than 4.00:1.00 but greater than or equal to 3.50:1.00	4.00%	3.00%
Less than 3.50:1.00	3.50%	2.50%

For the purposes of the Pricing Grid, changes in the Applicable Margin resulting from changes in the Consolidated Leverage Ratio shall become effective on the date (the "<u>Adjustment Date</u>") that is three Business Days after the date on which financial statements are delivered to the Lenders pursuant to Section 6.1 and shall remain in effect until the next change to be effected pursuant to this paragraph. If any financial statements referred to above are not delivered within the time periods specified in Section 6.1, then, until the date that is three Business Days after the date on which such financial statements are delivered, the higher rate set forth in each column of the Pricing Grid shall apply. In addition, at all times while an Event of Default shall have occurred and be continuing, the higher rate set forth in each column of the Pricing Grid shall apply. Each determination of the Consolidated Leverage Ratio pursuant to the Pricing Grid shall be made in a manner consistent with the determination thereof pursuant to Section 7.1.

"<u>Prime Rate</u>": the rate of interest per annum publicly announced from time to time by JPMorgan Chase Bank, N.A. as its prime rate in effect at its principal office in New York City (the Prime Rate not being intended to be the lowest rate of interest charged by JPMorgan Chase Bank, N.A. in connection with extensions of credit to debtors).

"Pro Forma Balance Sheet": as defined in Section 4.1(a).

"Pro Forma Leverage Ratio": as at the Closing Date and calculated giving effect to the Transactions on a pro forma basis, the ratio of (a) Adjusted Debt on such date to (b) Adjusted EBITDAR for the four most-recent fiscal quarters ended not less than 45 days prior to the Closing Date (it being understood that Schedule 5.1 sets forth (i) the Consolidated EBITDA and (ii) the amount to be included in Adjusted EBITDAR pursuant to clause (b) of the definition thereof, in each case, for the fiscal quarters indicated thereon for the purposes of such calculation); provided that such calculation shall be made after giving effect to the application of cash proceeds from the issuance of equity on the Closing Date (including the Equity Contribution and any amounts in excess thereof) which are utilized to permanently reduce Indebtedness (including any utilization to reduce the amount of Indebtedness outstanding under the Facilities on such date) of the Borrower.

"Pro Forma Statement of Income": as defined in Section 4.1(a).

"Prohibited Transaction": has the meaning assigned to such term in Section 406 of ERISA and Section 4975(f)(e) of the Code.

"Projections": as defined in Section 6.2(c).

"<u>Properties</u>": as defined in Section 4.17(a).

"<u>Purchase Agreement</u>": the Stock Purchase Agreement, dated as of May 2, 2010, by and among Holdings and the seller parties thereto (together with all exhibits, schedules and disclosure letters thereto).

"Purchaser": Dave & Buster's Parent, Inc., a Delaware corporation, formerly known as Games Acquisition Corp.

"<u>Qualifying IPO</u>": the issuance by Holdings or any direct or indirect parent of Holdings of its common Capital Stock in an underwritten primary public offering for cash (other than a public offering pursuant to a registration statement on Form S-8) pursuant to an effective registration statement filed with the SEC in accordance with the Securities Act (whether alone or in connection with a secondary public offering).

"Real Estate": all real property at any time owned or leased (as lessee or sublessee) by the Borrower or its Subsidiaries.

"<u>Recovery Event</u>": any settlement of or payment in respect of any property or casualty insurance claim or any condemnation proceeding relating to any asset of any Group Member.

"Refunded Swingline Loans": as defined in Section 2.7.

"Register": as defined in Section 10.6(b).

"Regulation S-X": Regulation S-X of the Securities Act.

"Regulation U": Regulation U of the Board as in effect from time to time.

"<u>Reimbursement Obligation</u>": the obligation of the Borrower to reimburse the Issuing Lender pursuant to Section 3.5 for amounts drawn under Letters of Credit.

"<u>Reinvestment Deferred Amount</u>": with respect to any Reinvestment Event, the aggregate Net Cash Proceeds received by any Group Member in connection therewith that are not applied to prepay the Term Loans pursuant to Section 2.11(b) as a result of the delivery of a Reinvestment Notice.

"Reinvestment Event": any Asset Sale or Recovery Event in respect of which the Borrower has delivered a Reinvestment Notice.

"<u>Reinvestment Notice</u>": a written notice executed by a Responsible Officer stating that no Event of Default has occurred and is continuing and that the Borrower (directly or indirectly through a Subsidiary) intends and expects to use all or a specified portion of the Net Cash Proceeds of an Asset Sale or Recovery Event to acquire or repair assets useful in its business.

"<u>Reinvestment Prepayment Amount</u>": with respect to any Reinvestment Event, the Reinvestment Deferred Amount relating thereto less any amount expended prior to the relevant Reinvestment Prepayment Date to acquire or repair assets useful in the Borrower's business.

"<u>Reinvestment Prepayment Date</u>": with respect to any Reinvestment Event, the earlier of (a)(i) the date occurring 365 days after such Reinvestment Event (if no binding commitment to reinvest all or a portion of the Reinvestment Deferred Amount relating to such Reinvestment Event has been entered into by such date) or (ii) the date occurring 18 calendar months after such Reinvestment Event (if a binding commitment to reinvest all or a portion of the Reinvestment Deferred Amount relating to such Reinvestment Event has been entered into within 365 days following the applicable Reinvestment Event) and (b) the date on which the Borrower shall have determined not to, or shall have otherwise ceased to, acquire or repair assets useful in the Borrower's business with all or any portion of the relevant Reinvestment Deferred Amount.

"Reorganization": with respect to any Multiemployer Plan, the condition that such Multiemployer Plan is in reorganization within the meaning of Section 4241 of ERISA.

"Replaced Term Loans": as defined in Section 10.1.

"Replacement Term Loans": as defined in Section 10.1.

"Reportable Event": any of the events set forth in Section 4043(c) of ERISA, other than those events as to which the thirty day notice period is waived under PBGC Reg. § 4043.

"<u>Required Lenders</u>": at any time, the holders of more than 50% of (a) until the Closing Date, the Commitments then in effect and (b) thereafter, the sum of (i) the aggregate unpaid principal amount of the Term Loans then outstanding, (ii) the Total Revolving Commitments then in effect or, if the Revolving Commitments have been terminated, the Total Revolving Extensions of Credit then outstanding and (iii) the Total Canadian Revolving Commitments then in effect or, if the Canadian Revolving Commitments have been terminated, the Total Revolving Commitments have been terminated, the Total Canadian Revolving Extensions of Credit then outstanding.

"<u>Requirement of Law</u>": as to any Person, the Certificate of Incorporation and By-Laws or other organizational or governing documents of such Person, and any law, treaty, rule or regulation or determination of an arbitrator or a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

"<u>Reset Date</u>": the second Canadian Business Day following each Calculation Date; <u>provided</u> that, in connection with any Calculation Date designated pursuant to clause (b) of the definition thereof, the applicable Reset Date shall be such Calculation Date.

"<u>Responsible Officer</u>": the chief executive officer, president, chief financial officer or any vice president of the Borrower, but in any event, with respect to financial matters, the chief financial officer of the Borrower.

#### "Restricted Payments": as defined in Section 7.6.

"<u>Revolving Commitment</u>": as to any Revolving Lender, the obligation of such Lender, if any, to make Revolving Loans and participate in Swingline Loans and Letters of Credit in an aggregate principal and/or face amount not to exceed the amount set forth under the heading "Revolving Commitment" opposite such Lender's name on Schedule 1.1A or in the Assignment and Assumption pursuant to which such Lender became a party hereto, as the same may be changed from time to time pursuant to the terms hereof. The original amount of the Total Revolving Commitments is \$49,000,000.

"Revolving Commitment Period": the period from and including the Closing Date to the Revolving Termination Date.

"<u>Revolving Extensions of Credit</u>": as to any Revolving Lender at any time, an amount equal to the sum of (a) the aggregate principal amount of all Revolving Loans held by such Lender then outstanding, (b) such Lender's Revolving Percentage of the L/C Obligations then outstanding and (c) such Lender's Revolving Percentage of the aggregate principal amount of Swingline Loans then outstanding.

"Revolving Lender": each Lender (other than the Canadian Revolving Lender) that has a Revolving Commitment or that holds Revolving

Loans.

"Revolving Loans": as defined in Section 2.4(a).

"<u>Revolving Percentage</u>": as to any Revolving Lender at any time, the percentage which such Lender's Revolving Commitment then constitutes of the Total Revolving Commitments or, at any time after the Revolving Commitments shall have expired or terminated, the percentage which the aggregate principal amount of such Lender's Revolving Loans then outstanding constitutes of the aggregate principal amount of the Revolving Loans then outstanding, <u>provided</u>, that, in the event that the Revolving Loans are paid in full prior to the reduction to zero of the Total Revolving Extensions of Credit, the Revolving Percentages shall be determined in a manner designed to ensure that the other outstanding Revolving Extensions of Credit shall be held by the Revolving Lenders on a comparable basis; <u>provided</u> further that, in the case of Section 2.23 when a Defaulting Lender shall exist, any such Defaulting Lender's Revolving Commitment shall be disregarded in such calculations.

"Revolving Termination Date": June 1, 2015.

"S&P": Standard & Poor's Ratings Services.

"Sale-Leaseback": as defined in Section 7.11.

"<u>Schedule I Reference Banks</u>": means collectively Bank of Montreal, The Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Royal Bank of Canada and The Toronto-Dominion Bank and such one or more other Canadian banks identified in Schedule I to the Bank Act (Canada) as may from time to time be designated by the Administrative Agent, in consultation with the Canadian Borrower.

"SEC": the Securities and Exchange Commission, any successor thereto and any analogous Governmental Authority.

"Securities Act": the Securities Act of 1933, as amended.

"Security Documents": the collective reference to the Guarantee and Collateral Agreement, the Mortgages and all other security documents hereafter delivered to the Administrative Agent granting a Lien on any property of any Person to secure the obligations and liabilities of any Loan Party under any Loan Document.

"Sellers": Wellspring Capital Partners III, L.P., a Delaware limited partnership and HBK Main Street Investments L.P., a Delaware limited partnership.

"<u>Senior Note Indenture</u>": the Indenture entered into by Holdings, the Borrower and certain of its Subsidiaries in connection with the issuance of the Senior Notes, together with all instruments and other agreements entered into by Holdings, the Borrower or such Subsidiaries in connection therewith.

"Senior Notes": the senior notes of the Borrower issued pursuant to the Senior Note Indenture.

"Significant Group Member": (i) Holdings, (ii) the Borrower, (iii) the Canadian Borrower and (iv) any of their respective Subsidiaries accounting for more than 5% of the total assets or revenues of Holdings or the Borrower on a consolidated basis; provided that the aggregate assets and revenues of Subsidiaries that are not Significant Group Members shall not exceed 5% of the total assets or revenues of Holdings or the Borrower on a consolidated basis (and the Borrower will designate in writing to the Administrative Agent from time to time the Subsidiaries that will not be treated as Significant Group Members in order to comply with the foregoing limitation).

"Single Employer Plan": any Plan (other than a Multiemployer Plan) that is subject to the provisions of Section 302 or Title IV of ERISA or Section 412 of the Code.

"<u>Solvent</u>": when used with respect to any Person, means that, as of any date of determination, (a) the amount of the "present fair saleable value" of the assets of such Person will, as of such date, exceed the amount of all "liabilities of such Person, contingent or otherwise", as of such date, as such quoted terms are determined in accordance with applicable federal and state laws governing determinations of the insolvency of debtors, (b) the present fair saleable value of the assets of such Person will, as of such date, be greater than the amount that will be required to pay the liability of such Person on its debts as such debts become absolute and matured, (c) such Person will not have, as of such date, an unreasonably small amount of capital with which to conduct its business, and (d) such Person will be able to pay its debts as they mature. For purposes of this definition, (i) "debt" means liability on a "claim", and (ii) "claim" means any (x) right to payment, whether or not such a right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured or (y) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, disputed, undisputed, legal, equitable remedy is reduced to judgment, fixed, contingent, matured, disputed, undisputed, legal, equitable remedy is reduced to judgment, fixed, contingent, matured, disputed, undisputed, legal.

"Specified Cash Management Agreement": any agreement providing for treasury, depositary or cash management services, including in connection with any automated clearing house transfers of funds or any similar transactions between the Borrower or any Guarantor and any Lender or Affiliate thereof.

"Specified Change of Control": a "Change of Control" (or any other defined term having a similar purpose) as defined in the Senior Note Indenture.

"Specified Representations": as defined in Section 5.2(a).

"Specified Swap Agreement": any Swap Agreement entered into by the Borrower or any Guarantor and any Lender or Affiliate thereof in respect of interest rates.

"Sponsor": the collective reference to Oak Hill Capital Partners III, L.P., Oak Hill Capital Management Partners III, L.P., Oak Hill Capital Management, LLC and OHCP GenPar III, L.P. or any of them.

"Subsidiary": as to any Person, a corporation, partnership, limited liability company or other entity of which more than 50% of the total shares of stock or other ownership interests or more than 50% of ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, Controlled or held by such Person, or the management of which is otherwise Controlled, directly or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise qualified, all references to a "Subsidiary" or to "Subsidiaries" in this Agreement shall refer to a Subsidiary or Subsidiaries of the Borrower.

"Subsidiary Guarantor": each Subsidiary of the Borrower other than any Excluded Foreign Subsidiary.

"Swap Agreement": 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 any of its Subsidiaries shall be a "Swap Agreement".

"Swingline Commitment": the obligation of the Swingline Lender to make Swingline Loans pursuant to Section 2.6 in an aggregate principal amount at any one time outstanding not to exceed \$5,000,000.

"Swingline Exposure": at any time, the sum of the aggregate undrawn amount of all outstanding Swingline Loans at such time. The Swingline Exposure of any Revolving Lender at any time shall be its Revolving Percentage of the total Swingline Exposure at such time.

"Swingline Lender": JPMorgan Chase Bank, N.A., in its capacity as the lender of Swingline Loans.

"Swingline Loans": as defined in Section 2.6.

"Swingline Participation Amount": as defined in Section 2.7.

"Target": Dave & Buster's Holdings, Inc.

"<u>Term Commitment</u>": as to any Lender, the obligation of such Lender, if any, to make a Term Loan to the Borrower in a principal amount not to exceed the amount set forth under the heading "Term Commitment" opposite such Lender's name on Schedule 1.1A. The original aggregate amount of the Term Commitments is \$150,000,000.

"Term Lenders": each Lender that holds a Term Commitment or that holds a Term Loan.

"Term Loans": as defined in Section 2.1.

"<u>Term Percentage</u>": as to any Term Lender at any time, the percentage which such Lender's Term Commitment then constitutes of the aggregate Term Commitments (or, at any time after the Closing Date, the percentage which the aggregate principal amount of such Lender's Term Loans then outstanding constitutes of the aggregate principal amount of the Term Loans then outstanding.

"Total Canadian Revolving Commitments": at any time, the aggregate amount of the Canadian Revolving Commitments then in effect.

"Total Canadian Revolving Extensions of Credit": at any time, the aggregate amount of the Canadian Revolving Extensions of Credit of the Canadian Revolving Lenders outstanding at such time.

"Total Revolving Commitments": at any time, the aggregate amount of the Revolving Commitments then in effect.

"Total Revolving Extensions of Credit": at any time, the aggregate amount of the Revolving Extensions of Credit of the Revolving Lenders outstanding at such time.

"Transactions": the Acquisition, the Equity Contribution, the borrowing of the Loans on the Closing Date, the issuance of the Senior Notes, the repayment of existing Indebtedness of Target and its Subsidiaries on or prior to the Closing Date and the payment of fees and expenses in connection with the foregoing.

"Transferee": any Assignee or Participant.

"Type": as to any Loan, its nature as an ABR Loan, a Eurodollar Loan, a Canadian Prime Rate Loan or a Canadian Cost of Funds Loan, as the case may be.

"<u>Unit</u>": a particular restaurant and/or entertainment center at a particular location that is owned or operated by the Borrower or one of its Subsidiaries or that is operated by a franchisee of the Borrower or one of its Subsidiaries.

"United States": the United States of America.

"USD Equivalent": with respect to an amount of Canadian Dollars on any date, the amount of Dollars that may be purchased with such amount of Canadian Dollars at the Exchange Rate in effect on such date.

"<u>Wholly Owned Subsidiary</u>": as to any Person, any other Person all of the Capital Stock of which (other than directors' qualifying shares required by law) is owned by such Person directly and/or through other Wholly Owned Subsidiaries.

"Wholly Owned Subsidiary Guarantor": any Subsidiary Guarantor that is a Wholly Owned Subsidiary of the Borrower.

"<u>Withdrawal Liability</u>": liability to a Multiemployer Plan as the 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, by the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities.

1.2 <u>Other Definitional Provisions</u>. (a) Unless otherwise specified therein, all terms defined in this Agreement shall have the defined meanings when used in the other Loan Documents or any certificate or other document made or delivered pursuant hereto or thereto.

(b) As used herein and in the other Loan Documents, and any certificate or other document made or delivered pursuant hereto or thereto, (i) accounting terms relating to any Group Member not defined in Section 1.1 and accounting terms partly defined in Section 1.1, to the extent not defined, shall have the respective meanings given to them under GAAP (provided that, notwithstanding anything to the contrary herein, all accounting or financial terms used herein shall be construed, and all financial computations pursuant hereto shall be made, without giving effect to any election under Statement of Financial Accounting Standards 159 (or any other Financial Accounting Standard having a similar effect) to value any Indebtedness or other liabilities of any Group Member at "fair value", as defined therein), (ii) the words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation", (iii) the word "incur" shall be construed to mean incur, create, issue, assume, become liable in respect of or suffer to exist (and the words "incurred" and "incurrence" shall have correlative meanings), (iv) 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, Capital Stock, securities, revenues, accounts, leasehold interests and contract rights, and (v) references to agreements or other Contractual Obligations shall, unless otherwise specified, be deemed to refer to such agreements or Contractual Obligations as amended, supplemented, restated or otherwise modified from time to time.

(c) The words "hereof", "herein" and "hereunder" and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and Section, Schedule and Exhibit references are to this Agreement unless otherwise specified.

(d) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

#### SECTION 2. AMOUNT AND TERMS OF COMMITMENTS

2.1 <u>Term Commitments</u>. Subject to the terms and conditions hereof, each Term Lender severally agrees to make a term loan (a "<u>Term Loan</u>") to the Borrower on the Closing Date in an amount not to exceed the amount of the Term Commitment of such Lender. The Term Loans may from time to time be Eurodollar Loans or ABR Loans, as determined by the Borrower and notified to the Administrative Agent in accordance with Sections 2.2 and 2.12.

2.2 Procedure for Term Loan Borrowing. The Borrower shall give the Administrative Agent irrevocable notice (which notice must be received by the Administrative Agent prior to 10:00 a.m., New York City time, one Business Day prior to the anticipated Closing Date requesting that the Term Lenders make the Term Loans on the Closing Date and specifying the amount to be borrowed. The Term Loans made on the Closing Date shall initially be ABR Loans and, unless otherwise agreed by the Administrative Agent in its sole discretion, no Term Loan may be converted into or continued as a Eurodollar Loan having an Interest Period in excess of one month prior to the date that is 30 days after the Closing Date. Upon receipt of such notice the Administrative Agent shall promptly notify each Term Lender thereof. Not later than 12:00 Noon, New York City time, on the Closing Date each Term Lender shall make available to the Administrative Agent at the Funding Office an amount in immediately available funds equal to the Term Loan or Term Loans to be made by such Lender. The Administrative Agent shall credit the account of the Borrower on the books of such office of the Administrative Agent with the aggregate of the amounts made available to the Administrative Agent by the Term Lenders in immediately available funds.

2.3 <u>Repayment of Term Loans</u>. The Term Loan of each Lender shall mature in 25 consecutive quarterly installments, each of which shall be in an amount equal to such Lender's Term Percentage multiplied by the percentage set forth below opposite such installment of the aggregate principal amount of Term Loans made on the Closing Date:

Installment	Percentage
July 31, 2010	0.25%
October 31, 2010	0.25%
January 31, 2011	0.25%
April 30, 2011	0.25%
July 31, 2011	0.25%
October 31, 2011	0.25%
January 31, 2012	0.25%
April 30, 2012	0.25%
July 31, 2012	0.25%
October 31, 2012	0.25%
January 31, 2013	0.25%
April 30, 2013	0.25%
July 31, 2013	0.25%
October 31, 2013	0.25%
January 31, 2014	0.25%
April 30, 2014	0.25%
July 31, 2014	0.25%
October 31, 2014	0.25%
January 31, 2015	0.25%
April 30, 2015	0.25%
July 31, 2015	0.25%
October 31, 2015	0.25%
January 31, 2016	0.25%
April 30, 2016	0.25%
June 1, 2016	94.00%

2.4 <u>Revolving Commitments</u>. (a) Subject to the terms and conditions hereof, each Revolving Lender severally agrees to make revolving credit loans ("<u>Revolving Loans</u>") to the Borrower in Dollars from time to time during the Revolving Commitment Period in an aggregate principal amount at any one time outstanding which, when added to such Lender's Revolving Percentage of the sum of (i) the L/C Obligations then outstanding and (ii) the aggregate principal amount of the Swingline Loans then outstanding, does not exceed the amount of such Lender's Revolving Commitment; provided, that the aggregate amount of Revolving Loans made on the Closing Date shall not exceed \$5,000,000 (which shall not include the Existing Letters of Credit which are deemed to be outstanding under this Agreement pursuant to Section 3.9). During the Revolving Commitment Period, the Borrower may use the Revolving Commitments by borrowing, prepaying the Revolving Loans in whole or in part, and reborrowing, all in accordance with the terms and conditions hereof. The Revolving Loans may from time to time be Eurodollar Loans or ABR Loans, as determined by the Borrower and notified to the Administrative Agent in accordance with Sections 2.5 and 2.12.

(b) The Borrower shall repay all outstanding Revolving Loans on the Revolving Termination Date.

2.4A. <u>Canadian Revolving Commitments</u>; Additional Revolving Loans. (a) Subject to the terms and conditions hereof, each Canadian Revolving Lender severally agrees to make (i) revolving credit loans ("<u>Canadian Revolving Loans</u>") to the Canadian Borrower in Canadian Dollars and (ii) revolving credit loans ("<u>Additional Revolving Loans</u>") to the Borrower in Dollars from time to time during the Revolving Commitment Period in an aggregate principal amount at any one time outstanding (USD Equivalent) which does not exceed the amount of such Lender's Canadian Revolving Commitment; provided</u>, that no Canadian Revolving Loans or Additional Revolving Loans shall be made on the Closing Date. During the Revolving Commitment Period, the Canadian Borrower and the Borrower may use the Canadian Revolving Commitments by borrowing, prepaying the Canadian Revolving Loans and the Additional Revolving Loans, as the case may be, in whole or in part, and reborrowing, all in accordance with the terms and conditions hereof. The Canadian Revolving Loans may from time to time be Canadian Prime Rate or Canadian Cost of Funds Loans, as determined by the Canadian Borrower and notified to the Administrative Agent in accordance with Sections 2.5(b) and 2.12. The Additional Revolving Loans may from time to time be Eurodollar Loans or ABR Loans, as determined by the Borrower and notified to the Administrative Agent in accordance with Sections 2.5(c) and 2.12.

- (b) The Canadian Borrower shall repay all outstanding Canadian Revolving Loans on the Revolving Termination Date.
- (c) The Borrower shall repay all outstanding Additional Revolving Loans on the Revolving Termination Date.

2.5 Procedure for Revolving Loan Borrowing; Currency Fluctuation Matters. (a) The Borrower may borrow under the Revolving Commitments during the Revolving Commitment Period on any Business Day, provided that the Borrower shall give the Administrative Agent irrevocable notice (which notice must be received by the Administrative Agent prior to 11:00 a.m., New York City time, (i) three Business Days prior to the requested Borrowing Date, in the case of Eurodollar Loans, or (ii) one Business Day prior to the requested Borrowing Date, in the case of ABR Loans) (provided that any such notice of a borrowing of ABR Loans under the Revolving Facility to finance payments required by Section 3.5 may be given not later than 10:00 a.m., New York City time, on the date of the proposed borrowing), specifying (A) the amount and Type of Revolving Loans to be borrowed, (B) the requested Borrowing Date and (C) in the case of Eurodollar Loans, the respective amounts of each such Type of Loan and the respective lengths of the initial Interest Period therefor. Any Revolving Loans made on the Closing Date shall initially be ABR Loans and, unless otherwise agreed by the Administrative Agent in its sole discretion, no Revolving Loan may be made as, converted into or continued as a Eurodollar Loan having an Interest Period in excess of one month prior to the date that is 30 days after the Closing Date. Each borrowing under the Revolving Commitments shall be in an amount equal to (x) in the case of ABR Loans, \$1,000,000 or a whole multiple of \$500,000 in excess thereof (or, if the then aggregate Available Revolving Commitments are less than \$1,000,000, such lesser amount) and (y) in the case of Eurodollar Loans, \$1,000,000 or a whole multiple of \$500,000 in excess thereof (or, if the then aggregate Available Revolving Commitments are less than \$1,000,000, such lesser amount); provided, that the Swingline Lender may request, on behalf of the Borrower, borrowings under the Revolving Commitments that are ABR Loans in other amounts pursuant to Section 2.7. Upon receipt of any such notice from the Borrower, the Administrative Agent shall promptly notify each Revolving Lender thereof. Each Revolving Lender will make the amount of its pro rata share of each borrowing available to the Administrative Agent for the account of the Borrower at the Funding Office prior to 12:00 Noon, New York City time, on the Borrowing Date requested by the Borrower in funds immediately available to the Administrative Agent. Such borrowing will then be made available to the Borrower by the Administrative Agent crediting the account of the Borrower on the books of such office with the aggregate of the amounts made available to the Administrative Agent by the Revolving Lenders and in like funds as received by the Administrative Agent.

(b) The Canadian Borrower may borrow under the Canadian Revolving Commitments during the Revolving Commitment Period on any Canadian Business Day, provided that the Canadian Borrower shall give the Administrative Agent irrevocable notice (which notice must be received by the Administrative Agent prior to 11:00 a.m., New York City time, three Canadian Business Days prior to the requested Borrowing Date) specifying (A) the amount in Canadian Dollars and Type of Canadian Revolving Loans to be borrowed, (B) the requested Borrowing Date and (C) in the case of Canadian Cost of Funds Loans, the respective amounts of each such Type of Loan and the respective lengths of the initial Interest Period therefor. Any Canadian Revolving Loans made on the Closing Date shall initially be Canadian Prime Rate Loans and, unless otherwise agreed by the Administrative Agent in its sole discretion, no Canadian Revolving Loan may be made as, converted into or continued as a Canadian Cost of Funds Loan having an Interest Period in excess of 30 days prior to the date that is 30 days after the Closing Date. Each borrowing of Canadian Revolving Loans under the Canadian Revolving Commitments shall be in an amount equal to (x) in the case of Canadian Prime Rate Loans, C\$100,000 or a whole multiple of C\$100,000 in excess thereof (or, if the then aggregate Available Canadian Revolving Commitments are less than C\$100,000, such lesser amount) and (y) in the case of Canadian Cost of Funds Loans, C\$100,000 or a whole multiple of C\$100,000 in excess thereof (or, if the then aggregate Available Canadian Revolving Commitments are less than C\$100,000, such lesser amount). Upon receipt of any such notice from the Canadian Borrower, the Administrative Agent shall promptly notify each Canadian Revolving Lender thereof. Each Canadian Revolving Lender will make the amount of its pro rata share of each borrowing available to the Administrative Agent for the account of the Canadian Borrower at the Funding Office prior to 12:00 Noon, New York City time, on the Borrowing Date requested by the Canadian Borrower in funds immediately available to the Administrative Agent. Such borrowing will then be made available to the Canadian Borrower by the Administrative Agent crediting the account of the Canadian Borrower on the books of such office with the aggregate of the amounts made available to the Administrative Agent by the Canadian Revolving Lenders and in like funds as received by the Administrative Agent.

(c) The Borrower may borrow under the Canadian Revolving Commitments during the Revolving Commitment Period on any Business Day, provided that the Borrower shall give the Administrative Agent irrevocable notice (which notice must be received by the Administrative Agent prior to 11:00 a.m., New York City time, (i) three Business Days prior to the requested Borrowing Date, in the case of Eurodollar Loans, or (ii) one Business Day prior to the requested Borrowing Date, in the case of ABR Loans), specifying (A) the amount and Type of Additional Revolving Loans to be borrowed, (B) the requested Borrowing Date and (C) in the case of Eurodollar Loans, the respective amounts of each such Type of Loan and the respective lengths of the initial Interest Period therefor. Any Additional Revolving Loans made on the Closing Date shall initially be ABR Loans and, unless otherwise agreed by the Administrative Agent in its sole discretion, no Additional Revolving Loan may be made as, converted into or continued as a Eurodollar Loan having an Interest Period in excess of one month prior to the date that is 30 days after the Closing Date. Each borrowing of Additional Revolving Loans under the Canadian Revolving Commitments shall be in an amount equal to (x) in the case of ABR Loans, \$200,000 or a whole multiple of \$100,000 in excess thereof (or, if the then aggregate Available Canadian Revolving Commitments are less than \$200,000, such lesser amount) and (y) in the case of Eurodollar Loans, \$200,000 or a whole multiple of \$100,000 in excess thereof (or, if the then aggregate Available Canadian Revolving Commitments are less than \$200,000, such lesser amount). Upon receipt of any such notice from the Borrower, the Administrative Agent shall promptly notify each Canadian Revolving Lender thereof. The U.S. Affiliate of each Canadian Revolving Lender will make the amount of its pro rata share of each borrowing available to the Administrative Agent for the account of the Borrower at the Funding Office prior to 12:00 Noon, New York City time, on the Borrowing Date requested by the Borrower in funds immediately available to the Administrative Agent. Such borrowing will then be made available to the Borrower by the Administrative Agent crediting the account of the Borrower on the books of such office with the aggregate of the amounts made available to the Administrative Agent by the U.S. Affiliate of the Canadian Revolving Lenders and in like funds as received by the Administrative Agent.

(d) With respect to each borrowing of Canadian Revolving Loans, not later than 11:00 a.m., New York City time, on the second Canadian Business Day preceding the Borrowing Date with respect to such Canadian Revolving Loan, the Administrative Agent shall determine the Exchange Rate as of such date and give notice thereof to the Canadian Borrower and the Canadian Revolving Lenders. The Exchange Rate so determined shall become effective on such Borrowing Date for the purposes of determining the availability under the Canadian Revolving Commitments (it being understood that such availability shall be calculated and determined by applying such Exchange Rate to the aggregate principal amount of Canadian Revolving Loans which are outstanding on such Borrowing Date).

(e) With respect to each borrowing of Additional Revolving Loans at a time when Canadian Revolving Loans are outstanding, not later than 11:00 a.m., New York City time, on the second Business Day preceding the Borrowing Date (or, in the case of an ABR Loan, promptly on the Borrowing Date) with respect to such Additional Revolving Loan, the Administrative Agent shall determine the Exchange Rate as of such date and give notice thereof to the Borrower and the Canadian Revolving Lenders. The Exchange Rate so determined shall become effective on such Borrowing Date for the purposes of determining the availability under the Canadian Revolving Commitments (it being understood that such availability shall be calculated and determined by applying such Exchange Rate to the aggregate principal amount of Canadian Revolving Loans which are outstanding on such Borrowing Date).

(f) Not later than 2:00 p.m., New York City time, on each Calculation Date (so long as any Canadian Revolving Loans are outstanding), the Administrative Agent shall determine the Exchange Rate as of such Calculation Date and give notice thereof to the Borrower, the Canadian Borrower and the Canadian Revolving Lenders. The Exchange Rate so determined shall become effective on the next succeeding Reset Date. If, on any Reset Date, the Total Canadian Revolving Extensions of Credit exceed an amount equal to 105% of the Total Canadian Revolving Commitments, then the Canadian Borrower and/or the Borrower, as the case may be, shall, within three Canadian Business Days (or Business Days, as applicable) after notice thereof from the Administrative Agent, or so long as no Default or Event of Default has occurred and is continuing, with respect to any Canadian Cost of Funds Loans or Eurodollar Loans to be prepaid, on the next applicable Interest Payment Date, prepay Canadian Revolving Loans and/or Additional Revolving Loans in an amount such that, after giving effect thereto, the Total Canadian Revolving Extensions of Credit do not exceed the Total Canadian Revolving Commitments (such calculation to be made using the Exchange Rate that is effective on such Reset Date); <u>provided</u> that any such prepayment shall be accompanied by accrued interest on the amount prepaid (except in the case of Canadian Revolving Loans that are Canadian Prime Rate Loans or Additional Revolving Loans that are ABR Loans) but shall be without premium or penalty of any kind (other than any payments required under Section 2.20).

2.6 Swingline Commitment. (a) Subject to the terms and conditions hereof, the Swingline Lender agrees to make a portion of the credit otherwise available to the Borrower under the Revolving Commitments from time to time during the Revolving Commitment Period by making swing line loans ("Swingline Loans") to the Borrower; provided that (i) the aggregate principal amount of Swingline Loans outstanding at any time shall not exceed the Swingline Commitment then in effect (notwithstanding that the Swingline Loans outstanding at any time, when aggregated with the Swingline Lender's other outstanding Revolving Loans, may exceed the Swingline Commitment then in effect) and (ii) the Borrower shall not request, and the Swingline Lender shall not make, any Swingline Loan if, after giving effect to the making of such Swingline Loan, the aggregate amount of the Available Revolving Commitments would be less than zero. During the Revolving Commitment Period, the Borrower may use the Swingline Commitment by borrowing, repaying and reborrowing, all in accordance with the terms and conditions hereof. Swingline Loans shall be ABR Loans only.

(b) The Borrower shall repay to the Swingline Lender the then unpaid principal amount of each Swingline Loan on the earlier of the Revolving Termination 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 Business Days after such Swingline Loan is made; provided that on each date that a Revolving Loan is borrowed, the Borrower shall repay all Swingline Loans then outstanding.

2.7 Procedure for Swingline Borrowing; Refunding of Swingline Loans. (a) Whenever the Borrower desires that the Swingline Lender make Swingline Loans it shall give the Swingline Lender irrevocable telephonic notice confirmed promptly in writing (which telephonic notice must be received by the Swingline Lender not later than 1:00 p.m., New York City time, on the proposed Borrowing Date), specifying (i) the amount to be borrowed and (ii) the requested Borrowing Date (which shall be a Business Day during the Revolving Commitment Period). Each borrowing under the Swingline Commitment shall be in an amount equal to \$500,000 or a whole multiple of \$100,000 in excess thereof. Not later than 3:00 p.m., New York City time, on the Borrowing Date specified in a notice in respect of Swingline Loans, the Swingline Lender shall make available to the Administrative Agent at the Funding Office an amount in immediately available funds equal to the amount of the Swingline Loan to be made by the Swingline Lender. The Administrative Agent shall make the proceeds of such Swingline Loan available to the Borrower on such Borrowing Date by depositing such proceeds in the account of the Borrower with the Administrative Agent on such Borrowing Date in immediately available funds.

(b) The Swingline Lender, at any time and from time to time in its sole and absolute discretion may, on behalf of the Borrower (which hereby irrevocably directs the Swingline Lender to act on its behalf), on one Business Day's notice given by the Swingline Lender no later than 12:00 Noon, New York City time, request each Revolving Lender to make, and each Revolving Lender hereby agrees to make, a Revolving Loan, in an amount equal to such Revolving Lender's Revolving Percentage of the aggregate amount of the Swingline Loans (the "<u>Refunded Swingline Loans</u>") outstanding on the date of such notice, to repay the Swingline Lender. Each Revolving Lender shall make the amount of such Revolving Loan available to the Administrative Agent at the Funding Office in immediately available funds, not later than 10:00 a.m., New York City time, one Business Day after the date of such notice. The proceeds of such Revolving Loans shall be immediately made available by the Administrative Agent to the repayment of the Refunded Swingline Loans. The Borrower irrevocably authorizes the Swingline Lender to charge the Borrower's accounts with the Administrative Agent (up to the amount available in each such account) in order to immediately pay the amount of such Refunded Swingline Loans.

(c) If prior to the time a Revolving Loan would have otherwise been made pursuant to Section 2.7(b), one of the events described in Section 8.1(f) shall have occurred and be continuing with respect to the Borrower or if for any other reason, as determined by the Swingline Lender in its sole discretion, Revolving Loans may not be made as contemplated by Section 2.7(b), each Revolving Lender shall, on the date such Revolving Loan was to have been made pursuant to the notice referred to in Section 2.7(b), purchase for cash an undivided participating interest in the then outstanding Swingline Loans by paying to the Swingline Lender an amount (the "<u>Swingline Participation Amount</u>") equal to (i) such Revolving Lender's Revolving Percentage <u>times</u> (ii) the sum of the aggregate principal amount of Swingline Loans then outstanding that were to have been repaid with such Revolving Loans.

(d) Whenever, at any time after the Swingline Lender has received from any Revolving Lender such Lender's Swingline Participation Amount, the Swingline Lender receives any payment on account of the Swingline Loans, the Swingline Lender will distribute to such Lender its Swingline Participation Amount (appropriately adjusted, in the case of interest payments, to reflect the period of time during which such Lender's participating interest was outstanding and funded and, in the case of principal and interest payments, to reflect such Lender's <u>pro rata</u> portion of such payment if such payment is not sufficient to pay the principal of and interest on all Swingline Loans then due); <u>provided</u>, <u>however</u>, that in the event that such payment received by the Swingline Lender is required to be returned, such Revolving Lender will return to the Swingline Lender any portion thereof previously distributed to it by the Swingline Lender.

(e) Each Revolving Lender's obligation to make the Loans referred to in Section 2.7(b) and to purchase participating interests pursuant to Section 2.7(c) shall be absolute and unconditional and shall not be affected by any circumstance, including (i) any setoff, counterclaim, recoupment, defense or other right that such Revolving Lender or the Borrower may have against the Swingline Lender, the Borrower or any other Person for any reason whatsoever, (ii) the occurrence or continuance of a Default or an Event of Default or the failure to satisfy any of the other conditions specified in Section 5, (iii) any adverse change in the condition (financial or otherwise) of the Borrower, (iv) any breach of this Agreement or any other Loan Document by the Borrower, any other Loan Party or any other Revolving Lender or (v) any other circumstance, happening or event whatsoever, whether or not similar to any of the foregoing.

2.8 <u>Commitment Fees, etc.</u> (a) The Borrower agrees to pay to the Administrative Agent for the account of each Revolving Lender a commitment fee for the period from and including the date hereof to the last day of the Revolving Commitment Period, computed at the Commitment Fee Rate on the average daily amount of the Available Revolving Commitment of such Lender during the period for which payment is made, payable quarterly in arrears on each Fee Payment Date, commencing on the first such date to occur after the date hereof.

(b) The Canadian Borrower and the Borrower, jointly and severally, agree to pay to the Administrative Agent for the account of each Canadian Revolving Lender a commitment fee for the period from and including the date hereof to the last day of the Revolving Commitment Period, computed at the Commitment Fee Rate on the average daily amount of the Available Canadian Revolving Commitment of such Lender during the period for which payment is made, payable quarterly in arrears on each Fee Payment Date, commencing on the first such date to occur after the date hereof.

(c) The Borrower agrees to pay to the Administrative Agent the fees in the amounts and on the dates as set forth in any fee agreements with the Administrative Agent and to perform any other obligations contained therein.

2.9 <u>Termination or Reduction of Revolving Commitments</u>. (a) The Borrower shall have the right, upon not less than three Business Days' notice to the Administrative Agent, to terminate the Revolving Commitments or, from time to time, to reduce the amount of the Revolving Commitments (without any reduction of the Canadian Revolving Commitments); <u>provided</u> that no such termination or reduction of Revolving Commitments shall be permitted if, after giving effect thereto and to any prepayments of the Revolving Loans and Swingline Loans made on the effective date thereof, the Total Revolving Extensions of Credit would exceed the Total Revolving Commitments. Any such reduction shall be in an amount equal to \$1,000,000, or a whole multiple of \$500,000 in excess thereof, and shall reduce permanently the Revolving Commitments then in effect.

(b) The Canadian Borrower and the Borrower shall have the right, upon not less than three Canadian Business Days' (or Business Days', as applicable) notice to the Administrative Agent, to terminate the Canadian Revolving Commitments or, from time to time, to reduce the amount of the Canadian Revolving Commitments (without any reduction of the Revolving Commitments); provided that no such termination or reduction of Canadian Revolving Commitments shall be permitted if, after giving effect thereto and to any prepayments of the Canadian Revolving Loans and the Additional Revolving Loans made on the effective date thereof, the Total Canadian Revolving Extensions of Credit would exceed the Total Canadian Revolving Commitments. Any such reduction shall be in an amount equal to \$100,000, or a whole multiple of \$100,000 in excess thereof, and shall reduce permanently the Canadian Revolving Commitments then in effect.

2.10 Optional Prepayments. (a) The Borrower may at any time and from time to time prepay the Loans, in whole or in part, without premium or penalty, upon irrevocable notice delivered to the Administrative Agent no later than 11:00 a.m., New York City time, three Business Days prior thereto, in the case of Eurodollar Loans, and no later than 11:00 a.m., New York City time, one Business Day prior thereto, in the case of ABR Loans, which notice shall specify the date and amount of prepayment and whether the prepayment is of Eurodollar Loans or ABR Loans; provided, that if a Eurodollar Loan is prepaid on any day other than the last day of the Interest Period applicable thereto, the Borrower shall also pay any amounts owing pursuant to Section 2.20. Upon receipt of any such notice the Administrative Agent shall promptly notify each relevant Lender thereof. If any such notice is given, the amount specified in such notice shall be due and payable on the date specified therein, together with (except in the case of Revolving Loans or Additional Revolving Loans and Additional Revolving Loans shall be in an aggregate principal amount of \$1,000,000 or a whole multiple of \$500,000 in excess thereof. Partial prepayments of Swingline Loans shall be in an aggregate principal amount of \$100,000 or a whole multiple thereof.

(b) The Canadian Borrower may at any time and from time to time prepay the Canadian Revolving Loans, in whole or in part, without premium or penalty, upon irrevocable notice delivered to the Administrative Agent no later than 11:00 a.m., New York City time, three Canadian Business Days prior thereto, in the case of Canadian Cost of Funds Loans, and no later than 11:00 a.m., New York City time, one Canadian Business Day prior thereto, in the case of Canadian Cost of Funds Loans, and no later than 11:00 a.m., New York City time, one Canadian Business Day prior thereto, in the case of Canadian Prime Rate Loans, which notice shall specify the date and amount of prepayment and whether the prepayment is of Canadian Cost of Funds Loans or Canadian Prime Rate Loans; provided, that if a Canadian Cost of Funds Loan is prepaid on any day other than the last day of the Interest Period applicable thereto, the Canadian Borrower shall also pay any amounts owing pursuant to Section 2.20. Upon receipt of any such notice shall be due and payable on the date specified therein, together with (except in the case of Canadian Revolving Loans that are Canadian Prime Rate Loans) accrued interest to such date on the amount prepaid. Partial prepayments of Canadian Revolving Loans shall be in an aggregate principal amount of C\$100,000 or a whole multiple of C\$100,000 in excess thereof.

2.11 <u>Mandatory Prepayments</u>. (a) If any Indebtedness shall be issued or incurred by any Group Member (excluding any Indebtedness incurred in accordance with Section 7.2, other than paragraph (g) thereof), an amount equal to 100% of the Net Cash Proceeds thereof shall be applied on the date of such issuance or incurrence toward the prepayment of the Term Loans as set forth in Section 2.11(d).

(b) If on any date any Group Member shall receive Net Cash Proceeds from any Asset Sale or Recovery Event then, unless a Reinvestment Notice shall be delivered in respect thereof, such Net Cash Proceeds shall be applied within three (3) Business Days of such date toward the prepayment of the Term Loans as set forth in Section 2.11(d); provided, that, notwithstanding the foregoing, (i) the aggregate Net Cash Proceeds of Asset Sales and Recovery Events that may be excluded from the foregoing requirement pursuant to a Reinvestment Notice shall not exceed \$5,000,000 in any Fiscal Year of the Borrower and (ii) on each Reinvestment Prepayment Date, an amount equal to the Reinvestment Prepayment Amount with respect to the relevant Reinvestment Event shall be applied toward the prepayment of the Term Loans as set forth in Section 2.11(d).

(c) If, for any Fiscal Year of the Borrower commencing with the Fiscal Year ending January 29, 2012 there shall be Excess Cash Flow, the Borrower shall, on the relevant Excess Cash Flow Application Date (as defined below), apply an amount (the "<u>ECF Application Amount</u>") equal to (i)(A) such Excess Cash Flow <u>multiplied</u> by (B) the relevant ECF Percentage <u>minus</u> (ii) the aggregate amount of all prepayments of Revolving Loans, Canadian Revolving Loans, Additional Revolving Loans and Swingline Loans during such Fiscal Year (or during the current Fiscal Year but prior to the relevant Excess Cash Flow Application Date, in which case such amount shall not be deducted in any subsequent calculation of Excess Cash Flow) to the extent accompanying permanent optional reductions of the Revolving Commitments, or the Canadian Revolving Commitments, as the case may be, and all optional prepayments of the Term Loans during such Fiscal Year (or during the current Fiscal Year but prior to the relevant Excess Cash Flow Application Date, in which case such amount shall not be deducted in any subsequent calculation of Excess Cash Flow Application Date, in which case such amount shall not be deducted in any subsequent calculation of Excess Cash Flow Application Date, in which case such amount shall not be deducted in any subsequent calculation of Excess Cash Flow), toward the prepayment of the Term Loans as set forth in Section 2.11(d). Each such prepayment shall be made on a date (an "<u>Excess Cash Flow Application Date</u>") no later than five days after the earlier of (i) the date on which the financial statements of the Borrower referred to in Section 6.1(a), for the Fiscal Year with respect to which such prepayment is made, are required to be delivered to the Lenders and (ii) the date such financial statements are actually delivered.

(d) Amounts to be applied in connection with prepayments made pursuant to Section 2.11 shall be applied to the prepayment of the Term Loans in accordance with Section 2.17(b). The application of any prepayment pursuant to Section 2.11 shall be made, <u>first</u>, to ABR Loans and, <u>second</u>, to Eurodollar Loans. Each prepayment of the Loans under Section 2.11 shall be accompanied by accrued interest to the date of such prepayment on the amount prepaid.

2.12 <u>Conversion and Continuation Options</u>. (a) The Borrower may elect from time to time to convert Eurodollar Loans to ABR Loans by giving the Administrative Agent prior irrevocable notice of such election no later than 11:00 a.m., New York City time, on the Business Day preceding the proposed conversion date, <u>provided</u> that any such conversion of Eurodollar Loans may only be made on the last day of an Interest Period with respect thereto. The Borrower may elect from time to time to convert ABR Loans to Eurodollar Loans by giving the Administrative Agent prior irrevocable notice of such election no later than 11:00 a.m., New York City time, on the third Business Day preceding the proposed conversion date (which notice shall specify the length of the initial Interest Period therefor), <u>provided</u> that no ABR Loan under a particular Facility may be converted into a Eurodollar Loan when any Event of Default has occurred and is continuing and the Administrative Agent or the Majority Facility Lenders in respect of such Facility have determined in its or their sole discretion not to permit such conversions. Upon receipt of any such notice the Administrative Agent shall promptly notify each relevant Lender thereof.

(b) Any Eurodollar Loan may be continued as such upon the expiration of the then current Interest Period with respect thereto by the Borrower giving irrevocable notice to the Administrative Agent, in accordance with the applicable provisions of the term "Interest Period" set forth in Section 1.1, of the length of the next Interest Period to be applicable to such Loans, provided that no Eurodollar Loan under a particular Facility may be continued as such when any Event of Default has occurred and is continuing and the Administrative Agent has or the Majority Facility Lenders in respect of such Facility have determined in its or their sole discretion not to permit such continuations, and provided, further, that if the Borrower shall fail to give any required notice as described above in this paragraph or if such continuation is not permitted pursuant to the preceding proviso such Loans shall be automatically converted to ABR Loans on the last day of such then expiring Interest Period. Upon receipt of any such notice the Administrative Agent shall promptly notify each relevant Lender thereof.

(c) The Canadian Borrower may elect from time to time to convert Canadian Cost of Funds Loans to Canadian Prime Rate Loans by giving the Administrative Agent prior irrevocable notice of such election no later than 11:00 a.m., New York City time, on the Canadian Business Day preceding the proposed conversion date, <u>provided</u> that any such conversion of Canadian Cost of Funds Loans may only be made on the last day of an Interest Period with respect thereto. The Canadian Borrower may elect from time to time to convert Canadian Prime Rate Loans to Canadian Cost of Funds Loans by giving the Administrative Agent prior irrevocable notice of such election no later than 11:00 a.m., New York City time, on the third Canadian Business Day preceding the proposed conversion date (which notice shall specify the length of the initial Interest Period therefor), <u>provided</u> that no Canadian Prime Rate Loan may be converted into a Canadian Cost of Funds Loan when any Event of Default has occurred and is continuing and the Administrative Agent or the Majority Facility Lenders in respect of the Canadian Revolving Facility have determined in its or their sole discretion not to permit such conversions. Upon receipt of any such notice the Administrative Agent shall promptly notify each relevant Lender thereof.

(d) Any Canadian Cost of Funds Loan may be continued as such upon the expiration of the then current Interest Period with respect thereto by the Canadian Borrower giving irrevocable notice to the Administrative Agent, in accordance with the applicable provisions of the term "Interest Period" set forth in Section 1.1, of the length of the next Interest Period to be applicable to such Loans, <u>provided</u> that no Canadian Cost of Funds Loan may be continued as such when any Event of Default has occurred and is continuing and the Administrative Agent has or the Majority Facility Lenders in respect of the Canadian Revolving Facility have determined in its or their sole discretion not to permit such continuations, and <u>provided</u>, <u>further</u>, that if the Canadian Borrower shall fail to give any required notice as described above in this paragraph or if such continuation is not permitted pursuant to the preceding proviso such Loans shall be automatically converted to Canadian Prime Rate Loans on the last day of such then expiring Interest Period. Upon receipt of any such notice the Administrative Agent shall promptly notify each relevant Lender thereof.

2.13 Limitations on Eurodollar Tranches and CCOF Tranches. Notwithstanding anything to the contrary in this Agreement, all borrowings, conversions and continuations of Eurodollar Loans or Canadian Cost of Funds Loans and all selections of Interest Periods shall be in such amounts and be made pursuant to such elections so that, (a) after giving effect thereto, the aggregate principal amount of (i) the Eurodollar Loans comprising each Eurodollar Tranche shall be equal to \$1,000,000 or a whole multiple of \$500,000 in excess thereof and (ii) the Canadian Cost of Funds Loans comprising each CCOF Tranche shall be equal to \$1,000,000 or a whole multiple of \$100,000 in excess thereof and (b) no more than ten Eurodollar Tranches and two CCOF Tranches shall be outstanding at any one time.

2.14 Interest Rates and Payment Dates. (a) Each Eurodollar Loan shall bear interest for each day during each Interest Period with respect thereto at a rate per annum equal to the Eurodollar Rate determined for such day plus the Applicable Margin.

(b) Each ABR Loan shall bear interest at a rate per annum equal to the ABR plus the Applicable Margin.

(c) Each Canadian Revolving Loan that is a Canadian Prime Rate Loan shall bear interest at a rate per annum equal to the Canadian Prime Rate plus the Applicable Margin.

(d) Each Canadian Revolving Loan that is a Canadian Cost of Funds Loan shall bear interest at a rate per annum equal to the Canadian Cost of Funds Rate plus the Applicable Margin.

(e) (i) If all or a portion of the principal amount of any Loan or Reimbursement Obligation shall not be paid when due (whether at the stated maturity, by acceleration or otherwise), such overdue amount shall bear interest at a rate per annum equal to (x) in the case of the Loans, the rate that would otherwise be applicable thereto pursuant to the foregoing provisions of this Section <u>plus</u> 2% or (y) in the case of Reimbursement Obligations, the rate applicable to ABR Loans under the Revolving Facility <u>plus</u> 2%, and (ii) if all or a portion of any interest payable on any Loan or Reimbursement Obligation or any commitment fee or other amount payable hereunder shall not be paid when due (whether at the stated maturity, by acceleration or otherwise), such overdue amount shall bear interest at a rate per annum equal to the rate then applicable to ABR Loans or Canadian Prime Rate Loans, as the case may be, under the relevant Facility <u>plus</u> 2% (or, in the case of any such other amounts that do not relate to a particular Facility, the rate then applicable to ABR Loans under the Revolving Facility <u>plus</u> 2%), in each case, with respect to clauses (i) and (ii) above, from the date of such non-payment until such amount is paid in full (as well after as before judgment).

(f) Interest shall be payable in arrears on each Interest Payment Date, <u>provided</u> that interest accruing pursuant to paragraph (e) of this Section shall be payable from time to time on demand.

2.15 <u>Computation of Interest and Fees</u>. (a) Interest and fees payable pursuant hereto shall be calculated on the basis of a 360-day year for the actual days elapsed, except that, with respect to ABR Loans the rate of interest on which is calculated on the basis of the Prime Rate and Canadian Prime Rate Loans, the interest thereon shall be calculated on the basis of a 365- (or 366-, as the case may be) day year for the actual days elapsed. The Administrative Agent shall as soon as practicable notify the Borrower and the relevant Lenders of each determination of a Eurodollar Rate. Any change in the interest rate on a Loan resulting from a change in the ABR or the Eurocurrency Reserve Requirements shall become effective as of the opening of business on the day on which such change becomes effective. The Administrative Agent shall as soon as practicable notify the Borrower and the relevant Lenders of the effective date and the amount of each such change in interest rate.

(b) Each determination of an interest rate by the Administrative Agent pursuant to any provision of this Agreement shall be conclusive and binding on the Borrower and the Canadian Borrower, as the case may be, and the Lenders in the absence of manifest error. The Administrative Agent shall, at the request of the Borrower, deliver to the Borrower a statement showing the quotations used by the Administrative Agent in determining any interest rate pursuant to Section 2.14(a) or Section 2.14(d).

(c) Wherever interest is calculated on the basis of a period which is less than the actual number of days in a calendar year, each rate of interest determined pursuant to such calculation, for the purposes of the Interest Act (Canada) is equivalent to such rate multiplied by the actual number of days in the calendar year in which such rate is to be ascertained and divided by the number of days used as the basis of that calculation.

2.16 Inability to Determine Interest Rate. If prior to the first day of any Interest Period:

(a) the Administrative Agent shall have determined (which determination shall be conclusive and binding upon the Borrower and the Canadian Borrower, as the case may be, in the absence of manifest error) that, by reason of circumstances affecting the relevant market, adequate and reasonable means do not exist for ascertaining the Eurodollar Rate or the Canadian Cost of Funds Rate for such Interest Period, or

(b) the Administrative Agent shall have received notice from the Majority Facility Lenders in respect of the relevant Facility that the Eurodollar Rate or the Canadian Cost of Funds Rate determined or to be determined for such Interest Period will not adequately and fairly reflect the cost to such Lenders (as conclusively certified by such Lenders) of making or maintaining their affected Loans during such Interest Period,

the Administrative Agent shall give telecopy or telephonic notice thereof to the Borrower or the Canadian Borrower, as the case may be, and the relevant Lenders as soon as practicable thereafter. If such notice is given, (x) any Eurodollar Loans or Canadian Cost of Funds Loans under the relevant Facility requested to be made on the first day of such Interest Period shall be made as ABR Loans or Canadian Prime Rate Loans, respectively, (y) any Loans under the relevant Facility that were to have been converted on the first day of such Interest Period to Eurodollar Loans or Canadian Cost of Funds Loans shall be continued as ABR Loans or Canadian Prime Rate Loans, as the case may be, and (z) any outstanding Eurodollar Loans or Canadian Cost of Funds Loans under the relevant Facility shall be converted, on the last day of the then-current Interest Period, to ABR Loans or Canadian Prime Rate Loans, respectively. Until such notice has been withdrawn by the Administrative Agent, no further Eurodollar Loans or Canadian Cost of Funds Loans under the relevant Facility shall be made or continued as such, nor shall the Borrower or the Canadian Borrower, as the case may be, have the right to convert Loans under the relevant Facility to Eurodollar Loans or Canadian Cost of Funds Loans, as the case may be.

2.17 Pro Rata Treatment and Payments. (a) Each borrowing by the Borrower or the Canadian Borrower, as the case may be, from the Lenders hereunder, each payment by the Borrower or the Canadian Borrower, as the case may be, on account of any commitment fee and any reduction of the Commitments of the Lenders shall be made pro rata according to the respective Term Percentages, Revolving Percentages or Canadian Revolving Percentages, as the case may be, of the relevant Lenders.

(b) Each payment (including each prepayment) by the Borrower on account of principal of and interest on the Term Loans shall be made <u>pro rata</u> according to the respective outstanding principal amounts of the Term Loans then held by the Term Lenders. The amount of each principal prepayment of the Term Loans made pursuant to Section 2.10(a) shall be applied to reduce the then remaining installments of the Term Loans, as directed by the Borrower. The amount of each principal prepayment of the Term Loans made pursuant to Section 2.11 shall be applied, <u>first</u>, to reduce the scheduled installments of the Term Loans <u>pro rata</u> based upon the respective then remaining principal amounts thereof. Amounts prepaid on account of the Term Loans may not be reborrowed.

(c) Each payment (including each prepayment) by the Borrower or the Canadian Borrower, respectively, on account of principal of and interest on the Revolving Loans, the Canadian Revolving Loans and the Additional Revolving Loans shall be made <u>pro rata</u> according to the respective outstanding principal amounts of the Revolving Loans, the Canadian Revolving Loans and the Additional Revolving Loans then held by the Revolving Lenders and the Canadian Revolving Lenders, respectively.

(d) All payments (including prepayments) to be made by the Borrower or the Canadian Borrower, as the case may be, hereunder, whether on account of principal, interest, fees or otherwise, shall be made without setoff or counterclaim and shall be made prior to 12:00 Noon, New York City time, on the due date thereof to the Administrative Agent, for the account of the relevant Lenders, at the Funding Office, in Dollars or Canadian Dollars, as the case may be, and in immediately available funds. The Administrative Agent shall distribute such payments to the relevant Lenders promptly upon receipt in like funds as received, net of any amounts owing by such Lender pursuant to Section 9.7. If any payment hereunder (other than payments on the Eurodollar Loans or Canadian Cost of Funds Loans) becomes due and payable on a day other than a Business Day or a Canadian Business Day, as the case may be, such payment shall be extended to the next succeeding Business Day or Canadian Business Day, as the case may be, the maturity thereof shall be extended to the next succeeding Business Day or Canadian Business Day, as the case may be, the maturity thereof shall be extended to the next succeeding Business Day or Canadian Business Day, as the case may be, unless the result of such extension would be to extend such payment into another calendar month, in which event such payment shall be made on the immediately preceding Business Day or Canadian Business Day, as the case may be, unless the result of such extension would be to payment into another calendar month, in which event such payment of principal pursuant to the preceding two sentences, interest thereon shall be payable at the then applicable rate during such extension.

(e) Unless the Administrative Agent shall have been notified in writing by any Lender prior to a borrowing that such Lender will not make the amount that would constitute its share of such borrowing available to the Administrative Agent, the Administrative Agent may assume that such Lender is making such amount available to the Administrative Agent, and the Administrative Agent may, in reliance upon such assumption, make available to the Borrower or the Canadian Borrower, as the case may be, a corresponding amount. If such amount is not made available to the Administrative Agent by the required time on the Borrowing Date therefor, such Lender shall pay to the Administrative Agent, on demand, such amount with interest thereon, at a rate equal to the greater of (i) the Federal Funds Effective Rate and (ii) a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation, for the period until such Lender makes such amount immediately available to the Administrative Agent. A certificate of the Administrative Agent shall be conclusive in the absence of manifest error. If such Lender's share of such borrowing is not made available to the Administrative Agent by such Lender within three Business Days after such Borrowing Date, the Administrative Agent by such Lender within three Business Days after such Borrowing Date, the Administrative Agent by such Lender within three Business Days after such Borrowing Date, the Administrative Agent shall also be entitled to recover such amount with interest thereon at the rate per annum applicable to ABR Loans or Canadian Prime Rate Loans, as the case may be, under the relevant Facility, on demand, from the Borrower or the Canadian Borrower, as the case may be.

(f) Unless the Administrative Agent shall have been notified in writing by the Borrower or the Canadian Borrower prior to the date of any payment due to be made by the Borrower or the Canadian Borrower hereunder that the Borrower or the Canadian Borrower will not make such payment to the Administrative Agent, the Administrative Agent may assume that the Borrower or the Canadian Borrower is making such payment, and the Administrative Agent may, but shall not be required to, in reliance upon such assumption, make available to the Lenders their respective <u>pro rata</u> shares of a corresponding amount. If such payment is not made to the Administrative Agent by the Borrower or the Canadian Borrower within three Business Days or Canadian Business Days, as the case may be, after such due date, the Administrative Agent shall be entitled to recover, on demand, from each Lender to which any amount which was made available pursuant to the preceding sentence, such amount with interest thereon at the rate per annum equal to the daily average Federal Funds Effective Rate. Nothing herein shall be deemed to limit the rights of the Administrative Agent or any Lender against the Borrower or the Canadian Borrower.

2.18 <u>Requirements of Law</u>. (a) If the adoption of or any change in any Requirement of Law or in the interpretation or application thereof or compliance by any Lender with any request or directive (whether or not having the force of law) from any central bank or other Governmental Authority made subsequent to the date hereof:

(i) shall subject any Lender to any tax on its capital reserves with respect to this Agreement, any Loan, any Letter of Credit or any Note made by it, (except for Non-Excluded Taxes or Excluded Taxes covered by Section 2.19);

(ii) shall impose, modify or hold applicable any reserve, special deposit, compulsory loan or similar requirement against assets held by, deposits or other liabilities in or for the account of, advances, loans or other extensions of credit by, or any other acquisition of funds by, any office of such Lender that is not otherwise included in the determination of the Eurodollar Rate or the Canadian Cost of Funds Rate; or

(iii) shall impose on such Lender any other condition;

and the result of any of the foregoing is to increase the cost to such Lender, by an amount that such Lender deems to be material, of making, converting into, continuing or maintaining Eurodollar Loans or Canadian Cost of Funds Loans or issuing or participating in Letters of Credit, or to reduce any amount receivable hereunder in respect thereof, then, in any such case, the Borrower or the Canadian Borrower, as the case may be, shall promptly pay such Lender, upon its demand, any additional amounts necessary to compensate such Lender for such increased cost or reduced amount receivable. If any Lender becomes entitled to claim any additional amounts pursuant to this paragraph, it shall promptly notify the Borrower or the Canadian Borrower, as the case may be, (with a copy to the Administrative Agent) of the event by reason of which it has become so entitled.

(b) If any Lender shall have determined that the adoption of or any change in any Requirement of Law regarding capital adequacy or in the interpretation or application thereof or compliance by such Lender or any corporation controlling such Lender with any request or directive regarding capital adequacy (whether or not having the force of law) from any Governmental Authority made subsequent to the date hereof shall have the effect of reducing the rate of return on such Lender's or such corporation's capital as a consequence of its obligations hereunder or under or in respect of any Letter of Credit to a level below that which such Lender or such corporation could have achieved but for such adoption, change or compliance (taking into consideration such Lender's or such corporation's policies with respect to capital adequacy) by an amount deemed by such Lender to be material, then from time to time, after submission by such Lender to the Borrower or the Canadian Borrower, as the case may be, (with a copy to the Administrative Agent) of a written request therefor, the Borrower or the Canadian Borrower, as the case may be, shall pay to such Lender such additional amount or amounts as will compensate such Lender or such corporation for such reduction.

(c) A certificate as to any additional amounts payable pursuant to this Section submitted by any Lender to the Borrower or the Canadian Borrower, as the case may be, (with a copy to the Administrative Agent) shall be conclusive in the absence of manifest error. Notwithstanding anything to the contrary in this Section, the Borrower or the Canadian Borrower, as the case may be, shall not be required to compensate a Lender pursuant to this Section for any amounts incurred more than nine months prior to the date that such Lender notifies the Borrower or the Canadian Borrower, as the case may be, of such Lender's intention to claim compensation therefor; <u>provided</u> that, if the circumstances giving rise to such claim have a retroactive effect, then such ninemonth period shall be extended to include the period of such retroactive effect. The obligations of the Borrower or the Canadian Borrower, as the case may be, pursuant to this Section shall survive the termination of this Agreement and the payment of the Loans and all other amounts payable hereunder.

2.19 Taxes. (a) Each payment made by or on behalf of any Loan Party under any Loan Document shall be made free and clear of, and without deduction or withholding for or on account of, any present or future income, stamp or other taxes, levies, imposts, duties, charges, fees, deductions or withholdings, now or hereafter imposed, levied, collected, withheld or assessed by any Governmental Authority, excluding income, branch profit and franchise taxes imposed on (or measured by) the net income or net profits of the Administrative Agent or any Lender as a result of a present or former connection between the Administrative Agent or such Lender and the jurisdiction of the Governmental Authority imposing such tax or any political subdivision or taxing authority thereof or therein (other than any such connection arising solely from the Administrative Agent or such Lender having executed, delivered or performed its obligations or received a payment under, or enforced, this Agreement or any other Loan Document) and any United States withholding taxes imposed by reason of Section 1471 or Section 1472 of the Code other than by reason of a change in law imposed after the date hereof ("Excluded Taxes"); provided that if any such non-excluded taxes, levies, imposts, duties, charges, fees, deductions or withholdings ("Non-Excluded Taxes") or Other Taxes are required to be withheld from any amounts payable to the Administrative Agent or any Lender, the amounts so payable to the Administrative Agent or such Lender by the applicable Loan Party shall be increased to the extent necessary to yield to the Administrative Agent or such Lender (after payment of all Non-Excluded Taxes and Other Taxes) interest or any such other amounts payable hereunder at the rates or in the amounts specified in this Agreement; provided further, however, that the applicable Loan Party shall not be required to increase any such amounts payable to the Administrative Agent or any Lender with respect to any Non-Excluded Taxes (i) that are attributable to the Administrative Agent's or such Lender's failure to comply with the requirements of paragraph (d), (e) or (i), where applicable, of this Section 2.19, (ii) that are United States withholding taxes imposed on amounts payable to the Administrative Agent or such Lender at the time the Administrative Agent or such Lender becomes a party to this Agreement except to the extent that such Lender's assignor (if any) was entitled, at the time of assignment, to receive additional amounts from the Borrower or the Canadian Borrower with respect to such Non-Excluded Taxes pursuant to this paragraph, or, (iii) that are United States withholding taxes imposed on amounts payable to the Administrative Agent or such Lender at the time the Administrative Agent or such Lender changes its lending office or other jurisdiction in which it receives payments from the Borrower or the Canadian Borrower (other than in accordance with Section 2.21) except to the extent that the Administrative Agent or such Lender was entitled, prior to the change in lending office, to receive additional amounts from the Borrower or the Canadian Borrower with respect to such Non-Excluded Taxes pursuant to this paragraph.

(b) In addition, the Borrower and the Canadian Borrower shall pay any Other Taxes to the relevant Governmental Authority in accordance with applicable law.

(c) Whenever any Non-Excluded Taxes or Other Taxes are payable by the Borrower or the Canadian Borrower, as promptly as possible thereafter the Borrower or the Canadian Borrower shall send to the Administrative Agent for its own account or for the account of the relevant Lender, as the case may be, a copy (or, if reasonably available, a certified copy) of an original official receipt received by the Borrower or the Canadian Borrower showing payment thereof. If (i) the Borrower or the Canadian Borrower fails to pay any Non-Excluded Taxes or Other Taxes when due to the appropriate taxing authority or (ii) the Borrower or the Canadian Borrower fails to remit to the Administrative Agent the required receipts or other required documentary evidence or (iii) any Non-Excluded Taxes or Other Taxes are imposed directly upon the Administrative Agent or any Lender, the Borrower or the Canadian Borrower shall indemnify the Administrative Agent and the Lenders for such amounts and any incremental taxes, interest or penalties that may become payable by the Administrative Agent or any Lender as a result of any such failure in the case of (i) or (ii), or any direct imposition, in the case of (iii).

(d) Any Lender that is entitled to an exemption from or reduction of any applicable withholding tax with respect to payments hereunder shall, to the extent it is legally entitled to do so, deliver to the Borrower (with a copy to the Administrative Agent), at the time or times reasonably requested by the Borrower or Administrative Agent, such properly completed and executed documentation prescribed by applicable law or as reasonable requested by the Borrower or the Administrative Agent as will permit such payments to be made without withholding or at a reduced rate of withholding (including any documentation necessary to prevent withholding under Section 1471 or Section 1472 of the Code). Each Lender and Administrative Agent that is not a "U.S. Person" as defined in Section 7701(a)(30) of the Code (a "Non-U.S. Person") shall deliver to the Borrower and the Administrative Agent (or, in the case of a Participant, to the Borrower and the Lender from which the related participation shall have been purchased) two true, accurate and complete originals (together with any applicable underlying IRS forms) of either U.S. Internal Revenue Service Form W-8BEN, W-8IMY, W-8EXP, W-8ECI or any subsequent versions thereof or successors thereto or, in the case of a Non-U.S. Person claiming exemption from U.S. federal withholding tax under Section 871(h) or 881(c) of the Code with respect to payments of "portfolio interest", a statement substantially in the form of Exhibit G and a Form W-8BEN, or any subsequent versions thereof or successors thereto, properly completed and duly executed by such Non-U.S. Person claiming complete exemption from, or a reduced rate of, U.S. federal withholding tax on all payments by the Borrower under this Agreement and the other Loan Documents. Such forms shall be delivered by each Non-U.S. Person on or before the date it becomes a party to this Agreement (or, in the case of any Participant, on or before the date such Participant purchases the related participation) and from time to time thereafter upon the request of the Borrower or the Administrative Agent. In addition, each Non-U.S. Person shall deliver such forms promptly upon the obsolescence or invalidity of any form previously delivered by such Non-U.S. Person. Each Non-U.S. Person shall promptly notify the Borrower at any time it determines that it is no longer in a position to provide any previously delivered certificate to the Borrower (or any other form of certification adopted by the U.S. taxing authorities for such purpose). Notwithstanding any other provision of this Section, a Non-U.S. Person shall not be required to deliver any form pursuant to this Section that such Non-U.S. Person is not legally able to deliver.

(e) A Lender or Administrative Agent that is entitled to an exemption from or reduction of non-U.S. withholding tax under the law of the jurisdiction in which the Borrower or the Canadian 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 or the Canadian Borrower (with a copy to the Administrative Agent), at the time or times prescribed by applicable law or reasonably requested by the Borrower or the Canadian Borrower or the Administrative Agent, such properly completed and executed documentation prescribed by applicable law as will permit such payments to be made without withholding or at a reduced rate, <u>provided</u> that such Lender or Administrative Agent is legally entitled to complete, execute and deliver such documentation and in such Lender's or Administrative Agent's judgment such completion, execution or submission would not materially prejudice the legal position of such Lender or Administrative Agent.

(f) Each Lender shall indemnify the Administrative Agent for the full amount of any taxes, levies, imposts, duties, charges, fees, deductions, withholdings or similar charges imposed by any Governmental Authority that are attributable to such Lender and that are payable or paid by the Administrative Agent, together with all interest, penalties, reasonable costs and expenses arising therefrom or with respect thereto, as determined by the Administrative Agent in good faith. A certificate as to the amount of such payment or liability delivered to any Lender by the Administrative Agent shall be conclusive absent manifest error.

(g) If the Administrative Agent or any Lender determines, in its sole discretion, that it has received a refund of any Non-Excluded Taxes or Other Taxes as to which it has been indemnified by the Borrower or the Canadian Borrower or with respect to which the Borrower or the Canadian Borrower has paid additional amounts pursuant to this Section 2.19, it shall pay over such refund to the Borrower or the Canadian Borrower (but only to the extent of indemnity payments made, or additional amounts paid, by the Borrower or the Canadian Borrower under this Section 2.19 with respect to the Non-Excluded Taxes or Other Taxes giving rise to such refund), net of all reasonable 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 or the Canadian 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 paragraph 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, the Canadian Borrower or any other Person.

(h) The agreements in this Section shall survive the termination of this Agreement and the payment of the Loans and all other amounts payable hereunder.

(i) Each Lender, other than a Non-U.S. Person, and Administrative Agent (other than Persons that are corporations or otherwise exempt from United States backup withholding tax), shall deliver at the time(s) and in the manner(s) prescribed by applicable law, to the Borrower, the Canadian Borrower and Administrative Agent (or, in the case of a Participant, to the Lender from which the related participation shall have been purchased with copies to the Borrower and the Canadian Borrower), as applicable, a properly completed and duly executed U.S. Internal Revenue Service Form W-9 or any subsequent versions thereof or successors thereto, certifying under penalty of perjury that such Person is exempt from United States backup withholding tax on payments made hereunder.

2.20 Indemnity. Each of the Borrower and the Canadian Borrower agrees, jointly and severally, to indemnify each Lender for, and to hold each Lender harmless from, any loss or expense that such Lender may sustain or incur as a consequence of (a) default by the Borrower or the Canadian Borrower in making a borrowing of, conversion into or continuation of Eurodollar Loans or Canadian Cost of Funds Loans, as the case may be, after the Borrower or the Canadian Borrower in making any prepayment of or conversion from Eurodollar Loans or Canadian Cost of Funds Loans, as the case may be, after the Borrower or the Canadian Borrower in making any prepayment of or conversion from Eurodollar Loans or Canadian Cost of Funds Loans, as the case may be, after the Borrower or the Canadian Borrower, as the case may be, has given a notice thereof in accordance with the provisions of this Agreement or (c) the making of a prepayment of Eurodollar Loans or Canadian Cost of Funds Loans, as the case may be, after the Borrower or the Canadian Borrower, as the case may be, has given a notice thereof in accordance with the provisions of this Agreement or (c) the making of a prepayment of Eurodollar Loans or Canadian Cost of Funds Loans, as the case may be, or not so borrowed, converted or continued, for the period from the date of such prepayment or of such failure to borrow, convert or continue to the last day of such Interest Period (or, in the case of a failure to borrow, convert or continue, the Interest Period that would have commenced on the date of such failure) in each case at the applicable rate of interest for such Loans provided for herein (excluding, however, the Applicable Margin included therein, if any) <u>over</u> (ii) the amount of interest (as reasonably determined by such Lender) that would have accrued to such Lender on such amount by placing such amount on deposit for a comparable period with leading banks in the interbank eurodollar market. A certificate as to any amounts payable pursuant to this Section submitted to the

2.21 <u>Change of Lending Office</u>. Each Lender agrees that, upon the occurrence of any event giving rise to the operation of Section 2.18 or 2.19(a) with respect to such Lender, it will, if requested by the Borrower or the Canadian Borrower, use reasonable efforts (subject to overall policy considerations of such Lender) to designate another lending office for any Loans affected by such event with the object of avoiding the consequences of such event; <u>provided</u>, that such designation is made on terms that, in the sole judgment of such Lender, cause such Lender and its lending office(s) to suffer no economic, legal or regulatory disadvantage, and <u>provided</u>, <u>further</u>, that nothing in this Section shall affect or postpone any of the obligations of the Borrower or the Canadian Borrower or the rights of any Lender pursuant to Section 2.18 or 2.19(a).

2.22 <u>Replacement of Lenders</u>. (a) Each of the Borrower and the Canadian Borrower shall be permitted to replace any Lender that (i) requests reimbursement for amounts owing pursuant to Section 2.18 or 2.19(a) or (ii) becomes a Defaulting Lender, with a replacement financial institution; provided that (A) such replacement does not conflict with any Requirement of Law, (B) no Event of Default shall have occurred and be continuing at the time of such replacement, (C) prior to any such replacement, such Lender shall have taken no action under Section 2.21 so as to eliminate the continued need for payment of amounts owing pursuant to Section 2.18 or 2.19(a), (D) the replacement financial institution shall purchase, at par, all Loans and other amounts owing to such replaced Lender on or prior to the date of replacement, (E) the Borrower or the Canadian Borrower, as the case may be, shall be liable to such replaced Lender under Section 2.20 if any Eurodollar Loan or Canadian Cost of Funds Loan, as the case may be, owing to such replaced Lender shall be purchased other than on the last day of the Interest Period relating thereto, (F) the replacement financial institution shall be reasonably satisfactory to the Administrative Agent, (G) the replaced Lender shall be obligated to make such replacement in accordance with the provisions of Section 10.6 (provided that the Borrower or the Canadian Borrower, as the case may be, shall be consummated, the Borrower or the Canadian Borrower, as the case may be, shall be obligated pursuant to Section 2.18 or 2.19(a), as the case may be, and (I) any such replacement shall not be deemed to be a waiver of any rights that the Borrower or the Canadian Borrower, as the case may be, the Administrative Agent or any other Lender shall not be deemed to be a waiver of any rights that the Borrower or the Canadian Borrower, as the case may be, shall pay all additional amounts (if any) required pursuant to Section 2.18 or 2.19(a), as the case may be, and (I) any such replacement shall not be dee

(b) If any Lender (such Lender, a "<u>Non-Consenting Lender</u>") has failed to consent to a proposed amendment or waiver which pursuant to the terms of Section 10.1 requires the consent of all Lenders or of all Lenders directly affected thereby and with respect to which the Required Lenders shall have granted their consent, then the Borrower or the Canadian Borrower, as the case may be, shall be permitted to replace such Non-Consenting Lender (unless such Non-Consenting Lender grants such consent); provided that (i) such replacement does not conflict with any Requirement of Law, (ii) no Event of Default shall have occurred and be continuing at the time of such replacement, (iii) the replacement financial institution shall purchase, at par, all Loans and other amounts owing to such replaced Lender on or prior to the date of replacement, (iv) the Borrower or the Canadian Borrower, as the case may be, shall be liable to such replaced Lender under Section 2.20 if any Eurodollar Loan or Canadian Cost of Funds Loan, as the case may be, owing to such replaced Lender shall be obligated to make such replacement in accordance with the provisions of Section 10.6 (provided that the Borrower or the Canadian Borrower, as the case may be, shall be obligated to pay the registration and processing fee referred to therein), and (vii) any such replacement shall not be deemed to be a waiver of any rights that the Borrower or the Canadian Borrower, as the case may be, shall be obligated to pay the registration and processing fee referred to therein), and (vii) any of any other Lender shall have against the replaced Lender.

2.23 <u>Defaulting Lenders</u>. Notwithstanding any provision of this Agreement to the contrary, if any Lender becomes a Defaulting Lender, then the following provisions shall apply for so long as such Lender is a Defaulting Lender.

(a) fees shall cease to accrue on the unfunded portion of the Revolving Commitment or the Canadian Revolving Commitment (as applicable) of such Defaulting Lender pursuant to Sections 2.8(a) or 2.8(b);

(b) the Revolving Commitment, Canadian Revolving Commitment, Revolving Extensions of Credit and Canadian Revolving Extensions of Credit of such Defaulting Lender shall not be included in determining whether all Lenders or the Required Lenders have taken or may take any action hereunder (including any consent to any amendment or waiver pursuant to Section 10.1), provided that any waiver, amendment or modification requiring the consent of all Lenders or each affected Lender which affects such Defaulting Lender differently than other affected Lenders shall require the consent of such Defaulting Lender;

(c) if any Swingline Exposure or L/C Exposure exists at the time a Lender becomes a Defaulting Lender then:

(i) all or any part of such Swingline Exposure and L/C Exposure shall be reallocated among the non-Defaulting Lenders in accordance with their respective Revolving Percentages but only to the extent (x) the sum of all non-Defaulting Lenders' Revolving Extensions of Credit do not exceed the total of all non-Defaulting Lenders' Revolving Commitments and (y) the conditions set forth in Section 5.2 are satisfied at such time; and

(ii) if the reallocation described in clause (i) above cannot, or can only partially, be effected, the Borrower shall within one Business Day following notice by the Administrative Agent (x) first, prepay such Defaulting Lender's Swingline Exposure and (y) second, cash collateralize such Defaulting Lender's L/C Exposure (after giving effect to any partial reallocation pursuant to clause (i) above) in accordance with the procedures set forth in Section 8.1 for so long as such L/C Exposure is outstanding;

(iii) if the Borrower cash collateralizes any portion of such Defaulting Lender's L/C Exposure pursuant to Section 2.23(c), the Borrower shall not be required to pay any fees to such Defaulting Lender pursuant to Section 3.3(a) with respect to such Defaulting Lender's L/C Exposure during the period such Defaulting Lender's L/C Exposure is cash collateralized;

(iv) if the L/C Exposure of the non-Defaulting Lenders is reallocated pursuant to Section 2.23(c), then the fees payable to the Lenders pursuant to Section 2.28(a) and Section 3.3(a) shall be adjusted in accordance with such non-Defaulting Lenders' Revolving Percentages; or

(v) if any Defaulting Lender's L/C Exposure is neither cash collateralized nor reallocated pursuant to Section 2.23(c), then, without prejudice to any rights or remedies of the Issuing Lender or any Lender hereunder, all letter of credit fees payable under Section 3.3(a) with respect to such Defaulting Lender's L/C Exposure shall be payable to the Issuing Lender until such L/C Exposure is cash collateralized and/or reallocated;

(d) so long as any Lender is a Defaulting Lender, the Swingline Lender shall not be required to fund any Swingline Loan and the Issuing Lender shall not be required to issue, amend or increase any Letter of Credit, unless it is satisfied that the related exposure will be 100% covered by the Revolving Commitments of the non-Defaulting Lenders and/or cash collateral will be provided by the Borrower in accordance with Section 2.23(c), and participating interests in any such newly issued or increased Letter of Credit or newly made Swingline Loan shall be allocated among non-Defaulting Lenders in a manner consistent with Section 2.23(c)(i) (and Defaulting Lenders shall not participate therein); and

(e) any amount payable to such Defaulting Lender hereunder (whether on account of principal, interest, fees or otherwise and including any amount that would otherwise be payable to such Defaulting Lender pursuant to Section 10.7(a) but excluding Section 2.22(a)) shall, in lieu of being distributed to such Defaulting Lender, be retained by the Administrative Agent in a segregated account and, subject to any applicable requirements of law, be applied at such time or times as may be determined by the Administrative Agent (i) first, to the payment of any amounts owing by such Defaulting Lender to the Administrative Agent hereunder, (ii) second, pro rata, to the payment of any amounts owing by such Defaulting Lender to the Issuing Lender or Swingline Lender hereunder, (iii) third, if so determined by the Administrative Agent or requested by an Issuing Lender or Swingline Lender, to be held in such account as cash collateral for future funding obligations of the Defaulting Lender of any participating interest in any Swingline Loan or Letter of Credit, (iv) fourth, to the funding of any Loan in respect of which such Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by the Administrative Agent, (v) fifth, if so determined by the Administrative Agent and the Borrower, held in such account as cash collateral for future funding obligations of the Defaulting Lender of any Loans under this Agreement, (vi) sixth, to the payment of any amounts owing to the Lenders or an Issuing Lender or Swingline Lender as a result of any judgment of a court of competent jurisdiction obtained by any Lender or such Issuing Lender or Swingline Lender against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement, (vii) seventh, to the payment of any amounts owing to the Borrower against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement, and (viii) eighth, to such Defaulting Lender or as otherwise directed by a court of competent jurisdiction; provided that if such payment is (x) a prepayment of the principal amount of any Loans or Reimbursement Obligations in respect of L/C Obligations for which a Defaulting Lender has funded its participation obligations and (y) made at a time when the conditions set forth in Section 5.2 are satisfied, such payment shall be applied solely to prepay the Loans of, and Reimbursement Obligations owed to, all non-Defaulting Lenders pro rata prior to being applied to the prepayment of any Loans, or Reimbursement Obligations owed to, any Defaulting Lender.

In the event that the Administrative Agent, the Borrower, the Issuing Lender and the Swingline Lender each agrees that a Defaulting Lender has adequately remedied all matters that caused such Lender to be a Defaulting Lender, then the Swingline Exposure and L/C Exposure of the Lenders shall be readjusted to reflect the inclusion of such Lender's Revolving Commitment and on such date such Lender shall purchase at par such of the Loans of the other Lenders (other than Swingline Loans) as the Administrative Agent shall determine may be necessary in order for such Lender to hold such Loans in accordance with its Revolving Percentage.

2.24 Incremental Facilities. (a) The Borrower may, by written notice to the Administrative Agent from time to time request Incremental Term Loans in an aggregate amount not to exceed the Incremental Amount from one or more Incremental Term Lenders (which may include any existing Lender, it being understood that no existing Lender shall be required to provide any Incremental Term Loans) willing to provide such Incremental Term Loans, as the case may be, in their own discretion; provided, that each Incremental Term Lender, if not already a Lender hereunder (unless such Lender is the Sponsor or an Affiliate thereof), shall be subject to the approval of the Administrative Agent (which approval shall not be unreasonably withheld). Such notice shall set forth (i) the amount of the Incremental Term Loans being requested (which shall be (1) in minimum increments of \$10,000,000, or (2) equal to the remaining Incremental Amount), (ii) the date, which shall be a Business Day, on which such Incremental Term Loans are requested to be made to become effective (the "Increased Amount Date") pursuant to an Incremental Facility Activation Notice, (iii) whether such Incremental Term Loans are to be loans on the same terms as the outstanding Term Loans or loans with terms different from the outstanding Term Loans, (iv) the use of proceeds for such Incremental Term Loan and (v) pro forma financial statements demonstrating (A) compliance on a pro forma basis with the financial covenant contained in Section 7.1(b) and (B) that the Consolidated Leverage Ratio is not greater than the Incurrence Ratio, in each case, after giving effect to such Incremental Term Loan and the application of the proceeds therefrom (including by giving pro forma effect to any Permitted Acquisition financed thereby) as if made and applied on the date of the mostrecent financial statements of the Borrower delivered pursuant to Section 6.1.

(b) The Borrower and each Incremental Term Lender shall execute and deliver to the Administrative Agent an Incremental Assumption Agreement and such other documentation as the Administrative Agent shall reasonably specify to evidence the Incremental Term Loans of such Incremental Term Lender. Each Incremental Assumption Agreement shall specify the terms of the Incremental Term Loans to be made thereunder; provided that (i) the maturity date of any Incremental Term Loan shall be no earlier than June 1, 2016, (ii) the weighted average life to maturity of any Incremental Term Loan shall be no shorter than the average life to maturity of the existing Term Facility, (iii) if the total yield (calculated for both the Incremental Term Loans and the Term Loans, including the upfront fees, any interest rate floors and any OID (as defined below but excluding any arrangement, underwriting or similar fee paid by the Borrower)) in respect of any Incremental Term Loans exceeds the total yield for the existing Term Loans (it being understood that any such increase may take the form of original issue discount ("OID"), with OID being equated to the interest rates in a manner determined by the Administrative Agent based on an assumed four-year life to maturity), the Applicable Margin for the Term Loans shall be increased so that the total yield in respect of such Incremental Term Loans is no higher than the total yield for the existing Term Loans, (iv) the Incremental Term Loans will rank pari passu with in right of payment and security with the Loans, (v) the proceeds for such Incremental Term Loan shall not be used to repurchase any subordinated Indebtedness and (vi) the other terms of the Incremental Term Loans, to the extent not consistent with those of the Term Loans, shall be reasonably satisfactory to the Administrative Agent. The Administrative Agent shall promptly notify each Lender as to the effectiveness of each Incremental Assumption Agreement. Each of the parties hereto hereby agrees that, upon the effectiveness of any Incremental Assumption Agreement, this Agreement shall be amended to the extent (but only to the extent) necessary to reflect the existence and terms of the Incremental Term Loans evidenced thereby. Any such deemed amendment may be memorialized in writing by the Administrative Agent with the Borrower's consent (not to be unreasonably withheld) and furnished to the other parties hereto.

(c) Notwithstanding the foregoing, no Incremental Term Loan may be made under this Section 2.24 unless (i) on the date on which such Loan is made or of such effectiveness, the conditions set forth in Section 5.2 shall be satisfied and the Administrative Agent shall have received a certificate to that effect dated such date and executed by a Responsible Officer of the Borrower and (ii) the Administrative Agent shall have received legal opinions, board resolutions and other closing certificates and documentation to the extent (i) required by the relevant Incremental Assumption Agreement and (ii) consistent with those delivered on the Closing Date under Section 6.1 and such additional documents and filings (including amendments to the Mortgages and other Security Documents and title endorsement bring downs) as the Administrative Agent may reasonably require to assure that the Incremental Term Loans are secured by the Collateral ratably with the existing Term Loans.

### SECTION 3. LETTERS OF CREDIT

3.1 L/C Commitment. (a) Subject to the terms and conditions hereof, the Issuing Lender, in reliance on the agreements of the other Revolving Lenders set forth in Section 3.4(a), agrees to issue letters of credit ("Letters of Credit") for the account of the Borrower on any Business Day during the Revolving Commitment Period in such form as may be approved from time to time by the Issuing Lender; provided that the Issuing Lender shall have no obligation to issue any Letter of Credit if, after giving effect to such issuance, (i) the L/C Obligations would exceed the L/C Commitment or (ii) the aggregate amount of the Available Revolving Commitments would be less than zero. Each Letter of Credit shall (i) be denominated in Dollars and (ii) expire no later than the earlier of (x) the first anniversary of its date of issuance and (y) the date that is five Business Days prior to the Revolving Termination Date, provided that any Letter of Credit with a one-year term may provide for the renewal thereof for additional one-year periods (which shall in no event extend beyond the date referred to in clause (y) above).

(b) The Issuing Lender shall not at any time be obligated to issue any Letter of Credit if such issuance would conflict with, or cause the Issuing Lender or any L/C Participant to exceed any limits imposed by, any applicable Requirement of Law.

3.2 Procedure for Issuance of Letter of Credit. The Borrower may from time to time request that the Issuing Lender issue a Letter of Credit by delivering to the Issuing Lender at its address for notices specified herein an Application therefor, completed to the satisfaction of the Issuing Lender, and such other certificates, documents and other papers and information as the Issuing Lender may request. Upon receipt of any Application, the Issuing Lender will process such Application and the certificates, documents and other papers and information delivered to it in connection therewith in accordance with its customary procedures and shall promptly issue the Letter of Credit requested thereby (but in no event shall the Issuing Lender be required to issue any Letter of Credit earlier than three Business Days after its receipt of the Application therefor and all such other certificates, documents and other papers and information relating thereto) by issuing the original of such Letter of Credit to the beneficiary thereof or as otherwise may be agreed to by the Issuing Lender and the Borrower. The Issuing Lender shall furnish a copy of such Letter of Credit to the Borrower promptly following the issuance of each Letter of Credit (including the amount thereof).

3.3 <u>Fees and Other Charges</u>. (a) The Borrower will pay a fee on all outstanding Letters of Credit at a per annum rate equal to the Applicable Margin then in effect with respect to Eurodollar Loans under the Revolving Facility, shared ratably among the Revolving Lenders and payable quarterly in arrears on each Fee Payment Date after the issuance date. In addition, the Borrower shall pay to the Issuing Lender for its own account a fronting fee of 0.25% per annum on the undrawn and unexpired amount of each Letter of Credit, payable quarterly in arrears on each Fee Payment Date after the issuance date.

(b) In addition to the foregoing fees, the Borrower shall pay or reimburse the Issuing Lender for such normal and customary costs and expenses as are incurred or charged by the Issuing Lender in issuing, negotiating, effecting payment under, amending or otherwise administering any Letter of Credit.

3.4 <u>L/C Participations</u>. (a) The Issuing Lender irrevocably agrees to grant and hereby grants to each L/C Participant, and, to induce the Issuing Lender to issue Letters of Credit, each L/C Participant irrevocably agrees to accept and purchase and hereby accepts and purchases from the Issuing Lender, on the terms and conditions set forth below, for such L/C Participant's own account and risk an undivided interest equal to such L/C Participant's Revolving Percentage in the Issuing Lender's obligations and rights under and in respect of each Letter of Credit and the amount of each draft paid by the Issuing Lender thereunder. Each L/C Participant agrees with the Issuing Lender that, if a draft is paid under any Letter of Credit for which the Issuing Lender is not reimbursed in full by the Borrower in accordance with the terms of this Agreement, such L/C Participant shall pay to the Issuing Lender upon demand at the Issuing Lender's address for notices specified herein an amount equal to such L/C Participant's Revolving Percentage of the amount of such draft, or any part thereof, that is not so reimbursed. Each L/C Participant's obligation to pay such amount shall be absolute and unconditional and shall not be affected by any circumstance, including (i) any setoff, counterclaim, recoupment, defense or other right that such L/C Participant or any have against the Issuing Lender, the Borrower or any other Person for any reason whatsoever, (ii) the occurrence or continuance of a Default or an Event of Default or the failure to satisfy any of the other conditions specified in Section 5, (iii) any adverse change in the condition (financial or otherwise) of the Borrower, (iv) any breach of this Agreement or any other Loan Document by the Borrower, any other Loan Party or any other L/C Participant or (v) any other circumstance, happening or event whatsoever, whether or not similar to any of the foregoing.

(b) If any amount required to be paid by any L/C Participant to the Issuing Lender pursuant to Section 3.4(a) in respect of any unreimbursed portion of any payment made by the Issuing Lender under any Letter of Credit is paid to the Issuing Lender within three Business Days after the date such payment is due, such L/C Participant shall pay to the Issuing Lender on demand an amount equal to the product of (i) such amount, times (ii) the daily average Federal Funds Effective Rate during the period from and including the date such payment is required to the date on which such payment is immediately available to the Issuing Lender, times (iii) a fraction the numerator of which is the number of days that elapse during such period and the denominator of which is 360. If any such amount required to be paid by any L/C Participant pursuant to Section 3.4(a) is not made available to the Issuing Lender by such L/C Participant within three Business Days after the date such payment is due, the Issuing Lender shall be entitled to recover from such L/C Participant, on demand, such amount with interest thereon calculated from such due date at the rate per annum applicable to ABR Loans under the Revolving Facility. A certificate of the Issuing Lender submitted to any L/C Participant with respect to any amounts owing under this Section shall be conclusive in the absence of manifest error.

(c) Whenever, at any time after the Issuing Lender has made payment under any Letter of Credit and has received from any L/C Participant its <u>pro</u> <u>rata</u> share of such payment in accordance with Section 3.4(a), the Issuing Lender receives any payment related to such Letter of Credit (whether directly from the Borrower or otherwise, including proceeds of collateral applied thereto by the Issuing Lender), or any payment of interest on account thereof, the Issuing Lender will distribute to such L/C Participant its <u>pro rata</u> share thereof; <u>provided</u>, <u>however</u>, that in the event that any such payment received by the Issuing Lender shall be required to be returned by the Issuing Lender, such L/C Participant shall return to the Issuing Lender the portion thereof previously distributed by the Issuing Lender to it.

3.5 <u>Reimbursement Obligation of the Borrower</u>. If any draft is paid under any Letter of Credit, the Borrower shall reimburse the Issuing Lender for the amount of (a) the draft so paid and (b) any taxes, fees, charges or other costs or expenses incurred by the Issuing Lender in connection with such payment, not later than 12:00 Noon, New York City time, on (i) the Business Day that the Borrower receives notice of such draft, if such notice is received on such day prior to 10:00 a.m., New York City time, or (ii) if clause (i) above does not apply, the Business Day immediately following the day that the Borrower receives such notice. Each such payment shall be made to the Issuing Lender at its address for notices referred to herein in Dollars and in immediately available funds. Interest shall be payable on any such amounts from the date on which the relevant draft is paid until payment in full at the rate set forth in (x) until the Business Day next succeeding the date of the relevant notice, Section 2.14(b) and (y) thereafter, Section 2.14(e).

3.6 Obligations Absolute. The Borrower's obligations under this Section 3 shall be absolute and unconditional under any and all circumstances and irrespective of any setoff, counterclaim or defense to payment that the Borrower may have or have had against the Issuing Lender, any beneficiary of a Letter of Credit or any other Person. The Borrower also agrees with the Issuing Lender that the Issuing Lender shall not be responsible for, and the Borrower's Reimbursement Obligations under Section 3.5 shall not be affected by, among other things, the validity or genuineness of documents or of any endorsements thereon, even though such documents shall in fact prove to be invalid, fraudulent or forged, or any dispute between or among the Borrower and any beneficiary of any Letter of Credit or any other party to which such Letter of Credit may be transferred or any claims whatsoever of the Borrower against any beneficiary of such Letter of Credit or any such transferee. The Issuing Lender shall not be liable for any error, omission, interruption or delay in transmission, dispatch or delivery of any message or advice, however transmitted, in connection with any Letter of Credit, except for errors or omissions found by a final and non-appealable decision of a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of the Issuing Lender. The Borrower agrees that any action taken or omitted by the Issuing Lender or in connection with any Letter of Credit or the related drafts or documents, if done in the absence of gross negligence or willful misconduct, shall be binding on the Borrower and shall not result in any liability of the Issuing Lender to the Borrower.

3.7 Letter of Credit Payments. If any draft shall be presented for payment under any Letter of Credit, the Issuing Lender shall promptly notify the Borrower of the date and amount thereof. The responsibility of the Issuing Lender to the Borrower in connection with any draft presented for payment under any Letter of Credit shall, in addition to any payment obligation expressly provided for in such Letter of Credit, be limited to determining that the documents (including each draft) delivered under such Letter of Credit in connection with such presentment are substantially in conformity with such Letter of Credit.

3.8 <u>Applications</u>. To the extent that any provision of any Application related to any Letter of Credit is inconsistent with the provisions of this Section 3, the provisions of this Section 3 shall apply.

3.9 Existing Letters of Credit. On the Closing Date, all Existing Letters of Credit shall be deemed to have been issued under this Agreement and shall be outstanding hereunder and subject to all provisions contained herein and shall be deemed to be Letters of Credit, and the Existing Letter of Credit Issuer shall be deemed to be the Issuing Lender with respect to each Existing Letter of Credit.

## SECTION 4. REPRESENTATIONS AND WARRANTIES

To induce the Administrative Agent and the Lenders to enter into this Agreement and to make the Loans and issue or participate in the Letters of Credit, Holdings, the Borrower and the Canadian Borrower hereby jointly and severally represent and warrant to the Administrative Agent and each Lender (subject to Section 5.2(a)) that:

4.1 <u>Financial Condition</u>. (a) The unaudited pro forma consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at January 31, 2010 (including the notes thereto) (the "<u>Pro Forma Balance Sheet</u>") and the related pro forma consolidated statement of income of the Borrower and its consolidated Subsidiaries (the "<u>Pro Forma Statement of Income</u>") for the 12-month period ending on January 31, 2010, copies of which have heretofore been furnished to each Lender, have been prepared giving effect to the Transactions as if such events had occurred as of such date (in the case of the Pro Forma Balance Sheet) or at the beginning of the period (in the case of the other financial statements). The Pro Forma Balance Sheet has been prepared based on the best information available to the Borrower as of the date of delivery thereof, and presents fairly on a pro forma basis the estimated financial position of Borrower and its consolidated Subsidiaries as at January 31, 2010, assuming that the events specified in the preceding sentence had actually occurred at such date.

(b) The audited consolidated balance sheets of the Borrower as at February 3, 2008, February 1, 2009 and January 31, 2010, and the related consolidated statements of income and of cash flows for the Fiscal Years ended on such dates, reported on by and accompanied by an unqualified report from Emst & Young LLP, present fairly the consolidated financial condition of the Borrower as at such date, and the consolidated results of its operations and its consolidated cash flows for the respective Fiscal Years then ended. The unaudited consolidated balance sheet of the Borrower as at January 31, 2010, and the related unaudited consolidated statements of income and cash flows for the twelve-month period ended on such date, present fairly the consolidated financial condition of the Borrower as at such date, and the consolidated financial condition of the Borrower as at such date, and the consolidated results of its operations and its consolidated cash flows for the twelve-month period then ended (subject to normal year-end audit adjustments). All such financial statements, including the related schedules and notes thereto, have been prepared in accordance with GAAP applied consistently throughout the periods involved (except as approved by the aforementioned firm of accountants and disclosed therein). No Group Member has any material Guarantee Obligations, contingent liabilities and liabilities for taxes, or any long-term leases or unusual forward or long-term commitments, including any interest rate or foreign currency swap or exchange transaction or other obligation in respect of derivatives, that are not reflected in the most recent financial statements referred to in this paragraph. During the period from January 31, 2010 to and including the date hereof, there has been no Disposition by any Group Member of any material part of its business or property.

4.2 <u>No Change</u>. Since January 31, 2010, there has been no development or event that has had or could reasonably be expected to have a Material Adverse Effect.

4.3 Existence: Compliance with Law. Each Group Member (a) is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization, (b) has the power and authority, and the legal right, to own and operate its property, to lease the property it operates as lessee and to conduct the business in which it is currently engaged, (c) is duly qualified as a foreign corporation or other organization and in good standing under the laws of each jurisdiction where its ownership, lease or operation of property or the conduct of its business requires such qualification and (d) is in compliance with all Requirements of Law, except, in the case of clauses (c) and (d), to the extent that the failure to be so qualified or to comply therewith could not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

4.4 <u>Power: Authorization: Enforceable Obligations</u>. Each Loan Party has the power and authority, and the legal right, to make, deliver and perform the Loan Documents to which it is a party and, in the case of the Borrower and the Canadian Borrower, to obtain extensions of credit hereunder. Each Loan Party has taken all necessary organizational action to authorize the execution, delivery and performance of the Loan Documents to which it is a party and, in the case of the Borrower and the Canadian Borrower, to authorize the extensions of credit on the terms and conditions of this Agreement. No consent or authorization of, filing with, notice to or other act by or in respect of, any Governmental Authority or any other Person is required in connection with the Acquisition and the extensions of credit hereunder or with the execution, delivery, performance, validity or enforceability of this Agreement or any of the Loan Documents, except (i) consents, authorizations, filings and notices described in Schedule 4.4 (which such consents, authorizations, filings and notices, if specified as having been obtained or made or as being in full force and effect in Schedule 4.4, have been so obtained or made or are in full force and effect) and (ii) the filings referred to in Section 4.19. Each Loan Document has been duly executed and delivered on behalf of each Loan Party party thereto, enforceable against each such Loan Party in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles (whether enforcement is sought by proceedings in equity or at law).

4.5 <u>No Legal Bar</u>. The execution, delivery and performance of this Agreement and the other Loan Documents, the issuance of Letters of Credit, the borrowings hereunder and the use of the proceeds thereof will not violate any Requirement of Law in any material respect or any material Contractual Obligation of any Group Member and will not result in, or require, the creation or imposition of any Lien on any of their respective properties or revenues pursuant to any Requirement of Law or any such Contractual Obligation (other than the Liens created by the Security Documents).

4.6 <u>Litigation</u>. Except as disclosed in Schedule 4.6, no litigation, investigation or proceeding of or before any arbitrator or Governmental Authority is pending or, to the knowledge of Holdings, the Borrower or the Canadian Borrower, threatened by or against any Group Member or against any of their respective properties or revenues (a) with respect to any of the Loan Documents or any of the transactions contemplated hereby or thereby, or (b) that could reasonably be expected to have a Material Adverse Effect.

4.7 <u>No Default</u>. No Group Member is in default under or with respect to any of its Contractual Obligations in any respect that could reasonably be expected to have a Material Adverse Effect. No Default or Event of Default has occurred and is continuing.

4.8 <u>Ownership of Property: Liens</u>. Each Group Member has good, sufficient and legal title in (in the case of fee interests in real property), or a valid leasehold interest in (in the case of leasehold interests in real property), all its real property, and good title to, or a valid leasehold interest in, all its other material personal property, and none of such property is subject to any Lien except as permitted by Section 7.3.

4.9 Intellectual Property. Each Group Member owns, or is licensed to use, all Intellectual Property necessary for the conduct of its business as currently conducted. Except as disclosed on Schedule 4.9, no claim has been asserted and is pending or threatened, in writing, by any Person challenging any Intellectual Property owned or used by any Group Member, nor does Holdings, the Borrower or the Canadian Borrower know of any valid basis for any such claim. To the knowledge of Holdings, the Borrower and the Canadian Borrower, (a) the conduct of the business by each Group Member does not infringe on the rights of any Person in any material respect, and (b) each Group Member's Intellectual Property is not being infringed by any Person in any material respect. Each Group Member takes commercially reasonable steps to maintain and protect its Intellectual Property necessary for the conduct of its business in all material respects.

4.10 Taxes. Each Group Member has filed or caused to be filed all material Federal, state, provincial and other tax returns that are required to be filed and has paid all taxes shown to be due and payable on said returns or on any assessments made against it or any of its property and all other material taxes, fees or other charges imposed on it or any of its property by any Governmental Authority (other than any the amount or validity of which are currently being contested in good faith by appropriate proceedings and with respect to which reserves in conformity with GAAP have been provided on the books of the relevant Group Member); to the best knowledge of Holdings, the Borrower and the Canadian Borrower, no tax Lien has been filed (other than tax Liens on its property that are not yet due and payable), and, to the best knowledge of Holdings, the Borrower and the Canadian Borrower, no claim is being asserted, with respect to any such tax, fee or other charge.

4.11 <u>Federal Regulations</u>. No part of the proceeds of any Loans, and no other extensions of credit hereunder, will be used for any purpose that violates the provisions of the Regulations of the Board. If requested by any Lender or the Administrative Agent, the Borrower will furnish to the Administrative Agent and each Lender a statement to the foregoing effect in conformity with the requirements of FR Form G-3 or FR Form U-1, as applicable, referred to in Regulation U.

4.12 Labor Matters. Except as, in the aggregate, could not reasonably be expected to have a Material Adverse Effect: (a) there are no strikes or other labor disputes against any Group Member pending or, to the knowledge of Holdings, the Borrower or the Canadian Borrower, threatened; (b) to the knowledge of Holdings, the Borrower and the Canadian Borrower, hours worked by and payment made to employees of each Group Member have not been in violation of the Fair Labor Standards Act or any other applicable Requirement of Law dealing with such matters; and (c) all payments due from any Group Member on account of employee health and welfare insurance have been paid or accrued as a liability on the books of the relevant Group Member.

4.13 <u>ERISA</u>. No ERISA Event has occurred during the five-year period prior to the date on which this representation is made that, when taken together with all other such ERISA Events would reasonably be expected to result in a Material Adverse Effect. The present value of all accrued benefits under each Single Employer Plan (based on those assumptions used for purposes of Statement of Financial Accounting Standards No. 158) did not, as of the last annual valuation date prior to the date on which this representation is made, exceed the value of the assets of such Single Employer Plan allocable to such accrued benefits by an amount that has had, or would reasonably be expected to have, a Material Adverse Effect, and, if all of the Single Employer Plans with surpluses), the unfunded liabilities with respect to such Single Employer Plans, individually or in the aggregate, would not reasonably be expected to result in a Material Adverse Effect.

4.14 <u>Investment Company Act: Other Regulations</u>. No Loan Party is an "investment company", or a company "controlled" by an "investment company", within the meaning of the Investment Company Act of 1940, as amended. No Loan Party is subject to regulation under any Requirement of Law (other than Regulation X of the Board) that limits its ability to incur Indebtedness.

4.15 <u>Subsidiaries</u>. Except as disclosed to the Administrative Agent by the Borrower in writing from time to time after the Closing Date, (a) Schedule 4.15 sets forth the name and jurisdiction of incorporation or formation of each Subsidiary, including without limitation the Canadian Borrower, and, as to each such Subsidiary, the percentage of each class of Capital Stock owned by any Loan Party and (b) there are no outstanding subscriptions, options, warrants, calls, rights or other agreements or commitments (other than stock options granted to employees or directors' qualifying shares) of any nature relating to any Capital Stock of the Borrower or any Subsidiary, except as created by the Loan Documents or under such Subsidiaries' existing constituent documents.

4.16 <u>Use of Proceeds</u>. The proceeds of the Term Loans shall be used to finance a portion of the Acquisition and to pay related fees and expenses. The proceeds of the Revolving Loans, the Canadian Revolving Loans, the Additional Revolving Loans, the Swingline Loans and the Letters of Credit shall be used for general corporate purposes.

4.17 Environmental Matters. Except as, in the aggregate, could not reasonably be expected to have a Material Adverse Effect or as disclosed on Schedule 4.17:

(a) the facilities and properties owned, leased or operated by any Group Member (the "Properties") do not contain, and have not previously contained, any Materials of Environmental Concern in amounts or concentrations or under circumstances that constitute or constituted a violation of, or could give rise to liability under, any Environmental Law;

(b) no Group Member has received or is aware of any notice of violation, alleged violation, non-compliance, liability or potential liability regarding environmental matters or compliance with Environmental Laws with regard to any of the Properties or the business operated by any Group Member (the "<u>Business</u>"), nor does Holdings, the Borrower or the Canadian Borrower have knowledge or reason to believe that any such notice will be received or is being threatened;

(c) Materials of Environmental Concern have not been transported or disposed of from the Properties in violation of, or in a manner or to a location that could give rise to liability under, any Environmental Law, nor have any Materials of Environmental Concern been generated, treated, stored or disposed of at, on or under any of the Properties in violation of, or in a manner that could give rise to liability under, any applicable Environmental Law;

(d) no judicial proceeding or governmental or administrative action is pending or, to the knowledge of Holdings, the Borrower and the Canadian Borrower, threatened, under any Environmental Law to which any Group Member is or will be named as a party with respect to the Properties or the Business, nor are there any consent decrees or other decrees, consent orders, administrative orders or other orders, or other administrative or judicial requirements outstanding under any Environmental Law with respect to the Properties or the Business;

(e) there has been no release or threat of release of Materials of Environmental Concern at or from the Properties, or arising from or related to the operations of any Group Member in connection with the Properties or otherwise in connection with the Business, in violation of or in amounts or in a manner that could give rise to liability under Environmental Laws;

(f) the Properties and all operations at the Properties are in compliance, and have in the last five years been in compliance, with all applicable Environmental Laws, and there is no contamination at, under or about the Properties or violation of any Environmental Law with respect to the Properties or the Business; and

(g) no Group Member has assumed any liability of any other Person under Environmental Laws.

4.18 Accuracy of Information, etc. No statement or information contained in this Agreement, any other Loan Document, the Confidential Information Memorandum or any other document, certificate or statement furnished by or on behalf of any Loan Party to the Administrative Agent or the Lenders, or any of them (as modified or supplemented by other information so furnished), for use in connection with the transactions contemplated by this Agreement or the other Loan Documents, contained as of the date such statement, information, document or certificate was so furnished (or, in the case of the Confidential Information Memorandum, as of the date of this Agreement), any untrue statement of a material fact or omitted (when taken as a whole and after giving effect to any updates and supplements thereto) to state a material fact (known to Holdings, the Borrower or the Canadian Borrower, in the case of any document not furnished by any of them) necessary to make the statements contained herein or therein not misleading in light of the circumstances in which the same were made. The projections and pro forma financial information contained in the materials referenced above are based upon good faith estimates and assumptions believed by management of the Borrower to be reasonable at the time made or furnished, it being recognized by the Lenders that such financial information as it relates to future events are subject to significant uncertainties and contingencies and are not to be viewed as fact and that actual results during the period or periods covered by such financial information may differ from the projected results set forth therein and such differences may be material or substantial. As of the date hereof, the representations and warranties contained in the Acquisition Documentation are true and correct in all material respects. There is no fact known to any Loan Party (other than matters of a general economic and industry specific nature) that could reasonably be expected to have a Material Adverse Effect that has not been expressly disclosed herein, in the other Loan Documents, in the Confidential Information Memorandum or in any other documents, certificates and statements furnished to the Administrative Agent and the Lenders for use in connection with the transactions contemplated hereby and by the other Loan Documents.

4.19 Security Documents. (a) The Guarantee and Collateral Agreement is effective to create in favor of the Administrative Agent, for the benefit of the Lenders, a legal, valid and enforceable security interest in the Collateral described therein and proceeds thereof. In the case of the Pledged Stock defined in and described in the Guarantee and Collateral Agreement, when stock certificates representing such Pledged Stock are delivered to the Administrative Agent, and in the case of the other Collateral described in the Guarantee and Collateral Agreement, when stock certificates representing such Pledged Stock are delivered to the Administrative Agent, and in the case of the other Collateral described in the Guarantee and Collateral Agreement, when financing statements and other filings specified on Schedule 4.19(a) in appropriate form are filed in the offices specified on Schedule 4.19(a), the Guarantee and Collateral Agreement shall constitute a fully perfected (with respect to Intellectual Property, to the extent such perfection and priority may be achieved by filings made in the U.S. Patent and Trademark Office and the U.S. Copyright Office) Lien on, and security interest in, all right, title and interest of the Loan Parties in such Collateral and the proceeds thereof, as security for the Obligations (as defined in the Guarantee and Collateral Agreement), in each case prior and superior in right to any other Person (except, in the case of Collateral other than Pledged Stock, Liens permitted by Section 7.3); provided, however, that (i) the recordation of any copyright security agreement shall occur within thre (3) months of the Guarantee and Collateral Agreement; (ii) the recordation of any copyright security agreement shall occur within one (1) month of the date of the Guarantee and Collateral Agreement; (iii) subsequent recordations may be necessary to perfect the security interest in issued registrations and applications for Intellectual Property acquired after the date of the Guarantee and Collateral Agre

(b) Each of the Mortgages is effective to create in favor of the Administrative Agent, for the benefit of the Lenders, a legal, valid and enforceable Lien on the Mortgaged Properties described therein and proceeds thereof, and when the Mortgages are filed in the offices specified on Schedule 4.19(b), each such Mortgage shall constitute a fully perfected Lien on, and security interest in, all right, title and interest of the Loan Parties in the Mortgaged Properties and the proceeds thereof, as security for the Obligations (as defined in the relevant Mortgage), in each case prior and superior in right to any other Person. Schedule 1.1B-1 lists, as of the Closing Date, each parcel of owned real property located in the United States and held by the Borrower or any of its Subsidiaries where the applicable lease agreement does not require the consent of the landlord thereunder to the granting of a leasehold mortgage by the lessee thereunder. Schedule 1.1B-3 lists, as of the Closing Date, each lease agreement requires the consent of the landlord thereunder to the granting of a leasehold mortgage by the lessee thereunder.

4.20 <u>Solvency</u>. Each Loan Party is, and after giving effect to the Acquisition and the incurrence of all Indebtedness and obligations being incurred in connection herewith and therewith will be, Solvent (it being understood that the representation contained in this Section 4.20, when made on the Closing Date, shall be made on a consolidated basis for Holdings and its Subsidiaries, after giving effect to the Transactions).

4.21 <u>Certain Documents</u>. The Borrower has delivered to the Administrative Agent a complete and correct copy of the Acquisition Documentation and the Senior Note Indenture, including any amendments, supplements or modifications with respect to any of the foregoing.

4.22 <u>Franchise Agreements</u>. The Borrower has delivered to the Administrative Agent true and complete copies of any franchise agreements to which the Borrower or any of its Subsidiaries is a party.

4.23 <u>Anti-Terrorism</u>. (a) The Borrower is not and, to the knowledge of the Borrower, none of its Affiliates is, in violation of any laws relating to terrorism or money laundering ("Anti-Terrorism Laws"), including Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001 (the "Executive Order"), and the PATRIOT Act.

(b) The Borrower is not, and to the knowledge of the Borrower, no (i) agent of the Borrower (excluding any Agent, Lender, Swing Line Lender or Issuing Bank) acting directly at the request of the Borrower or (ii) Affiliate of the Borrower benefiting in any capacity in connection with the Loans is, any of the following (in each case, with respect to agents of the Borrower, as at the date of such Person acting at the request of the Borrower):

(i) a Person that is listed in the annex to, or is otherwise subject to the provisions of, the Executive Order;

(ii) a Person owned or controlled by, or acting for or on behalf of, any Person that is listed in the annex to, or is otherwise subject to the provisions of, the Executive Order;

(iii) a Person with which any Lender is prohibited from dealing or otherwise engaging in any transaction by any Anti-Terrorism Law; or

(iv) a Person that commits, threatens or conspires to commit or supports "terrorism" as defined in the Executive Order.

(c) The Borrower does not, and to the knowledge of the Borrower, no agent of the Borrower (excluding any Agent, Lender, Swing Line Lender or Issuing Bank) acting directly at the request of the Borrower in connection with the Loans, (i) conducts any business or engages in making or receiving any contribution of funds, goods or services to or for the benefit of any Person described in paragraph (b) above, (ii) deals in, or otherwise engages in any transaction relating to, any property or interests in property blocked pursuant to the Executive Order or (iii) engages in or conspires to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in any Anti-Terrorism Law.

## SECTION 5. CONDITIONS PRECEDENT

5.1 <u>Conditions to Initial Extension of Credit</u>. The agreement of each Lender to make the initial extension of credit requested to be made by it is subject to the satisfaction, prior to or concurrently with the making of such extension of credit on the Closing Date, of the following conditions precedent:

(a) <u>Credit Agreement; Guarantee and Collateral Agreement</u>. The Administrative Agent shall have received (i) this Agreement or, in the case of the Lenders, an Addendum, executed and delivered by the Administrative Agent, Holdings, the Borrower, the Canadian Borrower and each Person listed on Schedules 1.1A and 1.1C, (ii) the Guarantee and Collateral Agreement, executed and delivered by Holdings, the Borrower and each Subsidiary Guarantor and (iii) an Acknowledgement and Consent in the form attached to the Guarantee and Collateral Agreement, executed and delivered by each Issuer (as defined therein), if any, that is not a Loan Party.

(b) Acquisition, etc. The following transactions shall have been consummated, in each case on terms and conditions reasonably satisfactory to the Lenders:

(i) the Purchaser shall acquire Target in accordance with the Purchase Agreement and in accordance with applicable law (the "Acquisition") (it being understood that no material provision of the Purchase Agreement shall have been amended or waived in any respect which could reasonably be considered to be materially adverse to the Lenders without the prior written consent of the Lead Arrangers);

(ii) the Purchaser shall issue to the Sponsor, the Sellers, certain members of the Borrower's management and/or certain co-investors reasonably satisfactory to the Administrative Agent, common equity of the Purchaser in an amount equal to at least 35% of the total capitalization of Holdings and the Borrower (the "Equity Contribution");

(iii) the Borrower shall receive, substantially concurrently with the initial extension of credit hereunder, at least \$200,000,000 in aggregate gross cash proceeds from the issuance of the Senior Notes; and

(iv)(A) The Administrative Agent shall receive satisfactory evidence that the Borrower's Credit Agreement, dated as of March 8, 2006, as amended by the first amendment dated August 17, 2006 (the "Existing Credit Agreement"), shall be terminated and all amounts thereunder shall be paid in full; and (B) satisfactory arrangements shall have been made for the termination of all Liens granted in connection therewith.

(c) Existing Notes. The Borrower (i) shall have delivered to the trustee under the Existing Notes an irrevocable notice of redemption to be given by the trustee on the Closing Date to all holders of the Existing Notes to effect the redemption in full of all outstanding Existing Notes on the earliest possible date following the Closing Date; and (ii) shall have deposited with the trustee an amount equal to the amount that the holders of the Existing Notes, including accrued and unpaid interest thereon to, but excluding, the redemption date.

(d) <u>Pro Forma Balance Sheet; Financial Statements</u>. The Lenders shall have received (i) the Pro Forma Balance Sheet and Pro Forma Statement of Income and (ii) unaudited consolidated balance sheets and related statements of income, stockholders' equity and cash flows of the Borrower and its Subsidiaries for each fiscal quarter ended (A) after January 31, 2010 and (B) at least 45 days before the Closing Date ; <u>provided</u> that filing of the required financial statements on form 10-K and form 10-Q by the Borrower will satisfy such requirements.

(e) <u>Fees</u>. The Lenders and the Administrative Agent shall have received all fees required to be paid, and all expenses for which invoices have been presented (including the reasonable fees and expenses of legal counsel), on or before the Closing Date. All such amounts will be paid with proceeds of Loans made on the Closing Date and will be reflected in the funding instructions given by the Borrower to the Administrative Agent on or before the Closing Date.

(f) <u>Closing Certificate; Certified Certificate of Incorporation; Good Standing Certificates</u>. The Administrative Agent shall have received a certificate of each Loan Party, dated the Closing Date, substantially in the form of Exhibit C, with appropriate insertions and attachments, including the certificate of incorporation of each Loan Party that is a corporation certified by the relevant authority of the jurisdiction of organization of such Loan Party.

(g) Legal Opinions. The Administrative Agent shall have received the following executed legal opinions:

(i) the legal opinion of Weil, Gotshal & Manges LLP, counsel to the Borrower, the Canadian Borrower and their Subsidiaries, substantially in the form of Exhibit F; and

(ii) the legal opinion of local counsel in each of New York, Delaware, Missouri, California, Texas, and Canada.

Each such legal opinion shall cover such other matters incident to the transactions contemplated by this Agreement as the Administrative Agent may reasonably require.

(h) <u>Pledged Stock</u>; <u>Stock Powers</u>; <u>Pledged Notes</u>. The Administrative Agent shall have received (i) the certificates representing the shares of Capital Stock pledged pursuant to the Guarantee and Collateral Agreement, together with an undated stock power for each such certificate executed in blank by a duly authorized officer of the pledgor thereof and (ii) each promissory note (if any) pledged to the Administrative Agent pursuant to the Guarantee and Collateral Agreement endorsed (without recourse) in blank (or accompanied by an executed transfer form in blank) by the pledgor thereof; <u>provided</u> that, in the event that items described in clause (ii) are not or cannot be provided on the Closing Date after the Borrower's use of commercially reasonable efforts to do so or without undue delay, burden or expense, the delivery of such items shall not constitute a condition precedent to the initial extensions of credit on the Closing Date, but instead shall be provided in accordance with Section 6.13.

(i) Filings, Registrations and Recordings. The Administrative Agent shall have received each document (including any Uniform Commercial Code financing statement) required by the Security Documents or under law or reasonably requested by the Administrative Agent to be filed, registered or recorded in order to create in favor of the Administrative Agent, for the benefit of the Lenders, a perfected Lien on the Collateral described therein, prior and superior in right to any other Person (other than with respect to Liens expressly permitted by Section 7.3), and each document shall be in proper form for filing, registration or recordation; provided that, in the event that items described in this Section 5.1(i) (other than any Uniform Commercial Code financing statements) are not or cannot be provided on the Closing Date after the Borrower's use of commercially reasonable efforts to do so or without undue delay, burden or expense, the delivery of such items shall not constitute a condition precedent to the initial extension of credit on the Closing Date, but instead shall be provided in accordance with Section 6.13.

(j) <u>Solvency Certificate</u>. The Administrative Agent shall have received a certificate from the chief financial officer of Holdings certifying that Holdings and its subsidiaries, on a consolidated basis after giving effect to the Transactions and the transactions specified in paragraph (b) above, are Solvent.

(k) <u>Insurance</u>. The Administrative Agent shall have received insurance certificates satisfying the requirements of Section 5.2(b) of the Guarantee and Collateral Agreement; <u>provided</u> that in the event such certificates are not or cannot be provided on the Closing Date after the Borrower's use of commercially reasonable efforts to do so or without undue delay, burden or expense, the delivery of such certificates shall not constitute a condition precedent to the initial extension of credit on the Closing Date, but instead shall be provided in accordance with Section 6.13.

(1) <u>Pro Forma Leverage Ratio</u>. The Pro Forma Leverage Ratio shall not exceed 5.65 to 1.0, and the Borrower shall have provided reasonably satisfactory support for such calculation, <u>provided</u> that the Sponsor shall have the ability to cure any shortfall with equity contributions in the same manner as provided for in Section 8.2 with respect to the Financial Condition Covenants.

(m) <u>Ratings</u>. The Borrower shall have received a public corporate credit rating and the Facilities shall have received a rating, in each case, from both Moody's and S&P.

(n) Since January 31, 2010, there shall not have been any change, effect, event, occurrence, state of facts or development, that, individually or in the aggregate has had, or would reasonably be expected to have, a material adverse effect on the business, assets, financial condition, liabilities or results of operations of the Target and its subsidiaries, taken as a whole (a "Closing Date Material Adverse Effect"); provided that none of the following shall be deemed, either alone or in combination, to constitute, and none of the following shall be taken into account in determining whether there has been or would reasonably be expected to have a Closing Date Material Adverse Effect: (1) any change, effect, event, occurrence, state of facts or development in the financial or securities markets or the economy in general; (2) any change, effect, event, occurrence, state of facts or development in general political or business conditions (including the commencement, continuation or escalation of war, material armed hostilities or other material international or national calamity or acts of terrorism or earthquakes, hurricanes, other natural disasters or acts of God); (3) any change, effect, event, occurrence, state of facts or development in the industries in which the Target or its subsidiaries operate in general, including prevailing interest rates, commodity markets and energy costs; (4) any change in applicable Legal Requirements, GAAP (in each case as defined in the Purchase Agreement) or other accounting standard, or authoritative interpretations thereof, after the date of the Purchase Agreement; (5) the announcement of the execution of the Purchase Agreement; (6) any change, effect, event, occurrence state of facts or development resulting from the Sellers' (as defined in the Purchase Agreement) or the Target's compliance with its obligations under the Purchase Agreement; or (7) any change, effect, event, occurrence, state of facts or development resulting from the Buyer's (as defined in the Purchase Agreement) unreasonably withholding its consent following written notice from the Securityholder Representative (as defined in the Purchase Agreement) to the Buyer of such request pursuant to Section 7.1 (Conduct of Business of the Company) of the Purchase Agreement; provided, further, that, with respect to clauses (1), (2), (3) and (4), any such change, effect, event, occurrence, state of facts or development occurring after the date hereof shall not be disregarded to the extent that it disproportionately impacts the Target and its subsidiaries, taken as a whole, as compared to other similarly situated companies (by size or otherwise) operating in the principal industries and geographic areas in which the Company and its subsidiaries operate.

(o) On the Closing Date, after giving effect to the Transactions, neither the Borrower nor any of its Subsidiaries shall have any material Indebtedness for borrowed money other than (i) the Facilities, (ii) the Senior Notes, (iii) Closing Indebtedness (as such term is defined in the Purchase Agreement, but with it being understood that the only amounts of material indebtedness for borrowed money itemized in Schedule 1.1(a) of the Purchase Agreement outstanding after giving effect to the Transactions will be the amounts itemized under the heading "Fin Agreement (2)" thereof) and (iv) an amount equal to approximately \$1,400,000, which reflects the amount payable to the Borrower's previous owners or employees, including relating to the Founders' Employment Agreements (as defined in the Purchase Agreement).

(p) The Administrative Agent shall have received all documentation and other information required by regulatory authorities under applicable "know your customer" and anti-money laundering rules and regulations, including the PATRIOT Act.

5.2 <u>Conditions to Each Extension of Credit</u>. The agreement of each Lender to make any extension of credit requested to be made by it on any date (including its initial extension of credit) is subject to the satisfaction of the following conditions precedent:

(a) <u>Representations and Warranties</u>. Each of the representations and warranties made by any Loan Party in or pursuant to the Loan Documents shall be true and correct in all material respects on and as of such date as if made on and as of such date, except to the extent that such representations and warranties specifically relate to an earlier date, in which case such representations and warranties shall have been true and correct in all material respects on and as of such earlier date (it being understood that, notwithstanding the foregoing, only the making of the representations and warranties contained in Sections 4.3, 4.4, 4.11, 4.16, 4.19 (subject, on the Closing Date to the provisos contained in each of Section 5.1(h), (i) and (k) above) and 4.20 (the "Specified Representations") will be a condition on the Closing Date and that, to the extent that any of the representations and warranties made on the Closing Date are qualified by or subject to "Material Adverse Effect", such representation or warranty shall be deemed to be qualified by or subject to "Closing Date Material Adverse Effect" for the purposes of any representations and warranties made or to be made on, as of, or prior to the Closing Date).

(b) <u>No Default</u>. No Default or Event of Default (subject, in the case of the initial extensions of credit on the Closing Date, to Section 5.2(a) above) shall have occurred and be continuing on such date or after giving effect to the extensions of credit requested to be made on such date.

Each borrowing by and issuance of a Letter of Credit on behalf of the Borrower hereunder shall constitute a representation and warranty by the Borrower as of the date of such extension of credit that the conditions contained in this Section 5.2 have been satisfied.

# SECTION 6. AFFIRMATIVE COVENANTS

Holdings, the Borrower and the Canadian Borrower hereby jointly and severally agree that, so long as the Commitments remain in effect, any Letter of Credit remains outstanding or any Loan or other amount is owing to any Lender or the Administrative Agent hereunder, each of Holdings, the Borrower and the Canadian Borrower shall and shall cause each of its Subsidiaries to:

6.1 Financial Statements. Furnish to the Administrative Agent and each Lender:

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(a) as soon as available, but in any event within 90 days after the end of each Fiscal Year of the Borrower, a copy of the audited consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at the end of such year and the related audited consolidated statements of income and of cash flows for such year, setting forth in each case in comparative form the figures for the previous year, reported on without a "going concern" or like qualification or exception, or qualification arising out of the scope of the audit, by Ernst & Young LLP or other independent certified public accountants of nationally recognized standing;

(b) as soon as available, but in any event not later than 45 days (or, in the case of the first quarterly period end date following the Closing Date, not later than 75 days) after the end of each of the first three quarterly periods of each Fiscal Year of the Borrower, the unaudited consolidated balance sheet of the Borrower and its consolidated Subsidiaries as at the end of such quarter and the related unaudited consolidated statements of income and of cash flows for such quarter and the portion of the Fiscal Year through the end of such quarter, setting forth in each case in comparative form the figures for the previous year, certified by a Responsible Officer as fairly presenting, in all material respects, the consolidated financial condition and results of operations of the Borrower and its Subsidiaries as at the dates indicated (subject to normal year-end audit adjustments and the absence of footnotes); and

(c) as soon as available, but in any event not later than 30 days after the end of each monthly fiscal accounting period occurring during each Fiscal Year of the Borrower (other than the third, sixth, ninth and twelfth such monthly fiscal accounting period), financial statements of the Borrower and its Subsidiaries in a form reasonably acceptable to the Administrative Agent, prepared in accordance with GAAP, certified by a Responsible Officer as fairly presenting, in all material respects, the consolidated financial condition and results of operations of the Borrower and its Subsidiaries as at the dates indicated (subject to normal year-end audit adjustments and the absence of footnotes).

All such financial statements shall be complete and correct in all material respects and shall be prepared in reasonable detail and in accordance with GAAP applied (except as approved by such accountants or officer, as the case may be, and disclosed in reasonable detail therein) consistently throughout the periods reflected therein and with prior periods.

6.2 Certificates; Other Information. Furnish to the Administrative Agent and each Lender (or, in the case of clause (h), to the relevant Lender):

(a) concurrently with the delivery of the financial statements referred to in Section 6.1(a), a certificate of the independent certified public accountants reporting on such financial statements stating that in making the examination necessary therefor no knowledge was obtained of any Default or Event of Default, except as specified in such certificate;

(b) concurrently with the delivery of any financial statements pursuant to Section 6.1(a) or (b), (i) a certificate of a Responsible Officer stating that, to the best of each such Responsible Officer's knowledge, such Responsible Officer has obtained no knowledge of any Default or Event of Default except as specified in such certificate and (ii) (x) a Compliance Certificate containing all information and calculations necessary for determining compliance by each Group Member with the provisions of this Agreement referred to therein as of the last day of the fiscal quarter or Fiscal Year of the Borrower, as the case may be, and (y) to the extent not previously disclosed to the Administrative Agent, a description of any change in the jurisdiction of organization of any Loan Party and a list of any Intellectual Property acquired by any Loan Party since the date of the most recent report delivered pursuant to this clause (y) (or, in the case of the first such report so delivered, since the Closing Date);

(c) as soon as available, and in any event no later than 45 days after the end of each Fiscal Year of the Borrower, a detailed consolidated budget for the following Fiscal Year (including a projected consolidated balance sheet of the Borrower and its Subsidiaries as of the end of the following Fiscal Year, the related consolidated statements of projected cash flow, projected changes in financial position and projected income (showing quarterby-quarter break-downs) and a description of the underlying assumptions applicable thereto), and, as soon as available, significant revisions, if any, of such budget and projections with respect to such Fiscal Year (collectively, the "<u>Projections</u>"), which Projections shall in each case be accompanied by a certificate of a Responsible Officer stating that such Projections are based on reasonable estimates, information and assumptions and that such Responsible Officer has no reason to believe that such Projections are incorrect or misleading in any material respect;

(d) concurrently with the delivery of any financial statements pursuant to Section 6.1(a) or (b), a narrative discussion and analysis of the financial condition and results of operations of the Borrower and its Subsidiaries (including comparable store narrative discussion and analysis for same store sales) for such fiscal quarter and for the period from the beginning of the then current Fiscal Year to the end of such fiscal quarter, as compared to the portion of the Projections covering such periods and to the comparable periods of the previous year;

(e) no later than 10 Business Days prior to the effectiveness thereof, copies of substantially final drafts of any proposed amendment, supplement, waiver or other modification with respect to the Senior Note Indenture or the Acquisition Documentation;

(f) within five days after the same are sent, copies of all financial statements and reports that Holdings or the Borrower sends to the holders of any class of its debt securities or public equity securities and, within five days after the same are filed, copies of all financial statements and reports that Holdings or the Borrower may make to, or file with, the SEC;

(g) promptly following receipt thereof, copies of any documents described in Sections 101(k) and 101(l) of ERISA that the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities may request with respect to any Multiemployer Plan; provided, that if the Borrower, the Canadian Borrower or any of their Commonly Controlled Entities have not requested such documents or notices from the administrator or sponsor of the applicable Multiemployer Plan, then, upon reasonable request of the Administrative Agent, the Borrower, the Canadian Borrower and/or any of their Commonly Controlled Entities shall promptly make a request for such documents or notices from such administrator or sponsor and the Borrower or the Canadian Borrower or any of their Commonly Controlled Entities shall provide copies of such documents and notices to the Administrative Agent promptly after receipt thereof; and

(h) promptly, such additional financial and other information as any Lender through the Administrative Agent may from time to time reasonably request.

6.3 <u>Payment of Obligations</u>. Pay, discharge or otherwise satisfy at or before maturity or before they become delinquent, as the case may be, all its material obligations of whatever nature, except (i) where the amount or validity thereof is currently being contested in good faith by appropriate proceedings and reserves in conformity with GAAP with respect thereto have been provided on the books of the relevant Group Member or (ii) where the amount thereof, the failure of which to make such payment, would not cause an Event of Default under Section 8.1(e).

6.4 <u>Maintenance of Existence</u>: Compliance. (a)(i) Preserve, renew and keep in full force and effect its organizational existence and (ii) take all reasonable action to maintain all rights, privileges and franchises necessary or desirable in the normal conduct of its business, except, in each case, as otherwise permitted by Section 7.4 and except, in the case of clause (ii) above, to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect; and (b) comply with all Contractual Obligations and Requirements of Law except to the extent that failure to comply therewith could not, in the aggregate, reasonably be expected to have a Material Adverse Effect.

6.5 <u>Maintenance of Property: Insurance</u>. (a) Keep all property useful and necessary in its business in good working order and condition, ordinary wear and tear excepted and (b) maintain with financially sound and reputable insurance companies insurance on all its property in at least such amounts and against at least such risks (but including in any event public liability, product liability, flood and business interruption) as are usually insured against in the same general area by companies engaged in the same or a similar business.

6.6 Inspection of Property: Books and Records; Discussions. (a) Keep proper books of records and account in which full, true and correct entries in conformity with GAAP and all Requirements of Law shall be made of all dealings and transactions in relation to its business and activities and (b) permit representatives of any Lender upon reasonable advance notice and during normal business hours to visit and inspect any of its properties and examine and make abstracts from any of its books and records at any reasonable time and as often as may reasonably be desired and to discuss the business, operations, properties and financial and other condition of the Group Members with officers and employees of the Group Members and with their independent certified public accountants; provided that in the case of any discussion or meeting with the independent public accountants, only if the Borrower has been given the opportunity to participate in such discussion or meeting.

6.7 Notices. Promptly give notice to the Administrative Agent and each Lender of:

(a) the occurrence of any Default or Event of Default;

(b) any (i) default or event of default under any Contractual Obligation of any Group Member or (ii) litigation, investigation or proceeding that may exist at any time between any Group Member and any Governmental Authority, that in either case, if not cured or if adversely determined, as the case may be, could reasonably be expected to have a Material Adverse Effect;

(c) any litigation or proceeding affecting any Group Member (i) in which the amount involved is \$2,500,000 or more and not covered by insurance, (ii) in which injunctive or similar relief is sought or (iii) which relates to any Loan Document;

(d) the occurrence of any ERISA Event that, when taken alone or together with any other ERISA Events, would reasonably be expected to have a Material Adverse Effect;

(e) any development or event that has had or could reasonably be expected to have a Material Adverse Effect; and

(f) any amendment or modification of any material provision relating to compensation, term or advertising requirements under any franchise agreement.

Each notice pursuant to this Section 6.7 shall be accompanied by a statement of a Responsible Officer setting forth details of the occurrence referred to therein and stating what action the relevant Group Member proposes to take with respect thereto.

6.8 <u>Environmental Laws</u>. (a) Comply with, and use commercially reasonable efforts to ensure compliance by all tenants and subtenants, if any, with, all applicable Environmental Laws, and obtain and comply with and maintain, and use commercially reasonable efforts to ensure that all tenants and subtenants obtain and comply with and maintain, any and all licenses, approvals, notifications, registrations or permits required by applicable Environmental Laws, except to the extent that the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.

(b) Conduct and complete all investigations, studies, sampling and testing, and all remedial, removal and other actions required under Environmental Laws and promptly comply with all lawful orders and directives of all Governmental Authorities regarding Environmental Laws, except to the extent that the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.

6.9 Additional Collateral, etc. (a) With respect to any property acquired after the Closing Date by any Group Member (other than (w) any property described in paragraph (b), (c), (d) or (e) below, (x) any property subject to a Lien expressly permitted by Section 7.3(g), (y) property acquired by any Excluded Foreign Subsidiary and (z) any property not meeting the minimum thresholds set forth in the Guarantee and Collateral Agreement) as to which the Administrative Agent, for the benefit of the Lenders, does not have a perfected Lien, promptly (i) execute and deliver to the Administrative Agent such amendments to the Guarantee and Collateral Agreement or such other documents as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a security interest in such property and (ii) take all actions necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a perfected first priority security interest in such property, including the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by the Guarantee and Collateral Agreement or by law or as may be requested by the Administrative Agent.

(b) With respect to any fee interest in any real property having a value (together with improvements thereof) of at least \$1,000,000 acquired after the Closing Date by any Group Member (other than (x) any such real property subject to a Lien expressly permitted by Section 7.3(g) and (y) real property acquired by any Excluded Foreign Subsidiary), promptly (i) execute and deliver a first priority Mortgage, in favor of the Administrative Agent, for the benefit of the Lenders, covering such real property, (ii) if requested by the Administrative Agent, provide the Lenders with (x) title and extended coverage insurance covering such real property in an amount at least equal to the purchase price of such real property (or such other amount as shall be reasonably specified by the Administrative Agent) as well as a current ALTA survey thereof, together with a surveyor's certificate and (y) any consents or estoppels reasonably deemed necessary or advisable by the Administrative Agent in connection with such Mortgage, each of the foregoing in form and substance reasonably satisfactory to the Administrative Agent and (iii) if requested by the Administrative Agent, deliver to the Administrative Agent legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Administrative Agent.

(c) With respect to any leasehold property acquired after the Closing Date (other than any leasehold property acquired by any Excluded Foreign Subsidiary), promptly execute and deliver (or, to the extent landlord consent to such leasehold Mortgage is required, use its commercially reasonable efforts to execute and deliver) a first priority leasehold Mortgage, in favor of the Administrative Agent, for the benefit of the Lenders, covering such leasehold property, together with such documents, title insurance policies and legal opinions as the Administrative Agent shall request consistent with the provisions of Section 6.11.

(d) With respect to any new Subsidiary (other than an Excluded Foreign Subsidiary) created or acquired after the Closing Date by any Group Member (which, for the purposes of this paragraph (c), shall include any existing Subsidiary that ceases to be an Excluded Foreign Subsidiary), promptly (i) execute and deliver to the Administrative Agent such amendments to the Guarantee and Collateral Agreement as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a perfected first priority security interest in the Capital Stock of such new Subsidiary that is owned by any Group Member, (ii) deliver to the Administrative Agent the certificates representing such Capital Stock, together with undated stock powers, in blank, executed and delivered by a duly authorized officer of the relevant Group Member, (iii) cause such new Subsidiary (A) to become a party to the Guarantee and Collateral Agreement, (B) to take such actions necessary or advisable to grant to the Administrative Agent for the benefit of the Lenders a perfected first priority security interest in the Collateral described in the Guarantee and Collateral Agreement with respect to such new Subsidiary, including the filing of Uniform Commercial Code financing statements in such jurisdictions as may be required by the Guarantee and Collateral Agreement or by law or as may be requested by the Administrative Agent and (C) to deliver to the Administrative Agent, deliver to the Administrative Agent legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Administrative Agent.

(e) With respect to any new Excluded Foreign Subsidiary created or acquired after the Closing Date by any Group Member (other than by any Group Member that is an Excluded Foreign Subsidiary), promptly (i) execute and deliver to the Administrative Agent such amendments to the Guarantee and Collateral Agreement as the Administrative Agent deems necessary or advisable to grant to the Administrative Agent, for the benefit of the Lenders, a perfected first priority security interest in the Capital Stock of such new Subsidiary that is owned by any such Group Member (provided that in no event shall more than 66% of the total outstanding voting Capital Stock of any such new Subsidiary be required to be so pledged), (ii) deliver to the Administrative Agent the certificates representing such Capital Stock, together with undated stock powers, in blank, executed and delivered by a duly authorized officer of the relevant Group Member, and take such other action as may be necessary or, in the opinion of the Administrative Agent, desirable to perfect the Administrative Agent's security interest therein, and (iii) if requested by the Administrative Agent, deliver to the Administrative Agent legal opinions relating to the matters described above, which opinions shall be in form and substance, and from counsel, reasonably satisfactory to the Administrative Agent.

6.10 Landlord Consents. Use its commercially reasonable efforts to obtain landlord consents to the granting of a leasehold mortgage in favor of the Administrative Agent with respect to each leasehold property listed on Schedule 1.1B-3, in form and substance reasonably satisfactory to the Administrative Agent.

6.11 Mortgages. On or prior to the date that is 90 days following the Closing Date (or, in relation to a landlord consent obtained pursuant to Section 6.10 above, following the date such consent is obtained, or, in either case, such later date as the Administrative Agent may agree in its sole discretion), deliver to the Administrative Agent the following with respect to each Mortgaged Property: (i) a Mortgage with respect to each such Mortgaged Property; (ii) any existing maps, plats and/or as-built surveys of such Mortgaged Properties which are in the possession of any Loan Party; (iii) a mortgagee's title insurance policy (or policies) or marked up unconditional binder for such insurance, in each case in form and substance reasonably satisfactory to the Administrative Agent (together with evidence that all premiums in respect of each such policy, all charges for mortgage recording taxes, and all related expenses, if any, have been paid); (iv) a "life of loan" standard flood hazard determination; (v) if such Mortgaged Property is located in a "special flood hazard area" (A) a policy of flood insurance that (1) covers such Mortgaged Property, written in an amount reasonably satisfactory to the Adeministrative Agent, and (B) confirmation that the Borrower has received, with respect to such Mortgaged Property, the notice required pursuant to Section 208(e)(3) of Regulation H of the Board; and (vi) a copy of all recorded documents referred to, or listed as exceptions to title in, the title policy or policies referred to in clause (iii) above and a copy of all other material documents affecting such Mortgaged Property.

6.12 <u>Maintenance of Ratings</u>. Each of Holdings and the Borrower will use commercially reasonable efforts, including, for the avoidance of doubt, the payment of the usual and customary fees and expenses of each of S&P and Moody's, to cause (a) the Borrower to continuously have a public corporate credit rating from each of S&P and Moody's (but not to maintain a specific rating) and (b) the Term Facility and the Revolving Facility to be continuously rated by each of S&P and Moody's (but not to maintain a specific rating).

6.13 Post-Closing Covenants. Cause each post-closing matter identified on Schedule 6.13 to be on or before the date set forth on Schedule 6.13 with respect to such post-closing matter.

# SECTION 7. NEGATIVE COVENANTS

Holdings, the Borrower and the Canadian Borrower hereby jointly and severally agree that, so long as the Commitments remain in effect, any Letter of Credit remains outstanding or any Loan or other amount is owing to any Lender or the Administrative Agent hereunder, each of Holdings, the Borrower and the Canadian Borrower shall not, and shall not permit any of its Subsidiaries to, directly or indirectly:

# 7.1 Financial Condition Covenants.

(a) <u>Consolidated Leverage Ratio</u>. Permit the Consolidated Leverage Ratio as at the last day of any period of four consecutive fiscal quarters of the Borrower ending with any fiscal quarter set forth below to exceed the ratio set forth below opposite such fiscal quarter:

Fiscal Quarter	Consolidated Leverage Ratio
Third Quarter of Fiscal Year 2010 through First Quarter of Fiscal Year 2011	5.25:1.00
Second Quarter of Fiscal Year 2011 through Fourth Quarter of Fiscal Year 2011	5.00:1.00
First Quarter of Fiscal Year 2012	4.75:1.00
Second Quarter of Fiscal Year 2012 through Fourth Quarter of Fiscal Year 2012	4.50:1.00
First Quarter of Fiscal Year 2013	4.25:1.00

Second Quarter of Fiscal Year 2013 through Fourth Quarter of Fiscal Year 2013	4.00:1.00
First Quarter of Fiscal Year 2014	3.75:1.00
Second Quarter of Fiscal Year 2014 through Third Quarter of Fiscal Year 2014	3.50:1.00
Fourth Quarter of Fiscal Year 2014 and thereafter	3.25:100

(b) <u>Consolidated Fixed Charge Coverage Ratio</u>. Permit the Consolidated Fixed Charge Coverage Ratio for any period of four consecutive fiscal quarters of the Borrower ending with any fiscal quarter set forth below to be less than the ratio set forth below opposite such fiscal quarter:

Fiscal Quarter	Consolidated Fixed Charge Coverage Ratio
Third Quarter of Fiscal Year 2010 through Fourth Quarter of Fiscal Year 2010	1.00:1.00
First Quarter of Fiscal Year 2011 through Fourth Quarter of Fiscal Year 2011	1.05:1.00
First Quarter of Fiscal Year 2012 through Fourth Quarter of Fiscal Year 2012	1.10:1.00
First Quarter of Fiscal Year 2013 through Fourth Quarter of Fiscal Year 2013	1.15:1.00
First Quarter of Fiscal Year 2014 through Third Quarter of Fiscal Year 2014	1.20:1.00
Fourth Quarter of Fiscal Year 2014 and thereafter	1.30:1.00

; <u>provided</u>, that for the purposes of determining the ratio described above for the third quarter of Fiscal Year 2010, the fourth quarter of Fiscal Year 2010 and the first quarter of Fiscal Year 2011, Consolidated Fixed Charges for the relevant period shall be deemed to equal Consolidated Fixed Charges for such fiscal quarter (and, in the case of the latter two such determinations, each previous fiscal quarter commencing after the Closing Date) <u>multiplied by</u> 4, 2 and 4/3, respectively.

7.2 Indebtedness. Create, issue, incur, assume, become liable in respect of or suffer to exist any Indebtedness, except:

(a) Indebtedness of any Loan Party pursuant to any Loan Document;

(b) Indebtedness of the Borrower to any Subsidiary and of any Wholly Owned Subsidiary Guarantor to the Borrower or any other Subsidiary;

(c) Guarantee Obligations incurred in the ordinary course of business by the Borrower or any of its Subsidiaries of obligations of any Wholly Owned Subsidiary Guarantor;

(d) Indebtedness outstanding on the date hereof and listed on Schedule 7.2(d) and any refinancings, refundings, replacements, renewals or extensions thereof (without increasing the principal amount thereof or shortening the maturity thereof);

(e) Indebtedness (including, without limitation, Capital Lease Obligations) secured by Liens permitted by Section 7.3(g) in an aggregate principal amount not to exceed \$15,000,000 at any one time outstanding and any refinancings, refundings, replacements, renewals or extensions thereof (without increasing the principal amount thereof or shortening the maturity thereof);

(f) (i) Indebtedness of the Borrower in respect of the Senior Notes in an aggregate principal amount not to exceed \$200,000,000, (ii) Indebtedness of the Borrower in respect of the Senior Notes or other Permitted Senior Indebtedness in an aggregate principal amount not to exceed \$50,000,000 provided that (A) the Borrower is in compliance on a pro forma basis with the financial covenants contained in Section 7.1 and (B) the Consolidated Leverage Ratio is not greater than the Incurrence Ratio, in each case, after giving effect to the incurrence of such Indebtedness and the application of the proceeds therefrom and (iii) Guarantee Obligations of Holdings and any Subsidiary Guarantor in respect of such Indebtedness under clauses (i) and (ii) above and any refinancings, refundings, replacements, renewals or extensions thereof (without increasing the principal amount thereof or shortening the maturity thereof) that qualifies as Permitted Senior Indebtedness;

(g) Permitted Senior Indebtedness and any refinancings, refundings, replacements, renewals or extensions thereof (without increasing the principal amount thereof or shortening the maturity thereof) to the extent the Net Cash Proceeds in respect thereof are used to prepay Term Loans pursuant to Section 2.11(a);

(h) endorsements of negotiable instruments for deposit or collection or similar transactions in the ordinary course of business;

(i) Indebtedness in respect of Swap Agreements permitted under Section 7.12;

(j) Indebtedness of any Excluded Foreign Subsidiary to the Borrower or any Subsidiary of the Borrower, provided that all such intercompany Indebtedness shall be subordinated to the Obligations on terms satisfactory to the Administrative Agent and shall be in an aggregate principal amount not to exceed \$1,000,000;

(k) Indebtedness consisting of Guarantee Obligations of any Indebtedness of the Borrower or any of its Subsidiaries otherwise permitted to be incurred pursuant to this Section 7.2;

(1) Indebtedness of a Person existing at the time such Person becomes a Subsidiary of the Borrower following the Closing Date, which Indebtedness is in existence at the time such Person becomes a Subsidiary and is not created in connection with or in contemplation of such Person becoming a Subsidiary; <u>provided</u> that the aggregate principal amount of all such Indebtedness in the aggregate shall not exceed \$5,000,000 at any time outstanding (and any refinancings, refundings, replacements, renewals or extensions thereof (without increasing the principal amount thereof or shortening the maturity thereof));

(m) Indebtedness consisting of obligations to employees, directors and consultants of Holdings (or any direct or indirect parent of Holdings that exists for the sole purpose of being a direct or indirect holding company of Holdings to the extent attributable to the operation of Holdings and its Subsidiaries), the Borrower or its Subsidiaries in respect of stock ownership or stock option plans to the extent that such obligations are permitted under Section 7.6;

(n) Indebtedness incurred in respect of workers' compensation claims, self-insurance obligations, performance, surety and similar bonds and completion guarantees provided by the Borrower or any Subsidiary of the Borrower in the ordinary course of business, <u>provided</u> such Indebtedness is not overdue;

(o) Indebtedness arising from agreements of Holdings, the Borrower or any Subsidiary of the Borrower providing for indemnification, adjustment of purchase price or similar obligations (including payments in relation to escrow or holdback obligations or, solely pursuant to clause (ii) below, tax benefit obligations), in each case, incurred or assumed (i) in connection with the disposition of any business, assets or Capital Stock or (ii) in connection with the Acquisition Documentation (without giving effect to subsequent amendments, waivers or other modifications to such agreements or documents);

(p) Indebtedness arising from the honoring by a bank or other financial institution of a check, draft or similar instrument (except in the case of daylight overdrafts) drawn against insufficient funds in the ordinary course of business, <u>provided</u>, <u>however</u>, that such Indebtedness is extinguished within five Business Days of incurrence;

(q) additional Indebtedness of the Borrower or any of its Subsidiaries in an aggregate principal amount (for the Borrower and all Subsidiaries) not to exceed \$20,000,000 at any one time outstanding; and

(r) Indebtedness arising under Card Programs, provided that the aggregate outstanding amount of such Indebtedness shall not exceed \$5,000,000 at any time.

7.3 Liens. Create, incur, assume or suffer to exist any Lien upon any of its property, whether now owned or hereafter acquired, except:

(a) Liens for taxes not yet due and payable or that are being contested in good faith by appropriate proceedings, <u>provided</u> that adequate reserves with respect thereto are maintained on the books of the Borrower or its Subsidiaries, as the case may be, in conformity with GAAP;

(b) carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business that are not overdue for a period of more than 30 days or that are being contested in good faith by appropriate proceedings;

(c) pledges or deposits in connection with workers' compensation, unemployment insurance and other social security legislation;

(d) deposits to secure the performance of bids, trade contracts (other than for borrowed money), leases, statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature incurred in the ordinary course of business;

(e) easements, rights-of-way, restrictions and other similar encumbrances incurred in the ordinary course of business that, in the aggregate, are not substantial in amount and that do not in any case materially detract from the value of the property subject thereto or materially interfere with the ordinary conduct of the business of the Borrower or any of its Subsidiaries and other encumbrances on each Mortgaged Property as and to the extent permitted by the Mortgage applicable thereto;

(f) Liens in existence on the date hereof listed on Schedule 7.3(f), securing Indebtedness permitted by Section 7.2(d), provided that no such Lien is spread to cover any additional property after the Closing Date and that the amount of Indebtedness secured thereby is not increased;

(g) Liens securing Indebtedness of the Borrower or any other Subsidiary incurred pursuant to Section 7.2(e) to finance the acquisition of fixed or capital assets, <u>provided</u> that (i) such Liens shall be created substantially simultaneously with the acquisition of such fixed or capital assets, (ii) such Liens do not at any time encumber any property other than the property financed by such Indebtedness, (iii) the Indebtedness secured thereby does not exceed 100% of the cost of such assets at the time of such acquisition, including transaction costs incurred in connection with such acquisition and (iv) the amount of Indebtedness secured thereby is not increased;

(h) Liens created pursuant to the Security Documents;

(i) any interest or title of a lessor under any lease entered into by the Borrower or any other Subsidiary in the ordinary course of its business and covering only the assets so leased;

(j) purported Liens evidenced by the filing of precautionary UCC financing statements relating solely to operating leases of personal property entered into in the ordinary course of business;

(k) any attachment or judgment Lien not constituting an Event of Default under Section 8.1(h);

(1) non-exclusive licenses or sublicenses of Intellectual Property granted by the Borrower or any of its Subsidiaries in the ordinary course of business consistent with past practice and not interfering in any respect with the ordinary conduct of the business of the Borrower or such Subsidiary;

(m) bankers liens and rights of set-off with respect to customary depositary arrangements entered into in the ordinary course of business of the Borrower and its Subsidiaries;

(n) Liens securing Indebtedness permitted under Section 7.2(l); <u>provided</u> that (i) such Liens are not created in contemplation of or in connection with such Person becoming a Subsidiary, (ii) such Liens do not apply to any other property of the Borrower or any of its Subsidiaries, and (iii) such Liens secure only those obligations secured by such Liens on the date such Person becomes a Subsidiary;

(o) 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;

(p) Liens in favor of issuers of surety or performance bonds or letters of credit or bankers' acceptances issued pursuant to the request of and for the account of such Person in the ordinary course of its business so long as neither (i) the aggregate outstanding principal amount of the obligations secured thereby nor (ii) the aggregate fair market value (determined as of the date such Lien is incurred) of the assets subject thereto exceeds (as to the Borrower and all Subsidiaries) \$2,000,000 at any one time;

(q) Liens securing Swap Agreements permitted under Section 7.12 so long as neither (i) the aggregate outstanding principal amount of the obligations secured thereby nor (ii) the aggregate fair market value (determined as of the date such Lien is incurred) of the assets subject thereto exceeds (as to the Borrower and all Subsidiaries) \$5,000,000 at any one time;

(r) Liens not otherwise permitted by this Section so long as neither (i) the aggregate outstanding principal amount of the obligations secured thereby nor (ii) the aggregate fair market value (determined as of the date such Lien is incurred) of the assets subject thereto exceeds (as to the Borrower and all Subsidiaries) \$5,000,000 at any one time; and

(s) Liens on property or assets of Excluded Foreign Subsidiaries securing Indebtedness and other obligations of Excluded Foreign Subsidiaries that are incurred under Section 7.2 in an aggregate principal amount outstanding at any one time not to exceed \$10,000,000.

7.4 <u>Fundamental Changes</u>. Enter into any merger, consolidation or amalgamation, or liquidate, wind up or dissolve itself (or suffer any liquidation or dissolution), or Dispose of all or substantially all of its property or business, except that:

(a) (i) any Subsidiary of the Borrower (other than the Canadian Borrower) may be merged or consolidated with or into the Borrower (<u>provided</u> that the Borrower shall be the continuing or surviving corporation) or with or into any Wholly Owned Subsidiary Guarantor (<u>provided</u> that the Wholly Owned Subsidiary Guarantor shall be the continuing or surviving corporation) and (ii) any Excluded Foreign Subsidiary (other than the Canadian Borrower) may be merged or consolidated with or into any other Excluded Foreign Subsidiary;

(b) (i) any Subsidiary of the Borrower (other than the Canadian Borrower) may Dispose of any or all of its assets (x) to the Borrower or any Wholly Owned Subsidiary Guarantor (upon voluntary liquidation or otherwise) or (y) pursuant to a Disposition permitted by Section 7.5 and (ii) any Excluded Foreign Subsidiary (other than the Canadian Borrower) may Dispose of any or all of its assets to any other Excluded Foreign Subsidiary;

(c) any Investment expressly permitted by Section 7.8 may be structured as a merger, consolidation or amalgamation; and

(d) the Acquisition may be consummated.

7.5 <u>Disposition of Property</u>. Dispose of any of its property, whether now owned or hereafter acquired, or, in the case of any Subsidiary, issue or sell any shares of such Subsidiary's Capital Stock to any Person, except:

(a) the Disposition of damaged, obsolete, surplus or worn out property in the ordinary course of business;

(b) the sale of inventory or the licensing of Intellectual Property or other general intangibles in connection with franchise agreements in the ordinary course of business;

(c) Dispositions permitted by clause (i)(x) or clause (ii) of Section 7.4(b);

(d) the sale or issuance of the Borrower's or any Subsidiary's Capital Stock to Holdings, the Borrower or any Wholly Owned Subsidiary Guarantor;

(e) cash and Cash Equivalents;

(f) Permitted Sale-Leasebacks to the extent the Net Cash Proceeds in respect thereof are used to prepay Term Loans pursuant to Section 2.11(b);

(g) Dispositions to the Borrower or any of its Subsidiaries; <u>provided</u> that any such Dispositions involving a Subsidiary that is not a Loan Party shall be made in compliance with Section 7.10;

(h) Dispositions constituting Investments permitted under Section 7.8;

(i) Dispositions of assets in a single or series of related transaction not constituting an Asset Sale; and

(j) the Disposition of other property or a series of related Dispositions of property having a book value not to exceed \$15,000,000 in the aggregate for any Fiscal Year of the Borrower.

7.6 <u>Restricted Payments</u>. Declare or pay any dividend (other than dividends payable solely in Capital Stock of the Person making such dividend) on, or make any payment on account of, or set apart assets for a sinking or other analogous fund for, the purchase, redemption, defeasance, retirement or other acquisition of, any Capital Stock of any Group Member, whether now or hereafter outstanding, or make any other distribution in respect thereof, either directly or indirectly, whether in cash or property or in obligations of any Group Member (collectively, "<u>Restricted Payments</u>"), except that:

(a) any Subsidiary may make Restricted Payments to the Borrower or any Wholly Owned Subsidiary Guarantor and, on a pro rata basis, to its equity holders (with respect to any non-Wholly Owned Subsidiary);

(b) so long as no Default or Event of Default shall have occurred and be continuing, the Borrower may pay dividends to Holdings, and Holdings may pay dividends to its direct or indirect parent that exists for the sole purpose of being a direct or indirect holding company of Holdings, to: (i) purchase its own common stock or common stock options from present or former officers, directors, consultants or employees of such Person upon the death, disability or termination of employment of such officer, director, consultant or employee or make payments to present or former officers, directors, consultants or employees of such Person in respect of stock ownership or stock option plans, <u>provided</u>, that the aggregate amount of payments under this clause (i) after the date hereof (net of any proceeds received by Holdings (or any such direct or indirect parent of Holdings) and contributed to the Borrower after the date hereof in connection with resales of any common stock or common stock options so purchased) shall not exceed \$2,500,000 in the aggregate for any Fiscal Year of the Borrower; and (ii) pay amounts expressly permitted by Section 7.10(b) below; and

(c) the Borrower may pay dividends to Holdings and Holdings may pay dividends to its direct or indirect parent that exists for the sole purpose of being a direct or indirect holding company of Holdings, to pay: (i) corporate overhead expenses incurred in the ordinary course of business not to exceed (A) \$1,000,000 prior to a Qualifying IPO and (B) \$2,000,000 on or following a Qualifying IPO, in each case in any Fiscal Year, (ii) any taxes that are due and payable by Holdings (or any such direct or indirect parent of Holdings) as a result of being part of a consolidated, combined or unitary tax group with the Borrower, or (iii) amounts contemplated by Section 7.2(o).

7.7 <u>Capital Expenditures</u>. Make or commit to make any initial New Unit Capital Expenditure at any time that (a) the aggregate Available Revolving Commitments is less than \$15,000,000 and (b) the Consolidated Leverage Ratio as at the last day of the period of four consecutive fiscal quarters most recently ended for which the Borrower has delivered a Compliance Certificate is greater than the Incurrence Ratio; <u>provided</u> that the restrictions contained in this Section 7.7 shall not apply to initial New Unit Capital Expenditures comprised of the then available Cumulative Credit that is attributable to clause (a)(ii) of the definition of "Cumulative Credit" that the Borrower chooses to apply to an initial New Unit Capital Expenditure.

7.8 <u>Investments</u>. Make any advance, loan, extension of credit (by way of guaranty or otherwise) or capital contribution to, or purchase any Capital Stock, bonds, notes, debentures or other debt securities of, or any assets constituting a business unit of, or make any other investment in, any Person (all of the foregoing, "<u>Investments</u>"), except:

(a) extensions of trade credit in the ordinary course of business;

(b) investments in cash and Cash Equivalents;

(c) Guarantee Obligations permitted by Section 7.2;

(d) loans and advances to employees of any Group Member in the ordinary course of business (including for travel, entertainment and relocation expenses) in an aggregate amount for all Group Members not to exceed \$2,500,000 at any one time outstanding;

(e) the Acquisition;

(f) Investments in assets useful in the business of the Borrower and its Subsidiaries made by the Borrower or any of its Subsidiaries with the proceeds of any Reinvestment Deferred Amount;

(g) intercompany Investments by any Group Member in the Borrower or any Person that, prior to such Investment, is a Wholly Owned Subsidiary Guarantor, or upon the making of such Investment or if as a result of such Investment, such Person becomes a Wholly Owned Subsidiary Guarantor, or such Person is merged into or consolidated with or transfers all or substantially all of its assets to the Borrower or any Wholly Owned Subsidiary Guarantor;

(h) intercompany loans to any Excluded Foreign Subsidiary to the extent permitted under Section 7.2(j);

(i) Capital Expenditures permitted by Section 7.7;

(j) Investments existing as of the Closing Date and listed on Schedule 7.8(j);

(k) Investments in Swap Agreements permitted under Section 7.12;

(1) Permitted Acquisitions;

(m) Capital Stock, obligations or securities received in settlement of debts created in the ordinary course of business and owing to the Borrower or any Subsidiary of the Borrower or in satisfaction of judgments or pursuant to any plan of reorganization or similar arrangement upon the bankruptcy or insolvency of a debtor;

(n) Investments made as a result of the receipt of non-cash consideration from a Disposition of property that was made pursuant to and in compliance with Section 7.5;

(o) Investments in or by any Foreign Subsidiary in an aggregate amount at the time of such Investments not to exceed \$10,000,000 outstanding at any one time (with the fair market value of such Investment being measured at the time made and without giving effect to subsequent changes in value);

(p) Investments by the Borrower or any Subsidiary in an amount not to exceed the then available Cumulative Credit; and

(q) in addition to Investments otherwise expressly permitted by this Section, Investments by the Borrower or any of its Subsidiaries in an aggregate amount (valued at cost) not to exceed \$10,000,000 during the term of this Agreement.

7.9 Optional Payments and Modifications of Certain Debt Instruments. (a) Make or offer to make any optional or voluntary payment, prepayment, repurchase or redemption of or otherwise optionally or voluntarily defease or segregate funds with respect to the Senior Notes or any Permitted Senior Indebtedness; provided that the Borrower may:

(i) make prepayments in connection with any refinancing, refunding, replacement, renewal or extension of the Senior Notes or any Permitted Senior Indebtedness permitted under Section 7.2 (in each case, without increasing the principal amount thereof or shortening the maturity thereof),

(ii) prepay, repurchase or redeem Senior Notes and Permitted Senior Indebtedness in an aggregate amount not to exceed \$15,000,000 so long as (x) no such repurchase or redemption is made with the proceeds of Revolving Loans, Canadian Revolving Loans or Additional Revolving Loans and (y) after giving pro forma effect to such repurchase or redemption, the Borrower is in compliance with both covenants set forth in Section 7.1, such compliance to be determined on the basis of the financial information most recently delivered to the Administrative Agent and the Lenders pursuant to Section 6.1, and

(iii) in addition to as permitted in clause (ii) above, prepay, repurchase or redeem up to 40% of the original principal amount of the Senior Notes (calculated after giving effect to the issuance of any additional Senior Notes) (any such prepayment, repurchase or redemption pursuant solely to this clause (iii), a "Note Prepayment") with the Net Cash Proceeds of one or more equity offerings, issuances or sales of Capital Stock issued by the Borrower or Holdings, in each case on and subject to the terms set out in the Senior Note Indenture, provided that, with respect to any such Note Prepayment (I) after the aggregate of all Note Prepayments exceed \$25,000,000 of principal amount of Senior Notes or (II) that would result in the aggregate of all Note Prepayments exceeding \$25,000,000 of principal amount of Senior Notes, the Borrower shall first make an offer (an "Offer") to the Term Lenders to repurchase and cancel the Term Loans (x) in the case of a Note Prepayment described in clause (I) above, in the amount of such intended Note Prepayment or (y) in the case of a Note Prepayment described in clause (II) above, in the amount by which such intended Note Prepayment would cause the aggregate of all Note Prepayments to exceed \$25,000,000 (such Term Loans, the "Offer Loans"), and in connection therewith (A) the Borrower shall deliver a notice of such Offer to the Administrative Agent and all Term Lenders no later than 12:00 noon New York City time at least five Business Days in advance of a proposed consummation date of such Offer indicating (1) the last date on which such Offer may be accepted. (2) the maximum dollar amount of such Offer: (B) the Borrower shall hold such Offer open for a minimum period of two Business Days; (C) a Term Lender who elects to participate in the Offer may choose to sell all or part of such Term Lender's Offer Loans; and (D) such Offer shall be made to Term Lenders on a pro rata basis in accordance with the respective principal amount then due and owing to the Term Lenders; provided, that: (1) if any Term Lender elects not to participate in the Offer, either in whole or in part, the amount of such Term Lender's Offer Loans not being tendered shall be excluded in calculating the pro rata amount applicable to each Term Lender tendering Offer Loans; and (2) an amount equal to the excess of (x) the Net Cash Proceeds of the relevant equity offerings, issuances or sales of Capital Stock over (y) the amount required to repurchase and cancel Offer Loans from participating Term Lenders in accordance with the Offer, may be applied by the Borrower or Holdings to such Note Prepayment without any further Offer being required; or

(b) amend, modify, waive or otherwise change, or consent or agree to any amendment, modification, waiver or other change to, any of the terms of the Senior Notes or any Permitted Senior Indebtedness (other than any such amendment, modification, waiver or other change that (i) would extend the maturity or reduce the amount of any payment of principal thereof or reduce the rate or extend any date for payment of interest thereon and (ii) does not involve the payment of a consent fee).

## 7.10 Transactions with Affiliates.

(a) Enter into any transaction, including any purchase, sale, lease or exchange of property, the rendering of any service or the payment of any management, advisory or similar fees, with any Affiliate (other than Holdings, the Borrower or any Wholly Owned Subsidiary Guarantor) unless such transaction is (i) otherwise permitted under this Agreement, (ii) in the ordinary course of business of the relevant Group Member, and (iii) upon fair and reasonable terms no less favorable to the relevant Group Member than it would obtain in a comparable arm's length transaction with a Person that is not an Affiliate.

(b) Notwithstanding paragraph (a) above, Holdings, the Borrower and its Subsidiaries may (i) pay to the Sponsor and its Control Investment Affiliates fees and expenses pursuant to a reimbursement agreement approved by the board of directors of the Borrower in an aggregate amount not to exceed in any Fiscal Year of the Borrower \$750,000 <u>plus</u> other fees or expenses incurred by the Sponsor or its Affiliates in connection with the procurement of insurance and/or goods and services by such Person on behalf of the Borrower or its Subsidiaries as permitted by such reimbursement agreement, (ii) pay reasonable and customary fees and expenses to members of the Board of Directors of Holdings (or any direct or indirect parent of Holdings that exists for the sole purpose of being a direct or indirect holding company of Holdings), to the extent attributable to the operation of Holdings, the Borrower and its Subsidiaries, (iii) make loans and advances to non-executive employees in the ordinary course of business to the extent permitted as a permitted Investment under Section 7.8(d), (iv) consummate the transactions set forth on Schedule 7.10 and (v) pay amounts to the Sellers and their affiliates on the Closing Date under the Acquisition Documentation in accordance with Section 7.2(o)(ii) above.

7.11 <u>Sales and Leasebacks</u>. Enter into any arrangement with any Person providing for the leasing by any Group Member of real or personal property that has been or is to be sold or transferred by such Group Member to such Person or to any other Person to whom funds have been or are to be advanced by such Person on the security of such property or rental obligations of such Group Member (a "<u>Sale-Leaseback</u>"); provided that, so long as no Event of Default has occurred and is continuing or would result therefrom, the Borrower or any Subsidiary of the Borrower may enter into a Sale-Leaseback with respect to any Unit which commences operations after the Closing Date (regardless of when the Real Estate on which such Unit is located was acquired) or any fee or leasehold interest in Real Estate acquired after the Closing Date if (a) the terms of the sale as such are comparable to terms which could be obtained in an arm's-length commercial operating lease among unaffiliated parties and (c) the Net Cash Proceeds in respect thereof are used to prepay Term Loans pursuant to Section 2.11(b) and, provided further that, assuming that such Sale-Leaseback (and any repayment of Indebtedness in conjunction therewith) had occurred immediately prior to the period of four consecutive fiscal quarters most recently ended, no Default or Event of Default would have occurred under Section 7.1 after giving effect to such Sale-Leaseback (any such Sale-Leaseback referred to herein, a "Permitted Sale-Leaseback").

7.12 <u>Swap Agreements</u>. 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 Capital Stock or the Senior Notes) 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.

7.13 <u>Changes in Fiscal Periods</u>. Permit the Fiscal Year of the Borrower to end on a day other than the Sunday after the Saturday closest to January 31 of each calendar year or change the Borrower's method of determining fiscal quarters. The term "Fiscal Year XXXX", where "XXXX" is a calendar year, shall refer to the Fiscal Year of the Borrower beginning during such calendar year.

7.14 <u>Negative Pledge Clauses</u>. Enter into or suffer to exist or become effective any agreement that prohibits or limits the ability of any Group Member to create, incur, assume or suffer to exist any Lien upon any of its property or revenues, whether now owned or hereafter acquired, other than (a) this Agreement and the other Loan Documents, (b) the Senior Notes Indenture, (c) any agreements governing any purchase money Liens or Capital Lease Obligations otherwise permitted hereby (in which case, any prohibition or limitation shall only be effective against the assets financed thereby), (d) customary provisions contained in any agreement that has been entered into in connection with a Disposition of assets permitted under Section 7.5, (e) customary anti-assignment provisions contained in leases and licensing agreements entered into in the ordinary course of business, if required by such lessor or licensor and (f) in the case of a joint venture that becomes a Subsidiary following the Closing Date, restrictions in such Person's organizational documents or pursuant to any joint venture agreement or stockholders' agreements that solely affect the Capital Stock of or property held in such Person.

7.15 <u>Clauses Restricting Subsidiary Distributions</u>. Enter into or suffer to exist or become effective any consensual encumbrance or restriction on the ability of any Subsidiary of the Borrower to (a) make Restricted Payments in respect of any Capital Stock of such Subsidiary held by, or pay any Indebtedness owed to, the Borrower or any other Subsidiary of the Borrower, (b) make loans or advances to, or other Investments in, the Borrower or any other Subsidiary of the Borrower or any other Subsidiary of the Borrower or (c) transfer any of its assets to the Borrower or any other Subsidiary of the Borrower, except for such encumbrances or restrictions existing under or by reason of (i) any restrictions existing under the Loan Documents or the Senior Notes Indenture, (ii) any restrictions with respect to a Subsidiary imposed pursuant to an agreement that has been entered into in connection with the Disposition of all or substantially all of the Capital Stock or assets of such Subsidiary, or (iii) any customary provisions in joint venture agreements relating to joint ventures and other similar agreements in the ordinary course of business (and in the case of a joint venture that becomes a Subsidiary following the Closing Date, restrictions in such Person's organizational documents or pursuant to any joint venture agreement or stockholders' agreements solely to the extent of the Capital Stock of or property held in such Person) that solely affect the relevant joint venture and any customary encumbrances or restrictions on any Foreign Subsidiary pursuant to Indebtedness incurred by such Foreign Subsidiary that solely affect such Foreign Subsidiary.

7.16 Lines of Business. Enter into any business, either directly or through any Subsidiary, except for those businesses in which the Borrower and its Subsidiaries are engaged on the date of this Agreement (after giving effect to the Acquisition) or that are reasonably related thereto.

7.17 <u>Amendments to Acquisition Documentation</u>. (a) Amend, supplement or otherwise modify (pursuant to a waiver or otherwise) the terms and conditions of the indemnities and licenses furnished to the Borrower or any of its Subsidiaries pursuant to the Acquisition Documentation such that after giving effect thereto such indemnities or licenses shall be materially less favorable to the interests of the Loan Parties or the Lenders with respect thereto or (b) otherwise amend, supplement or otherwise modify the terms and conditions of the Acquisition Documentation or any such other documents except for any such amendment, supplement or modification that (i) becomes effective after the Closing Date and (ii) could not reasonably be expected to have a Material Adverse Effect.

7.18 <u>Franchises</u>. Enter into any franchise agreement pursuant to which the Borrower or any of its Subsidiaries is prohibited from pledging or otherwise assigning its rights under such franchise agreement, including its right to receive any franchise fees or other fees or amounts paid to the Borrower or such Subsidiary thereunder.

## SECTION 8. EVENTS OF DEFAULT

8.1 Events of Default. If any of the following events shall occur and be continuing:

(a) the Borrower or the Canadian Borrower shall fail to pay any principal of any Loan or Reimbursement Obligation when due in accordance with the terms hereof; or the Borrower or the Canadian Borrower shall fail to pay any interest on any Loan or Reimbursement Obligation, or any other amount payable hereunder or under any other Loan Document, within five days after any such interest or other amount becomes due in accordance with the terms hereof; or

(b) any representation or warranty made or deemed made by any Loan Party herein or in any other Loan Document or that is contained in any certificate, document or financial or other statement furnished by it at any time under or in connection with this Agreement or any such other Loan Document shall prove to have been inaccurate in any material respect on or as of the date made or deemed made; or

(c) any Loan Party shall default in the observance or performance of any agreement contained in clause (i) or (ii) of Section 6.4(a) (with respect to Holdings, the Borrower and the Canadian Borrower only), Section 6.7(a) or Section 7 of this Agreement or Sections 5.4 and 5.6(b) of the Guarantee and Collateral Agreement; or

(d) any Loan Party shall default in the observance or performance of any other agreement contained in this Agreement or any other Loan Document (other than as provided in paragraphs (a) through (c) of this Section), and such default shall continue unremedied for a period of 30 days after notice to the Borrower from the Administrative Agent or the Required Lenders; or

(e) any Significant Group Member shall (i) default in making any payment of any principal of any Indebtedness (including any Guarantee Obligation, but excluding the Loans) on the scheduled or original due date with respect thereto; or (ii) default in making any payment of any interest on any such Indebtedness beyond the period of grace, if any, provided in the instrument or agreement under which such Indebtedness was created; or (iii) default in the observance or performance of any other agreement or condition relating to any such Indebtedness or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event shall occur or condition exist, the effect of which default or other event or condition is to cause, or to permit the holder or beneficiary of such Indebtedness (or a trustee or agent on behalf of such Indebtedness constituting a Guarantee Obligation) to become payable; provided, that a default, event or condition described in clause (i), (ii) or (iii) of this paragraph (e) shall not at any time constitute an Event of Default unless, at such time, one or more defaults, events or conditions of the type described in clauses (i), (ii) and (iii) of this paragraph (e) shall have occurred and be continuing with respect to Indebtedness the outstanding principal amount of which exceeds in the aggregate \$5,000,000; or

(f) (i) any Significant Group Member shall commence any case, proceeding or other action (A) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, monitor, conservator or other similar official for it or for all or any substantial part of its assets, or any Significant Group Member shall make a general assignment for the benefit of its creditors; or (ii) there shall be commenced against any Significant Group Member any case, proceeding or other action of a nature referred to in clause (i) above that (A) results in the entry of an order for relief or any such adjudication or appointment or (B) remains undismissed or undischarged for a period of 90 days; or (iii) there shall be commenced against any Significant Group Member any case, proceeding or other action of a retrievent or any such action or a period of 90 days; or (iii) there shall be commenced against any Significant Group Member any case, proceeding or other action of a retrievent or any such relief that shall not have been vacated, discharged, or stayed or bonded pending appeal within 60 days from the entry thereof; or (iv) any Significant Group Member shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due; or

(g) the occurrence of an ERISA Event that, when taken alone or together with any other ERISA Events, would reasonably be expected to have a Material Adverse Effect; or

(h) one or more judgments or decrees shall be entered against any Significant Group Member involving in the aggregate a liability (not paid or fully covered by insurance as to which the relevant insurance company has acknowledged coverage) of \$10,000,000 or more, and all such judgments or decrees shall not have been vacated, discharged, stayed or bonded pending appeal within 30 days from the entry thereof; or

(i) any of the Security Documents shall cease, for any reason, to be in full force and effect, or any Loan Party or any Affiliate of any Loan Party shall so assert, or any Lien created by any of the Security Documents shall cease to be enforceable and of the same effect and priority purported to be created thereby; or

(j) the guarantee contained in Section 2 of the Guarantee and Collateral Agreement shall cease, for any reason, to be in full force and effect or any Loan Party or any Affiliate of any Loan Party shall so assert; or

(k) a Change of Control shall occur; or

(l) Holdings shall (i) conduct, transact or otherwise engage in, or commit to conduct, transact or otherwise engage in, any business or operations other than those incidental to its ownership of the Capital Stock of the Borrower or as permitted by this Agreement, (ii) incur, create, assume or suffer to exist any Indebtedness except (A) Indebtedness incurred pursuant to Sections 7.2(a), 7.2(f)(iii), (g), (k), (m) or (o) (B) nonconsensual obligations imposed by operation of law, (y) obligations pursuant to the Loan Documents to which it is a party and (C) obligations with respect to its Capital Stock, or (iii) own, lease, manage or otherwise operate any properties or assets (including cash (other than cash received in connection with dividends made by the Borrower in accordance with Section 7.6 pending application in the manner contemplated by said Section) and cash equivalents) other than the ownership of shares of Capital Stock of the Borrower;

then, and in any such event, (A) if such event is an Event of Default specified in clause (i) or (ii) of paragraph (f) above with respect to the Borrower or the Canadian Borrower, automatically the Commitments shall immediately terminate and the Loans (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents (including all amounts of L/C Obligations, whether or not the beneficiaries of the then outstanding Letters of Credit shall have presented the documents required thereunder) shall immediately become due and payable, and (B) if such event is any other Event of Default, either or both of the following actions may be taken: (i) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the Borrower and/or the Canadian Borrower declare the Revolving Commitments and/or the Canadian Revolving Commitments to be terminated forthwith, whereupon the Revolving Commitments and/or the Canadian Revolving Commitments shall immediately terminate; and (ii) with the consent of the Required Lenders, the Administrative Agent may, or upon the request of the Required Lenders, the Administrative Agent shall, by notice to the Borrower and/or the Canadian Borrower, declare the Loans (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents (including all amounts of L/C Obligations, whether or not the beneficiaries of the then outstanding Letters of Credit shall have presented the documents required thereunder) to be due and payable forthwith, whereupon the same shall immediately become due and payable. With respect to all Letters of Credit with respect to which presentment for honor shall not have occurred at the time of an acceleration pursuant to this paragraph, the Borrower shall at such time deposit in a cash collateral account opened by the Administrative Agent an amount equal to the aggregate then undrawn and unexpired amount of such Letters of Credit. Amounts held in such cash collateral account shall be applied by the Administrative Agent to the payment of drafts drawn under such Letters of Credit, and the unused portion thereof after all such Letters of Credit shall have expired or been fully drawn upon, if any, shall be applied to repay other obligations of the Borrower hereunder and under the other Loan Documents. After all such Letters of Credit shall have expired or been fully drawn upon, all Reimbursement Obligations shall have been satisfied and all other obligations of the Borrower hereunder and under the other Loan Documents shall have been paid in full, the balance, if any, in such cash collateral account shall be returned to the Borrower (or such other Person as may be lawfully entitled thereto). Except as expressly provided above in this Section, presentment, demand, protest and all other notices of any kind are hereby expressly waived by the Borrower.

8.2 <u>Right to Cure</u>. (a) Notwithstanding anything to the contrary contained in Section 8.1, in the event that the Borrower fails to comply with the requirements of any Financial Condition Covenant, until the expiration of the 15th day subsequent to the date the certificate calculating such Financial Condition Covenant is required to be delivered pursuant to Section 6.2(b) (the "<u>Cure Date</u>"), Holdings shall have the right to issue Permitted Cure Securities for cash or otherwise receive cash contributions to the capital of Holdings, and, in each case, to contribute any such cash to the capital of the Borrower (collectively, the "<u>Cure Right</u>"), and upon the receipt by the Borrower of such cash (the "<u>Cure Amount</u>") pursuant to the exercise by Holdings of such Cure Right and request to the Administrative Agent to effect such recalculation, such Financial Condition Covenant shall be recalculated giving effect to the following pro forma adjustments:

(i) Consolidated EBITDAR shall be increased, solely for the purpose of measuring the Financial Condition Covenants and not for any other purpose under this Agreement, by an amount equal to the Cure Amount; and

(ii) if, after giving effect to the foregoing recalculations, the Borrower shall then be in compliance with the requirements of all Financial Condition Covenants, the Borrower shall be deemed to have satisfied the requirements of the Financial Condition Covenants as of the relevant date of determination with the same effect as though there had been no failure to comply therewith at such date, and the applicable breach or default of the Financial Condition Covenants that had occurred shall be deemed cured for the purposes of this Agreement.

For the avoidance of doubt, from the date that a Permitted Investor delivers a notice to the Administrative Agent specifying its intent to exercise its Cure Right, until the expiration of the earlier of (i) the Cure Date and (ii) the date on which the Borrower shall be deemed to have satisfied the requirements of the Financial Condition Covenants as set out above, neither the Administrative Agent nor any Lender shall exercise any right to accelerate the Loans, terminate the Commitments or foreclose on or take possession of the Collateral solely on the basis of an Event of Default having occurred and being continuing under Section 7.1 unless the Administrative Agent is notified in writing that the payment of such Cure Amount will not be made or, by the Cure Date, Cure Amounts have been made but in an amount less than the amount necessary to cause the Loan Parties to be in compliance with the covenants set forth in Section 7.1.

(b) Notwithstanding anything herein to the contrary, (a) in each four-fiscal-quarter period there shall be at least two fiscal quarters in which the Cure Right is not exercised, (b) in each eight-fiscal-quarter period, there shall be a period of at least four consecutive fiscal quarters during which the Cure Right is not exercised, (c) the Cure Amount shall be no greater than the amount required for purposes of complying with the Financial Condition Covenants, (d) no Indebtedness repaid with the proceeds of Permitted Cure Securities shall be deemed repaid for the purposes of calculating the ratios specified in Section 7.1(a) or (b) for the period during which such Permitted Cure Securities were issued, (e) the Cure Amount received pursuant to any exercise of the Cure Right shall be disregarded for purposes of determining any available basket under Section 7 and (f) the Cure Right may be exercised no more than five times during the term of this Agreement.

## SECTION 9. THE AGENTS

9.1 <u>Appointment</u>. Each Lender hereby irrevocably designates and appoints the Administrative Agent as the agent of such Lender under this Agreement and the other Loan Documents, and each such Lender irrevocably authorizes the Administrative Agent, in such capacity, to take such action on its behalf under the provisions of this Agreement and the other Loan Documents and to exercise such powers and perform such duties as are expressly delegated to the Administrative Agent by the terms of this Agreement and the other Loan Documents, together with such other powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary elsewhere in this Agreement, the Administrative Agent shall not have any duties or responsibilities, except those expressly set forth herein, or any fiduciary relationship with any Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against the Administrative Agent.

9.2 <u>Delegation of Duties</u>. The Administrative Agent may execute any of its duties under this Agreement and the other Loan Documents by or through agents or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. The Administrative Agent shall not be responsible for the negligence or misconduct of any agents or attorneys in-fact selected by it with reasonable care.

9.3 Exculpatory Provisions. Neither any Agent nor any of their respective officers, directors, employees, agents, attomeys-in-fact or affiliates shall be (i) liable for any action lawfully taken or omitted to be taken by it or such Person under or in connection with this Agreement or any other Loan Document (except to the extent that any of the foregoing are found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from its or such Person's own gross negligence or willful misconduct) or (ii) responsible in any manner to any of the Lenders for any recitals, statements, representations or warranties made by any Loan Party or any officer thereof contained in this Agreement or any other Loan Document or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Loan Document or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Loan Document or for any failure of any Loan Party a party thereto to perform its obligations hereunder or thereunder. The Agents shall not be under any obligation to any Lender to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Agreement or any other Loan Document, or to inspect the properties, books or records of any Loan Party.

9.4 <u>Reliance by Administrative Agent</u>. The Administrative Agent shall be entitled to rely, and shall be fully protected in relying, upon any instrument, writing, resolution, notice, consent, certificate, affidavit, letter, telecopy, telex or teletype message, statement, order or other document or conversation believed by it to be genuine and correct and to have been signed, sent or made by the proper Person or Persons and upon advice and statements of legal counsel (including counsel to Holdings or the Borrower), independent accountants and other experts selected by the Administrative Agent. The Administrative Agent may deem and treat the payee of any Note as the owner thereof for all purposes unless a written notice of assignment, negotiation or transfer thereof shall have been filed with the Administrative Agent. The Administrative Agent shall be fully justified in failing or refusing to take any action under this Agreement, all Lenders) as it deems appropriate or it shall first receive such advice or concurrence of the Required Lenders (or, if so specified by this Agreement by it by reason of taking or continuing to take any such action. The Administrative Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement and the other Loan Documents in accordance with a request of the Required Lenders (or, if so specified by this Agreement, all Lenders), and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Lenders and all future holders of the Loans.

9.5 Notice of Default. The Administrative Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default unless the Administrative Agent has received notice from a Lender, Holdings, the Borrower or the Canadian Borrower referring to this Agreement, describing such Default or Event of Default and stating that such notice is a "notice of default". In the event that the Administrative Agent receives such a notice, the Administrative Agent shall give notice thereof to the Lenders. The Administrative Agent shall take such action with respect to such Default or Event of Default as shall be reasonably directed by the Required Lenders (or, if so specified by this Agreement, all Lenders); provided that unless and until the Administrative Agent shall have received such directions, the Administrative Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable in the best interests of the Lenders.

9.6 Non-Reliance on Agents and Other Lenders. Each Lender expressly acknowledges that neither the Agents nor any of their respective officers, directors, employees, agents, attorneys-in-fact or affiliates have made any representations or warranties to it and that no act by any Agent hereafter taken, including any review of the affairs of a Loan Party or any affiliate of a Loan Party, shall be deemed to constitute any representation or warranty by any Agent to any Lender. Each Lender represents to the Agents that it has, independently and without reliance upon any Agent or any other Lender, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, financial and other condition and creditworthiness of the Loan Parties and their affiliates and made its own decision to make its Loans hereunder and enter into this Agreement. Each Lender also represents that it will, independently and without reliance upon any 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 analysis, appraisals and decisions in taking or not taking action under this Agreement and the other Loan Documents, and to make such investigation as it deems necessary to inform itself as to the business, operations, property, financial and other condition and creditworthiness of the Loan Parties of the Loan Parties and their affiliates. Except for notices, reports and other documents expressly required to be furnished to the Lenders by the Administrative Agent hereunder, the Administrative Agent shall not have any duty or responsibility to provide any Lender with any credit or other information concerning the business, operations, property, condition (financial or otherwise), prospects or creditworthiness of any Loan Party or any affiliate of a Loan Party that may come into the possession of the Administrative Agent or any of its officers, directors, employees, agent

9.7 Indemnification. The Lenders agree to indemnify each Agent in its capacity as such (to the extent not reimbursed by Holdings, the Borrower or the Canadian Borrower and without limiting the obligation of Holdings, the Borrower or the Canadian Borrower to do so), ratably according to their respective Aggregate Exposure Percentages in effect on the date on which indemnification is sought under this Section (or, if indemnification is sought after the date upon which the Commitments shall have terminated and the Loans shall have been paid in full, ratably in accordance with such Aggregate Exposure Percentages immediately prior to such date), from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind whatsoever that may at any time (whether before or after the payment of the Loans) be imposed on, incurred by or asserted against such Agent in any way relating to or arising out of, the Commitments, this Agreement, any of the other Loan Documents or any documents contemplated by or referred to herein or the transactions contemplated hereby or thereby or any action taken or omitted by such Agent under or in connection with any of the foregoing; provided that no Lender shall be liable for the payment of any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements that are found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from such Agent's gross negligence or willful misconduct. The agreements in this Section shall survive the payment of the Loans and all other amounts payable hereunder.

9.8 Agent in Its Individual Capacity. Each Agent and its affiliates may make loans to, accept deposits from and generally engage in any kind of business with any Loan Party as though such Agent were not an Agent. With respect to its Loans made or renewed by it and with respect to any Letter of Credit issued or participated in by it, each Agent shall have the same rights and powers under this Agreement and the other Loan Documents as any Lender and may exercise the same as though it were not an Agent, and the terms "Lender" and "Lenders" shall include each Agent in its individual capacity.

9.9 Successor Administrative Agent. The Administrative Agent may resign as Administrative Agent upon 30 days' notice to the Lenders, the Borrower and the Canadian Borrower. If the Administrative Agent shall resign as Administrative Agent under this Agreement and the other Loan Documents, then the Required Lenders shall appoint from among the Lenders a successor agent for the Lenders, which successor agent shall (unless an Event of Default shall have occurred and be continuing) be subject to approval by the Borrower and/or the Canadian Borrower (which approval shall not be unreasonably withheld or delayed), whereupon such successor agent shall succeed to the rights, powers and duties of the Administrative Agent, and the term "Administrative Agent" shall mean such successor agent effective upon such appointment and approval, and the former Administrative Agent's rights, powers and duties as Administrative Agent shall be terminated, without any other or further act or deed on the part of such former Administrative Agent or any of the parties to this Agreement or any holders of the Loans. If no successor agent has accepted appointment as Administrative Agent by the date that is 30 days following a retiring Administrative Agent's notice of resignation, the retiring Administrative Agent's resignation shall nevertheless thereupon become effective, and the Lenders shall assume and perform all of the duties of the Administrative Agent until such time, if any, as the Required Lenders appoint a successor agent as provided for above. After any retiring Administrative Agent's resignation as Administrative Agent, the provisions of this Section 9 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Administrative Agent under this Agreement and the other Loan Documents.

9.10 Documentation Agent and Co-Syndication Agents. Neither the Documentation Agent nor the Co-Syndication Agents shall have any duties or responsibilities hereunder in its capacity as such.

#### SECTION 10. MISCELLANEOUS

10.1 Amendments and Waivers. Neither this Agreement, any other Loan Document, nor any terms hereof or thereof may be amended, supplemented or modified except in accordance with the provisions of this Section 10.1. The Required Lenders and each Loan Party party to the relevant Loan Document may, or, with the written consent of the Required Lenders, the Administrative Agent and each Loan Party party to the relevant Loan Document may, from time to time, (a) enter into written amendments, supplements or modifications hereto and to the other Loan Documents for the purpose of adding any provisions to this Agreement or the other Loan Documents or changing in any manner the rights of the Lenders or of the Loan Parties hereunder or thereunder or (b) waive, on such terms and conditions as the Required Lenders or the Administrative Agent, as the case may be, may specify in such instrument, any of the requirements of this Agreement or the other Loan Documents or any Default or Event of Default and its consequences; provided, however, that no such waiver and no such amendment, supplement or modification shall (i) reduce or forgive the principal amount or extend the final scheduled date of maturity of any Loan, extend the scheduled date of any amortization payment in respect of any Term Loan, reduce the stated rate of any interest or fee payable hereunder (except (x) in connection with the waiver of applicability of any post-default increase in interest rates (which waiver shall be effective with the consent of the Majority Facility Lenders of each adversely affected Facility) and (y) that any amendment or modification of defined terms used in the financial covenants in this Agreement shall not constitute a reduction in the rate of interest or fees for purposes of this clause (i)) or extend the scheduled date of any payment thereof, or increase the amount or extend the expiration date of any Lender's Revolving Commitment or Canadian Revolving Commitment, in each case without the written consent of each Lender directly affected thereby; (ii) eliminate or reduce the voting rights of any Lender under this Section 10.1 without the written consent of such Lender; (iii) reduce any percentage specified in the definition of Required Lenders, consent to the assignment or transfer by the Borrower or the Canadian Borrower of any of its rights and obligations under this Agreement and the other Loan Documents, release all or substantially all of the Collateral or release all or substantially all of the Subsidiary Guarantors from their obligations under the Guarantee and Collateral Agreement, in each case without the written consent of all Lenders; (iv) amend, modify or waive any provision of Section 2.17 without the written consent of the Majority Facility Lenders in respect of each Facility adversely affected thereby; (v) reduce the amount of Net Cash Proceeds or Excess Cash Flow required to be applied to prepay Loans under this Agreement without the written consent of the Majority Facility Lenders with respect to each Facility adversely affected thereby; (vi) reduce the percentage specified in the definition of Majority Facility Lenders with respect to any Facility without the written consent of all Lenders under such Facility; (vii) amend, modify or waive any provision of Section 9 without the written consent of the Administrative Agent; (viii) amend, modify or waive any provision of Section 2.6 or 2.7 without the written consent of the Swingline Lender, or (ix) amend, modify or waive any provision of Section 3 without the written consent of the Issuing Lender. Any such waiver and any such amendment, supplement or modification shall apply equally to each of the Lenders and shall be binding upon the Loan Parties, the Lenders, the Administrative Agent and all future holders of the Loans. In the case of any waiver, the Loan Parties, the Lenders and the Administrative Agent shall be restored to their former position and rights hereunder and under the other Loan Documents, and any Default or Event of Default waived shall be deemed to be cured and not continuing; but no such waiver shall extend to any subsequent or other Default or Event of Default, or impair any right consequent thereon.

Notwithstanding the foregoing, this Agreement may be amended (or amended and restated) with the written consent of the Required Lenders, the Administrative Agent, the Borrower and the Canadian Borrower (a) to add one or more additional credit facilities to this Agreement and to permit the extensions of credit from time to time outstanding thereunder and the accrued interest and fees in respect thereof to share ratably in the benefits of this Agreement and the other Loan Documents with the Term Loans and Revolving Extensions of Credit and the accrued interest and fees in respect thereof and (b) to include appropriately the Lenders holding such credit facilities in any determination of the Required Lenders and Majority Facility Lenders.

In addition, notwithstanding the foregoing, this Agreement may be amended with the written consent of the Administrative Agent, the Borrower and the Lenders providing the relevant Replacement Term Loans (as defined below) to permit the refinancing, replacement or modification of all outstanding Term Loans ("<u>Replaced Term Loans</u>") with a replacement term loan tranche hereunder ("<u>Replacement Term Loans</u>"), <u>provided</u> that (a) the aggregate principal amount of such Replacement Term Loans shall not exceed the aggregate principal amount of such Replaced Term Loans, (b) the Applicable Margin for such Replacement Term Loans shall not be higher than the Applicable Margin for such Replaced Term Loans and (c) the weighted average life to maturity of such Replacement Term Loans at the time of such refinancing.

Finally, notwithstanding the foregoing, for all matters requiring a vote of the Lenders under this Agreement (including, without limitation, with respect to all proposed amendments, waivers and consents), the Sponsor shall vote its Loans (and shall approve, consent or reject all amendments, waivers and consents) in accord with the Required Lenders or the Majority Facility Lenders, as applicable, which for these purposes shall be calculated only with respect to the interests of Lenders other than the Sponsor (all as determined by the Administrative Agent), except where the vote relates to any of the matters set forth in (i), (ii) or (iii) of the proviso in the first paragraph of Section 10.1, in which case the Sponsor may vote its interest. The Sponsor designates the Administrative Agent as the Sponsor's attorney-in-fact with authority to vote the Sponsor's interest as a Lender as provided in this paragraph. All references to the Sponsor in this paragraph shall be deemed to include any Affiliate thereof.

10.2 <u>Notices</u>. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing (including by telecopy), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered, or three Business Days after being deposited in the mail, postage prepaid, or, in the case of telecopy notice, when received, addressed as follows in the case of Holdings, the Borrower, the Canadian Borrower and the Administrative Agent, and as set forth in an administrative questionnaire delivered to the Administrative Agent in the case of the Lenders, or to such other address as may be hereafter notified by the respective parties hereto:

Holdings, Borrower and Canadian Borrower: 2481 Manana Drive Dallas, Texas 75220 Attention: Chief Financial Officer Telecopy: 214-357-1536 Telephone: 214-357-9588

With a copy to: Oak Hill Capital Partners III, L.P. 201 Main Street Fort Worth, TX 76102 Facsimile: 817-339-7350 Attention: Corporate Counsel

Administrative Agent:

JPMorgan Chase Bank, N.A. Loan and Agency Services 1111 Fannin Street, 10 th Floor Houston, TX 77002-6925 Attention: Lisa McCants Telecopy: 713-750-2956

With a copy to: JPMorgan Chase Bank, N.A. 383 Madison Avenue, 24th Floor New York, NY 10179 Attention: Malwina Siedlinska

Email:malwina.m.siedlinska@jpmorgan.com

Copy of covenant compliance to: covenant.compliance@jpmorgan.com

With a copy to (if pertaining to Canadian Revolving Loans or Canadian Borrower): JPMorgan Chase Bank, N.A. Loan and Agency Services 1111 Fannin Street, 10th Floor Houston, TX 77002-6925 Attention: Carla Kinney Telecopy: 713-374-4312

provided that any notice, request or demand to or upon the Administrative Agent or the Lenders shall not be effective until received.

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 Section 2 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.

10.3 <u>No Waiver; Cumulative Remedies</u>. No failure to exercise and no delay in exercising, on the part of the Administrative Agent or any Lender, any right, remedy, power or privilege hereunder or under the other Loan Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

10.4 <u>Survival of Representations and Warranties</u>. All representations and warranties made hereunder, in the other Loan Documents and in any document, certificate or statement delivered pursuant hereto or in connection herewith shall survive the execution and delivery of this Agreement and the making of the Loans and other extensions of credit hereunder.

10.5 Payment of Expenses and Taxes. Each of the Borrower and the Canadian Borrower agrees (a) to pay or reimburse the Administrative Agent for all its reasonable out-of-pocket costs and expenses incurred in connection with the development, preparation and execution of, and any amendment, supplement or modification to, this Agreement and the other Loan Documents and any other documents prepared in connection herewith or therewith, and the consummation and administration of the transactions contemplated hereby and thereby, including the reasonable fees and disbursements of one outside counsel and any necessary local counsel to the Administrative Agent and filing and recording fees and expenses, with statements with respect to the foregoing to be submitted to the Borrower prior to the Closing Date (in the case of amounts to be paid on the Closing Date) and from time to time thereafter on a quarterly basis or such other periodic basis as the Administrative Agent shall deem appropriate, (b) to pay or reimburse each Lender and the Administrative Agent for all its costs and expenses incurred in connection with the enforcement or preservation of any rights under this Agreement, the other Loan Documents and any such other documents, including the fees and disbursements of counsel (including the allocated fees and expenses of in-house counsel) to each Lender and of counsel to the Administrative Agent, (c) to pay, indemnify, and hold each Lender and the Administrative Agent harmless from, any and all recording and filing fees and any and all liabilities with respect to, or resulting from any delay in paying, stamp and excise taxes, if any, that may be payable or determined to be payable in connection with the execution and delivery of, or consummation or administration of any of the transactions contemplated by, or any amendment, supplement or modification of, or any waiver or consent under or in respect of, this Agreement, the other Loan Documents and any such other documents, and (d) to pay, indemnify, and hold each Lender and the Administrative Agent and their respective officers, directors, employees, affiliates, agents and controlling persons (each, an "Indemnitee") harmless from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever with respect to the execution, delivery, enforcement, performance and administration of this Agreement, the other Loan Documents and any such other documents, including any of the foregoing relating to the use of proceeds of the Loans or the violation of, noncompliance with or liability under, any Environmental Law applicable to the operations of any Group Member or any of the Properties and the reasonable fees and expenses of legal counsel in connection with claims, actions or proceedings by any Indemnitee against any Loan Party under any Loan Document (all the foregoing in this clause (d), collectively, the "Indemnified Liabilities"), provided, that neither the Borrower nor the Canadian Borrower shall have any obligation hereunder to any Indemnitee with respect to Indemnified Liabilities to the extent such Indemnified Liabilities are found by a final and nonappealable decision of a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of such Indemnitee. Without limiting the foregoing, and to the extent permitted by applicable law, each of the Borrower and the Canadian Borrower agrees not to assert and to cause its Subsidiaries not to assert, and hereby waives and agrees to cause its Subsidiaries to waive, all rights for contribution or any other rights of recovery with respect to all claims, demands, penalties, fines, liabilities, settlements, damages, costs and expenses of whatever kind or nature, under or related to Environmental Laws, that any of them might have by statute or otherwise against any Indemnitee. All amounts due under this Section 10.5 shall be payable not later than 10 days after written demand therefor. Statements payable by the Borrower or the Canadian Borrower pursuant to this Section 10.5 shall be submitted to 2481 Manana Drive, Dallas, Texas 75220 Attention: Chief Financial Officer (Telephone No. 214-357-9588) (Telecopy No. 214-357-1536), at the address of the Borrower or the Canadian Borrower set forth in Section 10.2, or to such other Person or address as may be hereafter designated by the Borrower or the Canadian Borrower in a written notice to the Administrative Agent. The agreements in this Section 10.5 shall survive repayment of the Loans and all other amounts payable hereunder.

10.6 Successors and Assigns: Participations and Assignments. (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 Lender that issues any Letter of Credit), except that (i) the Borrower and the Canadian Borrower may not assign or otherwise transfer any of their rights or obligations hereunder without the prior written consent of each Lender (and any attempted assignment or transfer by the Borrower or the Canadian 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.

(b) (i) Subject to the conditions set forth in paragraph (b)(ii) below, any Lender may assign to one or more assignees or, in the case of the Canadian Revolving Facility, to an Eligible Canadian Assignee (in each case, an "<u>Assignee</u>") all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitments and the Loans at the time owing to it) with the prior written consent of:

(A) the Borrower (such consent not to be unreasonably withheld), <u>provided</u> that no consent of the Borrower shall be required for an assignment to a Lender, an Affiliate of a Lender, an Approved Fund (as defined below) or, if an Event of Default has occurred and is continuing, any other Person; provided <u>further</u>, that the Borrower shall be deemed to have consented to any such assignment unless the Borrower shall object thereto by written notice to the Administrative Agent within five Business Days after having received notice thereof; and

(B) the Administrative Agent, provided that no consent of the Administrative Agent shall be required for an assignment of all or any portion of a Term Loan to a Lender, an Affiliate of a Lender or an Approved Fund, in each case unless such Lender, Affiliate or Approved Fund is the Sponsor or an Affiliate thereof, provided further that, in relation to an assignment of all or any portion of the Revolving Facility to an Affiliate of a Lender or an Approved Fund, the consent of the Administrative Agent shall be required but shall not be unreasonably withheld.

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

(A) except in the case of an assignment to a Lender, an Affiliate of a Lender or an Approved Fund or an assignment of the entire remaining amount of the assigning Lender's Commitments or Loans under any Facility, the amount of the Commitments 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 (or, in the case of the Term Facility and the Canadian Revolving Facility, \$1,000,000) unless each of the Borrower and the Administrative Agent otherwise consent, provided that (1) no such consent of the Borrower shall be required if an Event of Default has occurred and is continuing and (2) such amounts shall be aggregated in respect of each Lender and its affiliates or Approved Funds, if any;

(B) 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;

(C) the Assignee, if it shall not be a Lender, shall deliver to the Administrative Agent an administrative questionnaire; and

(D) after giving effect to any assignment, the aggregate amount of the Loans and Commitments held by the Sponsor and its affiliates shall not exceed \$15,000,000.

For the purposes of this Section 10.6, "<u>Approved Fund</u>" 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) below, 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 and subject to the limitations and requirements of Sections 2.18, 2.19, 2.20 and 10.5). Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this Section 10.6 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 Commitments of, and principal amount of the Loans and L/C Obligations owing to, each Lender pursuant to the terms hereof from time to time (the "<u>Register</u>"). The entries in the Register shall be conclusive, and the Borrower, the Canadian Borrower, the Administrative Agent, the Issuing Lender 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 Canadian Borrower, the Issuing Lender and any Lender, at any reasonable time and from time to time upon reasonable prior notice. This Section 10.6(b)(iv) shall be construed so that the Term Loans and the Revolving Loans, the Canadian Revolving Loans and the Additional Revolving Loans are at all times maintained in "registered form" within the meaning of Sections 163(f), 871(h)(2) and 881(c)(2) of the Code and any related regulations (and any other relevant or successor provisions of the Code or such regulations).

(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)(ii)(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. 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 or the Administrative Agent, 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 Commitments 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 Canadian Borrower, the Administrative Agent, the Issuing Lender 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 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 may provide that such Lender will not, without the consent of the Participant, agree to any amendment, modification or waiver that (1) requires the consent of each Lender directly affected thereby pursuant to the proviso to the second sentence of Section 10.1 and (2) directly affects such Participant. Subject to paragraph (c)(ii) of this Section, each of the Borrower and the Canadian Borrower agrees that each Participant shall be entitled, through the participating Lender, to the benefits of Sections 2.18, 2.19 and 2.20 to the same extent and subject to the same limitations and requirements of such Sections 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 as though it were a Lender, provided such Participant shall be subject to Section 10.7(a) as though it were a Lender. Each Lender that sells a participation, acting solely for this purpose as an agent of the Borrower, shall maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Loans or other obligations under this Agreement (the "Participant Register"). The entries in the Participant Register shall be conclusive, and such Lender, each Loan Party and the Administrative Agent shall treat each person whose name is recorded in the Participant Register pursuant to the terms hereof as the owner of such participation for all purposes of this Agreement, notwithstanding notice to the contrary.

(ii) A Participant shall not be entitled to receive any greater payment under Section 2.18 or 2.19 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. No Participant shall be entitled to the benefits of Section 2.19 unless such Participant complies with Section 2.19(d), (e) and (i) as applicable and agrees, for the benefit of the Borrower and the Canadian Borrower, to comply with Section 2.19(f).

(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 (i) any pledge or assignment to secure obligations to a Federal Reserve Bank and (ii) any pledge or assignment to any holders of obligations owed, or securities issued, by such Lender including to any trustee for, or any other representative of, such holders, 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 pledge or Assignee for such Lender as a party hereto.

(e) Each of the Borrower and the Canadian Borrower, upon receipt of written notice from the relevant Lender, agrees to issue Notes to any Lender requiring Notes to facilitate transactions of the type described in paragraph (d) above.

(f) Notwithstanding the foregoing, any Conduit Lender may assign any or all of the Loans it may have funded hereunder to its designating Lender without the consent of the Borrower or the Administrative Agent and without regard to the limitations set forth in Section 10.6(b). Each of Holdings, the Borrower, the Canadian Borrower, each Lender and the Administrative Agent hereby confirms that it will not institute against a Conduit Lender or join any other Person in instituting against a Conduit Lender any bankruptcy, reorganization, arrangement, insolvency or liquidation proceeding under any state bankruptcy or similar law, for one year and one day after the payment in full of the latest maturing commercial paper note issued by such Conduit Lender; provided, however, that each Lender designating any Conduit Lender hereby agrees to indemnify, save and hold harmless each other party hereto for any loss, cost, damage or expense arising out of its inability to institute such a proceeding against such Conduit Lender during such period of forbearance.

10.7 Adjustments; Set-off. (a) Except to the extent that this Agreement expressly provides for payments to be allocated to a particular Lender or to the Lenders under a particular Facility, if any Lender (a "Benefitted Lender") shall receive any payment of all or part of the Obligations owing to it, or receive any collateral in respect thereof (whether voluntarily or involuntarily, by set-off, pursuant to events or proceedings of the nature referred to in Section 8.1(f), or otherwise), in a greater proportion than any such payment to or collateral received by any other Lender, if any, in respect of the Obligations owing to each such other Lender, or shall purchase for cash from the other Lenders a participating interest in such portion of the Obligations owing to each such other Lender, or shall provide such other Lenders with the benefits of any such collateral, as shall be necessary to cause such Benefitted Lender to share the excess payment or benefits of such collateral ratably with each of the Lenders; provided, however, that if all or any portion of such excess payment or benefits is thereafter recovered from such Benefitted Lender, such purchase shall be rescinded, and the purchase price and benefits returned, to the extent of such recovery, but without interest.

(b) In addition to any rights and remedies of the Lenders provided by law, each Lender shall have the right, upon the occurrence and during the continuance of an Event of Default, without prior notice to Holdings, the Borrower or the Canadian Borrower, any such notice being expressly waived by Holdings, the Borrower and the Canadian Borrower to the extent permitted by applicable law, upon any amount becoming due and payable by Holdings, the Borrower or the Canadian Borrower hereunder (whether at the stated maturity, by acceleration or otherwise), to set off and appropriate and apply against such amount any and all deposits (general or special, time or demand, provisional or final), in any currency, and any other credits, indebtedness or claims, in any currency, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by such Lender or any branch or agency thereof to or for the credit or the account of Holdings, the Borrower or the Canadian Borrower, as the case may be. Each Lender agrees promptly to notify the Borrower, the Canadian Borrower and the Administrative Agent after any such setoff and application made by such Lender, <u>provided</u> that the failure to give such notice shall not affect the validity of such setoff and application.

10.8 <u>Counterparts</u>. This Agreement may be executed by one or more of the parties to this Agreement on any number of separate counterparts, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. Delivery of an executed signature page of this Agreement by facsimile transmission shall be effective as delivery of a manually executed counterpart hereof. A set of the copies of this Agreement signed by all the parties shall be lodged with the Borrower and the Administrative Agent.

10.9 <u>Severability</u>. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

10.10 Integration. This Agreement and the other Loan Documents represent the entire agreement of Holdings, the Borrower, the Canadian Borrower, the Administrative Agent and the Lenders with respect to the subject matter hereof and thereof, and there are no promises, undertakings, representations or warranties by the Administrative Agent or any Lender relative to the subject matter hereof not expressly set forth or referred to herein or in the other Loan Documents.

# 10.11. <u>GOVERNING LAW</u>. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

10.12 <u>Submission To Jurisdiction; Waivers</u>. Each of Holdings, the Borrower and the Canadian Borrower hereby irrevocably and unconditionally:

(a) submits for itself and its property in any legal action or proceeding relating to this Agreement and the other Loan Documents to which it is a party, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the courts of the State of New York, the courts of the United States for the Southern District of New York, and appellate courts from any thereof;

(b) consents that any such action or proceeding may be brought in such courts and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(c) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to Holdings, the Borrower or the Canadian Borrower, as the case may be at its address set forth in Section 10.2 or at such other address of which the Administrative Agent shall have been notified pursuant thereto;

(d) agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction; and

(e) waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding referred to in this Section any special, exemplary, punitive or consequential damages.

10.13 Acknowledgements. Each of Holdings, the Borrower and the Canadian Borrower hereby acknowledges that:

(a) it has been advised by counsel in the negotiation, execution and delivery of this Agreement and the other Loan Documents;

(b) neither the Administrative Agent nor any Lender has any fiduciary relationship with or duty to Holdings, the Borrower or the Canadian Borrower arising out of or in connection with this Agreement or any of the other Loan Documents, and the relationship between Administrative Agent and Lenders, on one hand, and Holdings, the Borrower and the Canadian Borrower, on the other hand, in connection herewith or therewith is solely that of debtor and creditor; and

(c) no joint venture is created hereby or by the other Loan Documents or otherwise exists by virtue of the transactions contemplated hereby among the Lenders or among Holdings, the Borrower, the Canadian Borrower and the Lenders.

10.14 <u>Releases of Guarantees and Liens</u>. (a) Notwithstanding anything to the contrary contained herein or in any other Loan Document, the Administrative Agent is hereby irrevocably authorized by each Lender (without requirement of notice to or consent of any Lender except as expressly required by Section 10.1) to take any action requested by the Borrower having the effect of releasing any Collateral or guarantee obligations (i) to the extent necessary to permit consummation of any transaction not prohibited by any Loan Document or that has been consented to in accordance with Section 10.1 or (ii) under the circumstances described in paragraph (b) below.

(b) At such time as the Loans, the Reimbursement Obligations and the other obligations under the Loan Documents (other than obligations under or in respect of Swap Agreements) shall have been paid in full, the Commitments have been terminated and no Letters of Credit shall be outstanding, the Collateral shall be released from the Liens created by the Security Documents, and the Security Documents and all obligations (other than those expressly stated to survive such termination) of the Administrative Agent and each Loan Party under the Security Documents shall terminate, all without delivery of any instrument or performance of any act by any Person.

10.15 <u>Confidentiality</u>. Each of the Administrative Agent and each Lender agrees to keep confidential all non-public information provided to it by any Loan Party, the Administrative Agent or any Lender pursuant to or in connection with this Agreement that is designated by the provider thereof as confidential; <u>provided</u> that nothing herein shall prevent the Administrative Agent or any Lender from disclosing any such information (a) to the Administrative Agent, any other Lender or any affiliate thereof (it being understood that the Persons to whom such disclosure is being made will be informed of the confidential nature of such information and instructed to keep such information confidential), (b) subject to an agreement to comply with the provisions of this Section, to any actual or prospective Transferee or any direct or indirect counterparty to any Swap Agreement (or any professional advisor to such counterparty), (c) to its employees, directors, agents, attorneys, accountants and other professional advisors or those of any of its affiliates (it being understood that the Persons to whom such disclosure is being made will be informed of the confidential nature of such information and instructed to keep such information confidential nature of such information and instructed to keep such information confidential nature of such information and instructed to keep such informed of the confidential nature of such information and instructed to keep such information confidential), (d) upon the request or demand of any Governmental Authority, (e) in response to any order of any court or other Governmental Authority or as may otherwise be required pursuant to any Requirement of Law, (f) if requested or required to do so in connection with any litigation or similar proceeding, (g) that has been publicly disclosed, (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 con

## 10.16. <u>WAIVERS OF JURY TRIAL</u>. HOLDINGS, THE BORROWER, THE CANADIAN BORROWER, THE ADMINISTRATIVE AGENT AND THE LENDERS HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT AND FOR ANY COUNTERCLAIM THEREIN.

10.17 Delivery of Addenda. Each initial Lender shall become a party to this Agreement by delivering to the Administrative Agent an Addendum duly executed by such Lender.

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

## GAMES MERGER CORP.

By:

Name: Title:

# GAMES INTERMEDIATE MERGER CORP.

By:

6131646 CANADA INC.

By:

JPMORGAN CHASE BANK, N.A., as Administrative Agent and as a Lender

By:

GENERAL ELECTRIC CAPITAL CORPORATION, as Documentation Agent and as a Lender

By:

## AMENDED AND RESTATED EMPLOYMENT AGREEMENT

This Amended and Restated Employment Agreement (this "<u>Agreement</u>") is entered into on the [\_\_\_\_] day of [\_\_\_\_], and effective as of the Effective Date (as defined below), between Dave & Buster's Management Corporation, Inc., a Delaware corporation ("<u>D&B Management</u>"), Dave & Buster's, Inc., a Missouri corporation ("<u>D&B</u>"), and (the "<u>Employee</u>"). D&B Management and D&B are collectively referred to herein as the "Company." D&B Management, D&B and the Employee are collectively referred to herein as the "Parties".

WHEREAS, D&B and Employee entered into that certain Amended and Restated Employment Agreement, dated as of [\_\_\_\_] (the "Employment Agreement");

WHEREAS, in connection with the Stock Purchase Agreement, dated as of the date hereof (the "<u>Purchase Agreement</u>"), by and among Dave & Buster's Holdings, Inc., Games Acquisition Corp. ("<u>Holdings</u>") and certain other parties thereto, it is the intention of the Company and the Employee to amend and restate the Employment Agreement in its entirety as set forth herein, which shall be effective upon the consummation of the transactions contemplated by the Purchase Agreement with no further action required on part of any Party (the "<u>Effective Date</u>"), and, at the Effective Date, the Employment Agreement shall be deemed to be terminated and of no further force or effect;

WHEREAS, at the Effective Date, (i) the Employee shall receive options from common stock in Holdings ("<u>Options</u>") as part of a pool of Options pursuant to the Holdings' 2010 Management Incentive Plan (the "<u>Incentive Plan</u>") and a Stock Option Grant Agreement (the "<u>Option Grant Agreement</u>") and (ii) the Employee shall invest in Holdings pursuant to a Reinvestment Letter Agreement (the "<u>Reinvestment Letter Agreement</u>") and collectively with the Incentive Plan and the Option Grant Agreement, the "<u>Equity Arrangements</u>"), in each case, as a result of [his/her] position with the Company and in consideration for, among other things, protection of the Confidential Information (as defined below);

WHEREAS, the Parties acknowledge and agree that the services of the Employee are of a special and unique character, and in the performance of duties for the Company, the Employee has been and will be provided additional Confidential Information, pursuant to and in reliance on the restrictive covenant obligations and the restrictions on disclosure of the Confidential Information set forth in <u>Paragraph 7</u>;

WHEREAS, the Company desires to be assured that the Confidential Information and goodwill of the Company will be preserved for the exclusive benefit of the Company and that, as a material incentive for the Company to enter into this Agreement, as well as in exchange for the consideration specified herein (including, without limitation substantial amounts of compensation (including, without limitation, as obtained through the Equity Arrangements), benefits and access to the Confidential Information, in each case, as set forth herein), and employment of the Employee under this Agreement, the Employee acknowledges and agrees to be bound by the restrictive covenant obligations and the restrictions on disclosure of the Confidential Information set forth in Paragraph 7;

**WHEREAS**, the Parties acknowledge and agree that the restrictive covenant obligations and the restrictions on disclosure of the Confidential Information set forth in <u>Paragraph 7</u> are essential to the continued growth and stability of the Company's business, good will, customer base and to the continuing viability of its endeavors, and are a material inducement to the Company entering into this Agreement; and

WHEREAS, the Parties acknowledge and agree that the Company would be irreparably harmed if their Confidential Information were disclosed by the Employee.

NOW, THEREFORE, for and in consideration of the promises herein contained, the provision of Confidential Information and other good and valuable consideration, the sufficiency of which is hereby acknowledged, D&B, D&B Management, and Employee agree as follows:

1. <u>Employment/Duties</u>. D&B Management agrees to employ Employee and D&B agrees that Employee shall serve as [\_\_\_\_\_] of D&B. Employee will be responsible for performing those duties that are customarily associated with the position of [\_\_\_\_\_] and other such reasonable duties that are assigned by the Company from time-to-time. The Company or its Affiliates (as defined below) will provide appropriate training to Employee to permit [him/her] to perform [his/her] duties competently.

2. <u>Term of Agreement</u>. This Agreement shall be in effect for two (2) years from the Effective Date of this Agreement unless it is terminated earlier under the terms of <u>Paragraph 8</u>; provided, however, that commencing on the date two (2) years after the Effective Date, and on each annual anniversary of such date (such date and each annual anniversary thereof shall be hereinafter referred to as the "<u>Renewal Date</u>"), the term of this Agreement shall be automatically extended for a one year period unless it is terminated earlier under the terms of <u>Paragraph 8</u>. The Parties agree that unless specifically stated otherwise, the obligations created in <u>Paragraphs 7, 9, 10, 11, 12</u> and <u>18</u> will survive the termination of this Agreement and of Employee's employment with D&B Management.

**3.** <u>Employee's Responsibilities</u>. Employee agrees that unless specifically stated otherwise, during the term of Employee's employment by D&B Management, Employee will devote Employee's full business time and best efforts and abilities to the performance of [his/her] duties for the Company. Employee agrees to act in the best interest of the Company at all times. Employee will act in accordance with the highest professional standards of ethics and integrity. Employee agrees to use Employee's best efforts and skills to preserve the business of the Company and the goodwill of its employees and persons having business relations with the Company. Employee will comply with all applicable laws and all of the Company's and its Affiliates' then current policies and procedures. Notwithstanding anything contained herein to the contrary, if (a) Employee complies with the terms and provisions of D&B's Code of Business Ethics, as the same may be revised from time-to-time and (b) Employee's activities do not interfere with Employee's obligations to the Company, then, during the term of Employee's employment by D&B Management, Employee may (x) engage in charitable, civic, fratemal and professional activities, (y) give lectures on behalf of educational or for-profit institutions, and (z) manage personal investments; provided that Employee shall disclose any conflicts of interest that cause Employee's personal endeavors to be in material conflict with the business of the Company and/or its Affiliates.

4. <u>No Limitations</u>. Employee warrants and represents that there is no contractual, judicial or other restraint that impairs Employee's right or legal ability to enter into this Agreement and to carry out Employee's duties and responsibilities to the Company, Holdings and its subsidiaries.

### 5. Compensation and Benefits.

(a) <u>Base Salary</u>. During the term of this Agreement, D&B Management will pay to Employee a base salary of [] per year. The base salary will be paid bi-weekly on regularly scheduled paydays determined by the Company. Employee shall be given an annual performance evaluation and, as determined by the Board of Directors of D&B Management, may receive an annual salary increase.

(b) <u>Annual Bonus</u>. During the term of this Agreement, the Employee will be eligible to receive an annual bonus as approved on annual basis by the Board of Directors of D&B Management and, if so approved, as determined by the Company based upon the attainment of a combination of individual and Company goals during a fiscal year set forth in a bonus plan approved by the Board of Directors of D&B Management, payable in accordance with such bonus plan. Employee's individual participation percentage in the bonus plan is equal to 50% of such Employee's base salary for the fiscal year.

(c) <u>Automobile</u>. The Employee shall be entitled to an automobile allowance to be applied toward the use of an automobile for business purposes during the term of this Agreement, in an amount equal to \$10,000 per year, payable in accordance with the Company's standard payroll procedures.

(d) <u>Retirement and Welfare Plans</u>. Employee shall be eligible to participate in any profit sharing, qualified and nonqualified retirement plans, and any health, life, accident, disability insurance, sick leave, supplemental medical reimbursement insurance (Exec-U-Care) or other benefit plans or programs made available to similarly situated employees of the Company as of the Effective Date (collectively, the "<u>Plans</u>"), as long as they are kept in force by the Company and provided that Employee meets the eligibility requirements of the respective Plans. Nothing contained herein shall limit the right of the Company, in its sole and absolute discretion, to modify, amend or discontinue any of the Plans.

(e) <u>Vacation</u>. Subject to the Company's generally applicable policies relating to vacations, Employee shall be entitled to paid vacation commensurate with Employee's position and tenure with the Company, but in no event less than four (4) weeks paid vacation during each calendar year.

(f) Office and Support Staff. To the extent reasonably practicable, the Company shall endeavor to supply the Employee (i) with all equipment, supplies, and secretarial staff reasonably required in the performance of the Employee's duties and (ii) a fully furnished and appointed office comparable in size, furnishings and decorations to the offices of other officers of D&B of comparable responsibilities and the facilities of the Company shall be generally available to Employee in the performance of Employee's duties.

(g) Other Benefits. The Company will provide Employee with other employment benefits the Company provides to its full-time executive employees.

(h) Expenses. The Company shall reimburse the Employee for all reasonable business expenses incurred by the Employee in connection with the performance of the Employee's duties under this Agreement, including, but not limited to, reasonable travel, meals, and hotel accommodations of Employee, in each case subject to the Company's then current policies and procedures. Reimbursement shall be made upon submission by Employee of vouchers or an itemized list thereof in accordance with the Company's then current policies and procedures. Employee hereby authorizes the Company in advance to deduct any expenses from the Employee's salary if Employee fails to submit an expense as provided by the Company's then current policies and procedures.

(i) <u>Country Club Membership</u>. The Employee shall be entitled to an allowance for country club membership to be applied toward dues for business use of such club in an amount equal to \$3,120 per year, payable in accordance with the Company's standard payroll procedures.

(j) <u>Changes in Benefits</u>. Any changes to base salary, annual bonus, automobile allowance or other benefits paid to Employee during the term of this Agreement shall be memorialized by a written amendment to this Agreement executed by the Company and Employee.

(k) <u>Options</u>. At the Effective Date, the Employee shall receive Options as part of a pool of Options pursuant to the Incentive Plan, which Incentive Plan is equal to approximately 10% of the equity of Holdings for senior management and directors; provided that, the Option Grant Agreement to be entered into by the Employee and the Incentive Plan shall supersede in all respects the provisions of this <u>Paragraph 2(k)</u> and that the provisions of this <u>Paragraph 2(k)</u> and the provisions of the Option Grant Agreement and the Incentive Plan shall be at the sole and absolute discretion of the Board of Directors of Holdings.

(i) Subject to the terms and conditions of the Option Grant Agreement and the Incentive Plan, Holdings hereby agrees to grant at the Effective Date to the Employee an award of Options divided into "Time Vesting Options," "EBITDA Vesting Options," and "IRR Vesting Options" as follows and as set forth in greater detail in the Option Grant Agreement and the Incentive Plan:

(1) 1/3 Time Vesting Options, which shall vest ratably on the first (1st) through the fifth (5th) anniversary of the Effective Date, subject to certain conditions as set forth in the Option Grant Agreement and the Incentive Plan.

(2) 1/3 EBITDA Vesting Options, which shall vest over a five (5) year period from fiscal year 2010 through 2014, subject to D&B meeting annual EBITDA Targets (as set forth on <u>Annex A</u> hereto) for those fiscal years and certain conditions as set forth in the Option Grant Agreement and the Incentive Plan;

a. If, in any fiscal year such EBITDA Target is not achieved, the Options that would vest in that year will still vest if the EBITDA in the succeeding year aggregated with the EBITDA in such fiscal year would exceed the sum of the EBITDA Target for both fiscal years, subject to certain conditions as set forth in the Option Grant Agreement and the Incentive Plan.

b. Upon a Change of Control (as defined in the Option Grant Agreement and Incentive Plan), any the portion of unvested EBITDA Vesting Options for which the applicable fiscal year passed shall vest if the Oak Hill IRR (as defined in the Option Grant Agreement and Incentive Plan) is greater than or equal to 25%, subject to certain conditions as set forth in the Option Grant Agreement and the Incentive Plan.

(3) 1/3 IRR Vesting Options, which shall be divided equally into two (2) tranches. Upon a Change of Control, (i) Tranche 1 IRR Vesting Options shall vest if the Oak Hill IRR is greater than or equal to 20% and (ii) Tranche 2 IRR Vesting Options shall vest if the Oak Hill IRR is greater than or equal to 25%, in each case, subject to certain conditions as set forth in the Option Grant Agreement and the Incentive Plan.

6. <u>Training</u>. The Company has provided and will continue to provide Employee with such specialized training as the Company, in its sole discretion, deems necessary or beneficial to the performance of Employee's job duties.

7. <u>Confidential Information and Restrictive Covenants</u>. In consideration of the premises and mutual promises contained herein, and for other good and valuable consideration specified herein (including, without limitation substantial amounts of compensation (including, without limitation, as obtained through the Equity Arrangements), the Company Group (as defined below) shall provide the Employee with benefits and Confidential Information, the use or disclosure of which would cause the Company Group substantial loss or injury including substantial diminishment of their goodwill, and would place the Company Group at a material competitive disadvantage. Accordingly, the Company and the Employee hereby agree as follows:

#### (a) Certain Definitions.

(i) As used in this Agreement, "<u>Affiliate</u>" of any person means any person, directly or indirectly controlling, controlled by or under common control with such person, and includes any person who is an officer, director or employee of such person and any person that would be deemed to be an "affiliate" or an "associate" of such person, as those terms are defined in Rule 12b-2 of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended. As used in this Agreement. As used in these definitions, "<u>controlling</u>" (including, with its correlative meanings, "<u>controlled by</u>" and "<u>under common control with</u>") means possession, directly or indirectly, of power to direct or cause the direction of management or policies (whether through ownership of securities, partnership or other ownership interests, by contract or otherwise). With respect to any natural person, "Affiliates" shall also include, without limitation, such person's spouse, child and any trust the beneficiaries or grantor of which are limited solely to such person and/or his or her spouse or child. As used in this Agreement, "<u>person</u>" means any individual, corporation, limited liability company, partnership, firm, joint venture, association, joint-stock company, trust, unincorporated organization or other entity.

(ii) As used in this Agreement, "Company Group" shall mean Holdings, the Company, and any subsidiary, and any successor to any of the foregoing.

(iii) As used in this Agreement, "<u>Competitive Business</u>" shall mean any business which is a casual dining restaurant (including, without limitation, restaurants that combine dining and entertainment activities) in the Restricted Territory.

(iv) As used in this Agreement, "<u>Restricted Territory</u>" shall mean Alabama, Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Wisconsin, Ontario, Canada, and any other state or province in which the Company operates through the time of the Employee's resignation or termination.

(b) Nondisclosure of Confidential Information. During the term of this Agreement, the Company Group agrees to continue to provide, and the Employee will acquire, certain Confidential Information. As a material incentive for the Company Group to enter into this Agreement, as well as in exchange for the consideration specified herein (including, without limitation substantial amounts of compensation (including, without limitation, as obtained through the Equity Arrangements), benefits and access to the Confidential Information, in each case, as set forth herein), and employment of the Employee under this Agreement, the Employee shall maintain in strict confidence and shall not disclose to third parties or use in any task, work or business (except on behalf of the Company Group) any proprietary or confidential information regarding the Company Group and/or [his/her] work with the Company Group, including, without limitation, trade secrets, current and future business plans, customers, customer lists, customer information, vendors, vendor lists, vendor information, employees, employee information, sales, purchasing, pricing determinations, price points, internal and external cost structures, operations, marketing, financial and other business strategies, positioning of stores, information and plans, products and services, games and amusement, development of games and amusement, food and beverage, financial performance and other financial data and compilations of data, new store development and locations, pipeline, information regarding the Company Group's processes, computer programs and/or records, software programs, intellectual property, business development opportunities, acquisitions, acquisition targets, confidential information developed by consultants and contractors, manuals, memoranda, projections, and minutes ("Confidential Information"), without the express written permission of the Board of Directors of Holdings. The Employee's confidentiality obligation in this Paragraph 7 shall include, but not be limited to, any Confidential Information to which the Employee has access to, had access to, will have access to, receives, or received in connection with [his/her] employment by Company Group, and any information designated as confidential by the Company Group. Notwithstanding the foregoing, the term Confidential Information shall not include information that (i) is publicly disclosed through no fault of the Employee, either before or after it becomes known to the Employee, (ii) was known to the Employee prior to the date of this Agreement, which knowledge was acquired independently and not from the Company Group or its directors or employees or (iii) became available to the Employee on a nonconfidential basis from a source other than the Company Group, provided such source is not bound by a confidentiality agreement with or other contractual, legal or fiduciary obligation of confidentiality to the Company Group or any other party with respect to such information. The Company Group and the Employee acknowledge and agree that the Confidential Information is continually evolving and changing and that some new Confidential Information will be needed by the Employee and provided by the Company Group for the first time in the course of the term of this Agreement. The Employee expressly acknowledges the trade secret status of the Confidential Information and agrees that the Employee's access to such Confidential Information constitutes a protectable business interest of the Company Group. Notwithstanding the foregoing restrictions, the Employee may disclose any Confidential Information (a) to the Employee's legal advisors subject to such advisor's agreement to maintain the information as confidential, (b) to the extent required for the Employee's enforcement of [his/her] rights hereunder (provided that such information be submitted under seal or otherwise not publicly disclosed) and (c) to the extent required by an order of any court or other governmental authority, but in each case only after the Company Group has been so notified in writing and has had five (5) business days to obtain reasonable protection for such information in connection with such disclosure.

(c) <u>Return of Property</u>. Upon termination of the Employee's employment with the Company Group (for any reason), the Employee shall promptly return to the Company Group all Company property, Confidential Information and all copies thereof obtained by the Employee, or [his/her] employees or agents. The Parties acknowledge that the Company Group would not retain the Employee's services or provide [him/her] with access to its Confidential Information without the covenants and promises contained in this <u>Paragraph 7</u>. For avoidance of doubt, the Employee shall deliver promptly to the Company Group on termination of [his/her] employment with the Company Group for any reason, or at any other time the Company Group may so request, all Confidential Information and all other documentation containing information relating to the business of the Company Group or property of the Company Group which [he/she] obtained or developed while employed by, or otherwise serving or acting on behalf of, the Company Group and which [he/she] may then possess or have under [his/her] control or relating to the "Work" (as defined below).

(d) <u>Non-Access</u>. Employee agrees that following the termination of [his/her] employment with D&B Management, [he/she] will not access the Company Group's computer systems, download files or any information from the Company Group's computer systems or in any way interfere, disrupt, modify or change any computer program used by the Company Group or any data stored on the Company Group's computer systems. Employee further agrees that all of the computers, hand held devices, and mobile telephones provided by the Company are the sole property of the Company Group.

(e) Acknowledgment of the Company Group's Right In Work Product. During the term of this Agreement, the Employee will create, develop and contribute for consideration certain ideas, plans, calculations, technical specifications, works of authorship, inventions, information, data, formulas, models, reports, processes, photographs, marks, designs, computer code, concepts and/or other proprietary materials to the Company Group related to the operation or promotion of the business of the Company Group (collectively, the "Work"). All of the Work is, was and shall hereafter be, a commissioned "work for hire" owned by the Company Group within the meaning of Title 17, Section 101 of the United States Code, as amended. If any portion of the Work is determined not to be a "work for hire" or such doctrine is not effective, the Employee hereby irrevocably assigns, conveys and otherwise transfers to the Company Group, and its respective successors, licensees, and assigns, all right, title and interest worldwide in and to such portion of the Work and all proprietary rights therein, including, without limitation, all copyrights, trademarks, design patents, trade secret rights, moral rights, and all contract and licensing rights, and all claims and causes of action with respect to any of the foregoing, whether now known or hereafter to become known. In accordance with this assignment, the Company Group shall hold all ownership to all rights, without limitation, in and to all of the Work for its own use and for its legal representatives, assigns and successors, and this assignment shall be binding on and extended to the heirs, assigns, representatives and successors of the Employee. In the event the Employee has any right or interest in the Work which cannot be assigned, the Employee agrees to waive enforcement worldwide of any and all such rights or interests against the Company Group and its respective successors, licensees and assigns, and the Employee hereby exclusively and irrevocably licenses any and all such rights and interests, worldwide, to the Company Group in perpetuity and royalty-free, along with the unfettered right to sublicense. All such rights are fully assignable by Company Group. The Employee hereby agrees that all Work is created or developed for the sole use of the Company Group, and that the Employee has no right to market in any manner whatsoever any such Work.

(f) <u>Non-Compete Agreement</u>. The Parties agree that, during the course of the Employee's employment by the Company Group and during the term of this Agreement, the Employee will have access to, and the benefit of, the Company Group's Confidential Information, including but not limited to, the Confidential Information described in <u>Paragraph 7(b)</u>. The Parties agree that, during the Employee's employment, the Employee will represent the Company Group and develop contacts and relationships with other persons and entities on behalf of the Company Group, including but not limited to, with customers and potential customers. To protect the Company Group's interest in its Confidential Information, contacts and relationships, to enforce the Employee's obligations under this <u>Paragraph 7</u>, and as a material inducement for the Company Group to enter into this Agreement, as well as in exchange for the consideration specified herein (including, without limitation, substantial amounts of compensation (including, without limitation, as obtained through the Equity Arrangements), benefits and access to and provision of the Confidential Information, in each case, as set forth herein), and employment of the Employee under this Agreement for any reason (including, without limitation, resignation by the Employee or upon notice from the Employee as provided in <u>Paragraph 8(b)</u>) (the <u>"Non-Compete Period</u>"), other than (x) due to termination of the Employee's employment by the Employee for "good reason" or by the Company without "cause," each as defined herein or (y) if the Company elects not to provide the payments and other severance benefits set forth in <u>Paragraph 8(c)</u> as set forth in <u>Paragraph 8(f)</u>, the Employee shall not directly or indirectly for [himself/herself] or others, within the Restricted Territory:

(i) own, manage, operate, join, control, or participate in the ownership, management, operation or control of, or engage in any activity, work, business, or investment with any other Competitive Business (or for or on behalf of any other entity or person or any other Competitive Business), including, without limitation, any attempted or actual activity as an employee, officer, director, advisor, agent, equityholder, consultant or independent contractor (whether or not compensated for any of the foregoing); provided, however, that the Employee may own an investment interest of less than 2% in a publicly-traded company.

(g) Non-Solicitation and Non-Hire Agreement. Additionally, in exchange for the consideration specified herein and as stated in this Paragraph 7, and as a material incentive for the Company Group to enter into this Agreement, during the term of this Agreement and for a period of two (2) years from the termination of this Agreement for any reason (including, without limitation, resignation by the Employee) (the "Non-Solicitation and Non-Hire Period"), the Employee shall not, directly or indirectly, on [his/her] own behalf or on behalf of any other person, partnership, entity, association, or corporation, induce or attempt to influence, induce, encourage, any employee of the Company Group at or above the managerial level (including, without limitation, store managers and regional managers), supplier, vendor, licensee, distributor, contractor or other business relation of the Company Group to cease doing business with, adversely alter or interfere with its business relationship with, the Company Group. Further, during the Non-Solicitation and Non-Hire Period, the Employee shall not, on [his/her] own behalf of any other person, partnership, entity, association, solicit or seek to hire any employee of the Company Group. Further, during the Non-Solicitation and Non-Hire Period, the Employee shall not, on [his/her] own behalf of any other person, partnership, entity, association, or corporation, solicit or seek to hire any employee of the Company Group at or above the managerial level (including, without limitation, store managers and regional managers) or in any other manner attempt directly or indirectly to influence, induce, or encourage any employee of the Company Group at or above the managerial level (including, without limitation, store managers and regional managers) or in any other manner attempt directly to influence, induce, or encourage any employee of the Company Group at or above the managerial level (including, without limitation, store managers and regional managers) to leave their employ (provided, how

(h) <u>Reasonableness of Restrictions</u>. Modification. It is the desire and intent of the Parties to this Agreement that the provisions of this <u>Paragraph 7</u> shall be enforced to the fullest extent permissible under the laws and public policies applied in each jurisdiction in which enforcement is sought. It is expressly understood and agreed that the Company Group and the Employee consider the restrictions contained in this <u>Paragraph 7</u> to be reasonable and necessary for the purposes of preserving and protecting the Confidential Information and other legitimate business interests of the Company Group. Nevertheless, if any of the aforesaid restrictions is found to be unreasonable, over-broad as to geographic area, duration or scope of activity, or otherwise unenforceable, the Company Group and the Employee intend for the restrictions herein set forth to be modified to be reasonable and enforceable and, as so modified, to be fully enforced.

(i) <u>Specific Performance, Injunctive and Other Relief</u>. The Parties acknowledge that money damages would not be a sufficient remedy for any breach or threatened breach of this <u>Paragraph 7</u> by the Employee. Therefore, notwithstanding the arbitration provisions in <u>Paragraph 10</u>, the Employee and the Company Group agree that the Company Group may resort to a court to enforce this <u>Paragraph 7</u> by injunctive relief. The Parties agree that the Company Group may enforce this promise without posting a bond and without giving notice to the maximum extent permitted by law. The remedies addressed in this <u>Paragraph 7(i)</u> shall not be deemed the exclusive remedies for a breach and/or threatened breach of this <u>Paragraph 7</u>, but shall be in addition to all remedies available at law or in equity to the Company Group, including, without limitation, the recovery of damages from the Employee. The Employee agrees that the Non-Compete Period and the Non-Solicitation Period shall be tolled during any period of violation by Employee of this <u>Paragraph 7</u>.

(j) Notice and Opportunity to Cure. In the event that the Company asserts that Employee is not in compliance with any of its obligations under this Paragraph 7, unless such non-compliance or breach is willful and intentional, the Company shall provide the Employee with written notice of such assertion and a ten (10) business day opportunity to cure such noncompliance prior to its withholding payment of any consideration specified in this Agreement or taking other legal action.

#### 8. Termination of Agreement.

(a) <u>Death or Disability</u>. This Agreement shall automatically terminate upon the death of Employee or upon Employee's becoming disabled to the extent that [he/she] is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, or is, by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, or is, by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, receiving income replacement benefits for a period of not less than three (3) months under an accident and health plan covering employees of D&B Management. The determination of Employee's disability shall be made in good faith by a physician reasonably acceptable to the Company.

(b) Upon Notice. Either the Company or the Employee may terminate this Agreement at any time during the term by giving the other Party no less than thirty (30) days' prior written notice of the date of termination. Promptly after the Employee or the Company gives such notice, the Parties shall meet and in good faith confer regarding the Employee's work responsibilities during the remainder of the notice period; provided that the Company may determine in its sole discretion to not have the Employee continue [his/her] work responsibilities and the Employee shall promptly cease [his/her] work responsibility and vacate [his/her] office. During the remainder of the notice period (if so requested by the Company), Employee agrees to use best efforts to continue performing the duties assigned by the Company, and the Company agrees to continue compensating Employee until the termination date with the same pay and benefits as before the notice was given.

(c) For Cause. The Company may terminate this Agreement without any prior written notice to Employee if the termination is "for cause." For purposes of this Agreement "for cause" shall be defined as the willful and continued failure by Employee to perform the duties assigned by the Company, failure to follow reasonable business-related directions from the Company, gross insubordination, theft from the Company or its Affiliates, habitual absenteeism or tardiness, conviction or plea of a felony, or any other reckless or willful misconduct that is contrary to the best interests of the Company or materially and adversely affects the reputation of the Company. If the Company believes that an event constituting "for cause" under this section has occurred and such event (i) is not a criminal offense and (ii) is readily curable by Employee, then the Company shall provide written notice to the Employee setting forth: (A) the Company's intent to terminate the Employee's employment for cause, and (B) the reasons for the Company's intent to terminate the Employee if such cure has not occurred within such ten (10) business day period. In the event that the Company contends that the event is not readily curable by Employee, the Company shall provide written notice to Employee setting forth: (X) the reasons for the Company's intent to terminate the Employee if such cure has not occurred within such ten (10) business day period. In the event that the Company contends that the event is not readily curable by Employee, the Company shall provide written notice to Employee setting forth: (X) the reasons for the Company's intent to terminate Employee's employment "for cause" and (Y) the basis for the Company's determination that such event is not readily curable.

(d) For Good Reason. The Employee may terminate this Agreement without any prior written notice to the Company if the termination is "for good reason." For purposes of this Agreement "for good reason" shall be defined as (i) the material breach by the Company of this Agreement and the failure of the Company to remedy such breach within ten (10) days following the delivery of written notice of such breach by the Employee to the Company; (ii) the Company's relocation of the office where Employee performs [his/her] duties by twenty-five (25) or more miles; (iii) assignment to the Employee of any duties, authority or responsibilities that are materially inconsistent with the Employee's position, authority, duties or responsibilities, or any other Company action that results in the material diminution in such position, authorities, duties or responsibilities; (iv) substantial change in organizational reporting relationships as compared to the Effective Date that will materially impact Employee's title, status, position, authority, duties or responsibilities reporting requirements; and (v) any other purported termination of the Employee other than under the terms of this Agreement.

(e) Severance Pay and Release. In the event that the Employee's employment with the Company under this Agreement is terminated for reasons other than (x) upon notice from the Employee as provided in Paragraph 8(b), subject to Paragraph 8(f) or (y) "for cause" as defined in Paragraph 8(c), the Company shall, conditioned upon the Employee's compliance with this Agreement and upon the Employee's execution of a fully effective and non-revocable general release in favor of the Company, its Board of Directors, Affiliates, and employees, in such form as reasonably approved by the Company and the Employee (the "Release") within sixty (60) days of the Employee's termination of employment, which Release shall be provided to the Employee within five (5) days of the Employee's termination of employment, pay to the Employee: (i) twelve (12) months of severance pay at the Employee's then current base salary (adjusted, if applicable, as described below to take into account the amount of disability insurance payments received by the Employee), in accordance with the Company's normal payroll schedule and procedures and commencing on the first payroll date of the Company following the sixtieth (60th) day of the Employee's termination of employment (the "First Payroll Date"), and subject to all applicable withholding (it being agreed that the sum of the after-tax value of these monthly payments and any income replacement benefits received from Company-provided disability insurance as described in Paragraph 8(a) shall not exceed the after-tax value of the Employee's then-current base salary). The portion of the severance pay that would have been paid to the Employee during the period between the Employee's termination of employment and the First Payroll Date had no sixty-day delay been required shall be paid to the Employee on the First Payroll Date and thereafter the remaining portion of the severance pay shall be paid without delay as provided in clause (i) above of this [Paragraph 8(e)]; (ii) an amount equal to the annual bonus, if any, earned by the Employee for the prior fiscal year, if it has not previously been paid by the Company payable in a single lump sum payment at the time provided for under the bonus plan (but without regard to any requirement that the Employee be employed on the bonus payment date) or if later, on the First Payroll Date; (iii) the pro rata portion of the annual bonus, if any, earned by the Employee for the then-current fiscal year, payable in the calendar year in which the then-current fiscal year ends, but in no event later than one hundred twenty (120) days after the end of such fiscal year and no earlier than the First Payroll Date, in accordance with the Company's standard procedures for paying any such bonus to other employees under the bonus plan, except for any requirement that the Employee be employed on the bonus payment date, and subject to all applicable withholding; (iv) monthly payments for a period of twelve (12) months following the Employee's termination that are equal to the monthly payment being made to the Employee under Paragraph 5(c) at the time of the Employee's termination commencing on the First Payroll Date; and (v) monthly payments for a period of six (6) months following the Employee's termination, payable in accordance with the Company's normal payroll schedule and procedures and commencing on the First Payroll Date, and subject to all applicable withholding, that are equal to the monthly premium required by the Employee to maintain [his/her] health insurance benefits provided by the Company's group health insurance plan, in accordance with the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). In addition, unless the Employee's employment with the Company is terminated (A) "for cause" as defined in Paragraph 8(c) or (B) upon notice from the Employee as provided in Paragraph 8(b), the Employee shall be entitled to retain any stock options previously granted by Holdings to the Employee that are either (x) vested as of the date of the Employee's termination or (y) vest within 180 days after the date of the Employee's termination by virtue of a Change of Control (as defined in the Option Grant Agreement and Incentive Plan), in each case in accordance with the terms of the Incentive Plan and Option Grant Agreement; provided that, in the event the Employee's employment with the Company is terminated without "good reason" as defined in Paragraph 8(d), any vested stock option previously granted by Holdings to the Employee shall terminate thirty-one (31) days following the date of the Employee's termination in accordance with the terms of the Incentive Plan and Option Grant Agreement. In the event that this Agreement is terminated "for cause" pursuant to Paragraph 8(c), the Company shall pay to the Employee only (A) that base salary which has been earned by the Employee through the date of termination payable in accordance with the Company's normal payroll practices and (B) unless the "for cause" termination results from the Employee's theft from the Company or its Affiliates, conviction or plea of a felony, or any other reckless or willful misconduct that materially and adversely affects the reputation of the Company, the annual bonus, if any, described in clause (ii) above of this Paragraph 8(e) and payable in accordance with clause (ii) above of this Paragraph 8(e), if it has not previously been paid by the Company. In the event that this Agreement is terminated upon notice from the Employee pursuant to Paragraph 8(b), the Company shall pay to the Employee only (1) that base salary which has been earned by the Employee through the date of termination payable in accordance with the Company's normal payroll practices and (2) the annual bonus, if any, described in Paragraph 8(e)(ii) above and payable in accordance with Paragraph 8(e)(ii). Notwithstanding any provision to the contrary in this Agreement, no amount shall be paid pursuant to this Paragraph 8(e) unless the Employee's termination of employment constitutes of "separation from service" (as such term is defined in Treas. Reg. Section 1.409-1(h), including the default presumptions). The Employee agrees to return to the Company any payments received pursuant to this Paragraph 8 in the event that Employee does not fully comply (after written notice and opportunity to cure as provided in Paragraph 7(j) above) with all post-employment obligations set out in this Agreement, including, but not limited to, the restrictive covenants and the restrictions on disclosure of the Confidential Information of the Company Group set forth in Paragraph 7.

(f) Severance Pay and Release Upon Termination by the Employee Upon Notice. Notwithstanding anything to the contrary contained herein, if the Employee's employment with the Company is terminated upon notice from the Employee as provided in Paragraph 8(b) (including, without limitation, resignation by the Employee), the Company may at its sole option elect to: (i) provide any payments and other severance benefits set forth in Paragraph 8(e) to the Employee; provided that if the Employee is at any time not in full compliance with the Employee's obligations set forth in Paragraph 7, the Employee shall forfeit any and all payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e); or (ii) not provide any payments and other severance benefits set forth in Paragraph 8(e) to the Employee, in which case the Employee shall not be bound by the obligations set forth in Paragraph 7(f) (and, for the avoidance of doubt, the Employee shall continue to be bound by all of the other terms of Paragraph 7).

#### 9. Section 409A.

(a) If any payment, compensation or other benefit provided to the Employee in connection with [his/her] employment termination is determined, in whole or in part, to constitute "nonqualified deferred compensation" within the meaning of Section 409A of the Internal Revenue Code of 1986, as amended ("<u>Section 409A</u>") and the Employee is a specified employee as defined in Section 409A(a)(2)(B)(i), then no portion of such "nonqualified deferred compensation" shall be paid before the earlier of (i) the day that is six (6) months plus one (1) day after the date of termination or (ii) five (5) days following the Employee's death (the "<u>New Payment Date</u>"). The aggregate of any payments that otherwise would have been paid to the Employee during the period between the date of termination and the New Payment Date shall be paid to the Employee in a lump sum on such New Payment Date. Thereafter, any payments that remain outstanding as of the day immediately following the New Payment Date shall be paid without delay over the time period or ginally scheduled, in accordance with the terms of this Agreement. Notwithstanding the foregoing, to the extent that the foregoing applies to the provision of any ongoing welfare benefits to the Employee that would not be required to be delayed if the premiums therefor were paid by the Employee, the Employee shall pay the full cost of premiums for such welfare benefits during the six-month period and the Company shall pay the Employee an amount equal to the amount of such premiums paid by the Employee during such six-month period promptly after its conclusion.

(b) The Parties hereto acknowledge and agree that the interpretation of Section 409A and its application to the terms of this Agreement is uncertain and may be subject to change as additional guidance and interpretations become available. Anything to the contrary herein notwithstanding, all benefits or payments provided by the Company to the Employee that would be deemed to constitute "nonqualified deferred compensation" within the meaning of Section 409A are intended to comply with Section 409A. If, however, any such benefit or payment is deemed to not comply with Section 409A, the Company and the Employee agree to renegotiate in good faith any such benefit or payment (including, without limitation, as to the timing of any severance payments payable hereof) so that either (i) Section 409A will not apply or (ii) compliance with Section 409A will be achieved. Notwithstanding the foregoing, the Company makes no guarantee of any federal, state or local tax consequences with respect to the interpretation of Section 409A and its application to the terms of this Agreement, and the Company shall have no liability for any adverse tax consequences of the Employee, as a result of any violation of Section 409A.

(c) Notwithstanding anything to the contrary contained in this Agreement, all reimbursements for costs and expenses under this Agreement shall be paid in no event later than the end of the taxable year following the taxable year in which the Employee incurs such expense. With regard to any provision herein that provides for reimbursement of costs and expenses or in-kind benefits, except as permitted by Section 409A, (i) the right to reimbursement or in-kind benefits shall not be subject to liquidation or exchange for another benefit and (ii) the amount of expenses eligible for reimbursements or in-kind benefits provided during any taxable year shall not affect the expenses eligible for reimbursement or in-kind benefits to be provided in any other taxable year, provided, however, that the foregoing clause (ii) shall not be violated with regard to expenses are subject to a limit related to the period the arrangement is in effect.

(d) If under this Agreement, an amount is paid in two or more installments, for purposes of Section 409A, each installment shall be treated as a separate payment.

(e) A termination of employment shall not be deemed to have occurred for purposes of any provision of this Agreement providing for the payment of any amounts or benefits subject to Section 409A upon or following a termination of employment unless such termination is also a "separation from service" as defined in Treas. Reg. Section 1.409A-1(h), including the default presumptions, and for purposes of any such provision of this Agreement, references to a "resignation," "terminate," "termination of employment" or like terms shall mean separation from service.

**10.** <u>Confidential Arbitration</u>. The Employee and the Company hereby agree that any controversy or claim arising out of or relating to this Agreement, including the arbitrability of any controversy or claim, which cannot be settled by mutual agreement will be finally settled by confidential and binding arbitration in accordance with the Federal Arbitration Act. Further, notwithstanding the preceding sentence, in the event disputes arise that relate in any way to and concern one or more other Equity Agreements, the Parties agree that such disputes may be joined in a single binding arbitration if doing so would not result in unreasonable delay. All arbitrations shall be administered by a panel of three neutral arbitrators (the "Panel") admitted to practice law in Texas for at least ten (10) years, in accordance with the American Arbitration Association Rules. Any such arbitration proceeding shall be administered by the American Arbitration Association and all hearings shall take place in Dallas County, Texas. The arbitration proceeding and all related documents will be confidential, unless disclosure is required by law. The Panel will have the authority to award the same remedies, damages, and costs that a court could award, including but not limited to the right to award injunctive relief in accordance with the other reasons of this Agreement. Further, the Parties specifically agree that, in the interest of minimizing expenses and promoting early resolution of claims, the filing of dispositive motions shall be permitted and that prompt resolution of such motions by the Panel's decision will be final and binding. The judgment on the award rendered by the Panel may be entered in any court having jurisdiction thereof. This provision can be enforced under the Federal Arbitration Act. The Panel shall be permitted to award only those remedies in law or equity that are requested by the Parties, appropriate for the claims and supported by evidence, and each Party shall be required to bear its or [his/her] own arbitrati

(a) The decision of the arbitrator on the points in dispute will be final, unappealable and binding, and judgment on the award may be entered in any court having jurisdiction thereof. The Parties agree that this provision has been adopted by the Parties to rapidly and inexpensively resolve any disputes between them and that this provision will be grounds for dismissal of any court action commenced by any Party with respect to this Agreement, other than post-arbitration actions seeking to enforce an arbitration award.

(b) The Parties will keep confidential, and will not disclose to any person, except as may be required by law, the existence of any controversy under this <u>Paragraph 10</u>, the referral of any such controversy to arbitration or the status or resolution thereof. In addition, the confidentiality restrictions set forth in this Agreement shall continue in full force and effect.

(c) As the sole exception to the exclusive and binding nature of the arbitration commitment set forth above, the Parties agree that the Company Group may resort to Texas state courts having equity jurisdiction in and for Dallas County, Texas and the United States District Court for the Northern District of Texas, Dallas Division, at its sole option, to request temporary, preliminary, and/or permanent injunctive or other equitable relief, including, without limitation, specific performance, to enforce the post-employment restrictions and other non-solicitation and confidentiality obligations set forth in this Agreement, without the necessity of proving inadequacy of legal remedies or irreparable harm or posting bond or giving notice, to the maximum extent permitted by law. However, nothing in this Paragraph 10 should be construed to constitute a waiver of the Parties' rights and obligations to arbitrate as set forth in this <u>Paragraph 10</u>.

(d) IN THE EVENT THAT ANY COURT OF COMPETENT JURISDICTION OR ARBITRATOR DETERMINES THAT THE SCOPE OF THE ARBITRATION OR RELATED PROVISIONS OF THIS AGREEMENT ARE TOO BROAD TO BE ENFORCED AS WRITTEN, THE PARTIES INTEND THAT THE COURT REFORM THE PROVISION IN QUESTION TO SUCH NARROWER SCOPE AS IT DETERMINES TO BE REASONABLE AND ENFORCEABLE. EACH PARTY HERETO ACKNOWLEDGES THAT IT HAS BEEN INFORMED BY THE OTHER PARTY HERETO THAT THIS <u>PARAGRAPH 10(d)</u> CONSTITUTES A MATERIAL INDUCEMENT UPON WHICH IT OR [HE/SHE] IS RELYING AND WILL RELY IN ENTERING INTO THIS AGREEMENT.

#### BEFORE ACCEPTING THE TERMS OF THIS AGREEMENT, INCLUDING THE RESTRICTIVE COVENANT TERMS, PLEASE READ AND UNDERSTAND YOUR CONTINUING OBLIGATIONS TO THE COMPANY AND ITS AFFILIATES.

11. Indemnification. The Company shall indemnify Employee to the fullest extent permitted by Section 145 of the Delaware General Corporation Law against all costs, expenses, liabilities and losses, including but not limited to, attorneys fees, judgments, fines, penalties, taxes and amounts paid in settlement, reasonably incurred by Employee in conjunction with any action, suit, or proceeding, whether civil, criminal, administrative, or investigative in nature, which the Employee is made or threatened to be made a party or witness by reason of [his/her] position as officer, employee or agent of the Company or otherwise due to [his/her] association with the Company or due to [his/her] position or association with any other entity, at the request of the Company. The Company shall advance to Employee all reasonable costs and expenses incurred in connection with such action within twenty (20) days after receipt by the Company of Employee's written request. The Company shall be entitled to be reimbursed by Employee and Employee agrees to reimburse the Company if it is determined that Employee is not entitled to be indemnified with respect to an action, suit, or proceeding under applicable law. The Company shall not settle any such claim in any manner which would impose liability, including monetary penalties or censure, on the Employee without [his/her] prior written consent, unless the Employee would be harmed by such action.

**12.** <u>Governing Law; Submission to Jurisdiction; Jury Waiver</u>. THIS AGREEMENT SHALL BE EXCLUSIVELY GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO CONFLICTS OF LAW DOCTRINE. THE VENUE FOR ANY ENFORCEMENT OF THE ARBITRATION AWARD SHALL BE EXCLUSIVELY IN THE COURTS IN DALLAS, TEXAS, AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION. THE PARTIES WAIVE ANY RIGHT TO A JURY TRIAL.

13. <u>Severability</u>. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the Parties will be relieved of all obligations arising under such provision, but only to the extent it is illegal, unenforceable, or void. The Parties intend that this Agreement will be deemed amended by modifying any such illegal, unenforceable, or void provision to the extent necessary to make it legal and enforceable while preserving its intent, or if such is not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives. Notwithstanding the foregoing, if the remainder of this Agreement will not be affected by such declaration or finding and is capable of substantial performance, then each provision not so affected will be enforced to the extent permitted by law.

14. <u>Waiver</u>. No delay or omission by any Party to this Agreement to exercise any right or power under this Agreement will impair such right or power or be construed as a waiver thereof. A waiver by any of the Parties to this Agreement of any of the covenants to be performed by the other or any breach thereof will not be construed to be a waiver of any succeeding breach thereof or of any other covenant contained in this Agreement. All remedies provided for in this Agreement will be cumulative and in addition to and not in lieu of any other remedies available to any Party at law, in equity or otherwise.

**15**. <u>Notices</u>. Any notices, consents, demands, requests, approvals and other communications to be given under this Agreement by any Party to the other shall be deemed to have been duly given if given in writing and personally delivered or sent by mail (registered or certified) or by a recognized "next-day delivery service" to the address set forth below a Party's signature, with a courtesy copy provided to the Company's General Counsel.

16. <u>Entire Agreement</u>. This Agreement and the Equity Arrangements represents the entire agreement relating to employment between the Company and Employee and supersedes all previous oral and written and all contemporaneous oral negotiations or commitments, writings and other understandings, including the Employment Agreement which, at the Effective Date, shall be deemed to be terminated and of no further force or effect. No prior or subsequent promises, representation, or understandings relative to any terms or conditions of employment are to be considered as part of this Agreement or as binding.

17. <u>Amendment</u>. This Agreement may be amended or modified only (i) in a writing signed by the Parties hereto and (ii) with the prior written consent of Holdings.

18. Guarantee of Payment and Performance. D&B agrees to guarantee in all respects the payment and performance obligations of D&B Management set forth in this Agreement.

**19.** <u>Withholding</u>. The Company shall be entitled to withhold from any amounts to be paid or benefits provided to the Employee hereunder any federal, state, local, or foreign withholding or other taxes or charges which it is from time to time required to withhold. The Company shall be entitled to rely on an opinion of counsel if any question as to the amount or requirement of any such withholding shall arise.

**20.** <u>Acknowledgment</u>. By signing below, as a material inducement to the Company entering into this Agreement, Employee unconditionally represents and warrants that: (a) Employee has been advised to consult with an attorney regarding the terms of this Agreement; (b) Employee has consulted with, or has had sufficient opportunity to consult with Employee's own counsel or other advisors regarding the terms of this Agreement; (c) Employee has relied solely on Employee's own judgment and that of Employee's attorneys, advisors, and representatives regarding the consideration for, and the terms of, this Agreement; (d) any and all questions regarding the terms of this Agreement thave been asked and answered to Employee's complete satisfaction; (e) Employee has read this Agreement and fully understand its terms and their import; and (f) Employee is entering into this Agreement voluntarily, of Employee's own free will, and without any duress, coercion, fraudulent inducement, or undue influence exerted by or on behalf of any other Party or any other person or entity.

21. <u>Termination</u>. This Agreement shall automatically terminate without further action upon the termination of the Purchase Agreement and the Employee shall not be entitled to any rights hereunder.

22. <u>Counterparts</u>. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

# COMPANY:

DAVE & BUSTER'S MANAGEMENT CORPORATION, INC.

By:

Name: Title:

Address: 2481 Manana Drive Dallas, Texas 75220

### DAVE & BUSTER'S, INC.

By:

Name: Title:

Address: 2481 Manana Drive Dallas, Texas 75220

## **EMPLOYEE**:

Address:

[SIGNATURE PAGE TO AMENDED AND RESTATED EMPLOYMENT AGREEMENT]

#### DAVE & BUSTER'S PARENT, INC. 2010 MANAGEMENT INCENTIVE PLAN

#### 1. Purpose

The purpose of the Plan is to provide a means through which the Company and its Subsidiaries may attract able persons to enter and remain in the employ of the Company and its Subsidiaries and to provide a means whereby employees, directors and consultants of the Company and its Subsidiaries can acquire and maintain Common Stock ownership, thereby strengthening their commitment to the welfare of the Company and its Subsidiaries and promoting an identity of interest between stockholders and these employees, directors and consultants.

The Plan is intended to be a "compensatory benefit plan" within the meaning of Rule 701 under the Securities Act.

The Plan provides for the granting of Incentive Stock Options, Nonqualified Stock Options, Restricted Stock, Unrestricted Stock, Restricted Stock Units and the purchase of Restricted Stock and Unrestricted Stock.

#### 2. Definitions

The following definitions shall be applicable throughout the Plan:

(a) "<u>Affiliate</u>" with respect to any entity means (i) any other entity that directly or indirectly controls, is controlled by, or is under common control with such first entity and (ii) any other entity in which such first entity has a significant equity interest, in either case as determined by the Committee.

(b) "<u>Award</u>" means, individually or collectively, any Incentive Stock Option, Nonqualified Stock Option, Restricted Stock, Restricted Stock Unit, Unrestricted Stock, or Common Stock granted under the Plan or any right to purchase Common Stock, Restricted Stock or Unrestricted Stock under the Plan.

(c) "<u>Award Agreement</u>" means an agreement pursuant to which an Award is granted, which sets forth the terms and conditions of such Award. If there shall be a conflict between the provisions of the Plan and an Award Agreement, the provisions of this Plan shall control.

(d) "Board" means the board of directors of the Company.

(e) "<u>Cause</u>" means the willful and continued failure by a Participant to perform the duties assigned by the Company, failure to follow reasonable business-related directions from the Company, gross insubordination, theft from the Company or its Affiliates, habitual absenteeism or tardiness, conviction or plea of a felony, or any other reckless or willful misconduct that is contrary to the best interests of the Company or materially and adversely affects the reputation of the Company.

IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this document is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter that is contained in this document.

(f) "<u>Change of Control</u>" means (i) prior to an IPO, any Person owning a greater percentage of shares of Common Stock than OH or (ii) following an IPO, any Public Sale by OH, that when aggregated with other Public Sales by OH, results in the sale of at least 75% of the Stock held by OH immediately prior to the IPO.

(g) "<u>Code</u>" means the Internal Revenue Code of 1986, as amended. Reference in the Plan to any section of the Code shall be deemed to include any amendments or successor provisions to such section and any regulations under such section.

(h) "<u>Committee</u>" means the compensation committee of the Board established under the By-Laws of the Company, or if no such committee is established, the Board. The Committee shall consist of at least two directors as the Board may appoint to administer the Plan or, if no such committee has been appointed by the Board, the Board.

(i) "Common Stock" means the common stock, par value \$0.01 per share, of the Company.

(j) "Company" means Dave & Buster's Parent, Inc. (f/k/a Games Acquisition Corp.) a Delaware corporation, and any successor thereto.

(k) "<u>Disability</u>" means that a Participant is disabled to the extent that such Participant is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, or is, by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to result in death or can be expected to last for a continuous period of not less than twelve (12) months, receiving income replacement benefits for a period of not less than three (3) months under an accident and health plan covering employees of Dave & Buster's Management Corporation, Inc. The determination of Participant's disability shall be made in good faith by a physician reasonably acceptable to the Company.

(1) "Effective Date" means June 1, 2010.

(m) "Eligible Person" means any employee, director or consultant of the Company or of a Subsidiary of the Company, unless otherwise approved by the Board.

(n) "Exchange Act" means the Securities Exchange Act of 1934, as amended.

(o) "<u>Fair Market Value</u>" on a given date means (i) if the Stock is listed on a national securities exchange or national market system, the mean between the highest and lowest sale prices reported as having occurred on the primary exchange or market system with which the Stock is listed and traded on the date prior to such date, or, if there is no such sale on that date, then on the last preceding date on which a sale was reported; or (ii) if the Stock is not listed on a national securities exchange or national market system, the amount determined in good faith by the Committee to be the fair market value in accordance with Treasury Regulations Section 1.409A-1(b)(5)(iv)(B).

(p) "<u>Good Reason</u>" means (i) the material breach by the Company of the applicable Participant's employment agreement with the Company or any of its Subsidiaries and the failure of the Company to remedy such breach within ten (10) days following the delivery of written notice of such breach by the Participant to the Company; (ii) the Company's relocation of the office where Participant performs such Participant's duties by twenty-five (25) or more miles; (iii) assignment to the Participant of any duties, authority or responsibilities that are materially inconsistent with the Participant's position, authority, duties or responsibilities, or any other Company action that results in the material diminution in such position, authorities, duties or responsibilities; (iv) substantial change in organizational reporting relationships as compared to the effective date of the applicable Participant's employment agreement with the Company or any of its Subsidiaries that will materially impact Participant's title, status, position, authority, duties or responsibilities reporting requirements; and (v) any other purported termination of the Participant other than under the terms of the applicable Participant's employment agreement with the Company or any of its Subsidiaries.

(q) "Grant Date" means the date on which the granting of an Award is authorized and made effective by the Committee.

(r) "Incentive Stock Option" means an Option intended to meet the requirements of an incentive stock option as defined in Section 422 of the Code and designated by the Committee as such an incentive stock option.

(s) "<u>IPO</u>" means the Company's initial underwritten public offer for sale of shares of Common Stock pursuant to an effective Registration Statement filed under the Securities Act, other than pursuant to a registration statement on Form S-4 or Form S-8 or any similar or successor form.

(t) "<u>Nonqualified Stock Option</u>" means an Option granted by the Committee to a Participant under the Plan which is not designated by the Committee as an Incentive Stock Option.

(u) "<u>OH</u>" means, collectively, Oak Hill Capital Partners III, L.P. and Oak Hill Capital Management Partners III, L.P. and their respective affiliated funds and investment vehicles.

(v) "Option" means an option granted under Section 7.

(w) "Option Period" means the period described in Section 7(c).

(x) "Option Price" means the exercise price for an Option as described in Section 7(a).

(y) "Participant" means an Eligible Person to whom an Award has been granted by the Committee.

(z) "<u>Plan</u>" means this Dave & Buster's Parent, Inc. 2010 Management Incentive Plan as the same may be modified, amended, or otherwise supplemented from time to time.

(aa) "<u>Public Sale</u>" means any sale of Stock of the Company to the public (i) pursuant to an offering registered under the Securities Act or (ii) through a broker, dealer or market maker pursuant to the provisions of Rule 144 (or any similar provision then in effect) adopted under the Securities Act.

(bb) "<u>Restricted Period</u>" means, with respect to any Restricted Stock or any Restricted Stock Unit, the period of time determined by the Committee during which such Restricted Stock or Restricted Stock Unit is subject to the restrictions set forth in Section 8 or, as applicable, the period of time within which performance is measured for purposes of determining whether any Restricted Stock or Restricted Stock Unit has been earned.

(cc) "Restricted Stock" means shares of Stock issued or transferred to, or purchased by, a Participant subject to forfeiture and the other restrictions set forth in Section 8 of the Plan.

(dd) "<u>Restricted Stock Unit</u>" means a hypothetical investment equivalent to one share of Stock granted in connection with an Award made under Section 8.

(ee) "Securities Act" means the Securities Act of 1933, as amended.

(ff) "Stock" means the Common Stock or such other authorized shares of stock of the Company as the Committee may from time to time authorize for use under the Plan.

(gg) "Stockholders' Agreement" means the Stockholders' Agreement, dated as of June 1, 2010, by and among the Company and the stockholders party thereto, as it may be amended from time to time.

(hh) "Subsidiary" means, with respect to any person, any entity of which:

(i) if a corporation, a majority of the total voting power of shares of stock entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers or trustees thereof is at the time of determination owned or controlled, directly or indirectly, collectively or individually, by such person or by one or more Subsidiaries of such person; and

(ii) if a partnership, association, limited liability company or other entity, (x) the general partner or similar managing entity or (y) a majority of the partnership, membership or other similar ownership interest thereof is at the time of determination owned or controlled, directly or indirectly, collectively or individually, by such person or by one or more Subsidiaries of such person.

(ii) "Unrestricted Stock" means shares of Stock granted or sold to a Participant pursuant to Section 9 of the Plan.

#### 3. Effective Date, Duration and Stockholder Approval

The Plan is effective as of the Effective Date. No Option shall be treated as an Incentive Stock Option unless the Plan has been approved by the stockholders of the Company in a manner intended to comply with the stockholder approval requirements of Section 422(b)(1) of the Code; provided that any Option intended to be an Incentive Stock Option shall not fail to be effective solely on account of a failure to obtain such approval, but rather such Option shall be treated as a Nonqualified Stock Option unless and until such approval is obtained.

The expiration date of the Plan, on and after which no Awards may be granted hereunder, shall be the tenth anniversary of the Effective Date; <u>provided</u>, <u>however</u>, that the administration of the Plan shall continue in effect until all matters relating to the payment of Awards previously granted have been settled.

#### 4. Administration

The Committee shall administer the Plan. The majority of the members of the Committee shall constitute a quorum. The acts of a majority of the members of the Committee present at any meeting at which a quorum is present or acts approved in writing by a majority of the Committee shall be deemed the acts of the Committee.

(a) Subject to the provisions of the Plan and applicable law, the Committee shall have the power, in addition to other express powers and authorizations conferred on the Committee by the Plan, to: (i) designate Participants; (ii) determine the type or types of Awards to be granted to a Participant; (iii) determine the number of shares of Common Stock to be covered by, or with respect to which payments, rights, or other matters are to be calculated in connection with Awards; (iv) determine the terms and conditions of any Awards; (v) determine whether, to what extent, and under what circumstances Awards may be settled or exercised in cash, shares of Common Stock, other securities, other options, or other property, or canceled, forfeited, or suspended and the method or methods by which Awards may be settled, exercised, canceled, forfeited, or suspended; (vi) determine whether, to what extent, and under what circumstances cash, shares of Common Stock, other securities, other options, other property, and other amounts payable with respect to an Award shall be deferred either automatically or at the election of the holder thereof or of the Committee; (vii) interpret, administer, reconcile any inconsistency, correct any default and/or supply any omission in the Plan and any instrument or agreement relating to, or Award granted under the Plan; (viii) establish, amend, suspend, or waive such rules and regulations and appoint such agents as it shall deem appropriate for the proper administration of the Plan. Notwithstanding the foregoing or any other provision of the Plan, the Committee may delegate to one or more officers of the Company the authority to designate the individuals (other than such officer(s)) among those eligible to receive Awards pursuant to the terms of the Plan, who will receive rights or options under the Plan and the size of each such grant, to the fullest extent permitted by Section 157 of the Delaware General Corporation Law (or any successor provision thereto).

(b) Unless otherwise expressly provided in the Plan, all designations, determinations, interpretations, and other decisions under or with respect to the Plan or any Award or any documents evidencing any and all Awards shall be within the sole discretion of the Committee, may be made at any time Awards have been granted pursuant to the Plan and shall be final, conclusive, and binding upon all parties, including, without limitation, the Company, its Subsidiaries, any Participant, any holder or beneficiary of any Award, and any stockholder.

(c) No member of the Committee shall be liable for any action or determination made in good faith with respect to the Plan or any Award granted hereunder.

#### 5. Grant of Awards; Shares Subject to the Plan

The Committee may, from time to time, grant Awards, or authorize Restricted Stock or Common Stock to be sold, to one or more Eligible Persons; provided, however, that:

(a) Subject to Section 11, the aggregate number of shares of Stock in respect of which Awards may be granted under the Plan is 60,000 shares of Stock. The number of shares for granting Incentive Stock Options under the plan shall not exceed 60,000 shares of stock subject to any adjustment pursuant to Section 11 and subject to the provisions of Sections 422 or 424 of the Code or any successor provision.

(b) Shares of Stock shall be deemed to have been used in payment of Awards whether they are actually delivered or the Fair Market Value equivalent of such shares is paid in cash; <u>provided</u>, <u>however</u> that shares of Stock delivered (either directly or by means of attestation) in full or partial payment of the Option Price in accordance with Section 7(b) shall be deducted from the number of shares of Stock delivered to the Participant pursuant to such Option for purposes of determining the number of shares of Stock acquired pursuant to the Plan. In accordance with (and without limitation upon) the preceding sentence, if and to the extent any Option shall terminate, expire, be surrendered or be forfeited without receipt of any amounts therefor, the number of shares of Stock no longer subject thereto shall thereupon be released and shall thereafter be available for new grants under the Plan. If the Committee authorizes the assumption or substitution under this Plan, in connection with any merger, consolidation, acquisition of property or stock, or reorganization, of awards granted by another entity under another plan, such substitution or assumption shall not reduce the maximum number of shares of Stock available for issuance under this Plan.

(c) Stock delivered by the Company in settlement of Awards granted under the Plan may be authorized and unissued Stock or Stock held in the treasury of the Company or may be purchased on the open market or by private purchase.

### 6. Eligibility

Participation shall be limited to Eligible Persons who have received written notification from the Committee, or from a person designated by the Committee, that they have been selected to participate in the Plan and granted an Award.

#### 7. Terms of Options

The Committee is authorized to grant one or more Incentive Stock Options or Nonqualified Stock Options to any Eligible Person. Each Option so granted shall be subject to the following conditions, or to such other conditions as may be reflected in the applicable Award Agreement. In all events, the provisions in the applicable Award Agreement shall control the terms of the Option issued pursuant thereto.

(a) Option Price. The Option Price per share of Stock for each Option shall be set by the Committee at the time of grant but shall not be less than the Fair Market Value of a share of Stock at the Grant Date.

(b) <u>Manner of Exercise and Form of Payment</u>. No shares of Stock shall be delivered pursuant to any exercise of an Option until payment in full of the aggregate Option Price therefor is received by the Company. Options which have become exercisable may be exercised by delivery of written notice of exercise to the Committee accompanied by payment of the Option Price. The Option Price shall be payable in cash (by certified check or wire transfer) or, in the discretion of the Committee, either (i) if there shall be a public market for the Stock, by delivering to the Committee a copy of irrevocable instructions to a stockbroker to deliver promptly to the Company an amount of loan proceeds, or proceeds of the sale of the Stock subject to the Option, sufficient to pay the Option Price or by means of a broker-assisted cashless exercise or (ii) by such other method as the Committee may allow. Notwithstanding the foregoing, in no event shall a Participant be permitted to exercise an Option in a manner that the Committee determines would violate the Sarbanes-Oxley Act of 2002, as amended, any other applicable law or the applicable rules and regulations of the Securities and Exchange Commission or the applicable rules and regulations of any securities exchange or inter dealer quotation system on which the securities of the Company are listed or traded.

(c) <u>Award Agreement -Terms and Conditions</u>. Each Option granted under the Plan shall be evidenced by a Award Agreement, which shall contain such provisions as may be determined by the Committee and, except as may be specifically stated otherwise in such Award Agreement, which shall be subject to the following terms and conditions:

(i) Each Option or portion thereof that is exercisable shall be exercisable for the full amount or for any part thereof.

(ii) Each share of Stock purchased through the exercise of an Option shall be paid for in full at the time of the exercise. Each Option shall cease to be exercisable, as to any share of Stock, when the Participant purchases the share or when the Option expires.

(iii) Subject to Section 10(g), Options shall not be transferable by the Participant except by will or the laws of descent and distribution and shall be exercisable during the Participant's lifetime only by him, or, if permissible under applicable law, by the Participant's legal guardian or representative.

(iv) Each Option shall vest and become exercisable by the Participant in accordance with the vesting schedule established by the Committee and set forth in the Award Agreement evidencing such Option, which vesting schedule shall provide for vesting upon Participant's continued employment with the Company or one of its Subsidiaries and/or the achievement by the Company, a Subsidiary or the Participant of specified performance or return goals, provided, however, that no Option shall be immediately exercisable upon grant unless so determined by the Board. Options shall expire after the period set forth in the applicable Award Agreement, not to exceed ten years, as may be determined by the Committee (the "Option Period"). Notwithstanding any vesting dates set by the Committee, the Committee may in its sole discretion accelerate the exercisability of any Option, other than to result in an Option becoming immediately exercisable upon grant, which acceleration shall not affect the terms and conditions of any such Option other than with respect to exercisability. If an Option is exercisable in installments, such installments or portions thereof which become exercisable shall remain exercisable until the Option expires.

(v) Each Award Agreement may contain a provision that, upon demand by the Committee for such a representation, the Participant shall deliver to the Committee at the time of any exercise of an Option a written representation that the shares to be acquired upon such exercise are to be acquired for investment and not for resale or with a view to the distribution thereof, and any other representations deemed necessary by the Committee to ensure compliance with all applicable federal and state securities laws. Upon such demand, delivery of such representation prior to the delivery of any shares issued upon exercise of an Option shall be a condition precedent to the right of the Participant or such other person to purchase any shares. The Committee shall cause a legend or legends to be placed on such certificates to restrict transfer in the absence of compliance with applicable federal or state securities laws.

(vi) A Participant who makes a disqualifying disposition of any Stock acquired pursuant to the exercise of an Incentive Stock Option shall notify the Company in writing immediately after making such disqualifying disposition. A disqualifying disposition (including any sale) of such Stock before the later of (a) two years after the Grant Date of the Incentive Stock Option or (b) one year after the date the Participant acquired the Stock by exercising the Incentive Stock Option.

(d) Incentive Stock Option Grants to 10% Stockholders. Notwithstanding anything to the contrary in this Section 7, if an Incentive Stock Option is granted to a Participant who owns stock representing more than ten percent of the voting power of all classes of stock of the Company, the Option Period shall not exceed five (5) years from the Grant Date of such Option and the Option Price shall be at least 110 percent of the Fair Market Value (on the Grant Date) of the Stock subject to the Option.

(e) <u>\$100,000 Per Year Limitation for Incentive Stock Options</u>. To the extent the aggregate Fair Market Value (determined as of the Grant Date) of Stock for which Incentive Stock Options are exercisable for the first time by any Participant during any calendar year (under all plans of the Company) exceeds \$100,000, such excess Incentive Stock Options shall be treated as Nonqualified Stock Options.

(f) <u>Voluntary Surrender</u>. The Committee may permit the voluntary surrender of all or any portion of any Nonqualified Stock Option, if any, granted under the Plan to be conditioned upon the granting to the Participant of a new Option for the same or a different number of shares as the Option surrendered or require such voluntary surrender as a condition precedent to a grant of a new Option to such Participant. Such new Option shall be exercisable at an Option Price, during an Option Period, and in accordance with applicable law and any other terms or conditions specified by the Committee at the time the new Option is granted, all determined in accordance with the provisions of the Plan without regard to the Option Price, Option Period, or any other terms and conditions of the Nonqualified Stock Option surrendered.

#### 8. Restricted Stock and Restricted Stock Units

#### (a) Award or Sale of Restricted Stock.

(i) The Committee is authorized (A) to grant or sell Restricted Stock to Eligible Persons, (B) to issue or transfer Restricted Stock to Participants, and (C) to establish terms, conditions and restrictions applicable to such Restricted Stock, including the Restricted Period, as applicable, which may differ with respect to each grantee, the time or times at which Restricted Stock shall be granted or become vested, the performance conditions required for the vesting of such Restricted Stock and the number of shares to be covered by each grant.

(ii) Each Participant receiving Restricted Stock shall execute and deliver to the Company an Award Agreement or subscription agreement, as the case may be, with respect to the Restricted Stock setting forth the restrictions and other terms and conditions applicable to such Restricted Stock. If the Committee determines that the Restricted Stock shall be held by the Company or in escrow rather than delivered to the Participant pending the release of the applicable restrictions, the Committee may require the Participant to additionally execute and deliver to the Company (A) an escrow agreement satisfactory to the Committee, if applicable, and (B) the appropriate blank stock power with respect to the Restricted Stock covered by such agreement. If a Participant shall fail to execute an agreement evidencing an Award of Restricted Stock and, if applicable, an escrow agreement and stock power, the Committee shall have the discretion to declare such Award null and void. Subject to the restrictions set forth in Section 8(c), the Participant generally shall have the rights and privileges of a stockholder as to such Restricted Stock, including the right to vote such Restricted Stock. At the discretion of the Committee, cash dividends and stock dividends with respect to the Restricted Stock may be either currently paid to the Participant or withheld by the Company for the Participant's account (and be subject to the restrictions underlying the Restricted Stock), and interest may be credited on the amount of cash dividends withheld at a rate and subject to such terms as determined by the Committee during the restricted period. The cash dividends or stock dividends so withheld by the Committee and attributable to any particular share of Restricted Stock (and earnings thereon, if applicable) shall be distributed to the Participant in cash or, at the discretion of the Committee, in shares of Stock having a Fair Market Value equal to the amount of such dividends and earnings, if applicable, upon the release of restrictions on such share and, if such share is forfeited, the Participant shall have no right to such cash dividends, stock dividends or earnings. In the event that any such dividends are retained by the Company for a Participant's account, such Participant shall be no more than a general, unsecured creditor with respect to such dividends.

(iii) Upon the grant or sale of Restricted Stock, the Committee shall cause a stock certificate registered in the name of the Participant to be issued and, if it so determines, deposited together with the stock powers with an escrow agent designated by the Committee. If an escrow arrangement is used, the Committee may cause the escrow agent to issue to the Participant a receipt evidencing any stock certificate held by it, registered in the name of the Participant.

#### (b) Award or Sale of Restricted Stock Units.

(i) The Committee is authorized to grant or sell Restricted Stock Units to any Eligible Person. The terms and conditions of a grant or sale of Restricted Stock Units shall be reflected in an Award Agreement or subscription agreement, as applicable. No shares of Stock shall be issued at the time a Restricted Stock Unit is granted or sold, as applicable, and the Company will not be required to set aside a fund for the payment of any such Award. At the discretion of the Committee, each Restricted Stock Unit (representing one share of Stock) may be credited with cash, dividends, and distributions paid by the Company in respect of one share of Stock ("<u>Dividend Equivalents</u>"). At the discretion of the Committee, Dividend Equivalents may be either currently paid to the Participant or withheld by the Company for the Participant's account (subject to the vesting conditions of the underlying Restricted Stock Units), and interest may be credited on the amount of cash Dividend Equivalents withheld at a rate and subject to such terms as determined by the Committee during the Restricted Period. Dividend Equivalents credited to a Participant's account and attributable to any particular Restricted Stock Unit (and earnings thereon, if applicable) shall be distributed in cash or, at the discretion of the Committee, in shares of Stock having a Fair Market Value equal to the amount of such Dividend Equivalents and earnings, if applicable, to the Participant upon settlement of such Restricted Stock Unit and, if such Restricted Stock Unit is forfeited, the Participant shall have no right to such Dividend Equivalents.

#### (c) <u>Restrictions</u>.

(i) Restricted Stock awarded or sold to a Participant shall be subject to the following restrictions until the expiration of the Restricted Period, and to such other terms and conditions as may be set forth in the applicable Award Agreement: (A) if an escrow arrangement is used, the Participant shall not be entitled to delivery of the stock certificate; (B) the shares shall be subject to the restrictions on transferability set forth in the Award Agreement; (C) the shares shall be subject to forfeiture to the extent provided in Section 8(c)(ii) and the applicable Award Agreement; or subscription agreement; (D) satisfaction of any applicable performance goals, to the extent provided in the applicable Award Agreement; and (E) to the extent such shares are forfeited, the stock certificates shall be returned to the Company, and all rights of the Participant to such shares and as a stockholder with respect to such shares shall terminate without further obligation on the part of the Company.

(ii) Restricted Stock Units awarded or sold to any Participant shall be subject to (A) forfeiture until the expiration of the Restricted Period, and satisfaction of any applicable performance goals during such period, to the extent provided in the applicable Award Agreement or subscription agreement, as applicable, and to the extent such Restricted Stock Units are forfeited, all rights of the Participant to such Restricted Stock Units shall terminate without further obligation on the part of the Company and (B) such other terms and conditions as may be set forth in the applicable Award Agreement or subscription agreement, as applicable.

(iii) The Committee shall have the authority to remove any or all of the restrictions on the Restricted Stock or Restricted Stock Units whenever it may determine that, by reason of changes in applicable laws or other changes in circumstances arising after the date of the Restricted Stock or Restricted Stock Units are granted or sold, such action is appropriate.

(d) <u>Restricted Period</u>. With respect to Restricted Stock and Restricted Stock Units, the Restricted Period shall commence on the date of grant or sale and end at the time or times set forth on a schedule established by the Committee in the applicable Award Agreement or similar document.

(e) <u>Delivery of Restricted Stock</u>. Upon the expiration of the Restricted Period with respect to any shares of Restricted Stock, the restrictions set forth in Section 8(c) and the applicable Award Agreement shall be of no further force or effect with respect to such shares, except as set forth in the applicable Award Agreement or subscription agreement, as applicable. If an escrow arrangement is used, upon such expiration, the Company shall deliver to the Participant, or his beneficiary, without charge, the stock certificate evidencing the shares of Restricted Stock which have not then been forfeited and with respect to which the Restricted Period has expired (to the nearest full share) and any cash dividends or stock dividends credited to the Participant's account with respect to such Restricted Stock and the interest thereon, if any.

(f) <u>Settlement of Restricted Stock Units</u>. Upon the expiration of the Restricted Period with respect to any outstanding Restricted Stock Units, the Company shall, within five (5) business days, deliver to the Participant, or his beneficiary, without charge, one share of Stock for each such outstanding Restricted Stock Unit ("<u>Vested Unit</u>") and cash equal to any Dividend Equivalents credited with respect to each such Vested Unit in accordance with Section 8(b) hereof and the interest thereon, if any, or, at the discretion of the Committee, in shares of Stock having a Fair Market Value equal to such Dividend Equivalents and interest thereon, if any; <u>provided</u>, <u>however</u>, that, if explicitly provided in the applicable Award Agreement or similar document, the Committee may elect to (i) pay cash or part cash and part Stock in lieu of delivering only shares of Stock for Vested Units or (ii) delay the delivery of Stock (or cash or part Stock and part cash, as the case may be) beyond the expiration of the Restricted Period.

(g) <u>Stock Restrictions</u>. Each certificate representing Restricted Stock or Unrestricted Stock awarded or sold under the Plan shall bear a legend substantially in the form of the following until the lapse of all restrictions with respect to such Stock as well as any other information the Company deems appropriate:

THE SHARES OF STOCK REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO RESTRICTIONS ON TRANSFER SET FORTH IN THE DAVE & BUSTER'S PARENT, INC. 2010 MANAGEMENT INCENTIVE PLAN, A CERTAIN RESTRICTED STOCK AWARD AGREEMENT BETWEEN DAVE & BUSTER'S PARENT, INC. AND THE REGISTERED OWNER OF THIS CERTIFICATE (OR HIS PREDECESSOR IN INTEREST) AND THE STOCKHOLDERS' AGREEMENT TO WHICH DAVE & BUSTER'S PARENT, INC. AND THE REGISTERED OWNER OF THIS CERTIFICATE (OR HIS PREDECESSOR IN INTEREST) ARE PARTIES, WHICH AGREEMENTS ARE BINDING UPON ANY AND ALL OWNERS OF ANY INTEREST IN SAID SHARES. SAID PLAN AND AGREEMENTS ARE AVAILABLE FOR INSPECTION WITHOUT CHARGE AT THE PRINCIPAL OFFICE OF DAVE & BUSTER'S PARENT, INC. AND COPIES THEREOF WILL BE FURNISHED WITHOUT CHARGE TO ANY OWNER OF SAID SHARES UPON REQUEST.

THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS. THESE SECURITIES HAVE BEEN ACQUIRED FOR INVESTMENT AND NOT WITH A VIEW TO DISTRIBUTION OR RESALE, AND MAY NOT BE SOLD, MORTGAGED, PLEDGED, HYPOTHECATED OR OTHERWISE TRANSFERRED WITHOUT AN EFFECTIVE REGISTRATION STATEMENT FOR SUCH SECURITIES UNDER THE SECURITIES ACT OF 1933, AND ANY APPLICABLE STATE SECURITIES LAWS, UNLESS DAVE & BUSTER'S PARENT, INC. HAS RECEIVED AN OPINION OF COUNSEL, WHICH OPINION IS SATISFACTORY TO IT, TO THE EFFECT THAT SUCH REGISTRATIONS ARE NOT REQUIRED.

Stop transfer orders shall be entered with the Company's transfer agent and registrar against the transfer of legended securities.

#### 9. Unrestricted Stock Awards

(a) <u>Grant or Sale of Unrestricted Stock</u>. The Committee is authorized to grant or sell at par value or such higher purchase price determined by the Committee Unrestricted Stock to any Eligible Person, which purchase price shall be payable in cash (by certified check or wire transfer) or other form of consideration acceptable to the Committee. Unrestricted Stock may be granted or sold as described in the preceding sentence in respect of past services or other valid consideration, or in lieu of any cash compensation due to such Participant.

(b) <u>Elections to Receive Unrestricted Stock In Lieu of Compensation</u>. Subject to Section 409A of the Code, upon the request of an Eligible Person and with the consent of the Committee, an Eligible Person may, pursuant to an advance irrevocable written election delivered to the Company no later than the date specified by the Committee, receive a portion of the cash compensation otherwise due to such Eligible Person in the form of shares of Unrestricted Stock either currently or on a deferred basis.

(c) <u>Restrictions on Transfers</u>. The right to receive shares of Unrestricted Stock on a deferred basis may not be sold, assigned, transferred, pledged or otherwise encumbered, other than by will or the laws of descent and distribution.

#### 10. General

(a) <u>Privileges of Stock Ownership</u>. Except as otherwise specifically provided in the Plan, no person shall be entitled to the privileges of ownership in respect of shares of Stock which are subject to Awards hereunder until such shares have been issued to that person.

(b) Government and Other Regulations. The obligation of the Company to grant or settle Awards in Stock shall be subject to all applicable laws, rules, and regulations, and to such approvals by governmental agencies as may be required. Notwithstanding any terms or conditions of any Award to the contrary, the Company shall be under no obligation to offer to sell, to sell or to grant, and shall be prohibited from offering to sell or selling, any shares of Stock pursuant to an Award made or granted hereunder unless such shares have been properly registered for sale pursuant to the Securities Act with the Securities and Exchange Commission or unless the Company has received an opinion of counsel, satisfactory to the Company, that such shares may be offered or sold without such registration pursuant to an available exemption therefrom and the terms and conditions of such exemption have been fully complied with. The Company shall be under no obligation to register for sale under the Securities Act any of the shares of Stock to be offered or sold under the Plan are offered or sold pursuant to an exemption from registration under the Securities Act, the Company may restrict the transfer of such shares and may legend the Stock certificates representing such shares in such manner as it deems advisable to ensure the availability of any such exemption.

#### (c) Tax Withholding.

(i) A Participant may be required to pay to the Company or a Subsidiary of the Company, as applicable, and the Company or a Subsidiary of the Company, as applicable, shall have the right and is hereby authorized to withhold from any Shares or other property deliverable under any Award or from any compensation or other amounts owing to a Participant the amount (in cash, Stock or other property) of any required tax withholding and payroll taxes in respect of an Award, its exercise, or any payment or transfer under an Award or under the Plan and to take such other action as may be necessary in the opinion of the Company to satisfy all obligations for the payment of such taxes.

(ii) Without limiting the generality of clause (i) above, if so provided in an Award Agreement, a Participant may satisfy, in whole or in part, the minimum statutory withholding liability by having the Company withhold from the number of shares of Stock otherwise issuable pursuant to the exercise or settlement of the Award a number of shares with a Fair Market Value equal to the minimum statutory withholding liability.

(d) <u>Claim to Awards and Employment Rights</u>; <u>Unfunded Plan</u>. No employee of the Company or any of its Subsidiaries, or any other person, shall have any claim or right to be granted an Award under the Plan or, having been selected for the grant of an Award, to be selected for a grant of any other Award. Neither the Plan nor any action taken hereunder shall be construed as giving any Participant any right to be retained in the employ or service of the Company or a Subsidiary of the Company. Nothing contained in the Plan, and no action taken pursuant to its provisions, shall create or be construed to create a trust of any kind, or a fiduciary relationship between the Company and any Participant, beneficiary, legal representative, or any other person. To the extent that any person acquires a right to receive payments from the Company under the Plan, such right shall be no greater than the right of an unsecured general creditor of the Company. All payments to be made hereunder shall be paid from the general funds of the Company and no special or separate fund shall be established and no segregation of assets shall be made to assure payment of such amounts. The Plan is not subject to the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time.

(e) <u>No Liability of Committee Members</u>. No member of the Committee shall be personally liable by reason of any contract or other instrument executed by such member or on his behalf in his capacity as a member of the Committee nor for any mistake of judgment made in good faith, and the Company shall indemnify and hold harmless each member of the Committee and each other employee, officer or director of the Company to whom any duty or power relating to the administration or interpretation of the Plan may be allocated or delegated, against any cost or expense (including counsel fees) or liability (including any sum paid in settlement of a claim) arising out of any act or omission to act in connection with the Plan unless arising out of such person's own fraud or willful bad faith; provided, however, that approval of the Board shall be required for the payment of any amount in settlement of a claim against any such person. The foregoing right of indemnification shall not be exclusive of any other rights of indemnification to which such persons may be entitled under the Company's Certificate of Incorporation or By-Laws, as a matter of law, or otherwise, or any power that the Company may have to indemnify them or hold them harmless.

(f) <u>Governing Law</u>. The Plan shall be governed by and construed in accordance with the internal laws of the State of Delaware, without regard to conflict of laws principles.

#### (g) Nontransferability.

(i) No Award may be assigned, alienated, pledged, attached, sold or otherwise transferred or encumbered by a Participant otherwise than by will or by the laws of descent and distribution and any such purported assignment, alienation, pledge, attachment, sale, transfer or encumbrance shall be void and unenforceable against the Company; provided that the designation of a beneficiary shall not constitute an assignment, alienation, pledge, attachment, sale, transfer or encumbrance.

(ii) Notwithstanding the foregoing, to the extent permitted under applicable laws, the Committee may in the Award Agreement or similar document or at any time after the Grant Date in an amendment to an Award Agreement or similar document provide that an Award (including Options which are not intended to qualify as Incentive Stock Options) or other Stock may be transferred by a Participant without consideration, subject to such rules as the Committee may adopt consistent with any applicable Award Agreement or similar document to preserve the purposes of the Plan, to a "Permitted Transferee", as defined in the Stockholders' Agreement; provided that the Participant gives the Committee advance written notice describing the terms and conditions of the proposed transfer and the Committee notifies the Participant in writing that such a transfer would comply with the requirements of the Plan, the Company's organizational documents and any applicable Award Agreement or similar document.

(iii) The terms of any Award or other Stock transferred in accordance with the immediately preceding clause shall apply to the Permitted Transferee and any reference in the Plan or in a Award Agreement or similar document to a Participant shall be deemed to refer to the Permitted Transferee, except that (a) Permitted Transferees shall not be entitled to transfer any Awards, other than by will or the laws of descent and distribution; (b) Permitted Transferees shall not be entitled to exercise any transferred Option unless there shall be in effect a registration statement on an appropriate form covering the shares of Stock to be acquired pursuant to the exercise of such Option if the Committee determines, consistent with any applicable Award Agreement or similar document, that such a registration statement is necessary or appropriate; (c) the Committee or the Company shall not be required to provide any notice to a Permitted Transferee, whether or not such notice is or would otherwise have been required to be given to the Participant under the Plan or otherwise but shall continue to provide the Participant with all notices hereunder; (d) the consequences of the termination of the Participant's employment by the Company or a Subsidiary of the Company under the terms of the Plan and the applicable Award Agreement or similar document shall continue to be applied with respect to the Participant, including, without limitation, that an Option shall be exercisable by the Permitted Transferee only to the extent, and for the periods, specified in relation to the initial transfer, Participant or Permitted Transferee from whom such Permitted Transferee received the Award, then the relevant Participant shall take all actions necessary to effect a transfer of all Awards either back to such Participant or to another Permitted Transferee.

(h) <u>Reliance on Reports</u>. Each member of the Committee and each member of the Board shall be fully justified in relying, acting or failing to act, and shall not be liable for having so relied, acted or failed to act in good faith, upon any report made by the independent public accountant of the Company and upon any other information furnished in connection with the Plan by any person or persons other than himself.

(i) <u>Relationship to Other Benefits</u>. No Award or payment under the Plan shall be taken into account in determining any benefits under any pension, retirement, profit sharing, group insurance or other benefit plan of the Company or any of its Subsidiaries except as otherwise specifically provided in such other plan.

(j) Expenses. The expenses of administering the Plan shall be borne by the Company.

(k) Pronouns. Masculine pronouns and other words of masculine gender shall refer to both men and women.

(1) <u>Titles and Headings</u>. The titles and headings of the sections in the Plan are for convenience of reference only, and in the event of any conflict, the text of the Plan, rather than such titles or headings shall control.

(m) <u>Termination of Employment</u>. For all purposes herein, a person who transfers from employment with Dave & Buster's Management Corporation, Inc. to employment with the Company or a Subsidiary of the Company or vice versa shall not be deemed to have terminated employment with Dave & Buster's Management Corporation, Inc., the Company or a Subsidiary of the Company.

(n) <u>Severability</u>. If any provision of the Plan or any Award Agreement is or becomes or is deemed to be invalid, illegal, or unenforceable in any jurisdiction or as to any person or Award, or would disqualify the Plan or any Award under any law deemed applicable by the Committee, such provision shall be construed or deemed amended to conform to the applicable laws, or if it cannot be construed or deemed amended without, in the determination of the Committee, materially altering the intent of the Plan or the Award, such provision shall be stricken as to such jurisdiction, person or Award and the remainder of the Plan and any such Award shall remain in full force and effect.

(o) <u>No Guarantee Regarding Tax Treatment</u>. The Committee and the Company make no guarantees to any person regarding the tax treatment of Awards or payments made under the Plan, and none of the Company, any of its Subsidiaries or Affiliates, or any of their employees or representatives shall have any liability to a Participant or any person with respect thereto.

#### 11. Changes in Capital Structure

In the event of any corporate event or transaction involving the Company (including, but not limited to, a change in the Stock of the Company or the capitalization of the Company) such as a merger, consolidation, reorganization, recapitalization, separation, stock dividend, stock split, reverse stock split, split up, spin-off, combination of Stock, exchange of Stock, dividend in kind, extraordinary cash dividend, amalgamation, or other like change in capital structure (other than regular cash dividends to stockholders of the Company), or any similar corporate event or transaction, the Committee, to prevent dilution or enlargement of Participants' rights under the Plan, shall substitute or adjust, in its sole discretion, the number and kind of Stock or other property or consideration subject to outstanding Awards, the Option Price, grant price or purchase price applicable to outstanding Awards, and/or other value determinations applicable to the Plan or outstanding Awards.

Notwithstanding anything to the contrary contained herein, in the event of a Change of Control, reorganization or liquidation of the Company, or if the Company shall have entered into a written agreement to effect any of the foregoing, the Committee is authorized (but not obligated) to make adjustments in the terms and conditions of outstanding Awards, including without limitation the following (or any combination thereof): (i) continuation or assumption of such outstanding Awards under the Plan by the Company (if it is the surviving company or corporation) or by the surviving company or corporation or its parent; (ii) substitution by the surviving company or corporation or its parent; (ii) accelerated exercisability, vesting and/or lapse of restrictions under outstanding Awards immediately prior to the occurrence of such event; (iv) upon written notice, provide that any outstanding Awards must be exercised, to the extent then exercisable, during a reasonable period of time immediately prior to the scheduled consummation of the event, or such other period as determined by the Committee (in either case, contingent upon the consummation of all or any portion of outstanding Awards for fair value (as determined in the sole discretion of the Committee and which may be zero) which, in the case of Options and Stock Appreciation Rights or similar Awards, if the Committee so determines, may equal the excess, if any, of (A) the value of the consideration to be paid in the Change of Control transaction to holders of the same number of shares of Stock subject to such Awards (or Fair Market Value of the Stock subject to such Awards or portion thereof being canceled (which may be zero) and (2) to the extent determined by the Committee, any adjustments, deductions, indemnities, holdbacks and escrows generally applicable to holders of Stock in connection with the Change of Control.

#### 12. Effect of Change of Control

A Participant's Award Agreement may include specific provisions relating to the effect of a Change of Control including, without limitation, provisions that accelerate the vesting and exercisability (as applicable) of an Award in connection with a Change of Control.

#### 13. Compliance with section 409A of the Code

(a) The Company intends that any Awards be structured in compliance with, or to satisfy an exemption from, Section 409A of the Code, such that there are no adverse tax consequences, interest, or penalties under Section 409A of the Code as a result of the Awards. Notwithstanding the Company's intention, in the event any Award is subject to Section 409A of the Code, the Committee may, in its sole discretion and without a Participant's prior consent, amend the Plan and/or Awards, adopt policies and procedures, or take any other actions (including amendments, policies, procedures and actions with retroactive effect) as are necessary or appropriate to (i) exempt the Plan and/or any Award from the application of Section 409A of the Code, (ii) preserve the intended tax treatment of any such Award, or (iii) comply with the requirements of Section 409A of the Code, including without limitation any such regulations guidance, compliance programs and other interpretative authority that may be issued after the date of grant of an Award. This Plan, Awards and Award Agreements granted hereunder shall be interpreted at all times in such a manner that the terms and provisions of the Plan, Awards and Award Agreements are exempt from or comply with Section 409A.

(b) Payments to Specified Employees. Notwithstanding any contrary provision in this Plan or any Award Agreement, any payment(s) of "nonqualified deferred compensation" (within the meaning of Section 409A of the Code) that are otherwise required to be made to a "specified employee" (as defined under Section 409A of the Code) as a result of his or her "separation from service" (as defined below) shall be delayed for the first six (6) months following such "separation from service" and shall instead be paid (in a manner set forth in the Award Agreement) on the date that immediately follows the end of such six-month period (or, if earlier, within ten (10) business days following the date of death of the specified employee) (the "<u>New Payment Date</u>") or as soon as administratively practicable thereafter, but in no event later than the later of the end of the applicable taxable year of the "specified employee" or the fifteenth (15th) day of the third calendar month following the New Payment Date.

(c) Separation from Service. A termination of employment shall not be deemed to have occurred for purposes of any provision of the Plan or any Award Agreement providing for the payment of any amounts or benefits that are considered nonqualified deferred compensation under Section 409A of the Code upon or following a termination of employment, unless such termination is also a "separation from service" within the meaning of Section 409A of the Code and the payment thereof prior to a "separation from service" would violate Section 409A of the Code. For purposes of any such provision of the Plan or any Award Agreement relating to any such payments or benefits, references to a "termination," "termination of employment," "termination of Continuous Service" or like terms shall mean "separation from service."

#### 14. Nonexclusivity of the Plan

Neither the adoption of this Plan by the Board nor the submission of this Plan to the stockholders of the Company for approval shall be construed as creating any limitations on the power of the Board to adopt such other incentive arrangements as it may deem desirable, including, without limitation, the granting of stock options otherwise than under this Plan, and such arrangements may be either applicable generally or only in specific cases.

#### 15. Amendments and Termination

(a) <u>Amendment and Termination of the Plan</u>. The Board may amend, alter, suspend, discontinue, or terminate the Plan or any portion thereof at any time; <u>provided</u> that no such amendment, alteration, suspension, discontinuation or termination shall be made without stockholder approval if such approval is necessary to comply with any tax or regulatory requirement applicable to the Plan.

(b) <u>Amendment of Award Agreements</u>. The Committee may, to the extent consistent with the terms of any applicable Award Agreement or similar document, waive any conditions or rights under, amend any terms of, or alter, suspend, discontinue, cancel or terminate, any Award theretofore granted, prospectively or retroactively.

As adopted by the Board of Directors of Dave & Buster's Parent, Inc. on June 1, 2010.

#### DAVE & BUSTER'S, INC.

# COMPUTATION OF RATIO OF EARNINGS

# TO FIXED CHARGES

(dollars in thousands, except ratios)

	V E N	nirteen Veeks Inded Iay 2, 2010	1 7	hirteen Weeks Onded Jay 2, 2010	V E M	hirteen Veeks Inded Iay 3, 2009	Jai	scal Year Ended nuary 31, 2010	Jai	scal Year Ended nuary 31, 2010	I Feb	cal Year Ended Tuary 1, 2009	Fel	scal Year Ended Druary 3, 2008	Per N Fel	334-Day iod From farch 8, 2006 To pruary 4, 2007	_	37-Day Period From anuary 30, 2006 To March 7, 2006(1)	J	Fiscal Year Ended anuary 29, 2006(1)
	(Pre	decessor)	(Pr	o forma)	(Pre	decessor)	(Pr	edecessor)	(P1	o forma)	(Pre	decessor)	(Pre	edecessor)	(Pr	ed ecessor)	(1	Predecessor)	(1	Predecessor)
Income before provision for income taxes	s	6,984	\$	4,059	s	7,502	s	(251)	\$	(11,194)	\$	1,570	s	(10,102)	\$	(20,655)	s	908	\$	6,304
Add: Total fixed charges (per below)	φ	9,354	φ	12,324	φ	9,432	φ	37,645	φ	48,362	φ	40,888	φ	44,932	φ	39,199	φ	1,832		18,978
Less: Capitalized interest		110		110		169		640		640		522		151		252		70		295
Total income before provision for income taxes, plus fixed charges, less capitalized interest		16,228		16,273		16,765		36,754		36,528		41,936		34,679		18,292		2,670		24,987
Fixed charges:		10,220		10,275		10,700		50,751		50,520		11,950		51,075		10,272		2,070		21,707
Interest expense (2)		5,419		8,389		5,624		22,438		33,155		26,787		31,681		26,139		688		7,429
Bridge funding fee		_		_		_		_		_		_		_		1,313		_		
Capitalized interest		110		110		169		640		640		522		151		252		70		295
Estimate of interest included in rental expense <sup>(3)</sup>	_	3,825		3,825		3,639		14,567		14,567		13,579		13,100		11,495		1,074		11,254
Total fixed charges	\$	9,354	\$	12,324	\$	9,432	\$	37,645	\$	48,362	\$	40,888	\$	44,932	\$	39,199	\$	1,832	\$	18,978
Ratio of earnings to fixed charges (4)		1.73x		1.32x		1.78x		—		_		1.03x		—		_		1.46x		1.32x

These periods represent operations of the Predecessor prior to acquisition of the Company by the sellers.
 Interest expense includes interest in association with debt and amortization of debt issuance costs.
 Fixed charges include our estimate of interest included in rental payments (one-third of rent expense under operating leases).
 Earnings for the fiscal year ended January 31, 2010, the pro forma fiscal year ended January 31, 2010, the fiscal year ended February 3, 2008, and 334-day period ended February 4, 2007, were insufficient to cover fixed charges by \$891, \$11,834 \$10,253, and \$20,907, respectively.

#### Subsidiaries of Dave & Buster's, Inc.

D&B Leasing, Inc. D&B Marketing Company, LLC D&B Realty Holding, Inc. DANB Texas, Inc. Dave & Buster's I, L.P. Dave & Buster's Management Corporation, Inc. Dave & Buster's of California, Inc. Dave & Buster's of Colorado, Inc. Dave & Buster's of Florida, Inc. Dave & Buster's of Georgia, Inc. Dave & Buster's of Hawaii, Inc. Dave & Buster's of Indiana, Inc. Dave & Buster's of Illinois, Inc. Dave & Buster's of Kansas, Inc. Dave & Buster's of Maryland, Inc. Dave & Buster's of Massachusetts, Inc. Dave & Buster's of Nebraska, Inc. Dave & Buster's of New York, Inc. Dave & Buster's of Oklahoma, Inc. Dave & Buster's of Oregon, Inc. Dave & Buster's of Pennsylvania, Inc. Dave & Buster's of Pittsburgh, Inc. Dave & Buster's of Virginia, Inc. Dave & Buster's of Washington, Inc. Dave & Buster's of Wisconsin, Inc. Sugarloaf Gwinnett Entertainment Company, L.P. Tango Acquisition, Inc. **Tango License Corporation** Tango of Arizona, Inc. Tango of Arundel, Inc. Tango of Farmingdale, Inc. Tango of Franklin, Inc. Tango of Houston, Inc. Tango of North Carolina, Inc. Tango of Sugarloaf, Inc. Tango of Tennessee, Inc. Tango of Westbury, Inc.

Texas Virginia Missouri Texas Texas Delaware California Colorado Florida Georgia Hawaii Indiana Illinois Kansas Maryland Massachusetts Nebraska New York Oklahoma Oregon Pennsylvania Pennsylvania Virginia Washington Wisconsin Delaware Delaware

## **Consent of Independent Registered Public Accounting Firm**

We consent to the reference to our firm under the caption "Experts" and to the use of our report dated April 15, 2010, in the Registration Statement (Form S-4) and related Prospectus of Dave & Buster's, Inc. for the registration of \$200,000,000 of 11% Senior Notes due 2018.

Dallas, Texas August 10, 2010 /s/ Ernst & Young LLP

# **SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

# FORM T-1

STATEMENT OF ELIGIBILITY UNDER THE TRUST INDENTURE ACT OF 1939 OF A CORPORATION DESIGNATED TO ACT AS TRUSTEE

□ CHECK IF AN APPLICATION TO DETERMINE ELIGIBILITY OF A TRUSTEE PURSUANT TO SECTION 305(b) (2)

# WELLS FARGO BANK, NATIONAL ASSOCIATION

(Exact name of trustee as specified in its charter)

A National Banking Association (Jurisdiction of incorporation or organization if not a U.S. national bank)

101 North Phillips Avenue Sioux Falls, South Dakota (Address of principal executive offices)

> Wells Fargo & Company Law Department, Trust Section MAC N9305-175 Sixth Street and Marquette Avenue, 17<sup>th</sup> Floor Minneapolis, Minnesota 55479 (612) 667-4608 (Name, address and telephone number of agent for service)

Dave & Buster's, Inc.\* (Exact name of obligor as specified in its charter)

> 11% Senior Notes due 2018 (Title of the indenture securities)

Missouri (State or other jurisdiction of incorporation or organization)

2481 Mañana Drive Dallas, Texas (Address of principal executive offices)

75220 (Zip code)

43-1532756

(I.R.S. Employer Identification No.)

94-1347393 (I.R.S. Employer Identification No.)

> 57104 (Zip code)

The following subsidiaries of Dave & Buster's, Inc. are guarantors of \$200,000,000 aggregate principal amount of 11% Senior Notes due 2018 and are additional registrants:

#### TABLE OF ADDITIONAL REGISTRANTS\*

		Primary Standard			
	State or other jurisdiction	Industrial	I.R.S. Employer		
	of incorporation or	Classifications	Identification		
Name	organization	Code Number	Number		
D&B Leasing, Inc.	Texas	5812	75-2955199		
D&B Marketing Company, LLC		5812			
D&B Realty Holding, Inc.	Missouri	5812	43-1532957		
DANB Texas, Inc.	Texas	5812	75-2617801		
Dave & Buster's I, L.P.	Texas	5812	75-2680048		
Dave & Buster's Management Corporation, Inc.	Delaware	5812	20-1574573		
Dave & Buster's of California, Inc.	California	5812	33-0733010		
Dave & Buster's of Colorado, Inc.	Colorado	5812	84-1420593		
Dave & Buster's of Florida, Inc.	Florida	5812	58-2223494		
Dave & Buster's of Georgia, Inc.	Georgia	5812	58-1979705		
Dave & Buster's of Hawaii, Inc.	Hawaii	5812	75-2915058		
Dave & Buster's of Indiana, Inc.					
Dave & Buster's of Illinois, Inc.	Illinois	5812	43-1693115		
Dave & Buster's of Kansas, Inc.	Kansas	5812	20-2089073		
Dave & Buster's of Maryland, Inc.	Maryland	5812	52-1962723		
Dave & Buster's of Nebraska, Inc.	Nebraska	5812	20-2089036		
Dave & Buster's of New York, Inc.	New York	5812	13-3959054		
Dave & Buster's of Oklahoma, Inc.	Oklahoma	5812			
Dave & Buster's of Oregon, Inc.	Oregon	5812			
Dave & Buster's of Pennsylvania, Inc.	Pennsylvania	5812	36-3919848		
Dave & Buster's of Pittsburgh, Inc.	Pennsylvania	5812	74-2932642		
Dave & Buster's of Virginia, Inc.	Virginia	5812			
Dave & Buster's of Washington, Inc.	Washington	5812			
Dave & Buster's of Wisconsin, Inc.	Wisconsin	5812			
Sugarloaf Gwinnett Entertainment Company, L.P.	Delaware	5812			
Tango Acquisition, Inc.	Delaware	5812	20-1220294		
Tango License Corporation	Delaware	5812	20-1657537		
Tango of Arizona, Inc.	Delaware	5812	20-1209982		
Tango of Arundel, Inc.	Delaware	5812	20-1574690		
Tango of Farmingdale, Inc.	Delaware	5812	20-1574594		
Tango of Franklin, Inc.	Delaware	5812	20-1574645		
Tango of Houston, Inc.	Delaware	5812	20-1574628		
Tango of Minnesota, Inc.	Delaware	5812	20-1210011		
Tango of North Carolina, Inc.	Delaware	5812	20-1209953		
Tango of Sugarloaf, Inc.	Delaware	5812	20-1657553		
Tango of Tennessee, Inc.	Delaware	5812	20-1209923		
Tango of Westbury, Inc.	Delaware	5812	20-1574610		
		2012	20 10 / 1010		

\* The address, including zip code, and telephone number, including area code, of each of the above registrants' principal executive offices are the same as those of Dave & Buster's, Inc.

Item 1. General Information. Furnish the following information as to the trustee:

(a) Name and address of each examining or supervising authority to which it is subject.

Comptroller of the Currency Treasury Department Washington, D.C. Federal Deposit Insurance Corporation Washington, D.C.

Federal Reserve Bank of San Francisco San Francisco, California 94120

(b) Whether it is authorized to exercise corporate trust powers.

The trustee is authorized to exercise corporate trust powers.

Item 2. Affiliations with Obligor. If the obligor is an affiliate of the trustee, describe each such affiliation.

None with respect to the trustee.

No responses are included for Items 3-14 of this Form T-1 because the obligor is not in default as provided under Item 13.

Item 15. Foreign Trustee. Not applicable.

Item 16. List of Exhibits. List below all exhibits filed as a part of this Statement of Eligibility.

- Exhibit 1. A copy of the Articles of Association of the trustee now in effect.\*
- Exhibit 2. A copy of the Comptroller of the Currency Certificate of Corporate Existence and Fiduciary Powers for Wells Fargo Bank, National Association, dated February 4, 2004.\*\*
- Exhibit 3. See Exhibit 2
- Exhibit 4. Copy of By-laws of the trustee as now in effect.\*\*\*
- Exhibit 5. Not applicable.
- Exhibit 6. The consent of the trustee required by Section 321(b) of the Act.
- Exhibit 7. A copy of the latest report of condition of the trustee published pursuant to law or the requirements of its supervising or examining authority.
- Exhibit 8. Not applicable.
- Exhibit 9. Not applicable.



- \* Incorporated by reference to the exhibit of the same number to the trustee's Form T-1 filed as exhibit 25 to the Form S-4 dated December 30, 2005 of file number 333-130784-06.
- \*\* Incorporated by reference to the exhibit of the same number to the trustee's Form T-1 filed as exhibit 25 to the Form T-3 dated March 3, 2004 of file number 022-28721.
- \*\*\* Incorporated by reference to the exhibit of the same number to the trustee's Form T-1 filed as exhibit 25 to the Form S-4 dated May 26, 2005 of file number 333-125274.

# SIGNATURE

Pursuant to the requirements of the Trust Indenture Act of 1939, as amended, the trustee, Wells Fargo Bank, National Association, a national banking association organized and existing under the laws of the United States of America, has duly caused this statement of eligibility to be signed on its behalf by the undersigned, thereunto duly authorized, all in the City of New York and State of New York on the 28th day of July, 2010.

# WELLS FARGO BANK, NATIONAL ASSOCIATION

/S/ Raymond Delli Colli

Raymond Delli Colli Vice President

# July 28, 2010

#### Securities and Exchange Commission Washington, D.C. 20549

#### Gentlemen:

In accordance with Section 321(b) of the Trust Indenture Act of 1939, as amended, the undersigned hereby consents that reports of examination of the undersigned made by Federal, State, Territorial, or District authorities authorized to make such examination may be furnished by such authorities to the Securities and Exchange Commission upon its request therefor.

# Very truly yours,

WELLS FARGO BANK, NATIONAL ASSOCIATION

/S/ Raymond Delli Colli

Raymond Delli Colli Vice President

4

Consolidated Report of Condition of

Wells Fargo Bank National Association of 101 North Phillips Avenue, Sioux Falls, SD 57104 And Foreign and Domestic Subsidiaries, at the close of business March 31, 2010, filed in accordance with 12 U.S.C. §161 for National Banks.

ASSETS Cash and balances due from depository institutions: Cash and balances due from depository institutions: Noninterest-bearing balances and currency and coin Interest-bearing balances Securities Held-to-maturity securities			Dollar Amounts In Millions
Noninterest-bearing balances and currency and coin\$ 16,410Interest-bearing balances44,873Securities:0Held-to-maturity securities0Available-for-sale securities140,265Federal funds sold and securities purchased under agreements to resell:1.001Securities purchased under agreements to resell1.001Securities purchased under agreements to resell1.001Securities purchased under agreements to resell3.199Loans and lease financing receivables:25,900Loans and leases, net of uneamed income706,137LESS: Allowance for loan and lease loases21,371LESS: Allowance for loan and lease loases29,567Premises and fixed assets (including capitalized leases)8,244Other real estate owned3,758Investments in unconsolidated subsidiaries and associated companies5366Direct and indirect investments in real estate ventures121Intangible assets28,750Order assets51,065,890Ital State\$1,065,890Ital State\$1,065,890Ital State\$1,065,890Ital State sering150,608In foreign offices, Edge and Agreement subsidiaries, and IBFs\$53,239Noninterest-bearing14,937Interest-bearing150,608Interest-bearing15,937Interest-bearing15,937Interest-bearing15,937Interest-bearing15,937Interest-bearing15,937Interest-bearing15,937 <th>ASSETS</th> <th></th> <th></th>	ASSETS		
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Securities:       0         Held-to-maturity securities       0         Available-for-sale securities       140,265         Federal funds sold and securities purchased under agreements to resell:       1,991         Securities purchased under agreements to resell       3,199         Loans and lease financing receivables:       25,990         Loans and leases, net of uncamed income       706,137         LESS: Allowance for loan and lease losses       21,371         Loans and leases, net of uncamed income and allowance       684,766         Trading Assets       29,567         Premises and fixed assets (including capitalized leases)       8,244         Other real estate owned       3,758         Investments in unconsolidated subsidiaries and associated companies       536         Direct and indirect investments in real estate ventures       21,231         Intagible assets       21,238         Other relassets       21,238         Other assets       51,065,890         LIABILITIES       51,0658         Deposits:       1         In domestic offices       \$ 71,82,42         Noninterest-bearing       1,397         Interest-bearing       1,397         Interest-bearing       1,397         Interest-bear	Noninterest-bearing balances and currency and coin		\$ 16,410
Held-to-maturity securities0Available-for-sale securities purchased under agreements to resell:140,265Federal funds sold in domestic offices1.091Securities purchased under agreements to resell3,199Loans and lease financing receivables:25,90Loans and leases need on and lease losses21,371LESS: Allowance for loan and lease losses21,371Loans and leases, net of uneamed income706,137LSS: Allowance for loan and lease losses21,371Loans and leases, net of uneamed income and allowance684,766Trading Assets29,567Premises and fixed assets (including capitalized leases)8,244Other real estate owned3,758Investments in unconsolidated subsidiaries and associated companies536Direct and indirect investments in real estate ventures1101Intangible assets21,238Other rate assets21,237Total assets21,238Dother intangible assets57,082Total assets51,065,890LIABILITIES51,065,890LIABILITIES57,053Depositi:1In domestic offices, Edge and Agreement subsidiaries, and IBFS567,053In foreign offices, Edge and Agreement subsidiaries, and IBFS3,932Federal funds purchased and onestic offices5,562Federal funds purchased and onestic offices5,562	Interest-bearing balances		44,873
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Total assets       \$ 1,065,890         LIABILITIES       Deposits:         In domestic offices       \$ 718,242         Noninterest-bearing       150,608         Interest-bearing       567,634         In foreign offices, Edge and Agreement subsidiaries, and IBFs       85,329         Noninterest-bearing       1,397         Interest-bearing       1,397         Statestower       564         Federal funds purchased and securities sold under agreements to repurchase:       5,562	Other intangible assets		28,750
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LIABILITIES         Deposits:         In domestic offices       \$ 718,242         Noninterest-bearing       150,608         Interest-bearing       567,634         In foreign offices, Edge and Agreement subsidiaries, and IBFs       85,329         Noninterest-bearing       1,397         Interest-bearing       83,932         Federal funds purchased and securities sold under agreements to repurchase:       5,562	Total assets		\$ 1,065,890
Deposits: <ul> <li>In domestic offices</li> <li>Noninterest-bearing</li> <li>Interest-bearing</li> <li>Interest-bearing</li> <li>In foreign offices, Edge and Agreement subsidiaries, and IBFs</li> <li>Noninterest-bearing</li> <li>Noninterest-bearing</li> <li>Interest-bearing</li> <li>Int</li></ul>			\$ 1,000,000
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Federal funds purchased and securities sold under agreements to repurchase:         Federal funds purchased in domestic offices         5,562	e	,	
Federal funds purchased in domestic offices 5,562		85,752	
, I			5 562
	Securities sold under agreements to repurchase		14,003

	Dollar Aı In Mil	
Trading liabilities	1	0,396
Other borrowed money		
(includes mortgage indebtedness and obligations under capitalized leases)	5.	5,783
Subordinated notes and debentures	2	1,583
Other liabilities	2	8,269
Total liabilities	\$ 93	9,167
EQUITY CAPITAL		
Perpetual preferred stock and related surplus		0
Common stock		520
Surplus (exclude all surplus related to preferred stock)	9	8,967
Retained earnings	2	1,137
Accumulated other comprehensive income		4,440
Other equity capital components		0
Total bank equity capital	12	5,064
Noncontrolling (minority) interests in consolidated subsidiaries		1,659
Total equity capital	12	6,723
Total liabilities, and equity capital	\$ 1,06	5,890

I, Howard I. Atkins, EVP & CFO of the above-named bank do hereby declare that this Report of Condition has been prepared in conformance with the instructions issued by the appropriate Federal regulatory authority and is true to the best of my knowledge and belief.

Howard I. Atkins EVP & CFO

We, the undersigned directors, attest to the correctness of this Report of Condition and declare that it has been examined by us and to the best of our knowledge and belief has been prepared in conformance with the instructions issued by the appropriate Federal regulatory authority and is true and correct.

John Stumpf Carrie Tolstedt Michael Loughlin Directors

#### DAVE & BUSTER'S, INC.

Letter of Transmittal for Tender of any and all Outstanding \$200,000,000 11% Senior Notes due 2018 In Exchange for \$200,000,000 11% Senior Notes due 2018

Which have been registered under the Securities Act of 1933, as amended (the "Securities Act"), as described in the Prospectus dated [\_\_], 2010 (as the same may be amended or supplemented from time to time, the "Prospectus").

THE EXCHANGE OFFER AND WITHDRAWAL RIGHTS WILL EXPIRE AT 5:00 P.M., NEW YORK CITY TIME, ON [\_], 2010, UNLESS THE EXCHANGE OFFER (AS DEFINED BELOW) IS EXTENDED BY DAVE & BUSTER'S, INC. (THE "COMPANY") IN ITS SOLE DISCRETION (THE "EXPIRATION DATE"). TENDERS MAY BE WITHDRAWN PRIOR TO 5:00 P.M., NEW YORK CITY TIME, ON THE EXPIRATION DATE.

The Exchange Agent For The Exchange Offer Is:

Wells Fargo Bank, N.A.

By Registered or Certified Mail:

WELLS FARGO BANK, N.A. Corporate Trust Operations MAC N9303-121 PO Box 1517 Minneapolis, MN 55480 By Regular Mail or Overnight Courier: WELLS FARGO BANK, N.A. Corporate Trust Operations MAC N9303-121 Sixth & Marquette Avenue Minneapolis, MN 55479

By Facsimile (for Eligible Institutions only): (612) 667-6282 In Person by Hand Only:

WELLS FARGO BANK, N.A. 12th Floor-Northstar East Building Corporate Trust Operations 608 Second Avenue South Minneapolis, MN 55479

For Information of Confirmation by Telephone: (800) 344-5128

DELIVERY OF THIS LETTER OF TRANSMITTAL TO AN ADDRESS OTHER THAN AS SET FORTH ABOVE OR TRANSMISSION OF THIS LETTER OF TRANSMITTAL VIA FACSIMILE TO A NUMBER OTHER THAN AS SET FORTH ABOVE DOES NOT CONSTITUTE A VALID DELIVERY.

# THE INSTRUCTIONS CONTAINED HEREIN SHOULD BE READ CAREFULLY BEFORE THIS LETTER OF TRANSMITTAL IS COMPLETED.

Capitalized terms used but not defined herein shall have the same meaning given them in the Prospectus (as defined below).

This Letter of Transmittal is to be completed by: (i) the registered holders (which term, for purposes of this document, shall include any participant in The Depository Trust Company ("DTC")) (the "Registered Holder") of 11% Senior Notes issued June 1, 2010 by the Company (the "Restricted Notes"); or (ii) any persons authorized to become the Registered Holders by endorsements or appropriate bond powers, and documents transmitted herewith (including such opinions of counsel, certifications and other information as may be required by the Company for the Restricted Notes to comply with the restrictions on transfer applicable to the Restricted Notes), of the Restricted Notes (such persons together with the Registered Holders are collectively referred to herein as the "Tendering Holders"), either if (a) certificates for the Restricted Notes (the "Certificates") are to be forwarded herewith or (b) tenders are to be made pursuant to the procedures for tender by book-entry transfer set forth in the section entitled "The Exchange Offer" under the heading "Procedures for Tendering" in the Prospectus and an Agent's Message is not transmitted to and received by the Exchange Agent. See Instruction 5.

The Certificates or Book-Entry Confirmation (as defined below) of a book-entry transfer of the Restricted Notes into the Exchange Agent's account at DTC, as well as this Letter of Transmittal (or facsimile thereof), properly completed and duly executed, with any required signature guarantees, and any other documents required by this Letter of Transmittal, must be received by the Exchange Agent at its address set forth herein on or prior to the Expiration Date. Tenders by book-entry transfer may also be made by delivering an Agent's Message in lieu of this Letter of Transmittal. The term "Book-Entry Confirmation" means a timely confirmation of a book-entry transfer of the Restricted Notes into the Exchange Agent's account at DTC. The term "Agent's Message" means a message, transmitted by DTC to and received by the Exchange Agent and forming part of a Book-Entry Confirmation, which states that DTC has received an express acknowledgment from the tendering participant, which acknowledgment states that such participant has received and agrees to be bound by this Letter of Transmittal and that the Company may enforce this Letter of Transmittal against such participant.

Tendering Holders of the Restricted Notes whose Certificates are not immediately available, or who cannot deliver their Certificates and all other required documents to the Exchange Agent on or prior to the Expiration Date, or who cannot complete the procedures for book-entry transfer on a timely basis, must tender their Restricted Notes according to the guaranteed delivery procedures set forth in the section entitled "The Exchange Offer" under the heading "Procedures for Tendering Restricted Notes-Guaranteed Delivery" in the Prospectus.

#### Delivery of documents to the book-entry transfer facility does not constitute delivery to the Exchange Agent.

# NOTE: SIGNATURES MUST BE PROVIDED BELOW PLEASE READ THE ACCOMPANYING INSTRUCTIONS CAREFULLY.

#### All Tendering Holders Must Complete This Table:

# DESCRIPTION OF TENDERED RESTRICTED NOTES

If blank, please fill in name(s) and addresses of Registered Holder(s) of Tendered **Restricted Notes\*** 

Please fill in name(s) and addresses of Tendering Holder(s) of Tendered Restricted Notes\*\*

Tendered Restricted Notes (attach additional list if necessary)

Aggregate Principal Principal Amount of Restricted Notes Amount of Certificate Restricted Tendered Number(s)\*\*\* (if less than all)\*\*\*\* Notes

**Total Amount Tendered** 

- \* The name(s) and address(es) of the Registered Holder(s) of the Tendered Restricted Notes should be printed above, if they are not already set forth above, as they appear on the Certificates.
- \*\* If the undersigned Tendering Holder(s) is not the Registered Holder(s) of the Tendered Restricted Notes, the name(s) and address(es) of the undersigned Tendering Holder(s) should be printed above.
- \*\*\* The Certificate number(s) of the Tendered Restricted Notes should be indicated in the boxes above. These boxes do not need to be completed by bookentry holders.
- \*\*\*\* The Tendered Restricted Notes may be tendered in whole or in part in principal amounts of US\$2,000 or an integral multiple of US\$1,000 in excess thereof, provided that if any Tendered Restricted Notes are tendered for exchange in part, the untendered amount thereof must be in a principal amount of US\$2,000 or an integral multiple of US\$1,000 in excess thereof. All Tendered Restricted Notes held shall be deemed tendered unless a lesser number is specified in this column. See Instruction 4.

# (BOXES BELOW TO BE CHECKED BY ELIGIBLE INSTITUTIONS ONLY)

# □ CHECK HERE IF THE TENDERED RESTRICTED NOTES ARE BEING DELIVERED BY BOOK-ENTRY TRANSFER MADE TO THE ACCOUNT MAINTAINED BY THE EXCHANGE AGENT WITH DTC AND COMPLETE THE FOLLOWING:

Name of Tendering Institution:

DTC Account Number:

Transaction Code Number:

### □ CHECK HERE AND ENCLOSE A PHOTOCOPY OF THE NOTICE OF GUARANTEED DELIVERY IF THE TENDERED RESTRICTED NOTES ARE BEING DELIVERED PURSUANT TO A NOTICE OF GUARANTEED DELIVERY PREVIOUSLY SENT TO THE EXCHANGE AGENT AND COMPLETE THE FOLLOWING:

N	ame	of	Tend	lering	Hol	der	( <b>S</b>	):_	
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Window Ticket Number (if any):

Date of Execution of Notice of Guaranteed Delivery:

Name of Institution that Guaranteed Delivery:

If Guaranteed Delivery is to be made by Book-Entry Transfer:

Name of Tendering Institution:

DTC Account Number:

Transaction Code Number: \_\_\_\_\_

□ CHECK HERE IF THE TENDERED RESTRICTED NOTES ARE BEING DELIVERED BY BOOK-ENTRY TRANSFER AND THE EXCHANGE NOTES (AS DEFINED BELOW), OR NONEXCHANGED OR NONTENDERED RESTRICTED NOTES ARE TO BE RETURNED BY CREDITING THE DTC ACCOUNT NUMBER SET FORTH ABOVE.

# □ CHECK HERE IF THE RESTRICTED NOTES WERE ACQUIRED BY BROKER-DEALERS FOR THEIR OWN ACCOUNT AS A RESULT OF MARKET-MAKING OR OTHER TRADING ACTIVITIES (A "PARTICIPATING BROKER-DEALER") AND WHO WISH TO RECEIVE 10 ADDITIONAL COPIES OF THE PROSPECTUS AND 10 COPIES OF ANY AMENDMENTS OR SUPPLEMENTS THERETO.

\_\_\_\_\_

Name:\_\_\_

Address:\_\_\_\_\_

#### Ladies and Gentlemen:

The undersigned Tendering Holder(s) hereby tenders to the Company, the Restricted Notes identified in the table above (the "Tendered Restricted Notes") in exchange for the like principal amount of notes to be issued in exchange for the Restricted Notes which have been registered under the Securities Act (the "Exchange Notes"), upon the terms and subject to the conditions set forth in the Prospectus, receipt of which is hereby acknowledged, and in this Letter of Transmittal (which, together with the Prospectus, constitutes the "Exchange Offer").

Subject to and effective upon the acceptance for exchange of all or any portion of the Tendered Restricted Notes in accordance with the terms and conditions of the Exchange Offer (including, if the Exchange Offer is extended or amended, the terms and conditions of any such extension or amendment), the undersigned Tendering Holder(s) hereby sells, assigns and transfers to or upon the order of the Company all right, title and interest in and to the Tendered Restricted Notes. The undersigned Tendering Holder(s) hereby irrevocably constitutes and appoints the Exchange Agent as its agent and attorney-in-fact (with full knowledge that the Exchange Agent is also acting as agent of the Company in connection with the Exchange Offer) with respect to the Tendered Restricted Notes, with full power of substitution (such power of attorney being deemed to be an irrevocable power coupled with an interest) subject only to the right of withdrawal described in the Prospectus, to (i) receive the Exchange Notes to be issued in exchange for the Tendered Restricted Notes of transfer and authenticity to, or upon the order of, the Company, (ii) present Certificates for transfer, and to transfer the Tendered Restricted Notes of the Company, and (iii) receive for the account of the Company all benefits and otherwise exercise all rights of beneficial ownership of such Tendered Restricted Notes, all in accordance with the terms and conditions of the Exchange Offer.

THE UNDERSIGNED TENDERING HOLDER(S) HEREBY REPRESENTS AND WARRANTS THAT THE UNDERSIGNED TENDERING HOLDER(S) HAS FULL POWER AND AUTHORITY TO TENDER, EXCHANGE, SELL, ASSIGN AND TRANSFER THE TENDERED RESTRICTED NOTES AND THAT, WHEN THE SAME ARE ACCEPTED FOR EXCHANGE, THE COMPANY WILL ACQUIRE GOOD, MARKETABLE AND UNENCUMBERED TITLE THERETO, FREE AND CLEAR OF ALL LIENS, RESTRICTIONS, CHARGES AND ENCUMBRANCES, AND THAT THE TENDERED RESTRICTED NOTES ARE NOT SUBJECT TO ANY ADVERSE CLAIMS OR PROXIES. THE UNDERSIGNED TENDERING HOLDER(S) WILL, UPON REQUEST, EXECUTE AND DELIVER ANY ADDITIONAL DOCUMENTS DEEMED BY THE COMPANY OR THE EXCHANGE AGENT TO BE NECESSARY OR DESIRABLE TO COMPLETE THE EXCHANGE, ASSIGNMENT AND TRANSFER OF THE TENDERED RESTRICTED NOTES, AND THE UNDERSIGNED TENDERING HOLDER(S) WILL COMPLY WITH ITS OBLIGATIONS UNDER THE REGISTRATION RIGHTS AGREEMENT. THE UNDERSIGNED TENDERING HOLDER(S) HAS READ AND AGREES TO ALL OF THE TERMS OF THE EXCHANGE OFFER.

The undersigned Tendering Holder(s) understands that the tender of the Tendered Restricted Notes pursuant to any one of the procedures described in the section entitled "The Exchange Offer" in the Prospectus and in the instructions attached hereto will, upon the Company's acceptance for exchange of such Tendered Restricted Notes, constitute a binding agreement between the undersigned Tendering Holder(s) and the Company upon the terms and subject to the conditions of the Exchange Offer. The undersigned Tendering Holder(s) recognizes that, under certain circumstances set forth in the Prospectus, the Company may not be required to accept for exchange any Tendered Restricted Notes.

The undersigned Tendering Holder(s) understands that if any Tendered Restricted Notes are not exchanged pursuant to the Exchange Offer for any reason, or if the Certificates delivered to the Company represent more Restricted Notes than the Tendered Restricted Notes, then (i) the Certificates for such nonexchanged or nontendered Restricted Notes will be returned, (ii) substitute Certificates for such nonexchanged or nontendered Restricted Notes will be returned, (ii) substitute Certificates for such nonexchanged or nontendered Restricted Notes will be issued, or (iii) in the case of Tendered Restricted Notes tendered by book-entry transfer, such Tendered Restricted Notes will be credited to the account indicated above maintained at DTC, as applicable, without expense to the undersigned Tendering Holder(s), promptly following the expiration or termination of the Exchange Offer.

Unless otherwise indicated in the box entitled "Special Issuance Instructions" below, the undersigned Tendering Holder(s) hereby directs that the Exchange Notes, or nonexchanged or nontendered Restricted Notes, be issued in the name(s) of the undersigned Tendering Holder(s) or, in the case of a book-entry transfer of Restricted Notes, that such Exchange Notes, or nonexchanged or nontendered Restricted Notes, be credited to the account indicated above maintained at DTC. Similarly, unless otherwise indicated under "Special Delivery Instructions," please deliver the Exchange Notes, or nonexchanged or nontendered Restricted Notes, to the undersigned Tendering Holder(s) at the address shown below the undersigned Tendering Holder(s)'s signature. See Instruction 6.

BY TENDERING THE TENDERED RESTRICTED NOTES AND EXECUTING THIS LETTER OF TRANSMITTAL, OR EFFECTING DELIVERY OF AN AGENT'S MESSAGE IN LIEU THEREOF, THE UNDERSIGNED TENDERING HOLDER(S) HEREBY REPRESENTS AND AGREES THAT (i) THE UNDERSIGNED TENDERING HOLDER(S) IS NOT AN "AFFILIATE" OF THE COMPANY, (ii) ANY EXCHANGE NOTES TO BE RECEIVED BY THE UNDERSIGNED TENDERING HOLDER(S) ARE BEING ACQUIRED IN THE ORDINARY COURSE OF ITS BUSINESS, (iii) THE UNDERSIGNED TENDERING HOLDER(S) HAS NO ARRANGEMENT OR UNDERSTANDING WITH ANY PERSON TO PARTICIPATE IN A DISTRIBUTION (WITHIN THE MEANING OF THE SECURITIES ACT) OF THE EXCHANGE NOTES TO BE RECEIVED IN THE EXCHANGE OFFER, (iv) IF THE UNDERSIGNED TENDERING HOLDER(S) IS NOT A BROKER-DEALER, THE UNDERSIGNED TENDERING HOLDER(S) IS NOT ENGAGED IN, AND DOES NOT INTEND TO ENGAGE IN, A DISTRIBUTION (WITHIN THE MEANING OF THE SECURITIES ACT) OF ANY EXCHANGE NOTES TO BE RECEIVED BY THE UNDERSIGNED TENDERING HOLDER(S), AND (v) IF THE UNDERSIGNED TENDERING HOLDER(S) IS A BROKER-DEALER, CONSISTENT WITH CERTAIN INTERPRETIVE LETTERS ISSUED BY THE STAFF OF THE DIVISION OF CORPORATION FINANCE OF THE SECURITIES AND EXCHANGE COMMISSION TO THIRD PARTIES, (A) THE TENDERED RESTRICTED NOTES HELD BY THE BROKER-DEALER ARE HELD ONLY AS A NOMINEE, OR (B) IF SUCH BROKER-DEALER IS A PARTICIPATING BROKER-DEALER, IT WILL DELIVER THE PROSPECTUS MEETING THE REQUIREMENTS OF THE SECURITIES ACT IN CONNECTION WITH ANY RESALE OF ANY EXCHANGE NOTES TO BE RECEIVED BY THE UNDERSIGNED TENDERING HOLDER(S) (PROVIDED THAT, BY SO ACKNOWLEDGING AND BY DELIVERING A PROSPECTUS, SUCH BROKER-DEALER WILL NOT BE DEEMED TO ADMIT THAT IT IS AN "UNDERWRITER" WITHIN THE MEANING OF THE SECURITIES ACT), AS APPLICABLE.

THE COMPANY HAS AGREED THAT, SUBJECT TO THE PROVISIONS OF THE REGISTRATION RIGHTS AGREEMENT, IF THE UNDERSIGNED TENDERING HOLDER(S) IS A PARTICIPATING BROKER-DEALER, THE PROSPECTUS MAY BE USED BY SUCH TENDERING HOLDER(S) IN CONNECTION WITH ANY RESALE OF ANY EXCHANGE NOTES TO BE RECEIVED BY SUCH UNDERSIGNED TENDERING HOLDER(S) IN EXCHANGE FOR THE TENDERED RESTRICTED NOTES, WHERE SUCH TENDERED RESTRICTED NOTES WERE ACQUIRED BY SUCH UNDERSIGNED TENDERING HOLDER(S) FOR ITS OWN ACCOUNT AS A RESULT OF MARKET-MAKING ACTIVITIES OR OTHER TRADING ACTIVITIES, FOR A PERIOD ENDING 90 DAYS AFTER THE EXPIRATION DATE (SUBJECT TO EXTENSION UNDER CERTAIN LIMITED CIRCUMSTANCES DESCRIBED IN THE PROSPECTUS) OR, IF EARLIER, WHEN ALL SUCH EXCHANGE NOTES HAVE BEEN DISPOSED OF BY SUCH UNDERSIGNED TENDERING HOLDER(S). IN THAT REGARD, SUCH UNDERSIGNED TENDERING HOLDER(S) BY TENDERING THE TENDERED RESTRICTED NOTES AND EXECUTING THIS LETTER OF TRANSMITTAL. OR EFFECTING DELIVERY OF AN AGENT'S MESSAGE IN LIEU THEREOF, AGREES THAT, UPON RECEIPT OF NOTICE FROM THE COMPANY OF THE OCCURRENCE OF ANY EVENT OR THE DISCOVERY OF ANY FACT THAT MAKES ANY STATEMENT CONTAINED OR INCORPORATED BY REFERENCE IN THE PROSPECTUS UNTRUE IN ANY MATERIAL RESPECT OR THAT CAUSES THE PROSPECTUS TO OMIT TO STATE A MATERIAL FACT NECESSARY IN ORDER TO MAKE THE STATEMENTS CONTAINED OR INCORPORATED BY REFERENCE THEREIN, IN LIGHT OF THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE, NOT MISLEADING OR OF THE OCCURRENCE OF CERTAIN OTHER EVENTS SPECIFIED IN THE REGISTRATION RIGHTS AGREEMENT. SUCH UNDERSIGNED TENDERING HOLDER(S) WILL SUSPEND THE SALE OF THE EXCHANGE NOTES PURSUANT TO THE PROSPECTUS UNTIL THE COMPANY HAS AMENDED OR SUPPLEMENTED THE PROSPECTUS TO CORRECT SUCH MISSTATEMENT OR OMISSION AND HAS FURNISHED COPIES OF THE AMENDED OR SUPPLEMENTED PROSPECTUS TO SUCH TENDERING HOLDER(S) OR THE COMPANY HAS GIVEN NOTICE THAT THE SALE OF THE EXCHANGE NOTES MAY BE RESUMED, AS THE CASE MAY BE. IF THE COMPANY GIVES SUCH NOTICE TO SUSPEND THE SALE OF THE EXCHANGE NOTES, IT SHALL EXTEND THE 90-DAY PERIOD REFERRED TO ABOVE DURING WHICH SUCH TENDERING HOLDER(S) IS ENTITLED TO USE THE PROSPECTUS IN CONNECTION WITH THE RESALE OF THE EXCHANGE NOTES, BY THE NUMBER OF DAYS DURING THE PERIOD (i) FROM AND INCLUDING THE DATE OF THE GIVING OF SUCH NOTICE (ii) TO AND

INCLUDING THE DATE WHEN SUCH UNDERSIGNED TENDERING HOLDER(S) SHALL HAVE RECEIVED COPIES OF THE SUPPLEMENTED OR AMENDED PROSPECTUS NECESSARY TO PERMIT RESALES OF THE EXCHANGE NOTES, OR TO AND INCLUDING THE DATE ON WHICH THE COMPANY HAS GIVEN NOTICE THAT THE SALE OF THE EXCHANGE NOTES MAY BE RESUMED, AS THE CASE MAY BE.

AS A RESULT, IF THE UNDERSIGNED TENDERING HOLDER(S) IS A PARTICIPATING BROKER-DEALER AND INTENDS TO USE THE PROSPECTUS IN CONNECTION WITH RESALES OF THE EXCHANGE NOTES RECEIVED IN EXCHANGE FOR THE TENDERED RESTRICTED NOTES, WHERE SUCH TENDERED RESTRICTED NOTES WERE ACQUIRED BY SUCH UNDERSIGNED TENDERING HOLDER(S) FOR ITS OWN ACCOUNT AS A RESULT OF MARKET-MAKING ACTIVITIES OR OTHER TRADING ACTIVITIES, THE UNDERSIGNED MUST NOTIFY THE COMPANY, OR CAUSE THE COMPANY TO BE NOTIFIED, ON OR PRIOR TO THE EXPIRATION DATE, THAT IT IS A PARTICIPATING BROKER-DEALER. SUCH NOTICE MAY BE GIVEN IN THE SPACE PROVIDED ABOVE OR MAY BE DELIVERED TO THE EXCHANGE AGENT AT THE ADDRESS SET FORTH HEREIN.

All authority herein conferred or agreed to be conferred in this Letter of Transmittal shall survive the death or incapacity of the undersigned Tendering Holder(s) and any obligation of the undersigned Tendering Holder(s) hereunder shall be binding upon the heirs, executors, administrators, personal representatives, trustees in bankruptcy, legal representatives, successors and assigns of the undersigned Tendering Holder(s). Except as stated in the Prospectus, this tender is irrevocable.

THE UNDERSIGNED TENDERING HOLDER(S), BY COMPLETING THE BOX ENTITLED "DESCRIPTION OF RESTRICTED NOTES" ABOVE AND SIGNING THIS LETTER OF TRANSMITTAL, WILL BE DEEMED TO HAVE TENDERED THE TENDERED RESTRICTED NOTES AS SET FORTH IN SUCH BOX.

#### TENDERING HOLDER(S) SIGN HERE (SEE INSTRUCTIONS 2, 5 AND 6) (PLEASE COMPLETE SUBSTITUTE FORM W-9 ON PAGE \_\_) (NOTE: SIGNATURE(S) MUST BE GUARANTEED IF REQUIRED BY INSTRUCTION 2)

If the undersigned Tendering Holder(s) is a Registered Holder(s), this Letter of Transmittal must be signed by such Tendering Holder(s) exactly as its name(s) appears on the Certificate(s) hereby tendered or on the register of holders maintained by the Company.

If the undersigned Tendering Holder(s) is not a Registered Holder(s), this Letter of Transmittal must be signed by such Tendering Holder(s) exactly as its name should name appear on the register of holders maintained by the Company. Such Tendering Holder(s) must be authorized to become a Registered Holder(s) by endorsements and documents transmitted herewith (including such opinions of counsel, certifications and other information as may be required by the Company for the Restricted Notes to comply with the restrictions on transfer applicable to the Restricted Notes).

If this Letter of Transmittal is signed by an attorney-in-fact, executor, administrator, trustee, guardian, officer of a corporation or another person acting in a fiduciary capacity or representative capacity, of the Tendering Holder(s), please identify the signer's full title. See Instruction 5.

(Signature(s) of Tendering Holder(s))

Date:\_\_\_\_, 2010

Name(s):		
	(Please Print)	
Capacity (full title):		
Address:		
	(Include Zip Code)	
Area Code and Telephone Number:		
	(Tax Identification or Social Security Number(s))	
	GUARANTEE OF SIGNATURE(S) (SEE INSTRUCTIONS)	
	(Authorized Signature)	
Date:, 2010		
Name of Firm:		
	(Please Print)	
A 11		
Address:		
	(Include Zip Code)	
Area Code and Talankana Number		
Alea Coue and Telephone Number.		

# (TAX IDENTIFICATION OR SOCIAL SECURITY NUMBER(S))

SPECIAL ISSUANCE INSTRUCTIONS	SPECIAL DELIVERY INSTRUCTIONS
(See Instructions 1, 5 and 6)	(See Instructions 1, 5 and 6)
To be completed ONLY if Exchange Notes or Restricted Notes not tendered are to be issued in the name of someone other than the Tendering Holder(s) of Restricted Notes whose name(s) appear(s) above.	To be completed ONLY if Exchange Notes or Restricted Notes not tendered are to be sent to someone other than the Tendering Holder(s) of Restricted Notes whose name(s) appear(s) at an address other than that shown above.
Issue: Restricted Notes not tendered to:	Issue:  Restricted Notes not tendered to:
□ Exchange Notes to:	Exchange Notes to:
Name:	
	Name:
(Please Print) Address:	(Please Print)
	Address:
(Include Zip Code)	(Include Zip Code)
(Tax Identification or Social Security Number(s))	(Tax Identification or Social Security Number(s))

# INSTRUCTIONS

# FORMING PART OF THE TERMS AND CONDITIONS OF THE EXCHANGE OFFER

# 1. Delivery of Letter of Transmittal and Certificates; Guaranteed Delivery Procedures.

This Letter of Transmittal is to be completed either if (i) the Certificates are to be forwarded herewith or (ii) tenders are to be made pursuant to the procedures for tender by book-entry transfer set forth in the section entitled "The Exchange Offer" under the heading "Procedures for Tendering" in the Prospectus. The Certificates, or timely confirmation of a book-entry transfer of the Tendered Restricted Notes into the Exchange Agent's account at DTC, as well as this Letter of Transmittal (or facsimile thereof), properly completed and duly executed, with any required signature guarantees, or an Agent's Message in lieu thereof, and any other documents required by this Letter of Transmittal, must be received by the Exchange Agent at its address set forth herein on or prior to the Expiration Date.

The Tendered Restricted Notes may be tendered pursuant to the Exchange Offer in whole or in part in principal amounts of US\$2,000 or an integral multiple of US\$1,000 in excess thereof, provided that, if any Tendered Restricted Notes are tendered for exchange in part, the untendered amount thereof must be in a principal amount of US\$2,000 or an integral multiple of US\$1,000 in excess thereof.

If the Tendering Holder(s) wishes to tender the Tendered Restricted Notes and (i) the Tendered Restricted Notes are not immediately available or (ii) the Tendering Holder(s) cannot deliver the Tendered Restricted Notes, this Letter of Transmittal and all other required documents to the Exchange Agent on or prior to the Expiration Date or (iii) the Tendering Holder(s) cannot complete the procedures for delivery by book-entry transfer on a timely basis, may tender the Tendered Restricted Notes by complying with the guaranteed delivery procedures set forth in the section entitled "The Exchange Offer" under the heading "Guaranteed Delivery Procedures" in the Prospectus. Pursuant to such procedures: (i) such tender must be made by or through an Eligible Institution (as defined below); (ii) a properly completed and duly executed Notice of Guaranteed Delivery, substantially in the form made available by the Company, must be received by the Exchange Agent prior to the Expiration Date, by mail, hand delivery, overnight courier or facsimile transmission, and must include a guarantee by an Eligible Institution in the form set forth in such Notice; and (iii) the Certificates (or a Book-Entry Confirmation) representing all the Tendered Restricted Notes, in proper form for transfer, together with a Letter of Transmittal (or facsimile thereof), properly completed and duly executed, with any required signature guarantees, or an Agent's Message in lieu thereof, and any other documents required by this Letter of Transmittal, must be received by the Exchange Agent within three New York Stock Exchange trading days after the Expiration Date, all as provided in the section entitled "The Exchange Offer" in the Prospectus. As used herein and in the Prospectus. "Eligible Institution" means a firm or other entity identified in Rule 17Ad-15 under the Exchange Act as "an eligible guarantor institution," including (as such terms are defined therein): (i) a bank; (ii) a broker, dealer, municipal securities broker, municipal securities dealer, government securities broker or governmental securities dealer, (iii) a credit union; (iv) a national securities exchange, registered securities association or clearing agency, or (v) a savings association, with membership in an approved signature medallion guarantee program, that is a participant in a Securities Transfer Association.

THE METHOD OF DELIVERY OF CERTIFICATES, THIS LETTER OF TRANSMITTAL AND ALL OTHER REQUIRED DOCUMENTS IS AT THE OPTION AND SOLE RISK OF THE TENDERING HOLDER(S) AND THE DELIVERY WILL BE DEEMED MADE ONLY WHEN ACTUALLY RECEIVED BY THE EXCHANGE AGENT. IF DELIVERY IS TO BE MADE OTHER THAN BY HAND OR FACSIMILE, REGISTERED MAIL WITH RETURN RECEIPT REQUESTED, PROPERLY INSURED, OR OVERNIGHT DELIVERY SERVICE IS RECOMMENDED. IN ALL CASES, SUFFICIENT TIME SHOULD BE ALLOWED TO ENSURE TIMELY DELIVERY.

The Company will not accept any alternative, conditional or contingent tenders. Each Tendering Holder(s), by execution of a Letter of Transmittal (or facsimile thereof), or delivery of an Agent's Message in lieu thereof, waives any right to receive any notice of the acceptance of such tender.

2. Guarantee of Signatures. Signatures on this Letter of Transmittal must be guaranteed unless the Tendered Restricted Notes are tendered:

(i) by the Registered Holder(s) of such Tendered Restricted Notes and such Registered Holder(s) has not completed either the box entitled "Special Issuance Instructions" above or the box entitled "Special Delivery Instructions" above; or

(ii) for the account of a firm that is an Eligible Institution.

In the event that signatures on this Letter of Transmittal are required to be guaranteed, such guarantee must be by an Eligible Institution.

**3. Inadequate Space.** If the space provided in the box captioned "Description of Restricted Notes" is inadequate, the Certificate number(s) and/or the principal amount of Tendered Restricted Notes and any other required information should be listed on a separate signed schedule which is attached to this Letter of Transmittal.

4. Partial Tenders and Withdrawal Rights. Tenders of the Tendered Restricted Notes will be accepted only in principal amounts of US\$2,000 or an integral multiple of US\$1,000 in excess thereof.

All the Tendered Restricted Notes represented by the Certificates delivered to the Exchange Agent will be deemed to have been tendered unless otherwise indicated. If less than all the Tendered Restricted Notes evidenced by any Certificate submitted are to be tendered, fill in the principal amount of the Tendered Restricted Notes which are to be tendered in the box entitled "Principal Amount of Restricted Notes Tendered." If any Tendered Restricted Notes are tendered for exchange in part, the untendered amount thereof must be in a principal amount of US\$2,000 or an integral multiple of US\$1,000 in excess thereof.

In such case, unless otherwise indicated in the box entitled "Special Issuance Instructions" above, new Certificate(s) for the nontendered Restricted Notes (that were evidenced by the old Certificate(s) that were submitted to the Company) will be issued in the name(s) of the above Tendering Holder(s), or in the case of a book-entry transfer of Restricted Notes, such nontendered Restricted Notes, will be credited to the account indicated above maintained at DTC, in each case, promptly after the Expiration Date. Similarly, unless otherwise indicated under "Special Delivery Instructions," new Certificate(s) for the nontendered Restricted Notes will be delivered to the above Tendering Holder(s) at the address shown below the above Tendering Holder(s)'s signature.

Except as otherwise provided herein, tenders of the Tendered Restricted Notes may be withdrawn at any time prior to 5:00 p.m., New York City time, on the Expiration Date.

For a withdrawal to be effective, the Exchange Agent must receive a written notice of withdrawal at the address, or in the case of Eligible Institutions, at the facsimile number, set forth above or in the section entitled "The Exchange Offer" under the heading "Exchange Agent" in the Prospectus, before 5:00 p.m., New York City time, on the Expiration Date. Any notice of withdrawal must specify the name of the Tendering Holder(s), identify the Tendered Restricted Notes to be withdrawn (including the certificate number or numbers and the principal amount of the Tendered Restricted Notes), and, where Certificates for the Tendered Restricted Notes have been tendered, then before the release of such Certificate(s) the withdrawing Tendering Holder(s) must also submit (i) the name of the Registered Holder(s) of the Tendered Restricted Notes as set forth on the Certificate for such Tendered Restricted Notes, if different from that of the withdrawing Tendering Holder(s), (ii) the serial numbers shown on such Certificate(s), and (iii) a signed notice of withdrawal with signatures guaranteed by an Eligible Institution, except in the case of Tendered Restricted Notes tendered for the account of an Eligible Institution. If Tendered Restricted Notes have been tendered pursuant to the procedures for book-entry transfer set forth under the section entitled "The Exchange Offer" in the Prospectus, any notice of withdrawal must specify the name and number of the account at DTC to be credited with the withdrawal of the Tendered Restricted Notes and otherwise comply with the procedures of such facility.

All questions as to the validity, form and eligibility (including time of receipt) of withdrawal notices will be determined by the Company, in its sole discretion, which determination shall be final and binding on all parties. Neither the Company, any affiliates or assigns of the Company, the Exchange Agent nor any other person, shall be under any duty to give any notification of any irregularities in any notice of withdrawal or incur any liability for failure to give any such notification.

Tendered Restricted Notes properly withdrawn will be deemed not to have been validly tendered for exchange purposes of the Exchange Offer. Any Tendered Restricted Notes which have been tendered for exchange but which are not exchanged for any reason will be returned to the Tendering Holder(s) thereof without cost to such Tendering Holder(s) (or in the case of Tendered Restricted Notes tendered by book-entry transfer into the Exchange Agent's account at DTC pursuant to the book-entry transfer procedures described in the section entitled "The Exchange Offer" in the Prospectus, such Tendered Restricted Notes will be credited to an account maintained with DTC for Restricted Notes), as soon as practicable after withdrawal, rejection of tender or termination of the Exchange Offer.

Properly withdrawn Tendered Restricted Notes may be retendered by following one of the procedures described in the section entitled "The Exchange Offer" in the Prospectus, at any time on or before the Expiration Date.

**5. Signatures on Letter of Transmittal, Assignments and Endorsement**. If this Letter of Transmittal is signed by the Registered Holder(s) of the Tendered Restricted Notes, the signature(s) must correspond exactly with the name(s) as written on the face of the Certificate(s) without alteration, enlargement or any change whatsoever. Moreover, no endorsement(s) of Certificate(s) or separate bond power(s) are required, if this Letter of Transmittal is signed by the Registered Holder(s) of the Tendered Restricted Notes, unless the Exchange Notes, or nonexchanged or nontendered Tendered Restricted Notes, are to be issued in the name of a person(s) other than such Registered Holder(s) by completing the box entitled "Special Issuance Instructions" above. See Instruction 6.

If this Letter of Transmittal is signed by Tendering Holders other than the Registered Holder(s) of the Tendered Restricted Notes, the Certificates must be endorsed or accompanied by appropriate bond powers, signed exactly as the name or names of the Registered Holder(s) appear(s) on the Certificates, and such opinions of counsel, certifications and other information as the Company or the Trustee for the Restricted Notes may require in accordance with the restrictions on transfer applicable to Restricted Notes. Signature(s) on such Certificate(s) or bond power(s) must be guaranteed by an Eligible Institution. If any of the Tendered Restricted Notes are owned of record by two or more joint owners, all such owners must sign this Letter of Transmittal.

If any of the Tendered Restricted Notes are registered in different name(s) on several Certificates, it will be necessary to complete, sign and submit as many separate Letters of Transmittal (or facsimiles thereof) as there are different registrations of Certificates.

If this Letter of Transmittal or any Certificates or bond powers are signed by trustees, executors, administrators, guardians, attorneys-in-fact, officers of corporations or others acting in a fiduciary or representative capacity, such persons should so indicate when signing and must submit proper evidence satisfactory to the Company, in its sole discretion, of each such person's authority so to act.

6. Special Issuance and Delivery Instructions. If either the Exchange Notes, or the nonexchanged or nontendered Tendered Restricted Notes, are to be issued in the name of a person or persons other than the Tendering Holders of the Tendered Restricted Notes listed and transmitted hereby, the box entitled "Special Issuance Instructions" above should be completed. In addition, this Letter of Transmittal must be accompanied by such endorsements, bond powers, opinions of counsel, certifications and other information as the Company or the Trustee for the Restricted Notes may require in accordance with the restrictions on transfer applicable to the Tendered Restricted Notes. Such person or persons, as well as the Tendering Holders of the Tendered Restricted Notes, must sign this Letter of Transmittal. All signatures necessitated by the foregoing requirements must be guaranteed by an Eligible Institution.

If either the Exchange Notes, or the nonexchanged or nontendered Tendered Restricted Notes, are to be sent to someone other than the Tendering Holders, at an address other than that shown above, the box entitled "Special Delivery Instructions" above should be completed. In addition, such person or persons, as well as the Tendering Holders of the Tendered Restricted Notes, must sign this Letter of Transmittal. All signatures necessitated by the foregoing requirements must be guaranteed by an Eligible Institution.

7. Irregularities. The Company will determine, in its sole discretion, all questions as to the form of documents, validity, eligibility (including time of receipt) and acceptance for exchange of any tender of the Tendered Restricted Notes, which determination shall be final and binding on all parties. The Company reserves the absolute right to reject any and all tenders determined by it not to be in proper form or the acceptance of which, or exchange for which, may, in the view of counsel to the Company, be unlawful. The Company also reserves the absolute right, subject to applicable law, to waive satisfaction of any of the conditions of the Exchange Offer set forth in the Prospectus in the section entitled "The Exchange Offer" under the heading "Conditions to the Exchange Offer" or irregularities in any tender of the Tendered Restricted Notes by the above-identified Tendering Holder(s) whether or not similar conditions of the Exchange Offer (including this Letter of Transmittal and the instructions hereto) will be final and binding. No tender of the Tendered Restricted Notes will be deemed to have been validly made until all irregularities with respect to such tender have been cured or waived. The Company, any affiliates or assigns of the Company, the Exchange Agent, or any other person shall not be under any duty to give notification of any irregularities in tenders or incur any liability for failure to give such notification.

8. Questions, Requests for Assistance and Additional Copies. Questions and requests for assistance may be directed to the Exchange Agent at its address and telephone number set forth on the front of this Letter of Transmittal. Additional copies of the Prospectus, the Notice of Guaranteed Delivery and this Letter of Transmittal may be obtained from the Exchange Agent or from your broker, dealer, commercial bank, trust company or other nominee.

**9.28% Backup Withholding; Substitute Form W-9.** Under U.S. Federal income tax law, if the above-identified Tendering Holder(s)'s tender of the Tendered Restricted Notes are accepted for exchange, the above-identified Tendering Holder(s) is required to provide the Exchange Agent with its correct taxpayer identification number ("TIN") on Substitute Form W-9 below. If the Exchange Agent is not provided with the correct TIN, the Internal Revenue Service (the "IRS") may subject the holder or other payee to a penalty. In addition, payments to a holder or other payee with respect to the Tendered Restricted Notes exchanged pursuant to the Exchange Offer may be subject to 28% backup withholding.

If the above-identified Tendering Holder(s) is not the Registered Holder(s) of the Tendered Restricted Notes, the above-identified Tendering Holder(s) is required to provide the Exchange Agent with the TIN (e.g., social security number or employer identification number) of either the Registered Holder(s) of the Tendered Restricted Notes, or of the last transferee appearing on the transfers attached to, or endorsed on, the Tendered Restricted Notes, as the case may be.

Certain Tendering Holders (including, among others, corporations, financial institutions and certain foreign persons) may not be subject to these backup withholding and reporting requirements. Such Tendering Holders should nevertheless complete the attached Substitute Form W-9 below, and write "exempt" on the face thereof, to avoid possible erroneous backup withholding.

Backup withholding is not an additional tax. Rather, the U.S. Federal income tax liability of a person subject to backup withholding will be reduced by the amount of tax withheld. If withholding results in an overpayment of taxes, a refund may be obtained.

10. Waiver of Conditions. The Company reserves the absolute right to waive satisfaction of any or all conditions enumerated in the Prospectus.

11. No Conditional Tenders. No alternative, conditional or contingent tenders will be accepted. All tendering holders of Restricted Notes, by execution of this Letter of Transmittal, shall waive any right to receive notice of the acceptance of Restricted Notes for exchange.

Neither the Company, the Exchange Agent nor any other person is obligated to give notice of any irregularity with respect to any tender of Restricted Notes; nor shall any of them incur any liability for failure to give any such notice.

12. Lost, Destroyed or Stolen Certificates. If any Certificate(s) representing the Tendered Restricted Notes have been lost, destroyed or stolen, the above-identified Tendering Holder(s) should promptly notify the Exchange Agent. Such Tendering Holder(s) will then be instructed as to the steps that must be taken in order to replace the Certificate(s). This Letter of Transmittal and related documents cannot be processed until the procedures for replacing lost, destroyed or stolen Certificate(s) have been followed.

**13. Security Transfer Taxes**. If the above-identified Tendering Holder(s) who tenders the Tendered Restricted Notes for exchange, it will not be obligated to pay any transfer taxes in connection therewith. If, however, Exchange Notes are to be delivered to, or are to be issued in the name of, any person other than the Registered Holder(s) of the Tendered Restricted Notes, or if a transfer tax is imposed for any reason other than the exchange of the Tendered Restricted Notes in connection with the Exchange Offer, then the amount of any such transfer tax (whether imposed on the above-identified Tendering Holder(s) or any other persons) will be payable by the above-identified Tendering Holder(s). If satisfactory evidence of payment of such taxes or exemption therefrom is not submitted with the Letter of Transmittal, the amount of such transfer taxes will be billed directly to the above-identified Tendering Holder(s).

IMPORTANT: THIS LETTER OF TRANSMITTAL (OR FACSIMILE THEREOF) AND ALL OTHER REQUIRED DOCUMENTS MUST BE RECEIVED BY THE EXCHANGE AGENT ON OR PRIOR TO THE EXPIRATION DATE.

#### TO BE COMPLETED BY ALL TENDERING HOLDERS (SEE INSTRUCTION 9) PAYOR'S NAME: WELLS FARGO BANK, N.A.

SUBSTITUTE	<b>Part I</b> —PLEASE PROVIDE YOUR TIN IN THE BOX TO THE RIGHT AND CERTIFY	
Form W-9	BY SIGNING AND DATING BELOW.	Social security number OR
		Employer
		identification number
	Part II—Certification-Under penalties of perjury, I certify that	t:
	<ol> <li>The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me);</li> </ol>	
Department of the Treasury Internal Revenue Service	(2) I am not subject to backup withholding either because (i) I am exempt from backup withholding, (ii) I have not been notified by the Internal Revenue Service ("IRS") that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (iii) the IRS has notified me that I am no longer subject to backup withholding; and	
	(3) I am a U.S. person (including a U.S. resident alien).	
Payer's Request for Taxpayer Identification Number (TIN) and Certification	<i>Certification Instructions- You</i> must cross out item 2 of Part II IRS that you are subject to backup withholding because of un tax return and you have not been notified by the IRS that you withholding.	derreporting interest or dividends on your
	Signature:	Date:

NOTE: FAILURE TO COMPLETE AND RETURN THIS FORM MAY IN CERTAIN CIRCUMSTANCES RESULT IN BACKUP WITHHOLDING OF 28% OF ANY AMOUNTS PAID TO YOU PURSUANT TO THE EXCHANGE OFFER.

#### DAVE & BUSTER'S, INC.

Notice of Guaranteed Delivery For Tender of any and all Outstanding \$200,000,000 11% Senior Notes due 2018 In Exchange for \$200,000,000 11% Senior Notes due 2018

This Notice of Guaranteed Delivery may be used by: (i) the registered holders (which term, for purposes of this document, shall include any participant in The Depository Trust Company ("DTC")) (the "Registered Holder") of 11% Senior Notes Due 2018 issued June 1, 2010 (the "Restricted Notes") by Dave & Buster's, Inc. (the "Company"); or (ii) any persons authorized to become the Registered Holders by endorsements or appropriate bond powers, and other documents (including such opinions of counsel, certifications and other information as may be required by the Company for the Restricted Notes to comply with the restrictions on transfer applicable to the Restricted Notes), of the Restricted Notes (such persons together with the Registered Holders are collectively referred to herein as the "Tendering Holders"), to accept the Exchange Offer (as defined below) if (i) certificates for the Restricted Notes (the "Certificates") are not immediately available, (ii) the Restricted Notes, the Letter of Transmittal and all other required documents cannot be delivered to the Exchange Agent (as identified below) prior to 5:00 p.m., New York City Time, on [\_\_], 2010, unless the Exchange Offer (as defined below) is extended by the Company in its sole discretion (the "Expiration Date"), or (iii) the procedures for delivery by book-entry transfer cannot be completed on a timely basis. This Notice of Guaranteed Delivery may be delivered by mail, hand delivery, overnight courier or facsimile transmission, to the Exchange Agent, as more fully described in the section entitled "The Exchange Offer," in the Prospectus. In addition, in order to utilize the guaranteed delivery procedure to tender Restricted Notes pursuant to the Exchange Offer, a completed, signed and dated Letter of Transmittal relating to the Restricted Notes (or facsimile thereof) must also be received by the Exchange Agent within three New York Stock Exchange trading days after the Expiration Date. Capitalized terms not defined herein have the meanings assigned to them

The Exchange Agent For The Exchange Offer Is:

Wells Fargo Bank, N.A.

By Registered or Certified Mail:

WELLS FARGO BANK, N.A. Corporate Trust Operations MAC N9303-121 PO Box 1517 Minneapolis, MN 55480 By Regular Mail or Overnight Courier: WELLS FARGO BANK, N.A. Corporate Trust Operations MAC N9303-121 Sixth & Marquette Avenue Minneapolis, MN 55479

By Facsimile (for Eligible Institutions only): (612) 667-6282

For Information of Confirmation by Telephone: (800) 344-5128

DELIVERY OF THIS NOTICE OF GUARANTEED DELIVERY TO AN ADDRESS OTHER THAN AS SET FORTH ABOVE OR TRANSMISSION OF THIS NOTICE OF GUARANTEED DELIVERY VIA FACSIMILE TO A NUMBER OTHER THAN AS SET FORTH ABOVE WILL NOT CONSTITUTE A VALID DELIVERY.

This Notice of Guaranteed Delivery is not to be used by Eligible Institutions (as defined below) to guarantee signatures.

In Person by Hand Only:

WELLS FARGO BANK, N.A. 12th Floor-Northstar East Building Corporate Trust Operations 608 Second Avenue South Minneapolis, MN 55479

#### Ladies and Gentlemen:

The undersigned Tendering Holder(s) hereby tenders to the Company upon the terms and subject to the conditions set forth in the Prospectus dated [—], 2010 (as the same may be amended or supplemented from time to time, the "Prospectus"), and the related Letter of Transmittal (which, together with the Prospectus, constitutes the "Exchange Offer"), receipt of which is hereby acknowledged, the aggregate principal amount of Restricted Notes set forth below (the "Tendered Restricted Notes") pursuant to the guaranteed delivery procedures set forth in the Prospectus in the section entitled "The Exchange Offer."

The undersigned Tendering Holder(s) understands that tenders of the Tendered Restricted Notes will be accepted only in principal amounts of US\$2,000 or an integral multiple of US\$1,000 in excess thereof. The undersigned Tendering Holder(s) further acknowledges that, generally, tenders of the Tendered Restricted Notes may be withdrawn at any time prior to 5:00 p.m., New York City time, on the Expiration Date, and that additional information about the undersigned Tendering Holder(s) withdrawal rights are set forth in the Prospectus in the section entitled "The Exchange Offer" under the heading "Withdrawal Rights."

All authority herein conferred or agreed to be conferred by this Notice of Guaranteed Delivery shall survive the death or incapacity of the undersigned Tendering Holder(s) and every obligation of the undersigned Tendering Holder(s) under this Notice of Guaranteed Delivery shall be binding upon the heirs, personal representatives, successors and assigns of the undersigned.

# PLEASE SIGN AND COMPLETE

Signature(s) of Tendering Holder(s):	Name(s) of Tendering Holder(s):
Principal Amount of Restricted Notes Tendered:	Address:
Certificate No(s). of Tendered Restricted Notes (if available):	Area Code(s) and Telephone No(s).:
  Date:	

If this Notice of Guaranteed Delivery is signed by the Registered Holder(s) of the Tendered Restricted Notes, the signature(s) must correspond exactly with the name(s) as written on the face of the Certificate(s) without alteration, enlargement or any change whatsoever.

If this Notice of Guaranteed Delivery is signed by Tendering Holders other than the Registered Holder(s) of the Tendered Restricted Notes, the Certificates must be endorsed or accompanied by appropriate bond powers, signed exactly as the name or names of the Registered Holder(s) appear(s) on the Certificates, and such opinions of counsel, certifications and other information as the Company or the Trustee for the Restricted Notes may require in accordance with the restrictions on transfer applicable to Restricted Notes. Signature(s) on such Certificate(s) or bond power(s) must be guaranteed by an Eligible Institution (as defined below).

If a signature is by a trustee, executor, administrator, guardian, attorney-in-fact, officer or other person acting in a fiduciary or such representative capacity, such person must provide his or her full title below and, unless waived by the Company, provide proper evidence satisfactory to the Company of such person's authority to act.

#### PLEASE PRINT NAME(S) AND ADDRESS(ES)

Name(s):	 	 
Capacity:		
· ·		
Address(es)	 	 

# GUARANTEE (NOT TO BE USED FOR SIGNATURE GUARANTEE)

The undersigned, a firm or other entity identified in Rule 17Ad-15 under the Securities Exchange Act of 1934, as amended, as an "eligible guarantor institution," including (as such terms are defined therein): (i) a bank; (ii) a broker, dealer, municipal securities broker, municipal securities dealer, government securities broker or government securities dealer, (iii) a credit union; (iv) a national securities exchange, registered securities association or clearing agency; or (v) a savings association that is a participant in a Securities Transfer Association recognized program (each of the foregoing being referred to as an "Eligible Institution"), hereby guarantees to deliver to the Exchange Agent, at one of its addresses set forth above, either the Tendered Restricted Notes in proper form for transfer, or confirmation of the book-entry transfer of the Tendered Restricted Notes to the Exchange Agent's account at DTC, pursuant to the procedures for book-entry transfer set forth in the Prospectus, in either case, together with one or more properly completed and duly executed Letter(s) of Transmittal (or facsimile thereof) and any other required documents within three business days after the date of execution of this Notice of Guaranteed Delivery.

The undersigned acknowledges that it must deliver the Letter(s) of Transmittal and the Tendered Restricted Notes to the Exchange Agent within the time period set forth above and that failure to do so could result in a financial loss to the undersigned.

# (PLEASE TYPE OR PRINT)

Name of Firm:	
	Authorized Signature
Address:	Title:
	Date:

Area Code and Telephone No.

NOTE: DO NOT SEND CERTIFICATES FOR TENDERED RESTRICTED NOTES WITH THIS FORM. CERTIFICATES FOR TENDERED RESTRICTED NOTES SHOULD ONLY BE SENT WITH YOUR LETTER OF TRANSMITTAL.

#### DAVE & BUSTER'S, INC.

#### Tender of any and all Outstanding \$200,000,000 11% Senior Notes due 2018 In Exchange for \$200,000,000 11% Senior Notes due 2018

To: Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees:

Dave & Buster's, Inc. (the "Company") is offering, upon and subject to the terms and conditions set forth in a prospectus dated [\_\_], 2010 (the "Prospectus"), and the enclosed letter of transmittal (the "Letter of Transmittal"), to exchange (the "Exchange Offer") its 11% Senior Notes due 2018 which have been registered under the Securities Act of 1933, as amended, for a like principal amount of the Company's issued and outstanding 11% Senior Notes issued June 1, 2010 (the "Restricted Notes"). The Exchange Offer is being made in order to satisfy certain obligations of the Company contained in a Registration Rights Agreement, dated as of June 1, 2010, among the Company, the Guarantors (as defined therein) and the initial purchasers referred to therein.

We are requesting that you contact your clients for whom you hold Restricted Notes registered in your name or in the name of your nominee, or who hold Restricted Notes registered in their own names, regarding the Exchange Offer. For your and their information, and for forwarding to such clients, we are enclosing the following documents:

1. A Prospectus dated [\_], 2010;

2. The Letter of Transmittal for your use and for the information (or the use, where relevant) of your clients;

3. A Notice of Guaranteed Delivery to be used to accept the Exchange Offer if certificates for the Restricted Notes are not immediately available or time will not permit all required documents to reach Wells Fargo National Association, the exchange agent for the Restricted Notes (the "Exchange Agent"), prior to 5:00 P.M., New York City time, on [\_], 2010, unless extended by the Company in its sole discretion (the "Expiration Date"), or if the procedure for bookentry transfer set forth in the section entitled "The Exchange Offer" in the Prospectus cannot be completed on a timely basis and an Agent's Message (as defined in the Prospectus) is not transmitted to and received by the Exchange Agent;

4. A form of letter that may be sent to your clients for whose account you hold Restricted Notes registered in your name or the name of your nominee, with space provided for obtaining such clients' instructions with regard to the Exchange Offer; and

5. Return envelopes addressed to the Exchange Agent.

YOUR PROMPT ACTION IS REQUESTED. THE EXCHANGE OFFER WILL EXPIRE AT 5:00 P.M., NEW YORK CITY TIME, ON THE EXPIRATION DATE. THE RESTRICTED NOTES TENDERED PURSUANT TO THE EXCHANGE OFFER MAY BE WITHDRAWN AT ANY TIME BEFORE THE EXPIRATION DATE.

To participate in the Exchange Offer, generally, a duly executed and properly completed Letter of Transmittal (or facsimile thereof), or an Agent's Message (as defined in the Prospectus) in lieu thereof, with any required signature guarantees and any other required documents, should be sent to the Exchange Agent and certificates representing the Restricted Notes should be delivered to the Exchange Agent, all in accordance with the instructions set forth in the Letter of Transmittal and the Prospectus.

If holders of the Restricted Notes wish to tender, but it is impracticable for them to forward their certificates for the Restricted Notes prior to the expiration of the Exchange Offer, or to comply with the book-entry transfer procedures on a timely basis, a tender may be effected by following the guaranteed delivery procedures described in the Prospectus in the section entitled "The Exchange Offer."

The Company will, upon request, reimburse brokers, dealers, commercial banks and trust companies for reasonable and necessary costs and expenses incurred by them in forwarding the Prospectus and the related documents to the beneficial owners of Restricted Notes held by them as nominee or in a fiduciary capacity. The Company will pay or cause to be paid all transfer taxes applicable to the exchange of Restricted Notes pursuant to the Exchange Offer, except as set forth in Instruction 13 of the Letter of Transmittal.

Any inquiries you may have with respect to the Exchange Offer, or requests for additional copies of the enclosed materials, should be directed to Wells Fargo National Association, the Exchange Agent for the Restricted Notes, at its address and telephone number set forth on the front of the Letter of Transmittal.

Very truly yours,

#### DAVE & BUSTER'S, INC.

NOTHING HEREIN OR IN THE ENCLOSED DOCUMENTS SHALL CONSTITUTE YOU OR ANY PERSON AS AN AGENT OF THE COMPANY OR THE EXCHANGE AGENT, OR AUTHORIZE YOU OR ANY OTHER PERSON TO USE ANY DOCUMENT OR MAKE ANY STATEMENTS ON BEHALF OF EITHER OF THEM WITH RESPECT TO THE EXCHANGE OFFER, EXCEPT FOR STATEMENTS EXPRESSLY MADE IN THE PROSPECTUS OR THE LETTER OF TRANSMITTAL.

Enclosures

#### DAVE & BUSTER'S, INC.

#### Tender of any and all Outstanding \$200,000,000 11% Senior Notes due 2018 In Exchange for \$200,000,000 11% Senior Notes due 2018

# To Our Clients:

Enclosed for your consideration is a prospectus dated [\_], 2010 (the "Prospectus"), and the related letter of transmittal (the "Letter of Transmittal"), relating to the offer (the "Exchange Offer") of Dave & Buster's, Inc. (the "Company") to exchange its 11% Senior Notes due 2018 which have been registered under the Securities Act of 1933, as amended, for a like principal amount of the issued and outstanding 11% Senior Notes issued June 1, 2010 (the "Restricted Notes"), upon the terms and subject to the conditions described in the Prospectus and the Letter of Transmittal. The Exchange Offer is being made in order to satisfy certain obligations of the Company contained in a Registration Rights Agreement, dated as of June 1, 2010, among the Company, the Guarantors (as defined therein) and the initial purchasers referred to therein.

This material is being forwarded to you as the beneficial owner of the Restricted Notes held by us for your account but not registered in your name. A TENDER OF SUCH RESTRICTED NOTES MAY ONLY BE MADE BY US AS THE HOLDER OF RECORD AND PURSUANT TO YOUR INSTRUCTIONS.

Accordingly, we request instructions as to whether you wish us to tender on your behalf the Restricted Notes held by us for your account, pursuant to the terms and conditions set forth in the enclosed Prospectus and Letter of Transmittal.

Your instructions should be forwarded to us as promptly as possible in order to permit us to tender the Restricted Notes on your behalf in accordance with the provisions of the Exchange Offer. The Exchange Offer will expire at 5:00 p.m., New York City time, on [\_], 2010, unless extended by the Company in its sole discretion. Any Restricted Notes tendered pursuant to the Exchange Offer may be withdrawn at any time before the Expiration Date.

Your attention is directed to the following:

1. The Exchange Offer is for any and all Restricted Notes.

2. The Exchange Offer is subject to certain conditions set forth in the Prospectus in the section entitled "The Exchange Offer" under the heading "Conditions to the Exchange Offer."

3. Any transfer taxes incident to the transfer of Restricted Notes from the holder to the Company will be paid by the Company, except as otherwise provided in the Instructions in the Letter of Transmittal.

4. The Exchange Offer expires at 5:00 p.m., New York City time, on [\_], 2010, unless extended by the Company in its sole discretion.

If you wish to have us tender your Restricted Notes, please so instruct us by completing, executing and returning to us the instruction form on the back of this letter. THE LETTER OF TRANSMITTAL IS FURNISHED TO YOU FOR INFORMATION ONLY AND MAY NOT BE USED DIRECTLY BY YOU TO TENDER RESTRICTED NOTES.

# INSTRUCTIONS WITH RESPECT TO THE EXCHANGE OFFER

The undersigned acknowledge(s) receipt of your letter and the enclosed material referred to therein relating to the Exchange Offer made by the Company with respect to the Restricted Notes.

This will instruct you to tender the Restricted Notes held by you for the account of the undersigned, upon and subject to the terms and conditions set forth in the Prospectus and the related Letter of Transmittal.

The undersigned expressly agrees to be bound by the enclosed Letter of Transmittal and that such Letter of Transmittal may be enforced against the undersigned.

Please tender the Restricted Notes held by you for my account as indicated below.

Restricted Notes Aggregate Principal Amount of Restricted Notes Tendered
□ Please do not tender any Restricted Notes held by you for my account.
Dated:, 2010
Signature(s):
Please print name(s) here:
Address(es):
Area Code and Telephone Number(s):
Tax Identification or Social Security Number (s):

None of the Restricted Notes held by us for your account will be tendered unless we receive written instructions from you to do so. Unless a specific contrary instruction is given in the space provided, your signature(s) hereon shall constitute an instruction to us to tender all the Restricted Notes held by us for your account.

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