

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



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In the Matter of )  
)  
)  
Time Warner Inc., )  
Turner Broadcasting System, Inc., )  
Tele-Communications, Inc., and )  
Liberty Media Corporation )  
\_\_\_\_\_ )

Docket No. C-3709

**PETITION OF RESPONDENT  
LIBERTY MEDIA CORPORATION  
TO REOPEN AND MODIFY**

Liberty Media Corporation (“Liberty”), a Respondent in the above captioned matter, hereby requests the Federal Trade Commission (the “Commission”) to reopen and modify the Commission’s Decision and Order in the above captioned matter, dated February 3, 1997 (Docket No. C-3709) (the “Order”) as described herein. Liberty makes this request pursuant to §5(b) of the Federal Trade Commission Act, 15 U.S.C. §45(b), and §2.51 of the Commission’s Rules of Practice and Procedure, 16 C.F.R. §2.51, because the request is in the public interest and because changed circumstances relating to Liberty have arisen that are not expressly addressed by the Order.

The Order contemplated the divestiture by Liberty of its ownership interest in Time Warner, Inc. (“Time Warner”) as the primary relief with respect to Liberty; only if the conditions precedent for divestiture were not met (as in fact happened) would the Order’s alternative provisions establishing limits on the nature and extent of Liberty’s ownership interest in Time Warner come into effect.<sup>1</sup> Thus, it is not surprising that the Order does not address all possible

<sup>1</sup> Under Paragraph II of the Order, divestiture of the Time Warner interests to a separate company was subject to the receipt of a private letter ruling from the Internal Revenue Service (“IRS”) that the divestiture would be tax-free. Only if the IRS ruling were not obtained would the alternative provisions of Paragraph II(D) come into effect. As reported in Respondents’ Joint Compliance Report (April 11, 1997), Respondents, despite their best

issues relating to Liberty's continuing ownership of Time Warner stock during the term of the Order, including the issue of stock loans and their status under the Order.

Because Liberty now has a desire to loan some of its Time Warner stock to a financial institution in order to avoid incurring substantial costs, it discussed the status of stock loans under the Order with the staff of the Compliance Office of the Bureau of Competition. While the staff informed Liberty that loans of Time Warner stock, accompanied by appropriate safeguards to ensure that Liberty could not direct, control, or influence any voting of the stock, did not appear inconsistent with the goals of the Order, the staff indicated that this issue could be resolved only by the Commission and suggested that Liberty might wish to seek a modification of the Order.

Liberty, therefore, has filed this Petition to Reopen and Modify to confirm that the Order does not prohibit loans of Time Warner stock, provided that Liberty cannot direct, control, or influence any voting of Time Warner stock during the period of the loan. This modification is fully consistent with the goals of the Order and will avoid significant and unnecessary costs to Liberty during the remaining two and one-half year term of the Order.

Because this petition and accompanying materials contain confidential and competitively sensitive business information—the disclosure of which may prejudice Liberty or cause harm to the ongoing competitiveness of the financial institutions discussed herein—Liberty has redacted such confidential information from the public version of this petition and accompanying materials. Liberty requests that the nonpublic version of this petition and accompanying

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(continued...)

efforts, were unable to obtain the IRS ruling and therefore were relieved of the obligation to accomplish the divestiture.

materials and the information contained therein be accorded confidential treatment pursuant to all applicable laws and regulations.

## I. Background

Liberty, through its subsidiaries (collectively with Liberty, the “Liberty Parties”), currently holds 171,185,826 shares of the LMCN-V Common Stock (“LMCN-V Stock”) of Time Warner.<sup>2</sup> The LMCN-V Stock is specifically designed to comply with Paragraph II(D)(2) of the Order, which prohibits the Liberty Parties from acquiring or holding an Ownership Interest (as defined in the Order) in Time Warner that is entitled to exercise voting power (with limited exceptions).<sup>3</sup>

Shares of LMCN-V Stock are only held (and are only able to be held) by the Liberty Parties.<sup>4</sup> If a Liberty Party transfers shares of LMCN-V Stock to a party other than a Liberty Party, the shares of LMCN-V Stock must be converted into shares of the Common Stock of Time Warner (“Common Stock”).<sup>5</sup> Shares of LMCN-V Stock are not publicly traded, but because shares of LMCN-V Stock are, with the exception of voting rights, equivalent to and convertible into shares of Common Stock, the value of shares of LMCN-V Stock is best determined by reference to the current market price of shares of the Common Stock. Based upon

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<sup>2</sup> Affidavit of Neal Dermer in Support of Petition of Liberty Media Corporation to Reopen and Modify (“Dermer Affidavit”) ¶2. The LMCN-V Stock is a limited voting common stock of Time Warner, the terms of which are contained in the Certificate (“Certificate of Designations”) of the Voting Powers, Designations, Preferences and Relative, Participating, Optional or Other Special Rights and Qualifications, Limitations or Restrictions Thereof, of Series LMCN-V Common Stock, par value \$0.01 per share, of Time Warner Inc., a copy of which is attached hereto as Exhibit 1.

<sup>3</sup> The order provides that Liberty shall not acquire or hold any interest in Time Warner that is entitled to exercise voting power except “(a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power or preferences of such securities.” See Paragraph II(D)(2) of the Order and Certificate of Designations.

<sup>4</sup> See Certificate of Designations, Section 6.

<sup>5</sup> *Id.*

the August 23, 2004 closing price per share of Common Stock of \$16.47, the 171,185,826 shares of LMCN-V Stock held by the Liberty Parties have a market value of approximately \$2.819 billion.

**A. Order prohibitions with respect to Liberty's ownership interest in Time Warner**

The Order does not expressly prohibit the Liberty Parties from lending its Ownership Interest in Time Warner, and, indeed, is silent on the subject of stock loans. Paragraph II(D)(1) prohibits the Liberty Parties, among others, from collectively or individually acquiring or holding, directly or indirectly, an Ownership Interest that is more than the lesser of 9.2% of the Fully Diluted Equity (as defined in the Order) of Time Warner or 12.4% of the actual issued and outstanding common stock of Time Warner. The 171,185,826 shares of LMCN-V Stock owned by the Liberty Parties represent approximately 3.77% of the actual issued and outstanding common stock of Time Warner and approximately 3.16% of the Fully Diluted Equity of Time Warner, based upon information as of December 31, 2003 provided by Time Warner to the Liberty Parties for purposes of determining compliance with Paragraph II(D)(1).<sup>6</sup>

Paragraph II(D)(2) of the Order states that "LMC . . . shall not acquire or hold any Ownership Interest in Time Warner *that is entitled to exercise voting power* [emphasis added] except (a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power or preferences of such securities. *Provided, however, that* any portion of TCI's and

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<sup>6</sup> Dermer Affidavit ¶3.

LMC's Interest in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner."<sup>7</sup>

As used in the Order, the term "Ownership Interest" means "any *right(s)* [emphasis added], present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of a Person."<sup>8</sup> It is important to note that (1) an Ownership Interest must be a "right" (which is not a defined term in the Order, but which commonly refers to a property interest under law, custom or agreement),<sup>9</sup> but an Ownership Interest can be either voting or nonvoting, (2) the prohibition in Paragraph II(D)(1) pertains to any Ownership Interest, whether voting or nonvoting and (3) the prohibition in Paragraph II(D)(2) pertains only to an Ownership Interest that is entitled to exercise voting power, and is further subject to the exceptions contained in clauses (a) and (b) of Paragraph II(D)(2).<sup>10</sup>

**B. Current desire to lend [REDACTED] shares of LMCN-V Stock in order to avoid incurring substantial costs.**

The Liberty Parties have a current desire to lend [REDACTED] shares of LMCN-V Stock to [REDACTED] ("Bank") in order to avoid incurring substantial costs.<sup>11</sup> On [REDACTED], certain Liberty Parties preserved the then current economic value of [REDACTED] shares of LMCN-V Stock by entering into three forward sale transactions with Bank.<sup>12</sup> On [REDACTED], the economic terms of these forward sale transactions were amended and

<sup>7</sup> Order, Paragraph II(D)(2).

<sup>8</sup> *Id.*, Paragraph I(W).

<sup>9</sup> Webster's Ninth New Collegiate Dictionary, Merriam-Webster Inc., publishers (1991). *See, also* Black's Law Dictionary, Fifth Edition, West Publishing Co. (1979) which defines a "right" as, among other things, an interest or title in an object of property; a just and legal claim to hold, use or enjoy it, or to convey or donate it as [one] may please.

<sup>10</sup> It is also important to note that the proviso in Paragraph II(D)(2) is phrased in the conditional tense and does not purport to sanction sales as the exclusive method for transferring Ownership Interests. (The Order could have easily and unambiguously stated that sales of shares were the exclusive method for transferring Ownership Interests, if that were the intent of the parties.)

<sup>11</sup> Dermer Affidavit ¶6.

the definitive terms for the amended forward sale transactions were set forth in three forward sale agreements with Bank, each dated as of [REDACTED] (each a "Forward Sale Agreement").<sup>13</sup> Pursuant to the Forward Sale Agreements, the relevant Liberty Parties have agreed to reimburse Bank for any costs Bank incurs after [REDACTED] in borrowing shares of Common Stock in connection with its hedging activities related to the Forward Sale Agreements.<sup>14</sup> For the period from [REDACTED] through August 23, 2004, the Liberty Parties have incurred an obligation to reimburse Bank for [REDACTED] in borrow costs pursuant to the Forward Sale Agreements.<sup>15</sup> The reimbursement obligations of the Liberty Parties to the Bank pursuant to the Forward Sale Agreements are expected to continue at an average rate of approximately [REDACTED] per month or approximately [REDACTED] per year, unless the Liberty Parties are able to lend shares of LMCN-V Stock to Bank.<sup>16</sup>

The Liberty Parties have negotiated a proposed form of stock loan agreement (the "Stock Loan Agreement") with Bank pursuant to which the Liberty Parties would lend an aggregate of [REDACTED] shares to Bank.<sup>17</sup> Pursuant to the terms of the Stock Loan Agreement and consistent with Section 6 of the Certificate of Designations, the Bank, upon receiving shares of LMCN-V Stock loaned pursuant to the Stock Loan Agreement ("Loaned Securities"), would be

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<sup>12</sup> *Id.* ¶7.

<sup>13</sup> *Id.* ¶7.

<sup>14</sup> Forward Sale Agreements, "Borrow Cost Adjustment".

<sup>15</sup> Dermer Affidavit ¶10.

<sup>16</sup> *Id.* ¶11.

<sup>17</sup> *Id.* ¶ 12. The form of Stock Loan Agreement consists of the standard form of Master Securities Loan Agreement (2000 Version) as published by The Bond Market Association and the Securities Industry Association (the "MSLA") and Schedule B to the MSLA ("Schedule B") which contains certain proposed amendments to the MSLA in order to address the unique nature of the LMCN-V Stock and in order to add additional representations, warranties and covenants to the MSLA. *See* Dermer Affidavit, Exhibit 4.

required to have the Loaned Securities converted into shares of Common Stock.<sup>18</sup> During the term of a loan of LMCN-V Stock pursuant to the Stock Loan Agreement (a "Loan"), the Bank would have all of the incidents of ownership of the Loaned Securities, including the right to vote the Loaned Securities, the right to transfer the Loaned Securities to others and the right to receive distributions on the Loaned Securities from Time Warner. The relevant Liberty Party would expressly waive the right to vote or to provide any consent or to take any similar action with respect to the Loaned Securities in the event that the record date or deadline for the vote, consent or other action falls during the term of a Loan.<sup>19</sup>

Upon any termination of a Loan,<sup>20</sup> the Bank would be required, if the Loaned Securities are to be returned to the relevant Liberty Party and the Order remains in force, to deliver the Loaned Securities to Time Warner, including any shares of Common Stock which may have been distributed in respect of the Loaned Securities during the term of a Loan, to be converted into the appropriate number of LMCN-V shares. Upon such conversion, the Bank would be required to return the shares of LMCN-V Stock to the relevant Liberty Party.<sup>21</sup> At no time during a Loan would a Liberty Party hold title to or have the right to vote, control the disposition of or receive distributions from Time Warner on the Common Stock of Time Warner.<sup>22</sup>

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<sup>18</sup> Schedule B, Section 8 at Dermer Affidavit, Exhibit 4.

<sup>19</sup> MSLA § 7.1 at Dermer Affidavit, Exhibit 4. The Bank would have the contractual obligation pursuant to a Stock Loan Agreement to pay distributions made on the Loaned Securities to the relevant Liberty Party or to treat distributions as part of the Loaned Securities as described below. To the extent Time Warner made a cash distribution on the Loaned Securities, the Bank would be required, pursuant to the Stock Loan Agreement, to pay an amount equal to the cash distribution to the relevant Liberty Party. To the extent that Time Warner made a non-cash distribution on the Loaned Securities, the Bank would be required, pursuant to the Stock Loan Agreement, to treat the non-cash distribution as part of the Loaned Securities and to return the non-cash distribution to the relevant Liberty Party upon the termination of the Loan, subject to the conversion requirements pertaining to Common Stock described herein. MSLA § 8 at Dermer Affidavit, Exhibit 4.

<sup>20</sup> The Bank would have the right to terminate a Loan at any time, and the relevant Liberty Party would have the right to terminate a Loan at any time, generally with three business day's prior notice to the Bank. MSLA § 6.1 at Dermer Affidavit, Exhibit 4. *See also* Dermer Affidavit ¶16.

<sup>21</sup> Schedule B, § 8 at Dermer Affidavit, Exhibit 4.

<sup>22</sup> For purposes of relevant tax and securities laws and for purposes of the Order, however, the relevant Liberty Party would be deemed to own the shares of LMCN-V Stock subject to a Loan. Thus, any shares of LMCN-

During the term of a Loan, the Bank would be free to sell, pledge, rehypothecate, assign, invest, use, commingle or otherwise dispose of, or otherwise use in its business any Loaned Securities, including delivering Loaned Securities to other stock lenders who may have previously lent shares of Common Stock to the Bank. Because the Bank could take any action it desires with respect to Loaned Securities, the Bank would have no obligation or incentive, whether economic, fiduciary or otherwise, to seek the advice or consent of a Liberty Party with respect to the voting or use of the Loaned Securities.

Furthermore, based upon Liberty's experience in the stock lending area, the Loaned Securities likely would not even be held by the Bank on a proprietary basis but, instead, would be used by the Bank to close out short positions in the Loaned Securities, to further loan or pledge the Loaned Securities to third parties, or to deliver the Loaned Securities to one or more unknown stock lenders who may have previously lent shares of Loaned Securities to the Bank. As a result, the relevant Liberty Parties likely would not know and would have no right to know the whereabouts of any Loaned Securities or how the Loaned Securities were being used.

Because shares of LMCN-V Stock held by the Liberty Parties have a low tax basis and the Liberty Parties do not currently desire to sell shares of LMCN-V Stock,<sup>23</sup> Liberty may desire to effect other stock loans prior to the expiration of the Order to generate revenue in the form of stock lending fees from stock borrowers and, if applicable, to use those fees to offset any amounts otherwise payable by a Liberty Party to such stock borrower.<sup>24</sup> Any loan of additional

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(continued...)

V Stock loaned by the Liberty Parties would be considered by the Liberty Parties to be held in their original form for purposes of determining compliance with the ownership "cap" provisions of Paragraph II(D)(1) of the Order and so reported in Liberty's annual compliance report. See Dermer Affidavit ¶17.

<sup>23</sup> Dermer Affidavit ¶4.

<sup>24</sup> *Id.* ¶5.



shares of LMCN-V Stock to third parties would be made pursuant to written agreements substantially similar to the Stock Loan Agreement described above.<sup>25</sup>

## II.

### Legal Standard for Reopening and Modification

The unanticipated desire for the Liberty Parties to lend shares of LMCN-V Stock in order to avoid significant ongoing costs and the corresponding desire of the Liberty Parties to know, with certainty, that such a loan does not violate the Order, form the basis for this petition. Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. §45(b), provides that the Commission shall reopen a final order to consider whether it should be modified if the respondent makes a satisfactory showing that "changed conditions of law or fact" or the public interest so requires. *See In the Matter of Rite Aid Corp.*, 125 F.T.C. 846, 848 (1998); *see also U.S. v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardships). Even where changed circumstances would not require reopening, the Commission may reopen and modify an order on public interest grounds. *See* 65 Fed. Reg. 50,636 (FTC Aug. 21, 2000), *amending* 16 C.F.R. 2.51(b) (2001).

A satisfactory showing sufficient to require reopening is demonstrated when the request to reopen identifies significant changes in circumstances and shows that these changes eliminate the need for the order or make its continued application inequitable or harmful to competition.<sup>26</sup> The significant and unanticipated costs incurred by the Liberty Parties as a result of their inability to lend shares of LMCN-V Stock, due to the lack of certainty about how a loan of such shares of stock would be treated under the Order, and the fact that the requested modification

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<sup>25</sup> *Id.* ¶13.

<sup>26</sup> *See* S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979).

would advance the public interest and be consistent with the purposes of the Order all support reopening the Order and modifying it as proposed herein.

### **III. The Public Interest and Changed Factual Circumstances Support Modification of the Order**

Because consent decrees have many attributes of ordinary contracts, they should be construed basically as contracts; thus, any prohibition of a consent decree or order must be found within its four corners.<sup>27</sup> As stated above, the Order does not expressly prohibit the Liberty Parties from lending shares of LMCN-V Stock, and Liberty believes such a loan, accompanied by appropriate safeguards to prevent voting of or influence on the Time Warner stock would be fully consistent with the goals of the Order.

The Forward Sale Agreements, which impose significant costs upon the Liberty Parties, were not contemplated at the time the Order was issued, and, as a result, the legal status of a stock loan is not addressed in the Order. In order to determine if a stock loan would be contrary to the purposes of the Order, it is important to analyze the prohibitions contained in Paragraphs II(D)(1) and II(D)(2), the definition of Ownership Interest, and the nature of any Ownership Interest or "rights" held by the Liberty Parties in Time Warner. For the reasons set forth in Exhibit 2 (Status of Loaned Securities) hereto, it is clear that the Liberty Parties would not during the term of a Loan hold an Ownership Interest in Time Warner that is entitled to exercise voting power in violation of Paragraph II(D)(2).

As described in more detail in Exhibit 2, at no point during a Loan could a Liberty Party direct, control, or influence the voting of Time Warner stock.<sup>28</sup> (Indeed, it is likely Liberty will

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<sup>27</sup> *U.S. v. ITT Continental Baking Co.*, 420 U.S. 223, 233 (1975); *U.S. v. Armour & Co.*, 402 U.S. 673, 682 (1971); see also *Hughes v. U.S.*, 342 U.S. 353 (1952); *U.S. v. Atlantic Refining Co.*, 360 U.S. 19 (1959).

<sup>28</sup> See also Dermer Affidavit ¶15.

not know the specific owner of the shares at any particular time.) Thus, a Loan effected pursuant to the procedures described above would not conflict with or violate Paragraph II(D)(2) of the Order because a Loan would not create a Liberty right, present or contingent, to acquire or hold an Ownership Interest in Time Warner that is entitled to exercise voting power (*i.e.*, Common Stock).

Even if the Commission believed the Loan were prohibited by the current terms of the Order, reopening and modification of the Order in the manner requested by this petition is consistent with the public interest. To interpret the Order to prohibit Loans of shares of LMCN-V Stock would be to place restrictions upon the alienability of such stock which do not appear to be contemplated by or consistent with the Order. In fact, stock loans have the effect of furthering the policy goals underlying the Order, because a Loan that transfers stock to third parties would temporarily divest the relevant Liberty Party from title to and the right to vote, control the disposition of or receive distributions from Time Warner on shares of the capital stock of Time Warner.

Because a stock loan pursuant to the Stock Loan Agreement proposed here is fully consistent with the purposes of the Order, both the public interest and changed factual circumstances triggered by Liberty's current desire to loan the Time Warner stock make it appropriate for the Commission to reopen and modify the Order.

#### **IV. Requested Modification**

In order to confirm that a Loan would not be prohibited by the Order, Liberty requests that the Order be modified to insert a clarifying proviso in Paragraph II(D)(2). (The proposed modification language is provided in the draft Order attached hereto as Exhibit 3.) This proviso would recognize that stock loans are not prohibited by the Order, provided that (i) the Person (as

defined in the Order) lending the stock has no right or intention to vote the stock or to influence the voting thereof during the term of the loan thereof; (ii) the Person lending the stock does not vote and does not influence the voting of the stock during the term of the loan thereof; (iii) any agreement, document or instrument pursuant to which the stock is loaned contains one or more provisions (x) acknowledging that the Person lending the stock has no right or intention to vote the stock or influence the voting of the stock during the term of the loan thereof and (y) recognizing that the borrower of the stock has no obligation to respond to requests by the Persons lending the stock to vote or influence the voting of the stock during the term of the loan thereof; and (iv) any stock loaned shall be considered to be held in its original form by the Person lending the same for purposes of determining whether such Person is in compliance with the provisions of Paragraph II(D)(1). The first three clauses are intended to ensure that the terms of the Stock Loan Agreement do not permit circumvention of the Order's ban on acquiring or holding voting interests in Time Warner. The final clause is intended to address the treatment of any loaned stock under the ownership "cap" contained in Paragraph II(D)(1) and confirm that the loaned stock will continue to be counted toward that cap even while outside a Person's control pursuant to the Stock Loan Agreement.

## **V. Conclusion**

For the reasons stated above, modifying the Order in order to expressly permit the Liberty Parties to lend shares of Time Warner stock as described herein would be consistent with the purposes of the Order and would enable the Liberty Parties to eliminate significant unanticipated costs. No public interest is served by preventing the Liberty Parties from lending shares of Time Warner stock, and the proposed modification is fully consistent with the purposes of the Order. The Petition to Reopen and Modify therefore should be granted.

Dated: August 26, 2004

Respectfully submitted,

Kathryn Fenton / TD

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Exhibit 1 to Petition

Time Warner Certificate of Designations

**PUBLIC RECORD VERSION**

CERTIFICATE OF THE VOTING POWERS,  
DESIGNATIONS, PREFERENCES AND RELATIVE, PARTICIPATING,  
OPTIONAL OR OTHER SPECIAL  
RIGHTS AND QUALIFICATIONS, LIMITATIONS  
OR RESTRICTIONS THEREOF, OF  
SERIES LMCN-V COMMON STOCK

OF

AOL TIME WARNER INC.

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Pursuant to Section 151 of the General  
Corporation Law of the State of Delaware  
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AOL Time Warner Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware (the "Corporation"), does hereby certify that the following resolution was duly adopted by action of the Board of Directors of the Corporation (the "Board of Directors").

RESOLVED that pursuant to the authority expressly granted to and vested in the Board of Directors by the provisions of Section 3 of Article IV of the Restated Certificate of Incorporation of the Corporation, as amended from time to time (the "Certificate of Incorporation"), and Section 151(g) of the DGCL, the Board of Directors hereby creates, from the authorized shares of Series Common Stock, par value \$0.01 per share ("Series Common Stock"), of the Corporation authorized to be issued pursuant to the Certificate of Incorporation, a series of Series Common Stock, and hereby fixes the voting powers, designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, of the shares of such series as follows:

The series of Series Common Stock hereby established shall consist of 210,000,000 shares designated as Series LMCN-V Common Stock. The number of shares constituting such series may be increased or decreased (but not below the number of shares then outstanding) from time to time by a resolution or resolutions of the Board of Directors of the Corporation.

1. Definitions. As used herein, the following terms shall have the indicated meanings:

1.1 "Board of Directors" shall mean the Board of Directors of the Corporation or, with respect to any action to be taken by the Board of Directors, any committee of the Board of Directors duly authorized to take such action.

1.2 "Capital Stock" shall mean any and all shares of corporate stock of a Person (however designated and whether representing rights to vote, rights to participate in dividends or distributions upon liquidation or otherwise with respect to such Person, or any division or subsidiary thereof, or any joint venture, partnership, corporation or other entity).

1.3 "Certificate" shall mean the Certificate of the Voting Powers, Designations, Preferences and Relative, Participating, Optional or Other Special Rights, and Qualifications, Limitations or Restrictions Thereof, of Series LMCN-V Common Stock filed with the Secretary of State of the State of Delaware pursuant to Section 151 of the DGCL, as amended from time to time.

1.4 "Closing Price" of the Common Stock shall mean the last reported sale price of the Common Stock (regular way) as shown on the Composite Tape of the NYSE, or, in case no such sale takes place on such day, the average of the closing bid and asked prices on the NYSE, or, if the Common Stock is not listed or admitted to trading on the NYSE, on the principal national securities exchange on which such stock is listed or admitted to trading, or, if it is not listed or admitted to trading on any national securities exchange, the last reported sale price of the Common Stock, or, in case no such sale takes place on such day, the average of the closing bid and asked prices, in either case as reported by NASDAQ.

1.5 "Common Stock" shall mean the class of Common Stock, par value \$0.01 per share, of the Corporation, or any other class of stock resulting from (x) successive changes or reclassifications of such Common Stock consisting of changes in par value, or from par value to no par value, (y) a subdivision or combination or (z) any other changes for which an adjustment is made under Section 2.4(a), together with any rights associated generally with the shares of Common Stock.

1.6 "Communications Laws" shall mean the Communications Act of 1934 (as amended and supplemented from time to time and any successor statute or statutes regulating telecommunications companies) and the rules and



regulations (and interpretations thereof and determinations with respect thereto) promulgated, issued or adopted from time to time by the Federal Communications Commission (the "FCC"). All references herein to Communications Laws shall include as of any relevant date in question the Communications Laws as then in effect (including any Communications Law or part thereof the effectiveness of which is then stayed or promulgated with a delayed effective date).

1.7 "Conversion Date" shall have the meaning set forth in Section 3.5.

1.8 "Corporation" shall mean AOL Time Warner Inc., a Delaware corporation, and any of its successors by operation of law, including by merger or consolidation.

1.9 "DGCL" shall mean the General Corporation Law of the State of Delaware, as amended from time to time.

1.10 "Dividend Payment Date" shall have the meaning set forth in Section 2.1.

1.11 "Formula Number" shall have the meaning set forth in Section 2.1.

1.12 "LMC Agreement" shall mean the Second Amended and Restated LMC Agreement dated as of September 22, 1995, among a Delaware corporation known on such date as "Time Warner Inc.", TW Inc., Liberty Media Corporation, a Delaware corporation ("LMC Parent"), and certain subsidiaries of LMC Parent listed under "Subsidiaries of LMC Parent" on the signature pages thereto, as amended by Amendment No. 1 dated as of June 24, 1997, Amendment No. 2 dated as of May 25, 1999, and as further amended from time to time.

1.13 "Merger Agreement" shall mean the Second Amended and Restated Agreement and Plan of Merger dated as of January 10, 2000, among AOL Time Warner Inc., America Online, Inc., Time Warner Inc., America Online Merger Sub Inc. and Time Warner Merger Sub Inc., as such agreement may be amended from time to time in accordance with its terms.

1.14 "NASDAQ" shall mean The Nasdaq Stock Market.

1.15 "NYSE" shall mean the New York Stock Exchange, Inc.

1.16 "Parity Stock" shall mean shares of Common Stock and shares of any other class or series of Capital Stock of the Corporation that, by the terms of the Certificate of Incorporation or of the instrument by which the Board of Directors, acting pursuant to authority granted in the Certificate of Incorporation, shall fix the relative rights, preferences and limitations thereof, shall, in the event that the stated dividends thereon are not paid in full, be entitled to share ratably with the shares of this Series in the payment of dividends in accordance with the sums that would be payable on such shares if all dividends were declared and paid in full, or shall, in the event that the amounts payable thereon in liquidation are not paid in full, be entitled to share ratably with the shares of this Series in any distribution of assets other than by way of dividends in accordance with the sums that would be payable in such distribution if all sums payable were discharged in full.

1.17 "Permitted Transferee" shall mean any Liberty Party, as such term is defined in the LMC Agreement.

1.18 "Person" shall mean an individual, corporation, partnership, limited liability company, joint venture, association, trust, unincorporated organization or other entity.

1.19 "Preferred Stock" shall mean the class of Preferred Stock, par value \$0.10 per share, of the Corporation.

1.20 "Record Date" shall have the meaning set forth in Section 2.1.

1.21 "Senior Stock" shall mean shares of any class or series of Capital Stock of the Corporation that, by the terms of the Certificate of Incorporation or of the instrument by which the Board of Directors, acting pursuant to authority granted in the Certificate of Incorporation, shall fix the relative rights, preferences and limitations thereof, shall be senior to the shares of this Series in respect of the right to receive dividends or to participate in any distribution of assets other than by way of dividends.

1.22 "Series Common Stock" shall mean the class of Series Common Stock, par value \$0.01 per share, of the Corporation.

1.23 "Series LMC Common Stock" shall mean the series of Series Common Stock authorized and designated as Series LMC Common Stock.

1.24 "Series LMCN-V Common Stock" and "this Series" shall mean the series of Series Common Stock authorized and designated as Series LMCN-V Common Stock.

1.25 "Trading Day" shall mean, so long as the Common Stock is listed or admitted to trading on the NYSE, a day on which the NYSE is open for the transaction of business, or, if the Common Stock is not listed or admitted to trading on the NYSE, a day on which the principal national securities exchange on which the Common Stock is listed is open for the transaction of business, or, if the Common Stock is not so listed or admitted for trading on any national securities exchange, a day on which the National Market System of NASDAQ is open for the transaction of business.

## 2. Dividends.

2.1 The holders of shares of this Series shall be entitled to receive dividends, out of funds legally available therefor, payable on such dates as may be set by the Board of Directors for payment of cash dividends on the Common Stock (each such date being referred to herein as a "Dividend Payment Date"), in cash, in an amount per share equal to the product of (i) the Formula Number in effect as of such Dividend Payment Date multiplied by (ii) the amount of the regularly scheduled cash dividend to be paid on one share of Common Stock on such Dividend Payment Date; provided, however, dividends on the shares of this Series shall be payable pursuant to this Section 2.1 only to the extent that regularly scheduled cash dividends are declared and paid on the Common Stock. As used herein, the "Formula Number" shall initially be 1.0000, which shall be adjusted from time to time pursuant to Section 2.4. The dividends payable on any Dividend Payment Date shall be paid to the holders of record of shares of this Series at the close of business on the record date for the related regularly scheduled cash dividend on the Common Stock (each such date being referred to herein as a "Record Date"). The amount of dividends that are paid to each holder of record on any Dividend Payment Date shall be rounded to the nearest cent.

2.2 In case the Corporation shall at any time distribute (other than a distribution in liquidation of the Corporation and other than a distribution of Common Stock as a result of which an adjustment to the Formula

Number is made pursuant to Section 2.4 or in connection with which a dividend of shares of this Series is paid in accordance with Section 2.4(e) to the holders of its shares of Common Stock any assets or property, including evidences of indebtedness or securities of the Corporation or of any other Person (including common stock of such Person) or cash (but excluding regularly scheduled cash dividends payable on shares of Common Stock), or in case the Corporation shall at any time distribute (other than a distribution in liquidation of the Corporation) to such holders rights, options or warrants to subscribe for or purchase shares of Common Stock (including shares held in the treasury of the Corporation), or rights, options or warrants to subscribe for or purchase any other security or rights, options or warrants to subscribe for or purchase any assets or property (in each case, whether of the Corporation or otherwise, but other than any distribution of rights to purchase securities of the Corporation if the holder of shares of this Series would otherwise be entitled to receive such rights upon conversion of shares of this Series for Common Stock pursuant to Section 3, provided, however, that if such rights are subsequently redeemed by the Corporation, such redemption shall be treated for purposes of this Section 2.2 as a cash dividend (but not a regularly scheduled cash dividend) on the Common Stock), the Corporation shall simultaneously distribute such assets, property, securities, rights, options or warrants to the holders of shares of this Series on the record date fixed for determining the holders of Common Stock entitled to participate in such distribution (or, if no such record date shall be established, the effective time thereof) in an amount per share of this Series equal to the amount that a holder of one share of this Series would have been entitled to receive had such share of this Series been converted into Common Stock immediately prior to such record date (or effective time). In the event of a distribution to holders of shares of this Series pursuant to this Section 2.2, such holders shall be entitled to receive fractional shares or interests only to the extent that holders of Common Stock are entitled to receive the same. The holders of shares of this Series on the applicable record date (or effective time) shall be entitled to receive in lieu of such fractional shares or interests the same consideration as is payable to holders of Common Stock with respect thereto. If there are no fractional shares or interests payable to holders of Common Stock, the holders of shares of this Series on the applicable record date (or effective time) shall receive in lieu of such fractional shares or interests the fair value thereof as determined by the Board of Directors.

2.3 In the event that the holders of Common Stock are entitled to make any election with respect to the kind or amount of securities or other property receivable by them in any distribution that is subject to Section 2.2, the kind and amount of securities or other property that shall be distributable to the holders of shares of this Series shall be based on (i) the election, if any, made by the holder of record (as of the date used for determining the holders of Common Stock entitled to make such election) of the largest number of shares of this Series in writing to the Corporation on or prior to the last date on which a holder of Common Stock may make such an election or (ii) if no such election is timely made, an assumption that such holder failed to exercise any such rights (provided that if the kind or amount of securities or other property is not the same for each nonelecting holder, then the kind and amount of securities or other property receivable by holders of shares of this Series shall be based on the kind or amount of securities or other property receivable by a plurality of the shares held by the nonelecting holders of Common Stock). Concurrently with the mailing to holders of Common Stock of any document pursuant to which such holders may make an election of the type referred to in this Section 2.3, the Corporation shall mail a copy thereof to the holders of record of shares of this Series as of the date used for determining the holders of record of Common Stock entitled to such mailing, which document shall be used by the holders of record of shares of this Series to make such an election.

2.4 The Formula Number shall be adjusted from time to time as follows for events occurring after the effective time of the transactions contemplated by the Merger Agreement, whether or not any shares of this Series have been issued by the Corporation:

(a) In case the Corporation shall (i) pay a dividend in shares of its Common Stock, (ii) combine its outstanding shares of Common Stock into a smaller number of shares, (iii) subdivide its outstanding shares of Common Stock or (iv) reclassify (other than by way of a merger or consolidation that is subject to Section 3.6) its shares of Common Stock, then the Formula Number in effect immediately before such event shall be appropriately adjusted so that immediately following such event the holders of shares of this Series shall be entitled to receive upon conversion thereof the kind and amount of shares of Capital Stock of the Corporation that they would have owned or been entitled to receive upon or by reason of such event if such shares of this Series had been converted

immediately before the record date (or, if no record date, the effective date) for such event (it being understood that any distribution of cash or Capital Stock (other than Common Stock) that shall accompany a reclassification of the Common Stock, shall be subject to Section 2.2 rather than this Section 2.4(a)). An adjustment made pursuant to this Section 2.4(a) shall become effective retroactively immediately after the record date in the case of a dividend or distribution and shall become effective retroactively immediately after the effective date in the case of a subdivision, combination or reclassification. For the purposes of this Section 2.4(a), in the event that the holders of Common Stock are entitled to make any election with respect to the kind or amount of securities receivable by them in any transaction that is subject to this Section 2.4(a) (including any election that would result in all or a portion of the transaction becoming subject to Section 2.2), the kind and amount of securities that shall be distributable to the holders of shares of this Series shall be based on (i) the election, if any, made by the holder of record (as of the date used for determining the holders of Common Stock entitled to make such election) of the largest number of shares of this Series in writing to the Corporation on or prior to the last date on which a holder of Common Stock may make such an election or (ii) if no such election is timely made, an assumption that such holder failed to exercise any such rights (provided that if the kind or amount of securities is not the same for each nonelecting holder, then the kind and amount of securities receivable shall be based on the kind or amount of securities receivable by a plurality of nonelecting holders of Common Stock). Concurrently with the mailing to holders of Common Stock of any document pursuant to which such holders may make an election of the type referred to in this Section 2.4(a), the Corporation shall mail a copy thereof to the holders of record of shares of this Series as of the date used for determining the holders of record of Common Stock entitled to such mailing, which document shall be used by the holders of record of shares of this Series to make such an election.

(b) The Corporation shall be entitled to make such additional adjustments in the Formula Number, in addition to those required by Section 2.4(a) as shall be necessary in order that any dividend or distribution in Common Stock or any subdivision, reclassification or combination of shares of Common Stock referred to above, shall not be taxable to the

holders of Common Stock for United States Federal income tax purposes, so long as such additional adjustments pursuant to this Section 2.4(b) do not decrease the Formula Number.

(c) All calculations under this Section 2 and Section 3 shall be made to the nearest cent, one-hundredth of a share or, in the case of the Formula Number, one hundred-thousandth. Notwithstanding any other provision of this Section 2.4, the Corporation shall not be required to make any adjustment of the Formula Number unless such adjustment would require an increase or decrease of at least one percent (1%) of the Formula Number. Any lesser adjustment shall be carried forward and shall be made at the time of and together with the next subsequent adjustment that, together with any adjustment or adjustments so carried forward, shall amount to an increase or decrease of at least one percent (1%) of the Formula Number. Any adjustments under this Section 2.4 shall be made successively whenever an event requiring such an adjustment occurs.

(d) Promptly after an adjustment in the Formula Number is required, the Corporation shall provide written notice to each of the holders of shares of this Series, which notice shall state the adjusted Formula Number.

(e) Notwithstanding anything to the contrary in this Section 2.4 or the Certificate, if the Corporation pays a dividend with respect to its outstanding Common Stock in the form of additional shares of Common Stock, then:

(i) the Corporation may pay a dividend with respect to the outstanding shares of this Series in the form of additional shares of this Series, payable at the same time with the same record date and in the same ratio as the dividend with respect to the Common Stock (including treatment of fractional shares);

(ii) if the Corporation elects to pay the dividend in accordance with clause (i) above, the Corporation shall pay a dividend with respect to the outstanding shares, if any, of Series LMC Common Stock in the form of additional shares of Series LMC Common Stock, payable at the same time with the same record date and in the same ratio as

the dividend with respect to the Common Stock (including treatment of fractional shares); and

(iii) if the Corporation pays the dividend in accordance with clauses (i) and (ii) above, there shall not be any adjustment to the Formula Number by reason of such dividend with respect to the Common Stock.

(f) If a distribution is made in accordance with the provisions of Section 2.2, anything in this Section 2.4 to the contrary notwithstanding, no adjustment pursuant to this Section 2.4 shall be effected by reason of the distribution of such assets, property, securities, rights, options or warrants or the subsequent modification, exercise, expiration or termination of such securities, rights, options or warrants.

### 3. Conversion at the Option of the Holder.

3.1 Each holder of a share of this Series shall have the right at any time to convert such share of this Series into either: (i) a number of shares of Common Stock per share of this Series equal to the Formula Number in effect on the Conversion Date or (ii) one share of Series LMC Common Stock per share of this Series; provided, however, that such holder may convert shares of this Series only to the extent that the ownership by such holder or its designee of the shares of Common Stock or Series LMC Common Stock issuable upon such conversion would not violate the Communications Laws.

3.2 No adjustments in respect of payments of dividends on shares of this Series surrendered for conversion or any dividend on the Common Stock or Series LMC Common Stock issued upon conversion shall be made upon the conversion of any shares of this Series (it being understood that if the Conversion Date for shares of this Series occurs after the Record Date and prior to the Dividend Payment Date of any such dividend, the holders of record of shares of this Series on such Record Date shall be entitled to receive the dividend payable with respect to such shares on the related Dividend Payment Date pursuant to Section 2.1).

3.3 The Corporation may, but shall not be required to, in connection with any conversion of shares of this Series into shares of Common Stock, issue a fraction of a share of Common Stock, and if the Corporation shall determine not to issue any such fraction, the Corporation



shall make a cash payment (rounded to the nearest cent) equal to such fraction multiplied by the Closing Price of the Common Stock on the last Trading Day prior to the Conversion Date. The Corporation shall issue a fraction of a share of Series LMC Common Stock in order to effect a conversion of a fraction of a share of this Series into Series LMC Common Stock.

3.4 Any holder of shares of this Series electing to convert such shares into Common Stock or Series LMC Common Stock shall surrender the certificate or certificates for such shares at the principal executive office of the Corporation (or at such other place as the Corporation may designate by notice to the holders of shares of this Series) during regular business hours, duly endorsed to the Corporation or in blank, or accompanied by instruments of transfer to the Corporation or in blank, or in form satisfactory to the Corporation, and shall give written notice to the Corporation at such office that such holder elects to convert such shares of this Series, which notice shall state whether the shares of this Series delivered for conversion shall be converted into shares of Common Stock or shares of Series LMC Common Stock. If any such certificate or certificates shall have been lost, stolen or destroyed, the holder shall, in lieu of delivering such certificate or certificates, deliver to the Corporation (or such other place) an indemnification agreement and bond satisfactory to the Corporation. The Corporation shall, as soon as practicable (subject to Section 3.8) after such deposit of certificates for shares of this Series or delivery of the indemnification agreement and bond, accompanied by the written notice above prescribed, issue and deliver at such office (or such other place) to the holder for whose account such shares were surrendered, or a designee of such holder, certificates representing either (i) the number of shares of Common Stock and the cash, if any, or (ii) the number of shares of Series LMC Common Stock, as the case may be, to which such holder is entitled upon such conversion. Each share of Common Stock delivered to a holder or its designee as a result of conversion of shares of this Series pursuant to this Section 3 shall be accompanied by any rights associated generally with each other share of Common Stock outstanding as of the Conversion Date.

3.5 Conversion shall be deemed to have been made as of the date (the "Conversion Date") that the certificate or certificates for the shares of this Series to be converted and the written notice prescribed in Section 3.4 are received by the Corporation; and the Person entitled to receive the Common Stock or Series LMC Common

Stock issuable upon such conversion shall be treated for all purposes as the holder of record of such Common Stock or Series LMC Common Stock, as the case may be, on such date. The Corporation shall not be required to deliver certificates for shares of Common Stock or Series LMC Common Stock while the stock transfer books for such stock or for this Series are duly closed for any purpose, but certificates for shares of Common Stock or Series LMC Common Stock, as the case may be, shall be delivered as soon as practicable after the opening of such books.

3.6 In the event that after the effective time of the transactions contemplated by the Merger Agreement, whether or not any shares of this Series have been issued by the Corporation, in the event that either (a) any consolidation or merger to which the Corporation is a party, other than a merger or consolidation in which the Corporation is the surviving or continuing corporation and that does not result in any reclassification of, or change (other than a change in par value or from par value to no par value or from no par value to par value, or as a result of a subdivision or combination) in, outstanding shares of Common Stock or (b) any sale or conveyance of all or substantially all of the property and assets of the Corporation, then lawful provision shall be made as part of the terms of such transaction whereby the holder of each share of this Series shall have the right thereafter, during the period such share shall be convertible, to convert such share into the kind and amount of shares of stock or other securities and property receivable upon such consolidation, merger, sale or conveyance by a holder of the number of shares of Common Stock into which such shares of this Series could have been converted immediately prior to such consolidation, merger, sale or conveyance, subject to adjustment that shall be as nearly equivalent as may be practicable to the adjustments provided for in Section 2.4 and this Section 3 (based on (i) the election, if any, made in writing to the Corporation by the holder of record (as of the date used for determining holders of Common Stock entitled to make such election) of the largest number of shares of this Series on or prior to the last date on which a holder of Common Stock may make an election regarding the kind or amount of securities or other property receivable by such holder in such transaction or (ii) if no such election is timely made, an assumption that such holder failed to exercise any such rights (provided that if the kind or amount of securities or other property is not the same for each nonelecting holder, then the kind and amount of securities or other property receivable shall be based upon the kind and amount of securities or other property receivable by a plurality of the nonelecting holders of

Common Stock)). In the event that any of the transactions referred to in clause (a) or (b) of the first sentence of this Section 3.6 involve the distribution of cash or property (other than equity securities) to a holder of Common Stock, lawful provision shall be made as part of the terms of the transaction whereby the holder of each share of this Series on the record date fixed for determining holders of Common Stock entitled to receive such cash or property (or if no such record date is established, the effective date of such transaction) shall be entitled to receive the amount of cash or property that such holder would have been entitled to receive had such holder converted his shares of this Series into Common Stock immediately prior to such record date (or effective date) (based on the election or nonelection made by the holder of record of the largest number of shares of this Series, as provided above). Concurrently with the mailing to holders of Common Stock of any document pursuant to which such holders may make an election regarding the kind or amount of securities or other property that will be receivable by such holders in any transaction described in clause (a) or (b) of the first sentence of this Section 3.6, the Corporation shall mail a copy thereof to the holders of record of the shares of this Series as of the date used for determining the holders of record of Common Stock entitled to such mailing, which document shall be used by the holders of shares of this Series to make such an election. The Corporation shall not enter into any of the transactions referred to in clause (a) or (b) of the first sentence of this Section 3.6 unless effective provision shall be made in the certificate or articles of incorporation or other constituent documents of the Corporation or the entity surviving the consolidation or merger, if other than the Corporation, or the entity acquiring the Corporation's assets, as the case may be, so as to give effect to the provisions set forth in this Section 3.6. The provisions of this Section 3.6 shall apply similarly to successive consolidations, mergers, sales or conveyances. For purposes of this Section 3.6, the term "Corporation" shall refer to the Corporation as constituted immediately prior to the merger, consolidation or other transaction referred to in this Section 3.6.

3.7 The Corporation shall at all times reserve and keep available, free from preemptive rights, out of its authorized but unissued stock, for the purpose of effecting the conversion of the shares of this Series, such number of its duly authorized shares of Common Stock and Series LMC Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of this Series into shares of Common Stock or Series LMC Common Stock at any time (assuming that, at the

time of the computation of such number of shares, all such Common Stock or Series LMC Common Stock would be held by a single holder); provided, however, that nothing contained herein shall preclude the Corporation from satisfying its obligations in respect of the conversion of the shares by delivery of purchased shares of Common Stock or Series LMC Common Stock that are held in the treasury of the Corporation. All shares of Common Stock or Series LMC Common Stock that shall be deliverable upon conversion of the shares of this Series shall be duly and validly issued, fully paid and nonassessable. For purposes of this Section 3, any shares of this Series at any time outstanding shall not include shares held in the treasury of the Corporation.

3.8 In any case in which Section 2.4 shall require that any adjustment be made effective as of or retroactively immediately following a record date, the Corporation may elect to defer (but only for five (5) Trading Days following the occurrence of the event that necessitates the notice referred to in Section 2.4(d)) issuing to the holder of any shares of this Series converted after such record date (i) the shares of Common Stock issuable upon such conversion over and above (ii) the shares of Common Stock issuable upon such conversion on the basis of the Formula Number prior to adjustment; provided, however, that the Corporation shall deliver to such holder a due bill or other appropriate instrument evidencing such holder's right to receive such additional shares upon the occurrence of the event requiring such adjustment.

3.9 If any shares of Common Stock or Series LMC Common Stock that would be issuable upon conversion pursuant to this Section 3 require registration with or approval of any governmental authority before such shares may be issued upon conversion (other than any such registration or approval required to avoid a violation of the Communications Laws), the Corporation will in good faith and as expeditiously as possible cause such shares to be duly registered or approved, as the case may be. The Corporation will use commercially reasonable efforts to list the shares of (or depository shares representing fractional interests in) Common Stock required to be delivered upon conversion of shares of this Series prior to such delivery upon the principal national securities exchange, if any, upon which the outstanding Common Stock is listed at the time of such delivery.

3.10 The Corporation shall pay any and all issue or other taxes that may be payable in respect of any issue or delivery of shares of Common Stock or Series LMC

Common Stock on conversion of shares of this Series pursuant hereto. The Corporation shall not, however, be required to pay any tax that is payable in respect of any transfer involved in the issue or delivery of Common Stock or Series LMC Common Stock in a name other than that in which the shares of this Series so converted were registered, and no such issue or delivery shall be made unless and until the Person requesting such issue has paid to the Corporation the amount of such tax, or has established, to the satisfaction of the Corporation, that such tax has been paid.

3.11 In case of (i) the voluntary or involuntary dissolution, liquidation or winding up of the Corporation or (ii) any action triggering an adjustment to the Formula Number pursuant to Section 2.4 (or in connection with which a dividend of shares of this Series is paid in accordance with Section 2.4(e)) or Section 3.6, then, in each case, the Corporation shall cause to be mailed, first-class postage prepaid, to the holders of record of the outstanding shares of this Series, at least fifteen (15) days prior to the applicable record date for any such transaction (or if no record date will be established, the effective date thereof), a notice stating (x) the date, if any, on which a record is to be taken for the purpose of any such transaction (or, if no record date will be established, the date as of which holders of record of Common Stock entitled to participate in such transaction are determined), and (y) the expected effective date thereof. Failure to give such notice or any defect therein shall not affect the legality or validity of the proceedings described in this Section 3.11.

#### 4. Voting.

4.1 The shares of this Series shall have no voting rights except as expressly provided in this Section 4 or as required by law.

4.2 Each share of this Series shall be entitled to vote together as one class with the holders of shares of Common Stock upon the election of the directors of the Corporation. In any such vote, the holders of shares of this Series shall be entitled to a number of votes per share of this Series equal to the product of (i) the Formula Number then in effect multiplied by (ii) the maximum number of votes per share of Common Stock that any holder of shares of Common Stock generally then has with respect to such matter divided by (iii) 100.

4.3 So long as any shares of this Series remain outstanding, unless a greater percentage shall then be required by law, the Corporation shall not, without the affirmative vote or written consent of the holders of shares of this Series representing at least 66-2/3% of the aggregate voting power of shares of this Series then outstanding, amend, alter or repeal any of the provisions of the Certificate or the Certificate of Incorporation so as, in any such case, as applicable, to (i) amend, alter or repeal any of the powers, preferences or rights of the Series Common Stock or (ii) adversely affect the voting powers, designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, of the shares of this Series or the Series LMC Common Stock; provided, however, that no affirmative vote or written approval of any holder of shares of this Series shall be required to amend, alter or repeal any of the powers, preferences or rights of any series of Series Common Stock other than this Series and the Series LMC Common Stock.

4.4 So long as any shares of this Series remain outstanding, the Corporation shall not, without the affirmative vote or written consent of the holders of shares of this Series representing 100% of the aggregate voting power of shares of this Series then outstanding, amend, alter or repeal the provisions of Section 7.7 or this Section 4.4.

4.5 No consent of holders of shares of this Series shall be required for (i) the creation of any indebtedness of any kind of the Corporation, (ii) the authorization or issuance of any class or series of Parity Stock or Senior Stock, (iii) the approval of any amendment to the Certificate of Incorporation that would increase or decrease the aggregate number of authorized shares of Series Common Stock or Common Stock or (iv) the authorization of any increase or decrease in the number of shares constituting this Series; provided, however, that the number of shares constituting this Series shall not be decreased below the number of such shares then outstanding.

## 5. Liquidation Rights.

5.1 Upon the liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the holders of shares of this Series shall be entitled to receive, contemporaneously with any distribution to holders of shares of Common Stock upon such liquidation, dissolution or winding up, an aggregate amount per share

equal to the product of the Formula Number then in effect multiplied by the aggregate amount to be distributed per share to holders of Common Stock.

5.2 Neither the sale, exchange or other conveyance (for cash, shares of stock, securities or other consideration) of all or substantially all the property and assets of the Corporation nor the merger or consolidation of the Corporation into or with any other corporation, or the merger or consolidation of any other corporation into or with the Corporation, shall be deemed to be a dissolution, liquidation or winding up, voluntary or involuntary, for the purposes of this Section 5.

#### 6. Transfer Restrictions.

6.1 Without the prior written consent of the Corporation, no holder of shares of this Series shall offer, sell, transfer, pledge, encumber or otherwise dispose of, or agree to offer, sell, transfer, pledge, encumber or otherwise dispose of, any shares of this Series or interests in any shares of this Series except to a Permitted Transferee that shall agree that, prior to such Permitted Transferee ceasing to be a Permitted Transferee, such Permitted Transferee must transfer ownership of any shares of this Series, and all interests therein, held by such Permitted Transferee to any Permitted Transferee. For the avoidance of doubt, the preceding sentence is not intended to prohibit a holder of shares of this Series from entering into, or offering to enter into, (a) any arrangement under which such holder agrees to promptly convert shares of this Series and sell, transfer or otherwise dispose of the Common Stock issuable upon such conversion or (b) any pledge or encumbrance of shares of this Series; provided, however, that the terms of any such pledge or encumbrance must require that, in the event of any sale or foreclosure with respect to shares of this Series, such shares must be delivered immediately to the Corporation for conversion into Common Stock. The provisions of this Section 6.1 shall continue to be in effect with respect to any shares of this Series received by any holder by virtue of merger, consolidation, operation of law or otherwise.

6.2 Certificates for shares of this Series shall bear such legends as the Corporation shall from time to time deem appropriate.

## 7. Other Provisions.

7.1 All notices from the Corporation to the holders of shares of this Series shall be given by one of the methods specified in Section 7.2. With respect to any notice to a holder of shares of this Series required to be provided hereunder, neither failure to give such notice, nor any defect therein or in the transmission thereof, to any particular holder shall affect the sufficiency of the notice or the validity of the proceedings referred to in such notice with respect to the other holders or affect the legality or validity of any distribution, right, warrant, reclassification, consolidation, merger, conveyance, transfer, dissolution, liquidation or winding up, or the vote upon any such action. Any notice that was mailed in the manner herein provided shall be conclusively presumed to have been duly given whether or not the holder receives the notice.

7.2 All notices and other communications hereunder shall be deemed given (i) on the first Trading Day following the date received, if delivered personally, (ii) on the Trading Day following timely deposit with an overnight courier service, if sent by overnight courier specifying next day delivery and (iii) on the first Trading Day that is at least five days following deposit in the mails, if sent by first class mail to (x) a holder at its last address as it appears on the transfer records or registry for the shares of this Series and (y) the Corporation at the following address (or at such other address as the Corporation shall specify in a notice pursuant to this Section 7.2): AOL Time Warner Inc., 75 Rockefeller Plaza, New York, New York 10019, Attention: General Counsel.

7.3 Any shares of this Series that have been converted or otherwise acquired by the Corporation shall, after such conversion or acquisition, as the case may be, be retired and promptly canceled and shall become authorized but unissued shares of this Series, unless the Board of Directors determines otherwise.

7.4 The Corporation shall be entitled to recognize the exclusive right of a Person registered on its records as the holder of shares of this Series, and such holder of record shall be deemed the holder of such shares for all purposes.

7.5 All notice periods referred to in the Certificate shall commence on the date of the mailing of the applicable notice.



7.6 Any registered holder of shares of this Series may proceed to protect and enforce its rights by any available remedy by proceeding at law or in equity to protect and enforce any such rights, whether for the specific enforcement of any provision in the Certificate or in aid of the exercise of any power granted herein, or to enforce any other proper remedy.

7.7 The shares of this Series shall not be subject to redemption at the option of the Corporation, including pursuant to Section 5 of Article IV of the Certificate of Incorporation (or any equivalent provision in any further amendment to or restatement of the Certificate of Incorporation).

This Certificate shall not become effective until and shall become effective at 8:16 p.m. on January 11, 2001.

IN WITNESS WHEREOF, AOL Time Warner Inc. has caused this certificate to be signed this 11th day of January, 2001.

AOL TIME WARNER INC.

by /s/ Paul T. Cappuccio

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Name: Paul T. Cappuccio  
Title: Vice President and  
Assistant Secretary

## STATUS OF LOANED SECURITIES

To assist the Commission in its review, Liberty provides the following description of the various steps that would occur in a Loan. The status of the Loaned Securities during each stage of a Loan and the nature of voting rights (if any) at each stage of the Loan demonstrates that the Liberty Parties would not have any Ownership Interest in the Common Stock of Time Warner during a Loan:

(i) *Phase 1 (pre-Loan period)*. In Phase 1, the relevant Liberty Party owns shares of LMCN-V Stock as the record and beneficial holder of those shares.<sup>29</sup> This is an Ownership Interest in shares of LMCN-V Stock because the Liberty Party's status as record and beneficial holder of shares confers, using the terms contained in the definition of Ownership Interest, a present right to hold limited voting interest(s), equity interest(s) and/or beneficial ownership(s) in the capital stock of Time Warner. This form of Ownership Interest would be counted toward the ownership limitations contained in Paragraph II(D)(1), but would not be prohibited by Paragraph II(D)(2), because of the exceptions provided in clauses (a) and (b) of that paragraph, which excepts from that prohibition Ownership Interests having certain limited voting rights.

(ii) *Phase 2 (transfer of shares of LMCN-V Stock to the Bank as Loaned Securities)*. In Phase 2, the relevant Liberty Party effects the Loan by transferring the shares of LMCN-V Stock to the Bank. The transfer would be accomplished by delivering the physical stock certificate representing the shares of LMCN-V Stock to the Bank properly endorsed for transfer or together with a properly endorsed stock power. At this point, the Bank would be the beneficial holder of the shares of LMCN-V Stock (and able to transfer these securities as it pleases, subject to the Certificate of Designations) and the relevant Liberty Party would only have a right to the return of the shares of LMCN-V Stock which were loaned to the Bank pursuant to the Stock Loan Agreement. Such right would, using the terms contained in the definition of Ownership Interest, be a contingent right to hold limited voting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of Time Warner. This form of Ownership Interest would be counted toward the ownership limitations contained in Paragraph II(D)(1), but would not be prohibited by Paragraph II(D)(2), by virtue of the exceptions provided in clauses (a) and (b) of that paragraph.

(iii) *Phase 3 (conversion by Bank of shares of LMCN-V Stock into shares of Common Stock pursuant to the Certificate of Designations)*. In Phase 3, the Bank would present the loaned shares of LMCN-V Stock (together with any stock power) to Time Warner pursuant to the Certificate of Designations, in order to convert such shares into shares of Common Stock. This is required by Section 6 of the Certificate of Designations, which would not permit a transferee of LMCN-V Stock, such as the Bank, to hold such shares in its name without converting those shares into Common Stock. The shares of Common Stock issuable upon conversion of the shares of LMCN-V Stock would be registered in the name of the Bank or its

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<sup>29</sup> A "record holder" is a person who is listed on a corporation's list of stockholders as the owner of a share or shares of stock, and is the only holder entitled to exercise the rights as a stockholder against a corporation. A "beneficial holder" is a person who has the ability to control the vote or disposition of a share or shares of stock and need not be the record holder thereof.

designee. At this point, the Bank would be the record and/or beneficial holder of the shares of Common Stock subject to the Loan and the relevant Liberty Party would only have a contractual right to the return of the shares of LMCN-V Stock loaned to the Bank. Such right would, using the terms contained in the definition of Ownership Interest, be a contingent right to hold limited voting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of Time Warner. This form of Ownership Interest would be counted toward the ownership limitations contained in Paragraph II(D)(1), but would not be prohibited by Paragraph II(D)(2), by virtue of the exceptions provided in clauses (a) and (b) of that paragraph. Once converted, the shares of Common Stock subject to a Loan could be used by the Bank at its sole discretion to lend to other stock borrowers, to close out short positions which the Bank may have in respect of the Common Stock, to return shares of Common Stock to stock lenders from whom the Bank may have borrowed stock, or to pledge the shares of Common Stock. If the Bank were to transfer shares of Common Stock to third parties, the shares of Common Stock would then in turn be registered in the name of the relevant third party or its designee and the Bank would cease to be the record and/or beneficial holder of such shares.

*(iv) Phase 4 (termination of Loan and return of shares).* In Phase 4 (assuming the Order is still in effect), upon the termination of a Loan, the Bank would be required to return the Loaned Securities by delivering any Common Stock constituting Loaned Securities to Time Warner, in order to convert the shares of Common Stock into shares of LMCN-V Stock and to reregister the shares of LMCN-V Stock in the name of the relevant Liberty Party. At the point where the Loan is terminated and the Bank delivers the Loaned Securities to Time Warner for conversion to LMCN-V Stock and registration of the same in the name of the relevant Liberty Party, the relevant Liberty Party only has a contingent right to acquire a limited voting interest, equity interest or beneficial interest in Time Warner. This form of Ownership Interest would be counted toward the ownership limitations contained in Paragraph II(D)(1), but would not be prohibited by Paragraph II(D)(2), by virtue of the exceptions provided in clauses (a) and (b) of that paragraph. From the point of conversion and reregistration of the shares of LMCN-V Stock in the name of the relevant Liberty Party, the relevant Liberty Party will be the record and beneficial owner of the shares of LMCN-V Stock and will have a present right to hold limited voting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of Time Warner. This form of Ownership Interest would be counted toward the ownership limitations contained in Paragraph II(D)(1), but would not be prohibited by Paragraph II(D)(2), by virtue of the exceptions provided in clauses (a) and (b) of that paragraph.

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Timothy J. Muris  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary  
Pamela J. Harbour

In the Matter of	)	
	)	
	)	
Time Warner Inc.,	)	Docket No. C-3709
Turner Broadcasting System, Inc.,	)	
Tele-Communications, Inc., and	)	
Liberty Media Corporation	)	

**(DRAFT) ORDER REOPENING AND MODIFYING ORDER**

The Federal Trade Commission (“Commission”), having received and reviewed the Petition (the “Petition”) of Respondent Liberty Media Corporation, dated August 26, 2004, to Reopen and Modify the Commission’s Decision and Order in the above captioned matter, dated February 3, 1997 (Docket No. C-3709) (the “Order”) and the Affidavit of Neal Dermer, dated August 25, 2004, in Support of the Petition (the “Affidavit”) and having considered the matters set forth in the Petition and the Affidavit, and having placed such Petition and Affidavit on the public record for a period of thirty (30) days, and having duly considered any comments filed thereafter by interested persons pursuant to §2.34 of its Rules, now in further conformity with the procedure prescribed in §2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Modification of Order:

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that:

(A) Paragraph II(D)(2) of the Order be, and hereby is, modified, as of the effective date of this Order, to add the following:

*“Provided, further that this Paragraph II(D)(2) shall not prohibit the loan of any Time Warner stock, provided, that, (i) the Person lending the stock has no right or intention to vote the stock or to influence the voting thereof during the term of the loan thereof; (ii) the Person lending the stock does not vote and does not influence the voting of the stock during the term of the loan thereof; (iii) any agreement, document or instrument pursuant to which the stock is loaned contains one or more provisions (x) acknowledging that the Person lending the stock has no right or intention to vote the stock or influence the voting of the stock during the term of the loan thereof and (y) recognizing that the borrower of the stock has no obligation to respond to requests by the Persons lending the stock to vote or influence the voting of the stock during the term of the loan thereof; and (iv) any stock loaned shall be considered to be held in its original form by the Person lending the same for purposes of determining whether such Person is in compliance with the provisions of Paragraph II(D)(1) hereof.”*

By the Commission.

\_\_\_\_\_  
Donald S. Clark  
Secretary

SEAL:

ISSUED: \_\_\_\_\_, 2004

Exhibit 4 to Petition

**DERMER AFFIDAVIT**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

\_\_\_\_\_ )  
In the Matter of )

Time Warner Inc., )  
Turner Broadcasting System, Inc., )  
Tele-Communications, Inc., and )  
Liberty Media Corporation )  
\_\_\_\_\_ )

Docket No. C-3709

**AFFIDAVIT OF NEAL DERMER  
IN SUPPORT OF PETITION OF  
LIBERTY MEDIA CORPORATION  
TO REOPEN AND MODIFY**

1. I am a Vice President and Assistant Treasurer of Liberty Media Corporation, a Delaware corporation ("Liberty"), a Respondent in the above captioned matter, and I submit this affidavit, based on my personal knowledge, in support of Liberty's Petition to Reopen and Modify the Commission's Decision and Order in the above captioned matter, dated February 3, 1997 (Docket No. C-3709) (the "Order").

2. Liberty, through its subsidiaries (collectively with Liberty, the "Liberty Parties"), in the aggregate holds 171,185,826 shares of the LMCN-V Common Stock ("LMCN-V Stock") of Time Warner Inc. ("Time Warner").

3. Based upon information as of December 31, 2003 provided by Time Warner to Liberty for the purposes of determining compliance with Paragraph II(D)(1) of the Order, the 171,185,826 shares of LMCN-V Stock owned by the Liberty Parties represents approximately 3.77% of the actual issued and outstanding common stock of Time Warner and approximately 3.16% of the Fully Diluted Equity (as defined in the Order) of Time Warner.

4. The shares of LMCN-V Stock held by the Liberty Parties have a low tax basis, and the Liberty Parties do not currently desire to sell shares of LMCN-V Stock.

5. The Liberty Parties desire to lend the shares of LMCN-V Stock in order to generate revenue in the form of stock lending fees from stock borrowers and, if applicable, to use those fees to offset any amounts otherwise payable by a Liberty Party to such stock borrower.

6. The Liberty Parties have a current desire to lend [REDACTED] shares of LMCN-V Stock to [REDACTED] ("Bank") in order to avoid incurring substantial costs.

7. On [REDACTED], certain Liberty Parties preserved the then current economic value of [REDACTED] shares of LMCN-V Stock by entering into three forward sale transactions



with Bank. On [REDACTED], the economic terms of these forward sale transactions were amended and the definitive terms for the amended forward sale transactions were set forth in three forward sale agreements with Bank, each dated as of [REDACTED] (each as amended to the date hereof, a "Forward Sale Agreement").

8. Copies of the Forward Sale Agreements are attached to this Affidavit as Exhibits 1, 2 and 3.

9. Pursuant to the Forward Sale Agreements, the relevant Liberty Parties have agreed to reimburse Bank for any costs Bank incurs after [REDACTED] in borrowing shares of Common Stock in connection with its hedging activities related to the Forward Sale Agreements.<sup>1</sup>

10. For the period from [REDACTED] through August 23, 2004, the Liberty Parties have incurred an obligation to reimburse Bank for [REDACTED] in borrow costs pursuant to the Forward Sale Agreements.

11. The reimbursement obligations of the Liberty Parties to the Bank pursuant to the Forward Sale Agreements are expected to continue at an average rate of approximately [REDACTED] per month or approximately [REDACTED] per year, unless the Liberty Parties are able to lend shares of LMCN-V Stock to Bank.

12. The Liberty Parties and Bank have negotiated a proposed form of stock loan agreement pursuant to which the Liberty Parties would lend an aggregate of [REDACTED] shares of LMCN-V Stock to Bank, and the form of that stock loan agreement is attached to this Affidavit as Exhibit 4.

13. The Liberty Parties also desire to be able to lend additional shares of LMCN-V Stock in excess of the [REDACTED] shares of LMCN-V Stock described in Paragraph 12 from time to time to third parties for the purposes described in Paragraph 5. Any other loan of shares of LMCN-V Stock effected by a Liberty Party would be pursuant to written agreements substantially similar to the form of stock loan agreement attached to this Affidavit as Exhibit 4.

14. During the term of any loan of shares of LMCN-V Stock to Bank or another third party, the shares of LMCN-V Stock would convert into shares of Common Stock.


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<sup>1</sup> See Forward Sale Agreements, "Borrow Cost Adjustment".


15. The Liberty Parties have no intention to vote or influence the vote of shares of Common Stock into which loaned shares of LMCN-V Stock may be converted during the term of any loan thereof.

16. The Stock Loan Agreement pursuant to which the Liberty Parties would loan shares of LMCN-V Stock to Bank provides the stock lender with the right to terminate a loan of shares, generally with three business days' prior notice to Bank. Any other stock loan agreement pursuant to which the Liberty Parties would loan shares of LMCN-V Stock to a third party would provide the stock lender with the right to terminate a loan of shares, generally with three business days' prior notice to the stock borrower.

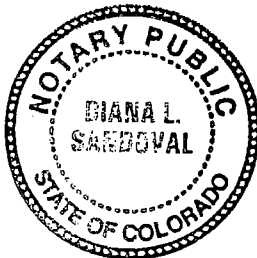
17. Any shares of LMCN-V Stock loaned by the Liberty Parties would be considered by the Liberty Parties to be held in their original form for purposes of determining compliance with the provisions of Paragraph II(D)(1) of the Order.

  
\_\_\_\_\_  
Neal Dermer

Subscribed and sworn to before me,  
this 25 day of August, 2004

  
\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_



*My Commission Expires Sept. 10, 2004*

**EXHIBIT 1 - Redacted**

**EXHIBIT 2 - Redacted**

**EXHIBIT 3 - Redacted**

**EXHIBIT 4**



# Master Securities Loan Agreement

2000 Version

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Dated as of: \_\_\_\_\_

Between: \_\_\_\_\_

and \_\_\_\_\_

## 1. Applicability.

From time to time the parties hereto may enter into transactions in which one party ("Lender") will lend to the other party ("Borrower") certain Securities (as defined herein) against a transfer of Collateral (as defined herein). Each such transaction shall be referred to herein as a "Loan" and, unless otherwise agreed in writing, shall be governed by this Agreement, including any supplemental terms or conditions contained in an Annex or Schedule hereto and in any other annexes identified herein or therein as applicable hereunder. Capitalized terms not otherwise defined herein shall have the meanings provided in Section 25.

## 2. Loans of Securities.

2.1 Subject to the terms and conditions of this Agreement, Borrower or Lender may, from time to time, seek to initiate a transaction in which Lender will lend Securities to Borrower. Borrower and Lender shall agree on the terms of each Loan (which terms may be amended during the Loan), including the issuer of the Securities, the amount of Securities to be lent, the basis of compensation, the amount of Collateral to be transferred by Borrower, and any additional terms. Such agreement shall be confirmed (a) by a schedule and receipt listing the Loaned Securities provided by Borrower to Lender in accordance with Section 3.2, (b) through any system that compares Loans and in which Borrower and Lender are participants, or (c) in such other manner as may be agreed by Borrower and Lender in writing. Such confirmation (the "Confirmation"), together with the Agreement, shall constitute conclusive evidence of the terms agreed between Borrower and Lender with respect to the Loan to which the Confirmation relates, unless with respect to the Confirmation specific objection is made promptly after receipt thereof. In the event of any inconsistency between the terms of such Confirmation and this Agreement, this Agreement shall prevail unless each party has executed such Confirmation.

2.2 Notwithstanding any other provision in this Agreement regarding when a Loan commences, unless otherwise agreed, a Loan hereunder shall not occur until the Loaned Securities and the Collateral therefor have been transferred in accordance with Section 15.

**3. Transfer of Loaned Securities.**

- 3.1 Unless otherwise agreed, Lender shall transfer Loaned Securities to Borrower hereunder on or before the Cutoff Time on the date agreed to by Borrower and Lender for the commencement of the Loan.
- 3.2 Unless otherwise agreed, Borrower shall provide Lender, for each Loan in which Lender is a Customer, with a schedule and receipt listing the Loaned Securities. Such schedule and receipt may consist of (a) a schedule provided to Borrower by Lender and executed and returned by Borrower when the Loaned Securities are received, (b) in the case of Securities transferred through a Clearing Organization which provides transferors with a notice evidencing such transfer, such notice, or (c) a confirmation or other document provided to Lender by Borrower.
- 3.3 Notwithstanding any other provision in this Agreement, the parties hereto agree that they intend the Loans hereunder to be loans of Securities. If, however, any Loan is deemed to be a loan of money by Borrower to Lender, then Borrower shall have, and Lender shall be deemed to have granted, a security interest in the Loaned Securities and the proceeds thereof.

**4. Collateral.**

- 4.1 Unless otherwise agreed, Borrower shall, prior to or concurrently with the transfer of the Loaned Securities to Borrower, but in no case later than the Close of Business on the day of such transfer, transfer to Lender Collateral with a Market Value at least equal to the Margin Percentage of the Market Value of the Loaned Securities.
- 4.2 The Collateral transferred by Borrower to Lender, as adjusted pursuant to Section 9, shall be security for Borrower's obligations in respect of such Loan and for any other obligations of Borrower to Lender hereunder. Borrower hereby pledges with, assigns to, and grants Lender a continuing first priority security interest in, and a lien upon, the Collateral, which shall attach upon the transfer of the Loaned Securities by Lender to Borrower and which shall cease upon the transfer of the Loaned Securities by Borrower to Lender. In addition to the rights and remedies given to Lender hereunder, Lender shall have all the rights and remedies of a secured party under the UCC. It is understood that Lender may use or invest the Collateral, if such consists of cash, at its own risk, but that (unless Lender is a Broker-Dealer) Lender shall, during the term of any Loan hereunder, segregate Collateral from all securities or other assets in its possession. Lender may Retransfer Collateral only (a) if Lender is a Broker-Dealer or (b) in the event of a Default by Borrower. Segregation of Collateral may be accomplished by appropriate identification on the books and records of Lender if it is a "securities intermediary" within the meaning of the UCC.
- 4.3 Except as otherwise provided herein, upon transfer to Lender of the Loaned Securities on the day a Loan is terminated pursuant to Section 6, Lender shall be obligated to transfer the Collateral (as adjusted pursuant to Section 9) to Borrower no later than the Cutoff Time on such day or, if such day is not a day on which a transfer of such Collateral may be effected under Section 15, the next day on which such a transfer may be effected.
- 4.4 If Borrower transfers Collateral to Lender, as provided in Section 4.1, and Lender does not transfer the Loaned Securities to Borrower, Borrower shall have the absolute right to the return of the Collateral; and if Lender transfers Loaned Securities to Borrower and



Borrower does not transfer Collateral to Lender as provided in Section 4.1, Lender shall have the absolute right to the return of the Loaned Securities.

- 4.5 Borrower may, upon reasonable notice to Lender (taking into account all relevant factors, including industry practice, the type of Collateral to be substituted, and the applicable method of transfer), substitute Collateral for Collateral securing any Loan or Loans; provided, however, that such substituted Collateral shall (a) consist only of cash, securities or other property that Borrower and Lender agreed would be acceptable Collateral prior to the Loan or Loans and (b) have a Market Value such that the aggregate Market Value of such substituted Collateral, together with all other Collateral for Loans in which the party substituting such Collateral is acting as Borrower, shall equal or exceed the agreed upon Margin Percentage of the Market Value of the Loaned Securities.
- 4.6 Prior to the expiration of any letter of credit supporting Borrower's obligations hereunder, Borrower shall, no later than the Extension Deadline, (a) obtain an extension of the expiration of such letter of credit, (b) replace such letter of credit by providing Lender with a substitute letter of credit in an amount at least equal to the amount of the letter of credit for which it is substituted, or (c) transfer such other Collateral to Lender as may be acceptable to Lender.

## **5. Fees for Loan.**

- 5.1 Unless otherwise agreed, (a) Borrower agrees to pay Lender a loan fee (a "Loan Fee"), computed daily on each Loan to the extent such Loan is secured by Collateral other than cash, based on the aggregate Market Value of the Loaned Securities on the day for which such Loan Fee is being computed, and (b) Lender agrees to pay Borrower a fee or rebate (a "Cash Collateral Fee") on Collateral consisting of cash, computed daily based on the amount of cash held by Lender as Collateral, in the case of each of the Loan Fee and the Cash Collateral Fee at such rates as Borrower and Lender may agree. Except as Borrower and Lender may otherwise agree (in the event that cash Collateral is transferred by clearing house funds or otherwise), Loan Fees shall accrue from and including the date on which the Loaned Securities are transferred to Borrower to, but excluding, the date on which such Loaned Securities are returned to Lender, and Cash Collateral Fees shall accrue from and including the date on which the cash Collateral is transferred to Lender to, but excluding, the date on which such cash Collateral is returned to Borrower.
- 5.2 Unless otherwise agreed, any Loan Fee or Cash Collateral Fee payable hereunder shall be payable:
- (a) in the case of any Loan of Securities other than Government Securities, upon the earlier of (i) the fifteenth day of the month following the calendar month in which such fee was incurred and (ii) the termination of all Loans hereunder (or, if a transfer of cash in accordance with Section 15 may not be effected on such fifteenth day or the day of such termination, as the case may be, the next day on which such a transfer may be effected); and
  - (b) in the case of any Loan of Government Securities, upon the termination of such Loan and at such other times, if any, as may be customary in accordance with market practice.

Notwithstanding the foregoing, all Loan Fees shall be payable by Borrower immediately in the event of a Default hereunder by Borrower and all Cash Collateral Fees shall be payable immediately by Lender in the event of a Default by Lender.

**6. Termination of the Loan.**

- 6.1 (a) Unless otherwise agreed, either party may terminate a Loan on a termination date established by notice given to the other party prior to the Close of Business on a Business Day. The termination date established by a termination notice shall be a date no earlier than the standard settlement date that would apply to a purchase or sale of the Loaned Securities (in the case of a notice given by Lender) or the non-cash Collateral securing the Loan (in the case of a notice given by Borrower) entered into at the time of such notice, which date shall, unless Borrower and Lender agree to the contrary, be (i) in the case of Government Securities, the next Business Day following such notice and (ii) in the case of all other Securities, the third Business Day following such notice.
- (b) Notwithstanding paragraph (a) and unless otherwise agreed, Borrower may terminate a Loan on any Business Day by giving notice to Lender and transferring the Loaned Securities to Lender before the Cutoff Time on such Business Day if (i) the Collateral for such Loan consists of cash or Government Securities or (ii) Lender is not permitted, pursuant to Section 4.2, to Retransfer Collateral.
- 6.2 Unless otherwise agreed, Borrower shall, on or before the Cutoff Time on the termination date of a Loan, transfer the Loaned Securities to Lender; provided, however, that upon such transfer by Borrower, Lender shall transfer the Collateral (as adjusted pursuant to Section 9) to Borrower in accordance with Section 4.3.

**7. Rights in Respect of Loaned Securities and Collateral.**

- 7.1 Except as set forth in Sections 8.1 and 8.2 and as otherwise agreed by Borrower and Lender, until Loaned Securities are required to be redelivered to Lender upon termination of a Loan hereunder, Borrower shall have all of the incidents of ownership of the Loaned Securities, including the right to transfer the Loaned Securities to others. Lender hereby waives the right to vote, or to provide any consent or to take any similar action with respect to, the Loaned Securities in the event that the record date or deadline for such vote, consent or other action falls during the term of the Loan.
- 7.2 Except as set forth in Sections 8.3 and 8.4 and as otherwise agreed by Borrower and Lender, if Lender may, pursuant to Section 4.2, Retransfer Collateral, Borrower hereby waives the right to vote, or to provide any consent or take any similar action with respect to, any such Collateral in the event that the record date or deadline for such vote, consent or other action falls during the term of a Loan and such Collateral is not required to be returned to Borrower pursuant to Section 4.5 or Section 9.

**8. Distributions.**

- 8.1 Lender shall be entitled to receive all Distributions made on or in respect of the Loaned Securities which are not otherwise received by Lender, to the full extent it would be so entitled if the Loaned Securities had not been lent to Borrower.

- 8.2 Any cash Distributions made on or in respect of the Loaned Securities, which Lender is entitled to receive pursuant to Section 8.1, shall be paid by the transfer of cash to Lender by Borrower, on the date any such Distribution is paid, in an amount equal to such cash Distribution, so long as Lender is not in Default at the time of such payment. Non-cash Distributions that Lender is entitled to receive pursuant to Section 8.1 shall be added to the Loaned Securities on the date of distribution and shall be considered such for all purposes, except that if the Loan has terminated, Borrower shall forthwith transfer the same to Lender.
- 8.3 Borrower shall be entitled to receive all Distributions made on or in respect of non-cash Collateral which are not otherwise received by Borrower, to the full extent it would be so entitled if the Collateral had not been transferred to Lender.
- 8.4 Any cash Distributions made on or in respect of such Collateral, which Borrower is entitled to receive pursuant to Section 8.3, shall be paid by the transfer of cash to Borrower by Lender, on the date any such Distribution is paid, in an amount equal to such cash Distribution, so long as Borrower is not in Default at the time of such payment. Non-cash Distributions that Borrower is entitled to receive pursuant to Section 8.3 shall be added to the Collateral on the date of distribution and shall be considered such for all purposes, except that if each Loan secured by such Collateral has terminated, Lender shall forthwith transfer the same to Borrower.
- 8.5 Unless otherwise agreed by the parties:
- (a) If (i) Borrower is required to make a payment (a "Borrower Payment") with respect to cash Distributions on Loaned Securities under Sections 8.1 and 8.2 ("Securities Distributions"), or (ii) Lender is required to make a payment (a "Lender Payment") with respect to cash Distributions on Collateral under Sections 8.3 and 8.4 ("Collateral Distributions"), and (iii) Borrower or Lender, as the case may be ("Payor"), shall be required by law to collect any withholding or other tax, duty, fee, levy or charge required to be deducted or withheld from such Borrower Payment or Lender Payment ("Tax"), then Payor shall (subject to subsections (b) and (c) below), pay such additional amounts as may be necessary in order that the net amount of the Borrower Payment or Lender Payment received by the Lender or Borrower, as the case may be ("Payee"), after payment of such Tax equals the net amount of the Securities Distribution or Collateral Distribution that would have been received if such Securities Distribution or Collateral Distribution had been paid directly to the Payee.
  - (b) No additional amounts shall be payable to a Payee under subsection (a) above to the extent that Tax would have been imposed on a Securities Distribution or Collateral Distribution paid directly to the Payee.
  - (c) No additional amounts shall be payable to a Payee under subsection (a) above to the extent that such Payee is entitled to an exemption from, or reduction in the rate of, Tax on a Borrower Payment or Lender Payment subject to the provision of a certificate or other documentation, but has failed timely to provide such certificate or other documentation.
  - (d) Each party hereto shall be deemed to represent that, as of the commencement of any Loan hereunder, no Tax would be imposed on any cash Distribution paid to it with respect to (i) Loaned Securities subject to a Loan in which it is acting as

Lender or (ii) Collateral for any Loan in which it is acting as Borrower, unless such party has given notice to the contrary to the other party hereto (which notice shall specify the rate at which such Tax would be imposed). Each party agrees to notify the other of any change that occurs during the term of a Loan in the rate of any Tax that would be imposed on any such cash Distributions payable to it.

- 8.6 To the extent that, under the provisions of Sections 8.1 through 8.5, (a) a transfer of cash or other property by Borrower would give rise to a Margin Excess or (b) a transfer of cash or other property by Lender would give rise to a Margin Deficit, Borrower or Lender (as the case may be) shall not be obligated to make such transfer of cash or other property in accordance with such Sections, but shall in lieu of such transfer immediately credit the amounts that would have been transferable under such Sections to the account of Lender or Borrower (as the case may be).

**9. Mark to Market.**

- 9.1 If Lender is a Customer, Borrower shall daily mark to market any Loan hereunder and in the event that at the Close of Trading on any Business Day the Market Value of the Collateral for any Loan to Borrower shall be less than 100% of the Market Value of all the outstanding Loaned Securities subject to such Loan, Borrower shall transfer additional Collateral no later than the Close of Business on the next Business Day so that the Market Value of such additional Collateral, when added to the Market Value of the other Collateral for such Loan, shall equal 100% of the Market Value of the Loaned Securities.
- 9.2 In addition to any rights of Lender under Section 9.1, if at any time the aggregate Market Value of all Collateral for Loans by Lender shall be less than the Margin Percentage of the Market Value of all the outstanding Loaned Securities subject to such Loans (a "Margin Deficit"), Lender may, by notice to Borrower, demand that Borrower transfer to Lender additional Collateral so that the Market Value of such additional Collateral, when added to the Market Value of all other Collateral for such Loans, shall equal or exceed the Margin Percentage of the Market Value of the Loaned Securities.
- 9.3 Subject to Borrower's obligations under Section 9.1, if at any time the Market Value of all Collateral for Loans to Borrower shall be greater than the Margin Percentage of the Market Value of all the outstanding Loaned Securities subject to such Loans (a "Margin Excess"), Borrower may, by notice to Lender, demand that Lender transfer to Borrower such amount of the Collateral selected by Borrower so that the Market Value of the Collateral for such Loans, after deduction of such amounts, shall thereupon not exceed the Margin Percentage of the Market Value of the Loaned Securities.
- 9.4 Borrower and Lender may agree, with respect to one or more Loans hereunder, to mark the values to market pursuant to Sections 9.2 and 9.3 by separately valuing the Loaned Securities lent and the Collateral given in respect thereof on a Loan-by-Loan basis.
- 9.5 Borrower and Lender may agree, with respect to any or all Loans hereunder, that the respective rights of Lender and Borrower under Sections 9.2 and 9.3 may be exercised only where a Margin Excess or Margin Deficit exceeds a specified dollar amount or a specified percentage of the Market Value of the Loaned Securities under such Loans (which amount or percentage shall be agreed to by Borrower and Lender prior to entering into any such Loans).

- 9.6 If any notice is given by Borrower or Lender under Sections 9.2 or 9.3 at or before the Margin Notice Deadline on any day on which a transfer of Collateral may be effected in accordance with Section 15, the party receiving such notice shall transfer Collateral as provided in such Section no later than the Close of Business on such day. If any such notice is given after the Margin Notice Deadline, the party receiving such notice shall transfer such Collateral no later than the Close of Business on the next Business Day following the day of such notice.

**10. Representations.**

The parties to this Agreement hereby make the following representations and warranties, which shall continue during the term of any Loan hereunder:

- 10.1 Each party hereto represents and warrants that (a) it has the power to execute and deliver this Agreement, to enter into the Loans contemplated hereby and to perform its obligations hereunder, (b) it has taken all necessary action to authorize such execution, delivery and performance, and (c) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with its terms.
- 10.2 Each party hereto represents and warrants that it has not relied on the other for any tax or accounting advice concerning this Agreement and that it has made its own determination as to the tax and accounting treatment of any Loan and any dividends, remuneration or other funds received hereunder.
- 10.3 Each party hereto represents and warrants that it is acting for its own account unless it expressly specifies otherwise in writing and complies with Section 11.1(b).
- 10.4 Borrower represents and warrants that it has, or will have at the time of transfer of any Collateral, the right to grant a first priority security interest therein subject to the terms and conditions hereof.
- 10.5 (a) Borrower represents and warrants that it (or the person to whom it lends the Loaned Securities) is borrowing or will borrow Loaned Securities that are Equity Securities for the purpose of making delivery of such Loaned Securities in the case of short sales, failure to receive securities required to be delivered, or as otherwise permitted pursuant to Regulation T as in effect from time to time.
- (b) Borrower and Lender may agree, as provided in Section 24.2, that Borrower shall not be deemed to have made the representation or warranty in subsection (a) with respect to any Loan. By entering into any such agreement, Lender shall be deemed to have represented and warranted to Borrower (which representation and warranty shall be deemed to be repeated on each day during the term of the Loan) that Lender is either (i) an "exempted borrower" within the meaning of Regulation T or (ii) a member of a national securities exchange or a broker or dealer registered with the U.S. Securities and Exchange Commission that is entering into such Loan to finance its activities as a market maker or an underwriter.
- 10.6 Lender represents and warrants that it has, or will have at the time of transfer of any Loaned Securities, the right to transfer the Loaned Securities subject to the terms and conditions hereof.

**11. Covenants.**

- 11.1 Each party agrees either (a) to be liable as principal with respect to its obligations hereunder or (b) to execute and comply fully with the provisions of Annex I (the terms and conditions of which Annex are incorporated herein and made a part hereof).
- 11.2 Promptly upon (and in any event within seven (7) Business Days after) demand by Lender, Borrower shall furnish Lender with Borrower's most recent publicly-available financial statements and any other financial statements mutually agreed upon by Borrower and Lender. Unless otherwise agreed, if Borrower is subject to the requirements of Rule 17a-5(c) under the Exchange Act, it may satisfy the requirements of this Section by furnishing Lender with its most recent statement required to be furnished to customers pursuant to such Rule.

**12. Events of Default.**

All Loans hereunder may, at the option of the non-defaulting party (which option shall be deemed to have been exercised immediately upon the occurrence of an Act of Insolvency), be terminated immediately upon the occurrence of any one or more of the following events (individually, a "Default"):

- 12.1 if any Loaned Securities shall not be transferred to Lender upon termination of the Loan as required by Section 6;
- 12.2 if any Collateral shall not be transferred to Borrower upon termination of the Loan as required by Sections 4.3 and 6;
- 12.3 if either party shall fail to transfer Collateral as required by Section 9;
- 12.4 if either party (a) shall fail to transfer to the other party amounts in respect of Distributions required to be transferred by Section 8, (b) shall have been notified of such failure by the other party prior to the Close of Business on any day, and (c) shall not have cured such failure by the Cutoff Time on the next day after such Close of Business on which a transfer of cash may be effected in accordance with Section 15;
- 12.5 if an Act of Insolvency occurs with respect to either party;
- 12.6 if any representation made by either party in respect of this Agreement or any Loan or Loans hereunder shall be incorrect or untrue in any material respect during the term of any Loan hereunder;
- 12.7 if either party notifies the other of its inability to or its intention not to perform its obligations hereunder or otherwise disaffirms, rejects or repudiates any of its obligations hereunder; or
- 12.8 if either party (a) shall fail to perform any material obligation under this Agreement not specifically set forth in clauses 12.1 through 12.7, above, including but not limited to the payment of fees as required by Section 5, and the payment of transfer taxes as required by Section 14, (b) shall have been notified of such failure by the other party prior to the Close of Business on any day, and (c) shall not have cured such failure by the Cutoff Time on the next day after such Close of Business on which a transfer of cash may be effected in accordance with Section 15.

The non-defaulting party shall (except upon the occurrence of an Act of Insolvency) give notice as promptly as practicable to the defaulting party of the exercise of its option to terminate all Loans hereunder pursuant to this Section 12.

### 13. Remedies.

- 13.1 Upon the occurrence of a Default under Section 12 entitling Lender to terminate all Loans hereunder, Lender shall have the right, in addition to any other remedies provided herein, (a) to purchase a like amount of Loaned Securities ("Replacement Securities") in the principal market for such Loaned Securities in a commercially reasonable manner, (b) to sell any Collateral in the principal market for such Collateral in a commercially reasonable manner and (c) to apply and set off the Collateral and any proceeds thereof (including any amounts drawn under a letter of credit supporting any Loan) against the payment of the purchase price for such Replacement Securities and any amounts due to Lender under Sections 5, 8, 14 and 16. In the event that Lender shall exercise such rights, Borrower's obligation to return a like amount of the Loaned Securities shall terminate. Lender may similarly apply the Collateral and any proceeds thereof to any other obligation of Borrower under this Agreement, including Borrower's obligations with respect to Distributions paid to Borrower (and not forwarded to Lender) in respect of Loaned Securities. In the event that (i) the purchase price of Replacement Securities (plus all other amounts, if any, due to Lender hereunder) exceeds (ii) the amount of the Collateral, Borrower shall be liable to Lender for the amount of such excess together with interest thereon at a rate equal to (A) in the case of purchases of Foreign Securities, LIBOR, (B) in the case of purchases of any other Securities (or other amounts, if any, due to Lender hereunder), the Federal Funds Rate or (C) such other rate as may be specified in Schedule B, in each case as such rate fluctuates from day to day, from the date of such purchase until the date of payment of such excess. As security for Borrower's obligation to pay such excess, Lender shall have, and Borrower hereby grants, a security interest in any property of Borrower then held by or for Lender and a right of setoff with respect to such property and any other amount payable by Lender to Borrower. The purchase price of Replacement Securities purchased under this Section 13.1 shall include, and the proceeds of any sale of Collateral shall be determined after deduction of, broker's fees and commissions and all other reasonable costs, fees and expenses related to such purchase or sale (as the case may be). In the event Lender exercises its rights under this Section 13.1, Lender may elect in its sole discretion, in lieu of purchasing all or a portion of the Replacement Securities or selling all or a portion of the Collateral, to be deemed to have made, respectively, such purchase of Replacement Securities or sale of Collateral for an amount equal to the price therefor on the date of such exercise obtained from a generally recognized source or the last bid quotation from such a source at the most recent Close of Trading. Subject to Section 18, upon the satisfaction of all obligations hereunder, any remaining Collateral shall be returned to Borrower.
- 13.2 Upon the occurrence of a Default under Section 12 entitling Borrower to terminate all Loans hereunder, Borrower shall have the right, in addition to any other remedies provided herein, (a) to purchase a like amount of Collateral ("Replacement Collateral") in the principal market for such Collateral in a commercially reasonable manner, (b) to sell a like amount of the Loaned Securities in the principal market for such Loaned Securities in a commercially reasonable manner and (c) to apply and set off the Loaned Securities and any proceeds thereof against (i) the payment of the purchase price for such Replacement Collateral, (ii) Lender's obligation to return any cash or other Collateral, and (iii) any amounts due to Borrower under Sections 5, 8 and 16. In such event, Borrower may treat the Loaned Securities as its own and Lender's obligation to return a

like amount of the Collateral shall terminate; provided, however, that Lender shall immediately return any letters of credit supporting any Loan upon the exercise or deemed exercise by Borrower of its termination rights under Section 12. Borrower may similarly apply the Loaned Securities and any proceeds thereof to any other obligation of Lender under this Agreement, including Lender's obligations with respect to Distributions paid to Lender (and not forwarded to Borrower) in respect of Collateral. In the event that (i) the sales price received from such Loaned Securities is less than (ii) the purchase price of Replacement Collateral (plus the amount of any cash or other Collateral not replaced by Borrower and all other amounts, if any, due to Borrower hereunder), Lender shall be liable to Borrower for the amount of any such deficiency, together with interest on such amounts at a rate equal to (A) in the case of Collateral consisting of Foreign Securities, LIBOR, (B) in the case of Collateral consisting of any other Securities (or other amounts due, if any, to Borrower hereunder), the Federal Funds Rate or (C) such other rate as may be specified in Schedule B, in each case as such rate fluctuates from day to day, from the date of such sale until the date of payment of such deficiency. As security for Lender's obligation to pay such deficiency, Borrower shall have, and Lender hereby grants, a security interest in any property of Lender then held by or for Borrower and a right of setoff with respect to such property and any other amount payable by Borrower to Lender. The purchase price of any Replacement Collateral purchased under this Section 13.2 shall include, and the proceeds of any sale of Loaned Securities shall be determined after deduction of, broker's fees and commissions and all other reasonable costs, fees and expenses related to such purchase or sale (as the case may be). In the event Borrower exercises its rights under this Section 13.2, Borrower may elect in its sole discretion, in lieu of purchasing all or a portion of the Replacement Collateral or selling all or a portion of the Loaned Securities, to be deemed to have made, respectively, such purchase of Replacement Collateral or sale of Loaned Securities for an amount equal to the price therefor on the date of such exercise obtained from a generally recognized source or the last bid quotation from such a source at the most recent Close of Trading. Subject to Section 18, upon the satisfaction of all Lender's obligations hereunder, any remaining Loaned Securities (or remaining cash proceeds thereof) shall be returned to Lender.

13.3 Unless otherwise agreed, the parties acknowledge and agree that (a) the Loaned Securities and any Collateral consisting of Securities are of a type traded in a recognized market, (b) in the absence of a generally recognized source for prices or bid or offer quotations for any security, the non-defaulting party may establish the source therefor in its sole discretion, and (c) all prices and bid and offer quotations shall be increased to include accrued interest to the extent not already included therein (except to the extent contrary to market practice with respect to the relevant Securities).

13.4 In addition to its rights hereunder, the non-defaulting party shall have any rights otherwise available to it under any other agreement or applicable law.

#### 14. Transfer Taxes.

All transfer taxes with respect to the transfer of the Loaned Securities by Lender to Borrower and by Borrower to Lender upon termination of the Loan and with respect to the transfer of Collateral by Borrower to Lender and by Lender to Borrower upon termination of the Loan or pursuant to Section 4.5 or Section 9 shall be paid by Borrower.



## 15. Transfers.

- 15.1 All transfers by either Borrower or Lender of Loaned Securities or Collateral consisting of "financial assets" (within the meaning of the UCC) hereunder shall be by (a) in the case of certificated securities, physical delivery of certificates representing such securities together with duly executed stock and bond transfer powers, as the case may be, with signatures guaranteed by a bank or a member firm of the New York Stock Exchange, Inc., (b) registration of an uncertificated security in the transferee's name by the issuer of such uncertificated security, (c) the crediting by a Clearing Organization of such financial assets to the transferee's "securities account" (within the meaning of the UCC) maintained with such Clearing Organization, or (d) such other means as Borrower and Lender may agree.
- 15.2 All transfers of cash hereunder shall be by (a) wire transfer in immediately available, freely transferable funds or (b) such other means as Borrower and Lender may agree.
- 15.3 All transfers of letters of credit from Borrower to Lender shall be made by physical delivery to Lender of an irrevocable letter of credit issued by a "bank" as defined in Section 3(a)(6)(A)-(C) of the Exchange Act. Transfers of letters of credit from Lender to Borrower shall be made by causing such letters of credit to be returned or by causing the amount of such letters of credit to be reduced to the amount required after such transfer.
- 15.4 A transfer of Securities, cash or letters of credit may be effected under this Section 15 on any day except (a) a day on which the transferee is closed for business at its address set forth in Schedule A hereto or (b) a day on which a Clearing Organization or wire transfer system is closed, if the facilities of such Clearing Organization or wire transfer system are required to effect such transfer.
- 15.5 For the avoidance of doubt, the parties agree and acknowledge that the term "securities," as used herein (except in this Section 15), shall include any "security entitlements" with respect to such securities (within the meaning of the UCC). In every transfer of "financial assets" (within the meaning of the UCC) hereunder, the transferor shall take all steps necessary (a) to effect a delivery to the transferee under Section 8-301 of the UCC, or to cause the creation of a security entitlement in favor of the transferee under Section 8-501 of the UCC, (b) to enable the transferee to obtain "control" (within the meaning of Section 8-106 of the UCC), and (c) to provide the transferee with comparable rights under any applicable foreign law or regulation.

## 16. Contractual Currency.

- 16.1 Borrower and Lender agree that (a) any payment in respect of a Distribution under Section 8 shall be made in the currency in which the underlying Distribution of cash was made, (b) any return of cash shall be made in the currency in which the underlying transfer of cash was made, and (c) any other payment of cash in connection with a Loan under this Agreement shall be in the currency agreed upon by Borrower and Lender in connection with such Loan (the currency established under clause (a), (b) or (c) hereinafter referred to as the "Contractual Currency"). Notwithstanding the foregoing, the payee of any such payment may, at its option, accept tender thereof in any other currency; provided, however, that, to the extent permitted by applicable law, the obligation of the payor to make such payment will be discharged only to the extent of the amount of Contractual Currency that such payee may, consistent with normal banking

procedures, purchase with such other currency (after deduction of any premium and costs of exchange) on the banking day next succeeding its receipt of such currency.

- 16.2 If for any reason the amount in the Contractual Currency received under Section 16.1, including amounts received after conversion of any recovery under any judgment or order expressed in a currency other than the Contractual Currency, falls short of the amount in the Contractual Currency due in respect of this Agreement, the party required to make the payment will (unless a Default has occurred and such party is the non-defaulting party) as a separate and independent obligation and to the extent permitted by applicable law, immediately pay such additional amount in the Contractual Currency as may be necessary to compensate for the shortfall.
- 16.3 If for any reason the amount in the Contractual Currency received under Section 16.1 exceeds the amount in the Contractual Currency due in respect of this Agreement, then the party receiving the payment will (unless a Default has occurred and such party is the non-defaulting party) refund promptly the amount of such excess.

## 17. ERISA.

Lender shall, if any of the Securities transferred to the Borrower hereunder for any Loan have been or shall be obtained, directly or indirectly, from or using the assets of any Plan, so notify Borrower in writing upon the execution of this Agreement or upon initiation of such Loan under Section 2.1. If Lender so notifies Borrower, then Borrower and Lender shall conduct the Loan in accordance with the terms and conditions of Department of Labor Prohibited Transaction Exemption 81-6 (46 Fed. Reg. 7527, Jan. 23, 1981; as amended, 52 Fed. Reg. 18754, May 19, 1987), or any successor thereto (unless Borrower and Lender have agreed prior to entering into a Loan that such Loan will be conducted in reliance on another exemption, or without relying on any exemption, from the prohibited transaction provisions of Section 406 of the Employee Retirement Income Security Act of 1974, as amended, and Section 4975 of the Internal Revenue Code of 1986, as amended). Without limiting the foregoing and notwithstanding any other provision of this Agreement, if the Loan will be conducted in accordance with Prohibited Transaction Exemption 81-6, then:

- 17.1 Borrower represents and warrants to Lender that it is either (a) a bank subject to federal or state supervision, (b) a broker-dealer registered under the Exchange Act or (c) exempt from registration under Section 15(a)(1) of the Exchange Act as a dealer in Government Securities.
- 17.2 Borrower represents and warrants that, during the term of any Loan hereunder, neither Borrower nor any affiliate of Borrower has any discretionary authority or control with respect to the investment of the assets of the Plan involved in the Loan or renders investment advice (within the meaning of 29 C.F.R. Section 2510.3-21(c)) with respect to the assets of the Plan involved in the Loan. Lender agrees that, prior to or at the commencement of any Loan hereunder, it will communicate to Borrower information regarding the Plan sufficient to identify to Borrower any person or persons that have discretionary authority or control with respect to the investment of the assets of the Plan involved in the Loan or that render investment advice (as defined in the preceding sentence) with respect to the assets of the Plan involved in the Loan. In the event Lender fails to communicate and keep current during the term of any Loan such information, Lender rather than Borrower shall be deemed to have made the representation and warranty in the first sentence of this Section 17.2.

- 17.3 Borrower shall mark to market daily each Loan hereunder pursuant to Section 9.1 as is required if Lender is a Customer.
- 17.4 Borrower and Lender agree that:
- (a) the term "Collateral" shall mean cash, securities issued or guaranteed by the United States government or its agencies or instrumentalities, or irrevocable bank letters of credit issued by a person other than Borrower or an affiliate thereof;
  - (b) prior to the making of any Loans hereunder, Borrower shall provide Lender with (i) the most recent available audited statement of Borrower's financial condition and (ii) the most recent available unaudited statement of Borrower's financial condition (if more recent than the most recent audited statement), and each Loan made hereunder shall be deemed a representation by Borrower that there has been no material adverse change in Borrower's financial condition subsequent to the date of the latest financial statements or information furnished in accordance herewith;
  - (c) the Loan may be terminated by Lender at any time, whereupon Borrower shall deliver the Loaned Securities to Lender within the lesser of (i) the customary delivery period for such Loaned Securities, (ii) five Business Days, and (iii) the time negotiated for such delivery between Borrower and Lender; provided, however, that Borrower and Lender may agree to a longer period only if permitted by Prohibited Transaction Exemption 81-6; and
  - (d) the Collateral transferred shall be security only for obligations of Borrower to the Plan with respect to Loans, and shall not be security for any obligation of Borrower to any agent or affiliate of the Plan.

**18. Single Agreement.**

Borrower and Lender acknowledge that, and have entered into this Agreement in reliance on the fact that, all Loans hereunder constitute a single business and contractual relationship and have been entered into in consideration of each other. Accordingly, Borrower and Lender hereby agree that payments, deliveries and other transfers made by either of them in respect of any Loan shall be deemed to have been made in consideration of payments, deliveries and other transfers in respect of any other Loan hereunder, and the obligations to make any such payments, deliveries and other transfers may be applied against each other and netted. In addition, Borrower and Lender acknowledge that, and have entered into this Agreement in reliance on the fact that, all Loans hereunder have been entered into in consideration of each other. Accordingly, Borrower and Lender hereby agree that (a) each shall perform all of its obligations in respect of each Loan hereunder, and that a default in the performance of any such obligation by Borrower or by Lender (the "Defaulting Party") in any Loan hereunder shall constitute a default by the Defaulting Party under all such Loans hereunder, and (b) the non-defaulting party shall be entitled to set off claims and apply property held by it in respect of any Loan hereunder against obligations owing to it in respect of any other Loan with the Defaulting Party.

**19. APPLICABLE LAW.**

THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICT OF LAW PRINCIPLES THEREOF.

**20. Waiver.**

The failure of a party to this Agreement to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement. All waivers in respect of a Default must be in writing.

**21. Survival of Remedies.**

All remedies hereunder and all obligations with respect to any Loan shall survive the termination of the relevant Loan, return of Loaned Securities or Collateral and termination of this Agreement.

**22. Notices and Other Communications.**

Any and all notices, statements, demands or other communications hereunder may be given by a party to the other by telephone, mail, facsimile, e-mail, electronic message, telegraph, messenger or otherwise to the individuals and at the facsimile numbers and addresses specified with respect to it in Schedule A hereto, or sent to such party at any other place specified in a notice of change of number or address hereafter received by the other party. Any notice, statement, demand or other communication hereunder will be deemed effective on the day and at the time on which it is received or, if not received, on the day and at the time on which its delivery was in good faith attempted; provided, however, that any notice by a party to the other party by telephone shall be deemed effective only if (a) such notice is followed by written confirmation thereof and (b) at least one of the other means of providing notice that are specifically listed above has previously been attempted in good faith by the notifying party.

**23. SUBMISSION TO JURISDICTION; WAIVER OF JURY TRIAL.**

23.1 EACH PARTY HERETO IRREVOCABLY AND UNCONDITIONALLY (A) SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY UNITED STATES FEDERAL OR NEW YORK STATE COURT SITTING IN NEW YORK CITY, AND ANY APPELLATE COURT FROM ANY SUCH COURT, SOLELY FOR THE PURPOSE OF ANY SUIT, ACTION OR PROCEEDING BROUGHT TO ENFORCE ITS OBLIGATIONS HEREUNDER OR RELATING IN ANY WAY TO THIS AGREEMENT OR ANY LOAN HEREUNDER AND (B) WAIVES, TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO, ANY DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING IN ANY SUCH COURT AND ANY RIGHT OF JURISDICTION ON ACCOUNT OF ITS PLACE OF RESIDENCE OR DOMICILE.

23.2 EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ANY RIGHT THAT IT MAY HAVE TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

**24. Miscellaneous.**

24.1 Except as otherwise agreed by the parties, this Agreement supersedes any other agreement between the parties hereto concerning loans of Securities between Borrower and Lender. This Agreement shall not be assigned by either party without the prior written consent of the other party and any attempted assignment without such consent shall be null and void. Subject to the foregoing, this Agreement shall be binding upon

and shall inure to the benefit of Borrower and Lender and their respective heirs, representatives, successors and assigns. This Agreement may be terminated by either party upon notice to the other, subject only to fulfillment of any obligations then outstanding. This Agreement shall not be modified, except by an instrument in writing signed by the party against whom enforcement is sought. The parties hereto acknowledge and agree that, in connection with this Agreement and each Loan hereunder, time is of the essence. Each provision and agreement herein shall be treated as separate and independent from any other provision herein and shall be enforceable notwithstanding the unenforceability of any such other provision or agreement.

- 24.2 Any agreement between Borrower and Lender pursuant to Section 10.5(b) or Section 25.37 shall be made (a) in writing, (b) orally, if confirmed promptly in writing or through any system that compares Loans and in which Borrower and Lender are participants, or (c) in such other manner as may be agreed by Borrower and Lender in writing.

**25. Definitions.**

For the purposes hereof:

- 25.1 "Act of Insolvency" shall mean, with respect to any party, (a) the commencement by such party as debtor of any case or proceeding under any bankruptcy, insolvency, reorganization, liquidation, moratorium, dissolution, delinquency or similar law, or such party's seeking the appointment or election of a receiver, conservator, trustee, custodian or similar official for such party or any substantial part of its property, or the convening of any meeting of creditors for purposes of commencing any such case or proceeding or seeking such an appointment or election, (b) the commencement of any such case or proceeding against such party, or another seeking such an appointment or election, or the filing against a party of an application for a protective decree under the provisions of the Securities Investor Protection Act of 1970, which (i) is consented to or not timely contested by such party, (ii) results in the entry of an order for relief, such an appointment or election, the issuance of such a protective decree or the entry of an order having a similar effect, or (iii) is not dismissed within 15 days, (c) the making by such party of a general assignment for the benefit of creditors, or (d) the admission in writing by such party of such party's inability to pay such party's debts as they become due.
- 25.2 "Bankruptcy Code" shall have the meaning assigned in Section 26.1
- 25.3 "Borrower" shall have the meaning assigned in Section 1.
- 25.4 "Borrower Payment" shall have the meaning assigned in Section 8.5(a).
- 25.5 "Broker-Dealer" shall mean any person that is a broker (including a municipal securities broker), dealer, municipal securities dealer, government securities broker or government securities dealer as defined in the Exchange Act, regardless of whether the activities of such person are conducted in the United States or otherwise require such person to register with the U.S. Securities and Exchange Commission or other regulatory body.
- 25.6 "Business Day" shall mean, with respect to any Loan hereunder, a day on which regular trading occurs in the principal market for the Loaned Securities subject to such Loan, provided, however, that for purposes of determining the Market Value of any Securities hereunder, such term shall mean a day on which regular trading occurs in the principal market for the Securities whose value is being determined. Notwithstanding the

foregoing, (a) for purposes of Section 9, "Business Day" shall mean any day on which regular trading occurs in the principal market for any Loaned Securities or for any Collateral consisting of Securities under any outstanding Loan hereunder and "next Business Day" shall mean the next day on which a transfer of Collateral may be effected in accordance with Section 15, and (b) in no event shall a Saturday or Sunday be considered a Business Day.

- 25.7 "Cash Collateral Fee" shall have the meaning assigned in Section 5.1.
- 25.8 "Clearing Organization" shall mean (a) The Depository Trust Company, or, if agreed to by Borrower and Lender, such other "securities intermediary" (within the meaning of the UCC) at which Borrower (or Borrower's agent) and Lender (or Lender's agent) maintain accounts, or (b) a Federal Reserve Bank, to the extent that it maintains a book-entry system.
- 25.9 "Close of Business" shall mean the time established by the parties in Schedule B or otherwise orally or in writing or, in the absence of any such agreement, as shall be determined in accordance with market practice.
- 25.10 "Close of Trading" shall mean, with respect to any Security, the end of the primary trading session established by the principal market for such Security on a Business Day, unless otherwise agreed by the parties.
- 25.11 "Collateral" shall mean, whether now owned or hereafter acquired and to the extent permitted by applicable law, (a) any property which Borrower and Lender agree prior to the Loan shall be acceptable collateral and which is transferred to Lender pursuant to Sections 4 or 9 (including as collateral, for definitional purposes, any letters of credit mutually acceptable to Lender and Borrower), (b) any property substituted therefor pursuant to Section 4.5, (c) all accounts in which such property is deposited and all securities and the like in which any cash collateral is invested or reinvested, and (d) any proceeds of any of the foregoing; *provided, however*, that if Lender is a Customer, "Collateral" shall (subject to Section 17.4(a), if applicable) be limited to cash, U.S. Treasury bills and notes, an irrevocable letter of credit issued by a "bank" (as defined in Section 3(a)(6)(A)-(C) of the Exchange Act), and any other property permitted to serve as collateral securing a loan of securities under Rule 15c3-3 under the Exchange Act or any comparable regulation of the Secretary of the Treasury under Section 15C of the Exchange Act (to the extent that Borrower is subject to such Rule or comparable regulation) pursuant to exemptive, interpretive or no-action relief or otherwise. If any new or different Security shall be exchanged for any Collateral by recapitalization, merger, consolidation or other corporate action, such new or different Security shall, effective upon such exchange, be deemed to become Collateral in substitution for the former Collateral for which such exchange is made. For purposes of return of Collateral by Lender or purchase or sale of Securities pursuant to Section 13, such term shall include Securities of the same issuer, class and quantity as the Collateral initially transferred by Borrower to Lender, as adjusted pursuant to the preceding sentence.
- 25.12 "Collateral Distributions" shall have the meaning assigned in Section 8.5(a).
- 25.13 "Confirmation" shall have the meaning assigned in Section 2.1.
- 25.14 "Contractual Currency" shall have the meaning assigned in Section 16.1.

- 25.15 "Customer" shall mean any person that is a customer of Borrower under Rule 15c3-3 under the Exchange Act or any comparable regulation of the Secretary of the Treasury under Section 15C of the Exchange Act (to the extent that Borrower is subject to such Rule or comparable regulation).
- 25.16 "Cutoff Time" shall mean a time on a Business Day by which a transfer of cash, securities or other property must be made by Borrower or Lender to the other, as shall be agreed by Borrower and Lender in Schedule B or otherwise orally or in writing or, in the absence of any such agreement, as shall be determined in accordance with market practice.
- 25.17 "Default" shall have the meaning assigned in Section 12.
- 25.18 "Defaulting Party" shall have the meaning assigned in Section 18.
- 25.19 "Distribution" shall mean, with respect to any Security at any time, any distribution made on or in respect of such Security, including, but not limited to: (a) cash and all other property, (b) stock dividends, (c) Securities received as a result of split ups of such Security and distributions in respect thereof, (d) interest payments, (e) all rights to purchase additional Securities, and (f) any cash or other consideration paid or provided by the issuer of such Security in exchange for any vote, consent or the taking of any similar action in respect of such Security (regardless of whether the record date for such vote, consent or other action falls during the term of the Loan). In the event that the holder of a Security is entitled to elect the type of distribution to be received from two or more alternatives, such election shall be made by Lender, in the case of a Distribution in respect of the Loaned Securities, and by Borrower, in the case of a Distribution in respect of Collateral.
- 25.20 "Equity Security" shall mean any security (as defined in the Exchange Act) other than a "nonequity security," as defined in Regulation T.
- 25.21 "Exchange Act" shall mean the Securities Exchange Act of 1934, as amended.
- 25.22 "Extension Deadline" shall mean, with respect to a letter of credit, the Cutoff Time on the Business Day preceding the day on which the letter of credit expires.
- 25.23 "FDIA" shall have the meaning assigned in Section 26.4.
- 25.24 "FDICIA" shall have the meaning assigned in Section 26.5.
- 25.25 "Federal Funds Rate" shall mean the rate of interest (expressed as an annual rate), as published in Federal Reserve Statistical Release H.15(519) or any publication substituted therefor, charged for federal funds (dollars in immediately available funds borrowed by banks on an overnight unsecured basis) on that day or, if that day is not a banking day in New York City, on the next preceding banking day.
- 25.26 "Foreign Securities" shall mean, unless otherwise agreed, Securities that are principally cleared and settled outside the United States.
- 25.27 "Government Securities" shall mean government securities as defined in Section 3(a)(42)(A)-(C) of the Exchange Act.
- 25.28 "Lender" shall have the meaning assigned in Section 1.

- 25.29 "Lender Payment" shall have the meaning assigned in Section 8.5(a).
- 25.30 "LIBOR" shall mean for any date, the offered rate for deposits in U.S. dollars for a period of three months which appears on the Reuters Screen LIBO page as of 11:00 a.m., London time, on such date (or, if at least two such rates appear, the arithmetic mean of such rates).
- 25.31 "Loan" shall have the meaning assigned in Section 1.
- 25.32 "Loan Fee" shall have the meaning assigned in Section 5.1.
- 25.33 "Loaned Security" shall mean any Security transferred in a Loan hereunder until such Security (or an identical Security) is transferred back to Lender hereunder, except that, if any new or different Security shall be exchanged for any Loaned Security by recapitalization, merger, consolidation or other corporate action, such new or different Security shall, effective upon such exchange, be deemed to become a Loaned Security in substitution for the former Loaned Security for which such exchange is made. For purposes of return of Loaned Securities by Borrower or purchase or sale of Securities pursuant to Section 13, such term shall include Securities of the same issuer, class and quantity as the Loaned Securities, as adjusted pursuant to the preceding sentence.
- 25.34 "Margin Deficit" shall have the meaning assigned in Section 9.2.
- 25.35 "Margin Excess" shall have the meaning assigned in Section 9.3.
- 25.36 "Margin Notice Deadline" shall mean the time agreed to by the parties in the relevant Confirmation, Schedule B hereto or otherwise as the deadline for giving notice requiring same-day satisfaction of mark-to-market obligations as provided in Section 9 hereof (or, in the absence of any such agreement, the deadline for such purposes established in accordance with market practice).
- 25.37 "Margin Percentage" shall mean, with respect to any Loan as of any date, a percentage agreed by Borrower and Lender, which shall be not less than 100%, unless (a) Borrower and Lender agree otherwise, as provided in Section 24.2, and (b) Lender is not a Customer. Notwithstanding the previous sentence, in the event that the writing or other confirmation evidencing the agreement described in clause (a) does not set out such percentage with respect to any such Loan, the Margin Percentage shall not be a percentage less than the percentage obtained by dividing (i) the Market Value of the Collateral required to be transferred by Borrower to Lender with respect to such Loan at the commencement of the Loan by (ii) the Market Value of the Loaned Securities required to be transferred by Lender to Borrower at the commencement of the Loan.
- 25.38 "Market Value" shall have the meaning set forth in Annex II or otherwise agreed to by Borrower and Lender in writing. Notwithstanding the previous sentence, in the event that the meaning of Market Value has not been set forth in Annex II or in any other writing, as described in the previous sentence, Market Value shall be determined in accordance with market practice for the Securities, based on the price for such Securities as of the most recent Close of Trading obtained from a generally recognized source agreed to by the parties or the closing bid quotation at the most recent Close of Trading obtained from such source, plus accrued interest to the extent not included therein (other than any interest credited or transferred to, or applied to the obligations of, the other party pursuant to Section 8, unless market practice with respect to the valuation of such Securities in



connection with securities loans is to the contrary). If the relevant quotation did not exist at such Close of Trading, then the Market Value shall be the relevant quotation on the next preceding Close of Trading at which there was such a quotation. The determinations of Market Value provided for in Annex II or in any other writing described in the first sentences of this Section 25.38 or, if applicable, in the preceding sentence shall apply for all purposes under this Agreement, except for purposes of Section 13.

- 25.39 "Payee" shall have the meaning assigned in Section 8.5(a).
- 25.40 "Payor" shall have the meaning assigned in Section 8.5(a).
- 25.41 "Plan" shall mean: (a) any "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 which is subject to Part 4 of Subtitle B of Title I of such Act; (b) any "plan" as defined in Section 4975(e)(1) of the Internal Revenue Code of 1986; or (c) any entity the assets of which are deemed to be assets of any such "employee benefit plan" or "plan" by reason of the Department of Labor's plan asset regulation, 29 C.F.R. Section 2510.3-101.
- 25.42 "Regulation T" shall mean Regulation T of the Board of Governors of the Federal Reserve System, as in effect from time to time.
- 25.43 "Retransfer" shall mean, with respect to any Collateral, to pledge, repledge, hypothecate, rehypothecate, lend, relend, sell or otherwise transfer such Collateral, or to re-register any such Collateral evidenced by physical certificates in any name other than Borrower's.
- 25.44 "Securities" shall mean securities or, if agreed by the parties in writing, other assets.
- 25.45 "Securities Distributions" shall have the meaning assigned in Section 8.5(a).
- 25.46 "Tax" shall have the meaning assigned in Section 8.5(a).
- 25.47 "UCC" shall mean the New York Uniform Commercial Code.

**26. Intent.**

- 26.1 The parties recognize that each Loan hereunder is a "securities contract," as such term is defined in Section 741 of Title 11 of the United States Code (the "Bankruptcy Code"), as amended (except insofar as the type of assets subject to the Loan would render such definition inapplicable).
- 26.2 It is understood that each and every transfer of funds, securities and other property under this Agreement and each Loan hereunder is a "settlement payment" or a "margin payment," as such terms are used in Sections 362(b)(6) and 546(e) of the Bankruptcy Code.
- 26.3 It is understood that the rights given to Borrower and Lender hereunder upon a Default by the other constitute the right to cause the liquidation of a securities contract and the right to set off mutual debts and claims in connection with a securities contract, as such terms are used in Sections 555 and 362(b)(6) of the Bankruptcy Code.
- 26.4 The parties agree and acknowledge that if a party hereto is an "insured depository institution," as such term is defined in the Federal Deposit Insurance Act, as amended ("FDIA"), then each Loan hereunder is a "securities contract" and "qualified financial

contract," as such terms are defined in the FDIA and any rules, orders or policy statements thereunder (except insofar as the type of assets subject to the Loan would render such definitions inapplicable).

26.5 It is understood that this Agreement constitutes a "netting contract" as defined in and subject to Title IV of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA") and each payment obligation under any Loan hereunder shall constitute a "covered contractual payment entitlement" or "covered contractual payment obligation," respectively, as defined in and subject to FDICIA (except insofar as one or both of the parties is not a "financial institution" as that term is defined in FDICIA).

26.6 Except to the extent required by applicable law or regulation or as otherwise agreed, Borrower and Lender agree that Loans hereunder shall in no event be "exchange contracts" for purposes of the rules of any securities exchange and that Loans hereunder shall not be governed by the buy-in or similar rules of any such exchange, registered national securities association or other self-regulatory organization.

**27. DISCLOSURE RELATING TO CERTAIN FEDERAL PROTECTIONS.**

**27.1 WITHOUT WAIVING ANY RIGHTS GIVEN TO LENDER HEREUNDER, IT IS UNDERSTOOD AND AGREED THAT THE PROVISIONS OF THE SECURITIES INVESTOR PROTECTION ACT OF 1970 MAY NOT PROTECT LENDER WITH RESPECT TO LOANED SECURITIES HEREUNDER AND THAT, THEREFORE, THE COLLATERAL DELIVERED TO LENDER MAY CONSTITUTE THE ONLY SOURCE OF SATISFACTION OF BORROWER'S OBLIGATIONS IN THE EVENT BORROWER FAILS TO RETURN THE LOANED SECURITIES.**

**27.2 LENDER ACKNOWLEDGES THAT, IN CONNECTION WITH LOANS OF GOVERNMENT SECURITIES AND AS OTHERWISE PERMITTED BY APPLICABLE LAW, SOME SECURITIES PROVIDED BY BORROWER AS COLLATERAL UNDER THIS AGREEMENT MAY NOT BE GUARANTEED BY THE UNITED STATES.**

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**Schedule A**

**Names and Addresses for Communications**

**Schedule B - Redacted**