

*Primary*  
RECORDATION NO. 21365 FILED

ALVORD, AND ALVORD  
ATTORNEYS AT LAW  
918 SIXTEENTH STREET, N.W.  
SUITE 200  
WASHINGTON, D.C.

MAY 4 '98 10-30AM

ELIAS C. ALVORD (1942)  
ELLSWORTH C. ALVORD (1964)

20006-2973  
(202) 393-2266  
FAX (202) 393-2156

OF COUNSEL  
URBAN A. LESTER

RECORDATION NO. 21365-A FILED

MAY 4 '98 10-30AM

MAY 4 10 27 AM '98

RECEIVED  
SURFACE TRANSPORTATION  
BOARD

*County part - Q. 2.*

May 4, 1998

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
Washington, D.C. 20423

Dear Mr. Williams:

Enclosed for recordation pursuant to the provisions of 49 U.S.C. Section 11301(a), are two (2) copies of a Loan and Security Agreement, dated as of May 1, 1998, a primary document as defined in the Board's Rules for the Recordation of Documents, and a Collateral Assignment of Contracts, also dated as of May 1, 1998, a secondary document related thereto.

The names and addresses of the parties to the enclosed documents are:

*Primary* → Assignor/Borrower: Compass Rail II  
750 Battery Street, Suite 430  
San Francisco, California 94111

Assignee/Lender: The Provident Bank  
One East Fourth Street, Suite 700  
Cincinnati, Ohio 75202

A description of the railroad equipment covered by the enclosed documents is:  
one hundred ten (110) BAR railcars on the Schedule attached hereto.

Mr. Vernon A. Williams  
May 4, 1998  
Page 2

Also enclosed is a check in the amount of \$52.00 payable to the order of the Surface Transportation Board covering the required recordation fee.

Kindly return stamped copies of the enclosed documents to the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert W. Alvord", with a stylized flourish at the end.

Robert W. Alvord

RWA/bg  
Enclosures

<u>Car Type</u>	<u>Completed Units</u>	<u>Prior</u>	<u>New</u>
	<u>No. Cars</u>	<u>Car Marks</u>	<u>Car Marks</u>
Interchange Log Cars - AAR Designation LP/Car Type LO28	25	BAR 1287	BAR 11000
		1319	11001
		1274	11002
		1307	11003
		1317	11004
		1313	11005
		1271	11006
		1301	11007
		1293	11008
		1303	11009
		1298	11010
		1315	11011
		1290	11012
		1300	11013
		1275	11014
		1296	11015
		1314	11016
		1277	11017
		1272	11018
		1288	11019
		1306	11020
		1299	11021
		1269	11022
		1283	11023
		1273	11024
Non-Interchange Log Cars - AAR Designation LP/Car Type LO28	25	1106	12000
		1107	12001
		1108	12002
		1116	12003
		1121	12004
		1123	12005
		1125	12006
		1165	12007
		1172	12008
		1198	12009
		1199	12010
		1205	12011
		1216	12012
		1218	12013
		1224	12014
		1234	12015
		1237	12016
		1239	12017
		1243	12018
		1259	12019
		1268	12020
		1276	12021
		1284	12022
		1285	12023
		1311	12024
Wood Chip Cars - AAR Designation GTS/Car Type E700	8	1124	13003
		1147	13009
		1179	13017
		1238	13034
		1282	13051
		1297	13055
		1305	13056
		1310	13058
Total Completed Units	58		

REMAINING UNITS - PULP RACK FLAT CARS

to be Reconstructed into

WOODCHIP CARS

<u>Car Type</u>	<u>No. Cars</u>	<u>Existing Car Marks</u>	<u>New Car Marks</u>
Pulp Rack Flat Cars- AAR Designation LP/Car Type LO28	52	BAR 1109	BAR 13000
When reconstructed:		1110	13001
Wood Chip Cars - AAR Designation GTS/Car Type E700		1120	13002
		1128	13004
		1130	13005
		1131	13006
		1143	13007
		1144	13008
		1151	13010
		1153	13011
		1158	13012
		1171	13013
		1173	13014
		1176	13015
		1178	13016
		1185	13018
		1188	13019
		1191	13020
		1192	13021
		1193	13022
		1194	13023
		1197	13024
		1201	13025
		1203	13026
		1206	13027
		1207	13028
		1209	13029
		1217	13030
		1226	13031
		1229	13032
		1235	13033
		1240	13035
		1247	13036
		1248	13037
		1249	13038
		1252	13039
		1253	13040
		1255	13041
		1256	13042
		1257	13043
		1261	13044
		1263	13045
		1264	13046
		1266	13047
		1267	13048
		1270	13049
		1281	13050
		1292	13052
		1294	13053
		1295	13054
		1308	13057
		1318	13059

RECORDATION NO. 21365 FILED

MAY 4 '98 10-30AM

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LOAN AND SECURITY AGREEMENT

Between

THE PROVIDENT BANK

Lender

and

COMPASS RAIL II

Borrower

Dated as of May 1, 1998

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TABLE OF CONTENTS

Page

ARTICLE 1

**DEFINITIONS AND ACCOUNTING TERMS** ..... 1

1.1 Defined Terms ..... 1

1.2 Accounting Terms ..... 5

1.3 Use of Defined Terms ..... 6

ARTICLE 2

**LOAN TERMS AND AMOUNT** ..... 6

2.1 Commitment ..... 6

2.2 Use of Proceeds ..... 6

2.3 Note; Interest Rate ..... 6

2.4 Payments of Interest and Principal ..... 7

2.5 Prepayment from Total Loss ..... 7

2.6 Additional Fees ..... 7

2.7 Manner of Payments and Computation of Interest ..... 8

2.8 Exchange of Notes ..... 9

ARTICLE 3

**COLLATERAL FOR THE LOAN** ..... 9

3.1 Grant of Security Interest ..... 9

3.2 Liability of Borrower ..... 10

ARTICLE 4

**REPRESENTATIONS AND WARRANTIES** ..... 10

4.1 Representations and Warranties of Borrower ..... 11

4.2 Representations and Warranties of the Lender ..... 14

4.3 Survival of Representations ..... 15

ARTICLE 5

**COVENANTS** ..... 15

5.1 Covenants ..... 15

ARTICLE 6

**DEFAULTS AND REMEDIES** ..... 19

6.1 Event of Default ..... 19

6.2 Remedies ..... 21

**ARTICLE 7**

**CLOSING** ..... 23  
7.1 Place, Time and Disbursement of the Loans. .... 24  
7.2 Documents to be Delivered to the Lender ..... 24  
7.3 Documents to be Delivered and Conditions Precedent to Subsequent Drawings.  
..... 25

**ARTICLE 8**

**PAYMENTS** ..... 27  
8.1 Payments ..... 27

**ARTICLE 9**

**MISCELLANEOUS** ..... 27  
9.1 Remedies Cumulative; No Waiver. .... 27  
9.2 Obligation to Pay, Expenses and Taxes ..... 27  
9.3 Severability. .... 28  
9.4 Entire Agreement; Amendments ..... 28  
9.5 Notices ..... 28  
9.6 Binding Effect ..... 29  
9.7 Execution in Counterparts ..... 29  
9.8 Reference to Headings ..... 30  
9.9 Limited Recourse to Borrower ..... 30  
9.10 Release of Lien ..... 30  
9.11 Attorney-in-Fact ..... 30  
9.12 Governing Law ..... 31  
9.13 Designation of Forum ..... 31

**EXHIBITS AND SCHEDULES**

Exhibit A	Note
Schedule 1	Equipment
Schedule 2.5(b)	Stipulated Loss Value Table

## LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT dated as of May 1, 1998 between THE PROVIDENT BANK, an Ohio banking corporation (the "Lender"), and COMPASS RAIL II, a California corporation (the "Borrower").

### WITNESSETH:

#### ARTICLE 1

##### DEFINITIONS AND ACCOUNTING TERMS

###### SECTION 1.1 Defined Terms.

As used in this Loan and Security Agreement, the following terms shall have the following meanings (such meaning to be equally applicable to both the singular and plural forms of terms):

"Act" means the Securities Act of 1933, as the same may be amended from time to time.

"Agreement" means this Loan and Security Agreement, including all Schedules, Exhibits, and Supplements hereto, if any, as the same may from time-to-time be amended, supplemented or otherwise modified.

"Assignment Agreement" means the Assignment of Agreement dated as of May 1, 1998, between Borrower and Lender providing for the assignment of the Reconstruction Agreement.

"Assignment of Guaranty" means the Assignment of Guaranty dated as of May 1, 1998, between Borrower and Lender providing for the assignment of the Guaranty and the consent and acknowledgment of the Guarantor to such assignment.

"Assignment of Sublease" means the Assignment of Sublease dated as of May 1, 1998, between BAR and Lender.

"BAR" means Bangor & Aroostook Railroad Company, a Maine corporation.

"BAR Consent" means the Consent and Acknowledgment dated as of May 1, 1998, pursuant to which BAR consents to and acknowledges the assignment of the Lease and the Reconstruction Agreement by Borrower to Lender.

"Borrower Warrants" means warrants issued to Lessee to purchase Sixteen Thousand Five Hundred (16,500) shares of the common stock of IRR.

"Business Day" means any day except a Saturday, Sunday or legal holiday on which commercial banking institutions are open for business in Cincinnati, Ohio and San Francisco, California.

"Certificate of Completion" has the meaning attributed thereto in Section 3 of the Reconstruction Agreement.

"Closing" has the meaning attributed thereto in Section 7.1 hereof.

"Closing Date" has the meaning attributed thereto in Section 7.1 hereof.

"Collateral" means the Equipment and all other property, interests and rights described or referred to in Article 3 hereof which are subject or intended to be subject to the lien and security interest created by this Agreement.

"Default" means any of the events specified in Section 6.1 hereof, whether or not there has been satisfied any requirement in connection with such event for the giving of notice, or the lapse of time, or the happening of any further condition, event or act.

"Default Interest Rate" means the interest rate per annum equal to Eighteen Percent (18%).

"Equipment" means the One Hundred Ten (110) 64' Flat Cars that have been, or that during the six (6) month period following the Closing Date shall be, fully refurbished and modified into: (i) Twenty-Five (25) Interchange Log Cars, (ii) Twenty-Five (25) Non-Interchange Log Cars, and (iii) Sixty (60) Woodchip Cars, as set forth on Schedule 1 attached hereto.

"Event of Default" means any of the events specified in Section 6.1 hereof, provided that there has been satisfied any requirement in connection with such event for the giving of notice, or the lapse of time, or the happening of any further condition, event or act.

"Final Redelivery Date" has the meaning attributed thereto in Section 2 of the Reconstruction Agreement.

"GAAP" means Generally Accepted Accounting Principles at the time in effect.

"Guaranty" means the Guaranty dated as of May 1, 1998, by IRR in favor of Borrower.

"Hereto", "herein", "hereof", "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular section or other subdivision of this Agreement unless the context otherwise indicates.

"Indebtedness" means, as to any Person, all items of indebtedness, obligation or liability, whether matured or unmatured, liquidated or unliquidated, direct or contingent, joint or several, including, without limitation:

(i) all indebtedness guaranteed, directly or indirectly, in any manner or endorsed (other than for collection or deposit in the ordinary course of business) or discounted with recourse;

(ii) all indebtedness in effect guaranteed, directly or indirectly, through agreements, contingent or otherwise:

(a) to purchase such indebtedness; or

(b) to purchase, sell or lease (as lessee or lessor) property, products, materials or supplies or to purchase or sell services, primarily for the purpose of enabling the debtor to make payment of such indebtedness or to assure the owner of the indebtedness against loss; or

(c) to supply funds to or in any other manner invest in the debtor;

(iii) all indebtedness secured by (or for which the holder of such indebtedness has a right, contingent or otherwise, to be secured by) any mortgage, deed of trust, pledge, lien, security interest or other charge or encumbrance upon property owned or acquired subject thereto, whether or not the liabilities secured thereby have been assumed; and

(iv) all indebtedness incurred as the lessee of goods or services under leases that in accordance with GAAP, should not be reflected on the lessee's balance sheet.

"IRR" means Iron Road Railways, a Delaware corporation.

"Lease" means the Amended and Restated Railroad Equipment Lease Agreement dated as of May 1, 1998 by and between Borrower and Lessee.

"Lease Documents" means the Lease and all of the documents and instruments relating to the Equipment and the Lease, including, but not limited to, the Guaranty, Assignment of Guaranty, Reconstruction Agreement, Assignment Agreement, BAR Consent and all notes, instruments and other agreements.

"Lease Payments" means any and all payments due on or after the Closing Date of whatsoever kind or nature pursuant to or relating to the Lease.

"Lessee" means BAR and its successors and assigns.

"Lien" means any mortgage, pledge, hypothecation, assignment, security interest, lien, charge or encumbrance of any kind or nature whatsoever (including, without limitation, any conditional sale or other title retention agreement, any lease having substantially the same economic effect as a conditional sale or title retention agreement, and the filing of, or agreement to give, any financing statement under the Uniform Commercial Code or comparable law of any jurisdiction).

"Loan" means the aggregate amount of each drawing made or to be made by Borrower pursuant to Section 2.3 of this Agreement.

"Loan Documents" means the agreements, documents, certificates and instruments delivered or to be delivered from time to time in connection with the Loan, including without limitation, this Agreement, the Note and the Residual Sharing Agreement.

"Note" means the promissory note made by the Borrower to the order of the Lender, executed pursuant hereto in substantially the form of Exhibit A attached hereto and any promissory notes made by the Borrower in exchange or substitution for such Note.

"Obligations" means, collectively, all of the indebtedness, obligations and liabilities existing on the date hereof or arising from time to time hereafter, whether direct, indirect, absolute, contingent, joint or several, matured or unmatured, liquidated or unliquidated, secured or unsecured, arising by contract, operation of law or otherwise, of Borrower to the Lender (i) in respect of the Loan made pursuant to this Agreement, or (ii) under or in respect of any one or more of the Loan Documents. Obligations shall also include all interest and other charges chargeable hereunder to Borrower or due hereunder from Borrower to the Lender from time to time and all costs and expenses referred to in Section 9.2 herein.

"Permitted Liens" means:

- (i) Liens for taxes, assessments, or similar charges, incurred in the ordinary course of business that are not yet due and payable;
- (ii) Liens in favor of the Lender; and
- (iii) Liens which are permitted under the Lease Documents.

"Permitted Payments" means those certain payments of Supplement Rent which shall be made by Lessee to Borrower, which payments shall (i) be payable on the fifteenth day of each month commencing on May 15, 1998 and ending on March 15, 1999 in the amount of Five Thousand Dollars (\$5,000) per month and (ii) in no event exceed Fifty-five Thousand Dollars (\$55,000) in the aggregate.

"Person" means any individual, corporation, partnership, joint venture, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof.

"Reconstruction Agreement" means the Amended and Restated Reconstruction Agreement dated as of May 1, 1998 by and between BAR and Borrower.

"Residual Sharing Agreement" means the Residual Sharing Agreement dated as of May 1, 1998 between Borrower and Lender pertaining to the Equipment.

"Stipulated Loss Value" means the value assigned to any Unit, in accordance with the formula set forth on Schedule 2.5(b) attached hereto, upon the occurrence of a Total Loss.

"Sublease" means the Lease Agreement between BAR, as lessor, and Bob Cauley Incorporated, as lessee, dated as of May 1, 1998.

"Sublessee Consent" means the Consent and Acknowledgment dated as of May 1, 1998, pursuant to which Bob Cauley Incorporated consents to and acknowledges the assignment of the Sublease by BAR to Lender.

"Surface Transportation Board" means the Surface Transportation Board of the Department of Transportation, or any successor thereto.

"Total Loss" has the meaning attributed thereto in Section 11 of the Lease.

"UCC" or "Uniform Commercial Code" means the Uniform Commercial Code as the same may, from time to time, be in effect in the State of Ohio; provided, however, that in the event that, by reason of mandatory provisions of law, any or all of the attachment, perfection, or priority of Lender's security interest in any of the Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of Ohio, the term "UCC" shall mean the Uniform Commercial Code as in effect in such other jurisdiction for purposes of the provisions hereof relating to such attachment, perfection, or priority and for purposes of definitions related to such provisions.

"Unit" means any of the One Hundred Ten (110) 64' Flat Cars constituting a portion of the Equipment.

"Warrants" mean warrants issued to the Lender to purchase Sixteen Thousand Five Hundred (16,500) shares of the common stock of IRR.

## **SECTION 1.2          Accounting Terms.**

All accounting terms not specifically defined herein shall be construed in accordance with GAAP.

**SECTION 1.3 Use of Defined Terms.**

All terms defined in this Agreement shall have their defined meanings when used in the Note and the other Loan Documents, unless the context otherwise indicates or requires.

**ARTICLE 2**

**LOAN TERMS AND AMOUNT**

**SECTION 2.1 Commitment.**

Subject to the terms and conditions of this Agreement, the Lender agrees to loan to the Borrower an aggregate amount of up to Two Million Five Hundred Eighty Thousand Eight Hundred Fifty-six and 00/100 Dollars (\$2,580,856.00).

**SECTION 2.2 Use of Proceeds.**

The Borrower shall use the proceeds of the Loan solely to repay existing indebtedness, to repay the modification costs incurred relating to the Equipment and to fund additional modifications to the Equipment and matters related thereto.

**SECTION 2.3 Note; Interest Rate.**

The Loan shall be evidenced by a promissory note of the Borrower in the principal amount of Two Million Five Hundred Eighty Thousand Eight Hundred Fifty-six and 00/100 Dollars (\$2,580,856.00) in substantially the form of Exhibit A hereto. The Loan shall be funded by (i) one drawing in the amount of One Million Seven Hundred Fifty Thousand and 00/100 Dollars (\$1,750,000.00) on the Closing Date (the "Initial Drawing"); and (ii) one or more drawings on or before October \_\_\_, 1998 of sums not to exceed Eight Hundred Thirty Thousand Nine Hundred Fifty-six and 00/100 Dollars (\$830,856.00) in the aggregate, at such times and in such amounts as set forth in Section 5 of the Reconstruction Agreement and subject to compliance by Borrower with the conditions precedent to such drawings set forth in Section 7.3 hereof ("Subsequent Drawings"). Amounts borrowed hereunder and repaid or prepaid may not be reborrowed.

The Note shall be dated the date of issue, and bear interest on the unpaid principal amount thereof from the date thereof at a rate per annum equal to Ten Percent (10.00%) per annum.

If an Event of Default shall occur, the outstanding principal and all accrued interest, as well as any other Obligations due Lender hereunder or under any Loan Document, shall bear interest from the date on which such amount shall have first become due and payable to Lender to the date on which such amount shall be paid to Lender (whether before or after judgment), at the Default Interest Rate. Interest will continue to accrue until the Obligations are discharged (whether before or after judgment).

Notwithstanding anything to the contrary in the Loan Documents, the Note will not bear interest and no interest will be collectible in excess of the maximum rate allowed by applicable law.

#### **SECTION 2.4            Payments of Interest and Principal.**

Principal and interest accrued on the unpaid principal amount of the Note shall be due and payable monthly in arrears on the fifteenth (15th) day of each month (each referred to herein as a "Payment Date") commencing May 15, 1998 in installments equal to the amount of Basic Rent payable by Lessee pursuant to Section 2(b) of the Lease and on the date the Loan is due (whether by maturity, acceleration or otherwise); provided that, in any event, the last installment payable on the Note shall be in an amount sufficient to pay in full the entire unpaid principal amount of such Note, together with all accrued but unpaid interest thereon. All of the Obligations evidenced by the Note shall, if not sooner due and payable as provided in this Agreement, be in any event absolutely and unconditionally due and payable in full by Borrower on January 15, 2005.

In the event that any payment due under the Note shall not be paid when due, Borrower shall pay to Lender interest on the applicable payment amount at a rate equal to thirteen percent (13%) per annum.

#### **SECTION 2.5            Prepayment from Total Loss.**

In the event of a Total Loss of any Unit, Borrower shall pay to the Lender an amount equal to the Stipulated Loss Value of such Unit as of the date of such payment, together with any other payments owing under this Agreement which are attributable to such Unit. Such prepayment shall be made on a Payment Date within the sixty (60) day period following such Total Loss.

Upon such prepayment pursuant to this Section 2.5, future installments due under such Note prior to maturity shall be reduced in accordance with the portion of the Loan attributable to any such Unit suffering such Total Loss. Upon the Borrower's compliance with the foregoing provisions, the Lender will, upon Borrower's request, if no Default or Event of Default has occurred and is continuing, execute and deliver to Borrower such instruments as shall be necessary to release each such Unit from the lien and security interest of this Agreement (without recourse to, or representation or warranty by, the Lender).

#### **SECTION 2.6            Additional Fees.**

(a) Proceeds of the Collateral. Upon payment in full of the Note, all further proceeds of the Collateral shall be distributed in accordance with the Residual Sharing Agreement.

(b) Warrants. Borrower shall cause IRR to issue the Warrants to Provident.

**SECTION 2.7 Manner of Payments and Computation of Interest.**

(a) Time and Place of Payments. All payments (including prepayments) by the Borrower on account of principal of and interest on the Note shall be made to the Lender at the address specified in Section 9.5 hereof (or at such other place as the Lender shall notify the Borrower in writing), not later than 12:00 p.m. Cincinnati, Ohio time, on the due date of such payments in lawful money of the United States of America and in immediately available funds.

(b) Payments on Business Days. If any payment to be made under the Note becomes due on a day that is not a Business Day, such payment shall be made on the immediately succeeding Business Day.

(c) Application of Payments. The payments received by the Lender with respect to the Obligations shall be applied as follows:

(i) No Default. If the Note has not been accelerated pursuant to Section 6.2(b)(ii) hereof and if no Default or Event of Default hereunder or under the Note or any of the other Loan Documents shall have occurred and be continuing at the time the Lender receives such payments, in the following manner: (a) first, to the payment of all fees, charges, and other sums (with exception of principal and interest) due and payable to the Lender under the Note, this Agreement or the other Loan Documents at such time; (b) second, to the payment of all of the interest which shall be due and payable on the principal of the Note at the time of such payment; (c) third, to the payment of such amount of principal of the Note that is then due; and (d) fourth, to the Borrower.

(ii) Default. If the Note has been accelerated pursuant to Section 6.2(b)(ii) hereof, or if a Default or Event of Default hereunder shall have occurred and be continuing hereunder or under the Note or any of the other Loan Documents at the time the Lender receives such payments, in the following manner: (a) first, to the payment or reimbursement of the Lender for all costs, expenses, disbursements and losses which shall have been incurred or sustained by the Lender in or incidental to the collection of the Obligations owed by Borrower hereunder or the exercise, protection, or enforcement by the Lender of all or any of the rights, remedies, powers and privileges of the Lender under this Agreement, the Note, or any of the other Loan Documents and in and towards the provision of adequate indemnity to the Lender against all taxes or Liens which by law shall have, or may have priority over the rights of the Lender in and to such payments and (b) second, to the payment of all of the Obligations in accordance with Section 2.7(c)(i).

(iii) Computation of Interest. Interest on the Note shall be calculated on the basis of a three hundred sixty (360) day year composed of twelve (12) months each having thirty (30) days.

**SECTION 2.8 Exchange of Notes.**

At the written request of the holder of any Note and upon surrender of such Note for such purposes, the Borrower shall, at any time and at its expense (other than any transfer taxes) issue a new Note in exchange for such Note in denominations not smaller than \$500,000.00 specified by such holder, in an aggregate principal amount equal to the unpaid principal amount of the Note so surrendered and substantially in the form of Exhibit A with appropriate insertions and variations, and bearing interest from the date to which interest has been paid on the Note so surrendered; provided, however, that Borrower's obligation to issue a new Note pursuant to this Section 2.8 shall be subject to delivery to Borrower by the holder of the Note of a representation substantially similar to that contained in Section 4.2(b) hereof.

**ARTICLE 3**

**COLLATERAL FOR THE LOAN**

**SECTION 3.1 Grant of Security Interest.**

As collateral security for the prompt and complete payment and performance when due (whether at stated maturity, by acceleration, or otherwise) of all the Obligations, including, without limitation, with respect to the Loan and the Loan Documents relating thereto, and to induce the Lender to make the Loan, and to secure the performance and observance by Borrower of all of its agreements and conditions applicable to it contained herein or in any other Loan Documents, Borrower hereby grants, bargains, assigns, warrants, conveys, mortgages, pledges, hypothecates and transfers to the Lender a first priority, continuing security interest and Lien in, with power of sale, to the Lender and to its successors and assigns forever, in all of Borrower's right, title and interest in and to the following, whether now owned or hereafter acquired:

(a) the Lease, the Lease Documents and all extensions or renewals thereof, including without limitation, the full amount of each payment of rent payable pursuant to the Lease, the security deposit of Lessee, the full amount of each payment pursuant to the indemnification provisions in the Lease, if any, and all other amounts payable by Lessee pursuant to the terms and conditions of the Lease Documents and all rights, claims, powers, privileges and remedies thereunder, provided that the Permitted Payments and Borrower Warrants shall be excluded from this Article 3;

(b) all rights, claims, powers, privileges and remedies of Borrower as a result of the failure by the Lessee to perform or comply with any term of the Lease or the Lease Documents, together with full power and authority in the name of Borrower to enforce, collect, receive and receipt for any and all of the foregoing;

(c) the Equipment, together with all accessories, fixtures, software, manuals, components, parts, attachments and appurtenances appertaining or attached to any of the Equipment, whether now owned or hereafter acquired, and all additions, substitutions, renewals and replacements of, and improvements to, any and all of the Equipment, wherever located, together with all the rents, proceeds, issues, income, profits and avails thereof including proceeds of insurance policies with respect thereto;

(d) all monies, deposits and other property of any kind of Borrower relating to the Collateral, whether or not in the possession or under the control of the Lender or a bailee of Lender and Lender's successors and assigns; and

(e) all accessions to, substitutions for and replacements, products and proceeds of any of the foregoing.

As further security for the prompt and complete payment and performance when due (whether at stated maturity, by acceleration, or otherwise) of all the Obligations, Borrower shall (i) cause Lessee and Bob Cauley Incorporated to execute and deliver to Lender the Assignment of Sublease and Sublessor Consent, and (ii) direct Lessee to deposit the Security Deposit to a non-interest bearing account controlled by Lender with The Provident Bank, which Security Deposit shall be released as collateral and remitted to Lessee on December 15, 2001 as set forth in Section 2(d) of the Lease Agreement, provided that no Default or Event of Default has occurred and is continuing under the Lease.

### **SECTION 3.2 Liability of Borrower.**

The assignment and grant of the security interest made by the Borrower hereunder is only as security and, therefor, shall not subject the Lender to, or transfer, or pass, or in any way affect or modify, the liability of the Borrower under the Lease Documents, it being agreed that, notwithstanding this Agreement, all obligations of the Borrower to the Lessee or otherwise shall be and remain enforceable against, and only against, the Borrower or other Persons (as defined herein) other than the Lender. The Borrower shall appear in and defend every action in connection with Borrower's obligations under the Lease Documents or otherwise at its sole cost, except to the extent that any of such obligations represent concurrent obligations of the Lessee under the Lease Documents.

## **ARTICLE 4**

## REPRESENTATIONS AND WARRANTIES

### SECTION 4.1 Representations and Warranties of Borrower.

In order to induce the Lender to enter into this Agreement and to make the Loan, the Borrower makes the following representations and warranties to the Lender:

(a) Existence. The Borrower is a corporation duly organized, validly existing and in good standing under the laws of the State of California.

(b) Power and Authority. The Borrower has full power, authority and legal right, governmental permits, consents and licenses, and other authorizations which are necessary to own its properties and to transact the business in which it is engaged.

(c) Qualification. The Borrower is qualified and licensed, admitted or approved to do business in each jurisdiction in which the conduct of its business or the ownership of its assets requires such qualification.

(d) Transaction Authority and Proceedings. The Borrower has all requisite power, authority and legal right to execute, deliver and perform all of its obligations under the Lease Documents, this Agreement, the Note, and the other Loan Documents; and the execution, delivery and performance by the Borrower of the Lease Documents, this Agreement, the Note, and the other Loan Documents have been duly authorized by all necessary corporate action, and do not and will not require any consent or approval of any other party (including the stockholders of the Borrower).

(e) No Legal Bar. The execution, delivery and performance by the Borrower of the Lease Documents, this Agreement, the Note, and the other Loan Documents do not and will not violate any provision of any law, rule, regulation (including, without limitation, Regulation G, T, U or X of the Board of Governors of the Federal Reserve System), order, writ, judgment, injunction, decree, determination or award having applicability to the Borrower or of the Articles of Incorporation or Corporate By-Laws of the Borrower nor result in a breach of or constitute a default under any existing indebtedness, mortgage, indenture, loan or credit agreement, or any other agreement, lease or instrument to which the Borrower is a party or by which the Borrower or its property may be bound or affected; nor result in the creation or imposition of any Lien on any of the properties or assets of the Borrower except as contemplated by this Agreement and the other Loan Documents.

(f) Execution, Binding Effect. The Lease Documents, this Agreement and all other Loan Documents when executed and delivered by the Borrower will constitute, legal, valid and binding obligations of the Borrower enforceable against it in accordance with their respective terms (subject to applicable bankruptcy and insolvency laws and other laws affecting creditor's rights generally).

(g) Litigation. There are no actions, suits, investigations, claims or proceedings (whether or not purportedly on behalf of the Borrower) pending or, to the knowledge of the Borrower, threatened against or affecting the Borrower or the properties of the Borrower before any court, arbitrator or governmental body which (a) relate to any of the Collateral or to any of the transactions contemplated by this Agreement, or (b) would, if determined adversely to Borrower have a material adverse effect on the financial condition, business or operations of the Borrower or the ability of the Borrower to perform its obligations under any of the Lease Documents, this Agreement, the Note or the other Loan Documents.

(h) Default. The Borrower is not in default and no condition exists which, with the passing of time, and/or the giving of notice would constitute a default or an event of default under any existing Indebtedness of Borrower, or any order, writ, judgment, injunction, decree, determination, award, indenture, agreement, lease or other instrument to which the Borrower is a party or by which the Borrower is subject or bound.

(i) Government Consents, Registration, Etc. No authorization, consent, approval, license, exemption, filing, qualification or registration with any court or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, is or will be necessary in connection with the execution, delivery or performance by the Borrower of any of the Lease Documents, this Agreement, the Note and the other Loan Documents or the transactions contemplated hereby or thereby except for any UCC filings and filings with the Surface Transportation Board contemplated by this Agreement.

(j) Principal Office; Name. The principal place of business, the chief executive office and the place at which the books and records of the Borrower from and after the Closing are kept shall be 750 Battery Street, Suite 430, San Francisco, California 94111.

(k) Private Offering. The Borrower has not, either directly or indirectly, offered the Note or any similar security of the Borrower to, or solicited offers to acquire from, or otherwise approached or negotiated with respect thereto with, any Person other than Lender. Neither the Borrower nor anyone acting on its behalf shall offer the Note or any part thereof or any similar securities for issue or sale to, or solicit any offer to acquire any of the same from, anyone so thereby as to bring the issuance of the Note within the provisions of Section 5 of the Act.

(l) Broker's Fee. The Borrower has not made any agreement or taken any action which may cause anyone to become entitled to a commission or broker's fee as a result of the making of the Loan.

(m) Taxes. The Borrower has filed all tax returns (Federal, state and local) required to be filed (except those as to which valid extensions of time have been granted) and paid all taxes, assessments, fees and other governmental charges imposed upon Borrower or upon any of its

properties, income or franchises, which are due and payable (except such taxes, if any, as are being contested in good faith and as to which adequate reserves have been provided).

(n) Title to Properties; Absence of Liens and Encumbrances, Etc.

(i) Borrower has good and valid title to the Equipment, free and clear of all Liens (except the liens and security interests created by this Agreement and the Lease), security interests and encumbrances arising by, through or under Borrower, except for Permitted Liens.

(ii) Borrower has not entered into any contract or agreement, oral or written, in the nature of a residual sharing agreement with any person or entity other than the Lender with respect to any Equipment.

(iii) None of the Equipment is subject to a purchase option in favor of any Person other than such purchase options as may have been granted under the Lease in favor of Lessee.

(o) Equipment. Borrower represents and warrants that Schedule 1 hereto sets forth equipment descriptions which accurately describe the Equipment in all material respects. Borrower further represents and warrants that upon the filing of the UCC-1 financing statements contemplated by Section 7.2(i) of this Agreement and the filing of this Agreement with the Surface Transportation Board, Lender shall have a valid first priority security interest in all of the Equipment.

(p) Reconstruction Agreement and Guaranty. Upon the filing of the UCC-1 financing statements contemplated by Section 7.2(i) of this Agreement and delivery to Lender of the executed original of the Reconstruction Agreement and Guaranty, Lender shall have a valid first priority security interest in the Reconstruction Agreement and the Guaranty.

(q) Lease Documents.

(i) No Lease Documents have been modified, amended or canceled except as evidenced in the Lease Documents. There are no material agreements, written or oral, between Lessee other than the Lease Documents, or other documentation specifically provided to Lender relating to the leasing or financing of the Equipment.

(ii) Borrower is not in default under or in violation of any material obligations to be performed by it pursuant to the Lease Documents nor does any condition exist which, upon the giving of notice or the lapse of time, or both, would constitute such a default by Borrower.

(iii) To Borrower's knowledge, no default or event of default (as such terms may be defined in the Lease) nor any event which, upon giving of notice or the lapse of time, or both, would constitute a default or event of default has occurred and is continuing under the Lease Documents, including without limitation, the obligations to maintain insurance pursuant to the Lease.

(iv) To the best of Borrower's knowledge and except as otherwise disclosed in writing to the Lender, no event which constitutes a Total Loss or any event which, upon the giving of notice or the lapse of time or both, would constitute a Total Loss has occurred with respect to any of the Units.

(v) To the best of Borrower's knowledge there are no claims to indemnify any Person under any indemnification provisions of the Lease Documents outstanding against Borrower or any other Person.

(vi) Annex A of the Note sets forth a true and complete summary of the payments of Basic Rent due under the Lease as of the Closing Date.

(vii) Assuming due authorization, execution and delivery by the parties thereto, other than the Borrower, the Lease Documents constitute valid agreements enforceable in accordance with their respective terms and agreements in full force and effect.

(viii) Upon delivery to the Lender of the duly marked chattel paper original thereof, Lender shall have pursuant to this Agreement a valid first priority security interest in the Lease (subject to applicable bankruptcy and insolvency laws and other laws affecting creditor's rights generally).

(r) Compliance With Law. The Borrower is in compliance with all applicable statutes, laws and regulations affecting its property or the operation of its business.

(s) Disclosure. No representation, information, exhibit or report furnished by the Borrower to the Lender in connection with the negotiation of the Loan, or the Loan Documents contains any material misstatement of fact or omits to state a material fact necessary to make the statements contained therein not misleading.

(t) Investment Company. The Borrower is not an investment company within the meaning of the Investment Company Act of 1940, as amended, or, to the best of the Borrower's knowledge, is it, directly or indirectly, controlled by or acting on behalf of any Person which is an investment company within the meaning of said act.

#### **SECTION 4.2 Representations and Warranties of the Lender.**

The Lender makes the following representations and warranties to the Borrower.

(a) Corporate Organization. The Lender is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation and has all requisite power and authority to carry on its business as now conducted.

(b) Investment Representation. The Lender is acquiring the Note in the ordinary course of its commercial lending business for its own account for investment and not with a view to any resale or distribution thereof.

(c) Corporate Authority. The Lender has taken all corporate action necessary to authorize the execution, delivery and performance of all obligations on its part to be performed hereunder.

(d) Broker's Fee. No broker's, finder's or similar fee is payable in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of Lender.

#### **SECTION 4.3 Survival of Representations.**

All representations and warranties made by the Borrower and the Lender in this Agreement and the other Loan Documents shall survive the execution and delivery of such instrument and the making of the Loan.

### **ARTICLE 5**

#### **COVENANTS**

##### **SECTION 5.1 Covenants.**

The Borrower covenants and agrees that from the date of this Agreement until all of the principal amount of and interest due on the Note and all other amounts due hereunder shall have been duly paid in full in lawful money the Borrower will comply with the following covenants.

(a) Financial Statements and Reports. The Borrower will maintain an adequate system of accounting in which complete entries are made in accordance with federal tax basis accounting reflecting all financial transactions of the Borrower and the Borrower will furnish to the Lender the following:

(i) Annual Financial Statements. Within ninety (90) days after the close of each fiscal year of Borrower annual unaudited financial statements, certified by a responsible financial officer of Borrower;

(ii) No Default Certificate. Together with the annual financial statements required hereunder, a certificate signed by the President or any Vice President of Borrower to the effect that no Default under this Agreement exists, and that no condition exists which with the

passage of time or the giving of notice or both would give rise to a Default hereunder except as specified in such certificate;

(iii) Tax Returns. Within ten (10) days of the Lender's request therefor, copies of the federal and state income tax returns filed by the Borrower; and

(iv) Lease Information. Promptly, upon delivery or receipt thereof, copies of all financial statements of Lessee and IRR required to be delivered to Borrower pursuant to Section 8 of the Lease and of all correspondence relating to the Lease or the Equipment directed by Borrower to Lessee or received by Borrower from Lessee; and

(v) Additional Information. Such other information with respect to the Borrower, the Equipment or the Lease as the Lender may from time to time reasonably request.

(vi) Lender Reports. The Borrower will prepare and deliver to the Lender, or cause to be prepared and delivered to the Lender, within a reasonable time prior to the required date of filing (or, to the extent permissible, file or cause to be filed on behalf of the Lender) all reports (other than income tax returns), if any, relating to the maintenance, registration and operation of the Equipment required to be filed by the Lender with any federal, state or other regulatory agency by reason of the Lender's lien on and security interest in the Equipment and the Lease or the provisions of this Agreement.

(b) Maintenance of Existence. The Borrower will carry on and conduct its business in substantially the same manner and in substantially the same fields of enterprise as it is presently conducted and do all things necessary to preserve its corporate existence, rights, and franchises.

(c) Merger. The Borrower will not directly or indirectly, merge or consolidate with or into, any Person without the prior written consent of Lender.

(d) Disposition of Assets. With the exception of the Sublease, the Borrower will not sell, assign, lease or otherwise dispose of any of the Equipment or other Collateral subject to the Lien of this Agreement, and Borrower will not sell, assign, lease or otherwise dispose of (whether in one transaction or in a series of transactions) all or substantially all of its properties and assets, without the prior written consent of the Lender.

(e) Compliance with Laws.

(i) The Borrower will comply with all requirements, specifications and standards prescribed by any law, rule or regulation of any governmental body or industry association to which it may be subject and maintain and keep in full force and effect all franchises, licenses, permits, approvals or certificates required by governmental authorities material to the conduct of its business.

(ii) The Borrower will (A) comply, and cause the Lessee under the Lease and every user of the Equipment to comply in all respects (including, without limitation, with respect to the use, maintenance and operation of the Equipment), with all laws and rules of the jurisdictions in which its or Lessee's or such user's operations involving the Equipment may extend, with any other governmental authority or industry association exercising any power or jurisdiction over the Equipment, to the extent that such laws or rules affect the title, operation or use of the Equipment, and in the event that such laws or rules require any alternation, replacement or addition of or to any part of the Equipment, the Borrower will conform therewith at its own expense and (B) comply with all other applicable laws and regulations of any governmental authority or industry association relative to the conduct of its business or the ownership of its properties or assets, provided that the Borrower may, in good faith, contest the validity or application of any such law or rule by appropriate proceedings which do not, in the opinion of the Lender, involve any reasonable danger of the sale, forfeiture or loss of the Equipment or any part thereof.

(f) Principal Office. Borrower will maintain its principal place of business, chief executive office and the place at which its books and records are kept within the United States of America, and will not change the location of its principal place of business, its chief executive office or the place at which its books and records are kept from the address specified in Section 4.1(j) hereof unless Borrower shall have given the Lender at least thirty (30) days prior written notice of such change.

(g) Default Notice. The Borrower will give prompt notice in writing to the Lender of any Default or Event of Default hereunder or of any default or event of default (as such terms may be defined therein) under the Lease, or of any condition which with the passage of time or the giving of notice or both would give rise to a Default or an Event of Default hereunder or default or event of default under the Lease.

(h) Use of Proceeds. The Borrower will use the proceeds of the Loan for the purposes set forth in Section 2.2 hereof.

(i) Further Assurances. As requested by the Lender, the Borrower will, at its sole cost and expense, do, execute, acknowledge and deliver all further acts, supplements, mortgages, security agreements, conveyances, transfers and assurances necessary or advisable for the perfection and preservation of the lien and security interest created by this Agreement in the Collateral, whether now owned or hereafter acquired. The Borrower will cause all financing and continuation statements, security agreements, assignments, affidavits, reports, notices and documents, in form and substance satisfactory to the Lender, to be filed as may be required by law in order fully to preserve and protect the rights of the Lender hereunder and as shall be necessary or desirable in the Lender's opinion to perfect and maintain perfected the Lender's security interest in the Collateral and to maintain the priority of such security interest. The Borrower hereby authorizes the Lender as the Borrower's agent and attorney-in-fact to execute and file on the Borrower's behalf in any appropriate office, UCC financing statements and continuation statements signed by Lender alone.

(j) Taxes and Other Claims. The Borrower will promptly pay and discharge all taxes, assessments and governmental charges and levies upon it or its income, profits or property, real, personal or mixed, or any part thereof, and all lawful claims for labor, materials and supplies which, if unpaid, might by law become a Lien upon the property of the Borrower; provided, however, that the Borrower shall not be required to pay or cause to be paid any tax, assessment, charge, levy or claim which is contested in good faith by appropriate proceedings and with respect to which it shall have set aside or caused to be set aside on its books reserves adequate therefor.

(k) Insurance. The Borrower shall maintain, or cause to be effective and maintained, insurance in accordance with Section 10 of the Lease.

(l) Total Loss. Borrower, upon obtaining knowledge thereof, will notify the Lender promptly of any Total Loss, and thereafter, comply with the provisions of Section 2.5 hereof.

(m) Maintenance of Properties. The Borrower will do all things necessary to materially maintain, preserve, protect and keep the Equipment in good repair, working order and condition (or cause any lessee to do so), and make all necessary and proper repairs, renewals and replacements (or cause any lessee to do so) so that its business carried on in connection therewith may be properly and advantageously conducted at all times.

(n) Litigation. The Borrower will deliver to the Lender immediately after the commencement thereof, notice in writing of all actions, suits and proceedings before any court or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, affecting the Collateral.

(o) Inspection. The Borrower will permit the Lender, its representatives and agents, to visit and inspect any of the Collateral and any of the books and records of the Borrower pertaining to the Collateral.

(p) Liens. Borrower will not create, permit or suffer to exist, and will defend the Collateral against and take such other action as is necessary to remove, any Lien, claim or right in or to the Collateral arising by, through or under Borrower (other than Permitted Liens), and will defend the right, title and interest of the Lender in and to the Equipment, the Lease, the other Collateral and the proceeds of all of the foregoing against the claims and demands of all Persons arising by, through or under Borrower. The Borrower will advise the Lender promptly, after acquiring knowledge thereof, in reasonable detail, of any Lien or claim made or asserted against any of the Collateral and of any event affecting the Lender's lien on and security interest in the Collateral.

(q) Amendments to Lease Documents. The Borrower will not, without the prior written consent of the Lender, which shall not be unreasonably withheld, agree to, grant or permit:

(i) any amendment, waiver, consent or other modification of the Lease Documents; or

(ii) the termination of any of the Lease Documents in whole or in part.

(r) Indebtedness. Borrower will not contract for, create, incur or assume any Indebtedness, except as expressly permitted by this Agreement.

(s) Limited Activities. Borrower agrees not to enter into any business or other activity other than the exercise of rights under, and the performance of all obligations to be performed by it pursuant to, the Lease Documents and Loan Documents, any lawful business and activities expressly consented to in writing by Lender, the incurrence and payment of costs and expenses in connection with the consummation of the transactions contemplated by the Lease Documents and Loan Documents and payment of all ongoing fees and expenses in connection with the transactions contemplated by such Documents, and activities incidental to the foregoing.

(t) No Voluntary Bankruptcy. To the extent the Borrower may lawfully so agree, the Borrower agrees not to commence any case, proceeding or other action under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or seek appointment of a receiver, trustee, custodian or other similar official for it or for all or any substantial part of its assets, or make a general assignment for the benefit of its creditors; and the Borrower shall not take any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth above.

(u) Indemnity. In any suit, proceedings or action brought by the Lender under the Lease or to enforce any provisions thereof, the Borrower will save, indemnify and keep the Lender harmless from and against all expense, loss or damage suffered by reason of any defense, setoff, counterclaim, recoupment or reduction of liability whatsoever of Lessee under the Lease, as the case may be, arising out of a breach by the Borrower of any obligation under the Lease or arising out of any other agreement, indebtedness or liability at any time owing to or in favor of Lessee or its respective successors from the Borrower, and all such obligations of the Borrower shall be and remain enforceable against and only against the Borrower and shall not be enforceable against the Lender.

## ARTICLE 6

### DEFAULTS AND REMEDIES

#### SECTION 6.1 Event of Default.

The occurrence of any one or more of the following events shall constitute an Event of Default, provided that there has been satisfied any requirement in connection with such event for the giving of notice or the lapse of time, or the happening of any further condition, event or act, it being agreed that time is of the essence hereof;

(a) Payment. Failure to pay any installment of principal of, or interest to the Note when due or any other amount due the Lender under this Agreement for a period of ten (10) days after the same becomes due; or

(b) Misrepresentation. Any representation or warranty made by the Borrower in this Agreement or in any Loan Document, including any certificate, agreement, instrument or written statement contemplated hereby or made or delivered pursuant hereto or in connection herewith, shall prove to have been incorrect in any material respect as of the date on which made; or

(c) Breach of Covenant. Failure by the Borrower in the observance or performance of any other material term, covenant or agreement contained in, or made in connection with, this Agreement or any Loan Document on its part to be performed or observed and any such failure shall remain unremedied for ten (10) days after written notice from Lender to Borrower;

(d) Default Under Lease Documents. An event of default (as defined therein) under the Lease Documents.

(e) Insolvency. The Borrower shall be or become insolvent, or be adjudicated a bankrupt or insolvent, or admit its inability to pay its debts as they mature, or make an assignment for the benefit of creditors; or Borrower shall apply for or consent to the appointment of any receiver, trustee, or similar officer for it or for all or any substantial part of its property, or such receiver, trustee or similar officer shall be appointed without the application or consent of the Borrower and such appointment shall continue undischarged for a period of forty-five (45) days; or the Borrower shall institute (by petition, application, answer, consent or otherwise) any bankruptcy, insolvency, reorganization, arrangement, readjustment of debt, dissolution, liquidation or similar proceeding relating to it under the laws of any jurisdiction, or any such proceeding shall be instituted (by petition, application or otherwise) against the Borrower shall remain undismissed for a period of forty-five (45) days; or any judgment, writ, warrant of attachment or execution or similar process shall be issued or levied against a substantial part of the property of Borrower and such judgment, writ, or similar process shall not be released, vacated or fully bonded within forty-five (45) days after its issue or levy; or

(f) Contest Loan. The validity or enforceability of this Agreement, the Note or any of the other Loan Documents shall be contested by Borrower or any stockholder of Borrower where Borrower shall deny that it has any further liability or obligation hereunder or thereunder, or the validity or enforceability of any of the Lease Documents shall be contested by Lessee where Lessee shall deny that it has any further liability or obligation thereunder.

(g) Possession of Collateral. A judgment creditor of Borrower shall obtain possession of the Collateral by any means.

**SECTION 6.2 Remedies.**

(a) Lease Default. If an event of default (as defined therein) under the Lease exists, Lender, as assignee hereunder of the Lease, may declare the Lease in default pursuant to Section 16 thereof. Thereupon, Lender, as assignee hereunder of the Lease or as secured party hereunder of the Equipment or otherwise, may, to the exclusion of Borrower, exercise any right and power and pursue any remedy under Section 16 of the Lease and this Section 6.2. If Lender at any time declares the Lease to be in default pursuant to Section 16 thereof, the unpaid principal amount of the Loan then outstanding and accrued interest thereon shall immediately become due and payable without further act or notice of any kind.

(b) Loan Default. If any Event of Default set forth herein shall occur, the Lender may, at its election, and without notice thereof (and the Borrower hereby authorizes it to) take any one or more of the following actions:

(i) exercise any or all of the rights and remedies accruing to a secured party under the UCC of any state having jurisdiction, and under any other applicable law;

(ii) declare the entire principal amount of the Note and all accrued interest thereon due and payable whereupon such amount and interest shall be due and payable on the date of such declaration;

(iii) proceed at law or in equity or otherwise to enforce the payment of the Loan in accordance with the terms hereof and of the Note and, if the outstanding principal amount of the Loan become due and payable pursuant to this Agreement or the Note, to foreclose the Lien of this Agreement in one or more proceedings or, to the extent permitted by law, in one or more public or private, judicial or nonjudicial sales of all or part of the Collateral, or any interest therein or proceed to take either of such actions;

(iv) sell, assign, transfer and deliver the whole or, from time to time, any part of the Collateral or any interest in any part thereof, at private sale or public action, with or without demand, advertisement or notice (except as expressly provided for below in this Section 6.2), for cash or credit or for other property, for immediate or future delivery, and for such price or prices and on such terms as Lender in its sole discretion may determine, or as may be required by law. Lender shall give Borrower at least ten (10) days' written notice (which Borrower agrees is reasonable notification within the meaning of Section 9-504(3) of the UCC) of any public or private sale. The notice in case of public sale shall state the time and place fixed for such sale. Any such public sale shall be held at such time or times within ordinary business hours as Lender shall fix in the notice of sale. At any such sale the Collateral may be sold in one lot as an entirety or in separate parcels.

Lender shall not be obligated to make any sale pursuant to any such notice. Lender may, without notice or publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for such sale, and any such sale may be made at any time or place to which the same may be so adjourned without further notice or publication;

(v) require the Borrower to promptly execute and deliver to the Lender such instruments and other documents as the Lender may deem necessary or advisable to enable the Lender or an agent or representative designated by the Lender, at such time or times and place or places as the Lender may specify, to obtain possession of all or any part of the Equipment. If the Borrower shall for any reason fail to execute and deliver such instruments and documents promptly after such request by the Lender, the Lender may (a) obtain a judgment conferring on the Lender the right to immediate possession and requiring the Borrower to deliver such instruments and documents to the Lender, to the entry of which judgment the Borrower hereby specifically consents, and (b) to the extent permitted by applicable law, pursue all or part of the Equipment wherever it may be found and may enter any of the premises of the Lessee or the Borrower wherever the Equipment may be or be supposed to be and search for the Equipment and take possession of and remove the Equipment;

(vi) from time to time, at the expense of the Borrower, make all such expenditures for maintenance, insurance and alterations, to and of the Equipment, as it may deem proper. In each such case, the Lender shall have the right to maintain, use, operate, store, lease, control or manage the Equipment and to carry on the business and to exercise all rights and powers of the Borrower relating to the Equipment, as the Lender shall deem reasonably appropriate, including the right to enter into any and all such agreements with respect to the maintenance, use, operation, storage, leasing, control or management of the Equipment or any part thereof as the Lender may determine, and the Lender shall be entitled to collect and receive all tolls, rents, revenues, issues, income, products and profits of the Equipment and every part thereof, without prejudice, however, to the right of the Lender under any provisions of this Agreement to collect and receive all cash held by, or required to be deposited with, the Lender hereunder. Such tolls, rents, revenues, issues, income, products and profits shall be applied to pay the expenses of the use, operation, storage, leasing, control or management of the Equipment and of conducting the business thereof, and of all maintenance, repairs, replacements, alterations, additions and improvements, and to make all payments which the Lender may be required or may so elect to make, if any, for taxes, assessments, insurance or other proper charges upon the Equipment or any part thereof; and

(vii) employ counsel in connection with any of the foregoing or in connection with a Lease default as provided in subparagraph (a) above, and all of the attorneys' fees arising from such services and all expenses, costs and charges in any way or respect arising in connection therewith or relating thereto shall be payable by the Borrower on demand.

Provided, however, that nothing in this Agreement shall permit or require Lender to take any action contrary to, or disturb, Lessee's rights under the Lease, except in accordance with the provisions of the Lease.

(c) Application of Payments. Other than payments received by Borrower from Lender in accordance with the terms of this Agreement, all payments received by the Borrower in connection with or arising out of any of the Collateral pursuant to the Lease shall be held by the Borrower in trust for the Lender, shall be segregated from other funds of the Borrower and shall forthwith upon receipt by the Borrower be turned over to the Lender, in the same form as received by the Borrower (duly indorsed by the Borrower to the Lender, if required); any and all such payments so received by the Lender (whether from the Borrower or otherwise) may, in the sole discretion of the Lender, be held by the Lender as collateral security for the Obligations, and/or then or at any time thereafter applied in whole or in part by the Lender against all or any part of the Obligations then due in such order as the Lender shall elect. Any balance of such payments held by the Lender shall be applied first to the payment of all of the Obligations in full, and the remainder shall be paid over to the Borrower or to whomsoever may be lawfully entitled to receive the same.

(d) No Waiver. Each right, power and remedy of Lender provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise (all of which rights, powers and remedies are hereby granted to Lender and assented to by Borrower) shall be cumulative and concurrent and shall be in addition to every other right, power or remedy provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise, and the exercise or beginning of the exercise by Lender of any one or more of the rights, powers or remedies provided for in this Agreement or now or hereafter existing at law or in equity or by statute or otherwise, or the exercise of any such right, power or remedy with respect to any part of the Collateral, shall not preclude the simultaneous or later exercise by Lender of any or all such other rights, power or remedies, or the simultaneous or later exercise by Lender of any such right, power or remedy with respect to any other part of the Collateral.

(e) Purchase of Collateral by Lender. To the extent permitted by applicable law, the Lender may be a purchaser of the Collateral or any part thereof or any interest therein at any sale thereof, whether pursuant to foreclosure or power of sale or otherwise. The Lender may apply against the purchase price therefor the amount then due under the Note. The Lender or any nominee thereof shall, upon any such purchase, acquire good title to the property so purchased, free of the lien of this Agreement and, to the extent permitted by applicable law, free of all rights of redemption in or by the Borrower.

## ARTICLE 7

### CLOSING

**SECTION 7.1 Place, Time and Disbursement of the Loans.**

The closing ("Closing") of the Loan shall take place at the offices of Keating, Muething & Klekamp, P.L.L. in Cincinnati, Ohio, or at such other location agreed upon by the parties. At the Closing, upon satisfaction of all applicable conditions set forth herein, the Lender shall disburse the Initial Drawing under the Loan in accordance with written disbursement instructions of the Borrower delivered by the Borrower to the Lender (the "Closing Date").

**SECTION 7.2 Documents to be Delivered to the Lender.**

At the Closing, the Borrower shall deliver to the Lender the following documents, each dated as of the Closing Date unless otherwise herein indicated, in form and substance satisfactory to the Lender and its counsel:

(a) Charter Documents. A copy of the Articles of Incorporation of Borrower, as amended, certified not more than ten (10) days prior to the Closing by the Secretary of State of California, together with the certificate of the Secretary or Assistant Secretary of Borrower dated the Closing Date to the effect that the foregoing Articles of Incorporation have not been amended since the date of the aforesaid certification and certifying a copy of the Corporate By-Laws of Borrower as being a true, correct and complete copy thereof as of the Closing Date.

(b) Corporate Resolutions. Copies of the resolutions of the Board of Directors of Borrower authorizing and approving the execution, delivery and performance of the Lease, the Lease Documents, this Agreement, and the other Loan Documents and the transactions contemplated thereby and hereby certified by the Secretary or Assistant Secretary of Borrower.

(c) Good Standing Certificate. Certificate of Good Standing from the Secretary of State of California certifying the existence and good standing of Borrower under the laws of California.

(d) Incumbency of Officers. A certificate of the Secretary or an Assistant Secretary of Borrower as to the identity and incumbency of the officers of Borrower authorized to sign the Lease, this Agreement and the other Loan Documents together with specimen true signatures of such officers.

(e) Opinion of Borrower's Counsel. A favorable opinion of Borrower's counsel satisfactory to the Lender, addressed to the Lender.

(f) Note. The Note in the principal amount of the Loan drawn to the order of the Lender or its designated nominee, if any, duly executed by the Borrower.

(g) Disbursement Instructions. Loan disbursement instructions in form and substance satisfactory to Lender.

(h) UCC Financing Statements. UCC Financing Statements relating to the Lease, Equipment and other Collateral in form and substance satisfactory to Lender.

(i) Delivery of Lease Documents. Delivery to Lender of the chattel paper original of the Lease and the executed originals of all Lease Documents in the possession of Borrower on the Closing Date, certified by the Secretary or Assistant Secretary of Borrower as being true and complete originals thereof.

(j) Insurance Certificates. Certificates evidencing the insurance required by Section 5.1(k) hereof.

(k) Officer's Certificate. A certificate, dated the Closing Date and signed by the President or any Vice President of the Borrower, to the effect that the Equipment being financed by the Loan has been delivered to Lessee and accepted by the Borrower and Lessee in the condition the Equipment is in as of the Closing Date; the Borrower has valid and legal title to, and is the lawful owner of such Equipment, free and clear of all Liens arising by, through or under Borrower and except the liens and security interests created by this Agreement and the Lease; and such Equipment has been duly leased to the Lessee under the Lease.

(l) Opinion of Counsel - Surface Transportation Board Lien Search. An opinion of Alvord and Alvord regarding the perfection and priority of Lender's security interest in the Equipment, in form and substance satisfactory to Lender.

(m) Other Documents. Such other documents, agreements or certificates as the Lender or its counsel may request.

(n) Legal Fees and Search Fees. Borrower shall have reimbursed Lender for all fees and disbursements of legal counsel to Lender which shall have been incurred by Lender through the Closing Date in connection with the preparation, negotiation, review, execution and delivery of the Lease and the Loan Documents and the handling of any other matters incidental thereto, and for all UCC and Surface Transportation Board search fees conducted by Lender or Lender's counsel.

**SECTION 7.3 Documents to be Delivered and Conditions Precedent to Subsequent Drawings.**

Prior to the disbursement of Subsequent Drawings under the Loan, the Borrower shall deliver to the Lender the following documents, each dated as of the date of such disbursement unless otherwise herein indicated, in form and substance satisfactory to Lender and its counsel, and shall meet the following conditions:

(a) Representations and Warranties. The representations and warranties of the Borrower set forth herein and in any other Loan Document shall be true and accurate as of such Closing Date.

(b) No Material Change. On such Closing Date, there shall have been or occurred no event or occurrence which shall have a material adverse effect on the business, assets, operations or conditions of the Borrower, the ability of Borrower to perform its obligations hereunder, or the validity or enforceability of any provision of this Agreement or any other Loan Document.

(c) No Default. On such Closing Date, no event shall have occurred and be continuing on such date, and no condition shall exist on such date which constitutes a Default or Event of Default.

(d) Note. The Note in the principal amount of such Loan drawn to the order of Lender or its designated nominee, if any, duly executed by Borrower.

(e) Disbursement Instructions. Loan disbursement instructions in form and substance satisfactory to Lender.

(f) Certificate of Borrower's Officer. A certificate, dated the Closing Date and signed by the President or any Vice President of the Borrower, to the effect that the Equipment being financed by the Loan has been delivered to Lessee and accepted by the Borrower and Lessee; the Borrower has valid and legal title to, and is the lawful owner of such Equipment, free and clear of all Liens arising by, through or under Borrower and except (i) the liens and security interests created by this Agreement and the Lease, and (ii) the Permitted Liens under the Reconstruction Agreement; and such Equipment has been duly leased to the Lessee under the Lease.

(g) Certificate of Completion. At least three (3) business days prior to such drawing, a Certificate of Completion and accompanying invoice duly executed by Lessee shall be delivered to and approved by Borrower pursuant to the requirements of the Reconstruction Agreement, which approval shall not be granted by Borrower to Lessee without the consent of Lender in its sole discretion, with respect to each Unit for which funds shall be drawn.

(h) Inspection Report. The inspector chosen by the Lender, in its sole discretion, shall issue a favorable inspection report with respect to each Unit for which funds shall be drawn.

(i) Certificate of Lessee's Officer. The certificate duly executed by an officer of Lessee and required to be delivered to Borrower and Lender pursuant to Section 5(b) of the Reconstruction Agreement, and

(j) Other Documents. All other agreements, certificates, orders, authorities, consents, affidavits, schedules, instruments, security agreements, financing statements, mortgages and other documents, in form and substance satisfactory to the Lender, as the Lender or its counsel may request.

## ARTICLE 8

### PAYMENTS

#### SECTION 8.1 Payments.

The Borrower shall authorize and instruct the Lessee to make all payments as they become due after the date hereof under the Lease to the Lender and the Borrower agrees to pay to the Lender as set forth below all portions thereof received by the Borrower. To the extent any such payment received by the Lender shall exceed the amount due and owing to the Lender pursuant to the Note, this Agreement, or any other Loan Document, the Lender shall, so long as no Default or Event of Default has occurred and is continuing, promptly remit such excess to the Borrower by mailing a check payable to the order of the Borrower to the Borrower's address set forth herein. Amounts payable to the Lender shall be payable in immediately available funds on or before the date said payment is due, to Lender at its address stated herein or at such other addresses as the Lender may designate by written notice to the Borrower. The Borrower may deem and treat the Lender as the absolute owner and holder of the Note for the purpose of receiving payment of all amounts payable with respect to such Note and for all other purposes, unless notified otherwise in writing by the Lender.

## ARTICLE 9

### MISCELLANEOUS

#### SECTION 9.1 Remedies Cumulative; No Waiver.

The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

No failure or delay on the part of the Lender or any holder of the Note in exercising any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy hereunder.

#### SECTION 9.2 Obligation to Pay, Expenses and Taxes.

The Borrower agrees, whether or not the transactions contemplated by this Agreement shall be consummated, to pay or reimburse the Lender for all costs and expenses incurred by the Lender in connection with the preparation, administration, amendment, or modification of the Loan and the Loan Documents including without limitation the fees and out-of-pocket expenses of Messrs. Keating, Muething & Klekamp, counsel for the Lender, with respect thereto and of local counsel,

if any, who may be retained by said counsel with respect thereto; all out-of-pocket costs and expenses of the Lender incurred after the Closing Date in connection with the granting by Lender of any consents, approvals or waivers under any of the Loan Documents; all out-of-pocket costs and expenses of the Lender incurred after the Closing Date in connection with the administration of this Agreement or any other Loan Document, including without limitation, legal fees and expenses and all costs and expenses incurred or sustained by Lender in connection with the perfection and continuation of the rights of Lender in connection with the Loan; and all stamp, other taxes and license fees, if any, payable or determined to be payable by Lender in connection with execution and delivery of the Loan Documents, and the Borrower shall indemnify and save the Lender harmless from and against any and all liabilities with respect to or resulting from any delay in paying or omission to pay such taxes. The obligations of the Borrower under this Section 9.2 shall survive payment of the Note and termination of this Agreement and the other Loan Documents.

**SECTION 9.3 Severability.**

Any provision of this Agreement which is prohibited and unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or affecting the validity or enforceability of such provision in any other jurisdiction.

**SECTION 9.4 Entire Agreement; Amendments.**

This Agreement and the instruments referred to herein constitute the entire agreement of the parties hereto with respect to the subject matter hereof.

No amendment, modification, termination, or waiver of any provision of this Agreement or of the Note nor consent to any departure by the Borrower therefrom, shall in any event be effective unless the same shall be in writing and signed by the Lender, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given. No notice to or demand on the Borrower in any case shall entitle the Borrower to any other or further notice or demand in similar or other circumstances.

**SECTION 9.5 Notices.**

All notices, requests, demands and other communications provided for hereunder shall be in writing, and if addressed to the Borrower, mailed or delivered to it, addressed to it at:

Compass Rail II  
750 Battery Street, Suite 430  
San Francisco, CA 94111  
Attention: Stephen C. Bieneman, President

and, if to the Lender, mailed or delivered to it, addressed to it at:

The Provident Bank  
One East Fourth Street  
Cincinnati, Ohio 45202  
Attention: Forest C. Frank, Sr. Vice President

with a copy to:

Keating, Muething & Klekamp, P.L.L.  
One East Fourth Street  
1800 Provident Tower  
Cincinnati, Ohio 45202  
Attention: Richard D. Siegel, Esq.

or, as to each party, at such other address as shall be designated by such party in a written notice to the other party complying as to delivery with the terms of this Section. All notices, requests, demands and other communications provided for hereunder shall be effective when deposited in the mail, first class, postage prepaid or delivered to the telegraph company charges prepaid, addressed as aforesaid.

**SECTION 9.6 Binding Effect.**

This Agreement shall be binding upon and inure to the benefit of the Borrower and the Lender and their respective successors and assigns. The Borrower shall not have the right to assign its rights hereunder or any interest herein without the prior written consent of the Lender.

The Lender shall have the right to assign all or any part of its obligations to make the loan to any affiliate, subsidiary or any Person. In the event of such assignment by the Lender, the assignee in addition to the Lender, shall be deemed to have been named the "Lender" in the first paragraph of this Agreement and all representations, warranties and covenants of the Borrower made herein or any other Loan Document shall be deemed to have been made to and shall inure to the benefit of such assignee.

**SECTION 9.7 Execution in Counterparts.**

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

**SECTION 9.8 Reference to Headings.**

The Article and Section headings and the Index used in this Agreement are for convenience only and shall not affect the construction of this Agreement.

**SECTION 9.9 Limited Recourse to Borrower.**

Notwithstanding anything herein or in any of the Lease Documents or Loan Documents to the contrary, all payments, including payments of principal and interest, to be made by Borrower under the Note and under this Agreement shall, except as set forth in this paragraph, be made only from the Collateral and only to the extent that Borrower shall at any time and from time to time have received sufficient Collateral to make such payments in accordance with the terms hereof and thereof. Lender agrees that insofar as Borrower is concerned, Lender will look solely to the Collateral, to the extent available for distribution to Lender as herein provided, and that (except as expressly set forth in this paragraph) neither Borrower nor any permitted transferee of Borrower shall be personally liable to the Lender for any amounts payable under the Note or this Agreement or any Lease Document or Loan Document. Notwithstanding anything to the contrary contained in this paragraph, the limitation on personal liability described herein shall not discharge or release the Note or any indebtedness evidenced by the Note; limit Borrower's liability for any of its obligations under or arising out of Sections 3.2, 4.1, 5.1(i), 5.1(p), 5.1(q), 5.1(s), 5.1(t), 8.1 and 9.2 of this Agreement; preclude Lender from exercising any right or invoking any remedy as to the Collateral whether upon an Event of Default or otherwise; or prejudice the rights of Lender in the Collateral against any Person; provided, however, this shall not constitute a waiver of any of the rights or defenses of Borrower under this Agreement.

**SECTION 9.10 Release of Lien.**

Upon payment in full of the Obligations, the security interest granted by Borrower herein shall terminate, and the Lender agrees to execute such documents and take such other actions, at the sole expense of the Borrower and as may be reasonably requested by the Borrower, in order to evidence the discharge of the Note and the security interests granted hereby.

**SECTION 9.11 Attorney-in-Fact.**

The Borrower does hereby constitute the Lender its true and lawful attorney, irrevocably, with full power (in the name of the Borrower or otherwise) to ask, require, demand, receive, compound and give acquittance for any and all payments due and to become due under or arising out of the Lease Documents to which the Borrower is or may become entitled; to enforce compliance by the Lessee or manufacturer with all of the terms and provisions thereof, to collect and enforce any checks or other instruments or orders in connection therewith, to give any or all of the notices, consents, instructions or other communications reserved to the Borrower thereunder and to file any claims or take any action or institute any proceedings which the Lender may deem to be necessary or advisable in connection therewith; and upon the occurrence of any Event of Default hereunder and for the purpose of effectuating any sale, assignment, transfer or delivery for the

enforcement of the lien of this Agreement, whether pursuant to foreclosure or power of sale or otherwise, and to execute and deliver all such bills of sale, assignments and other instruments as the Lender may consider necessary or appropriate, with full power of substitution. If so requested by the Lender or any purchaser, the Borrower shall ratify and confirm any such sale, assignment, transfer or delivery by executing and delivering to the Lender or such purchaser all bills of sale, assignments, releases and other proper instruments to effect such ratification and confirmation as may be designated in any such request.

**SECTION 9.12      Governing Law.**

The Loan Documents shall be deemed to be contracts made under the laws of, executed, and delivered in the State of Ohio, and for all purposes shall be construed in accordance with the laws of said State.

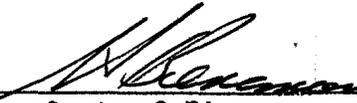
**SECTION 9.13      Designation of Forum.**

The Borrower agrees (a) that any suit, action, or proceeding pertaining to this Agreement may be instituted in the Courts of the State of Ohio or the United States District Court for the Southern District of Ohio, Western Division, and (b) irrevocably and unconditionally submits and consents to the jurisdiction and venue of any such court for such purpose. Borrower hereby irrevocably appoints CT Corporation System, and its duly constituted successor(s), if any, as the agent for service of process in any proceeding instituted hereunder and Borrower agrees that service of process upon such agent, in accordance with the then-prevailing and applicable law as hereinabove agreed to, with a copy of such summons or other instrument mailed to the Borrower in the manner specified in Section 9.5 hereof, shall, upon receipt by Borrower, constitute proper service on Borrower for all purposes without objections of any kind whatsoever. Notwithstanding the provisions of this Section 9.13, either party shall also be entitled to institute legal proceedings to adjudicate matters pertaining to this Agreement against the other in any other competent court.

*[Remainder of page intentionally left blank. Signature page follows.]*



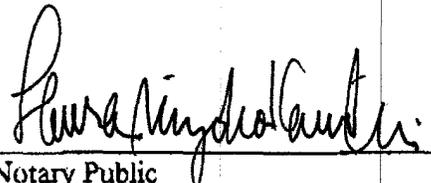
BORROWER:  
COMPASS RAIL II

By:   
Name: Stephen C. Bieneman  
Title: President

STATE OF CALIFORNIA            )  
  : SS:  
COUNTY OF SAN FRANCISCO    )

BEFORE ME, the Subscriber, a Notary Public in and for said County and State, personally appeared Stephen C. Bieneman, President of Compass Rail II, the corporation which executed the foregoing instrument, who acknowledged he did sign said instrument as such officer on behalf of said corporation, and by authority of its Board of Directors, and that the execution of said instrument is his free and voluntary act and deed individually and as such officer, and the free and voluntary act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed by Notarial Seal this 1 day of May, 1998.

  
Notary Public

