

FIRST NATIONAL BANK  
OF LOUISVILLE

Post Office Box 36000 Louisville, Kentucky 40233 Telephone (502) 581-4200

0-254A011

September 6, 1990

SEP 11 11 20 AM '90  
RECORDS UNIT

RECORDATION NO 18999 FILED 1425

SEP 11 1990 - 11 15 AM

INTERSTATE COMMERCE COMMISSION

Honorable Noretta R. McGee  
Secretary  
Interstate Commerce Commission  
Washington, D.C. 20423

Dear Ms. McGee:

Please find enclosed for filing under 49 U.S.C. Section 11302 and the regulations promulgated thereunder, four (4) executed counterparts of a Memorandum of Non-Recourse Note & Security Agreement executed as of August 31, 1990.

You will also find enclosed our check in the amount of \$15.00 in payment of the filing fee. Once the filing has been made, please return the stamped counterparts of the Memorandum not required for your files, together with the fee receipt and the letter from the ICC acknowledging the filing.

Very truly yours,

FIRST NATIONAL BANK OF LOUISVILLE

Toni Scott  
Vice President

MLS:as

Interstate Commerce Commission  
Washington, D.C. 20423

9/12/90

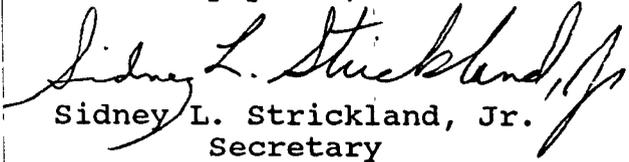
OFFICE OF THE SECRETARY

Toni Scott  
Vice President  
First National Bank  
P.O.Box 3600  
Louisville, Kentucky 40233

Dear Sir:

The enclosed document(s) was recorded pursuant to the provisions of Section 11303 of the Interstate Commerce Act, 49 U.S.C. 11303, on 9/11/90 at 11:15am , and assigned recordation number(s). 16999

Sincerely yours,

  
Sidney L. Strickland, Jr.  
Secretary

MEMORANDUM OF  
NON-RECOURSE NOTE AND SECURITY AGREEMENT

RECORDATION NO. 16990  
SEP 11 1990 - 11 15 AM  
INTERSTATE COMMERCE COMMISSION

THIS MEMORANDUM OF NON-RECOURSE NOTE & SECURITY AGREEMENT is intended to evidence the Non-Recourse Note & Security Agreement dated as of August 31, 1990 (the "Note and Security Agreement") between Helm Financial Corporation, a California corporation (the "Debtor"), and First National Bank of Louisville, (the "Secured Party"), for the purpose of satisfying the requirements of recordation with the Interstate Commerce Commission under Section 49 of U.S.C. 11303. The Debtor is the owner of the rapid discharge cars more fully described in Annex A hereto (the "Unit(s)"). The Debtor has granted a security interest in the Units to the Secured Party upon the terms and conditions provided in the Note and Security Agreement, attached hereto as Annex B.

IN WITNESS WHEREOF, the Debtor and the Secured Party, each pursuant to due authority, have executed this Memorandum of Note and Security Agreement, as of this 31st day of August, 1990.

DEBTOR

HELM FINANCIAL CORPORATION

By: 

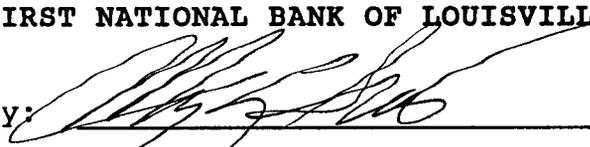
Title: President

By: 

Title: Executive Vice President

SECURED PARTY

FIRST NATIONAL BANK OF LOUISVILLE

By: 

Title: Vice President

STATE OF CALIFORNIA )  
 ) S  
COUNTY OF SAN FRANCISCO )

On this 28<sup>th</sup> day of AUGUST, 1990, before me personally appeared WILLIAM U. PETERSON, to me personally known, who, being by me duly sworn, says that he is PRES EXEC VP of HELM FINANCIAL CORPORATION, that said instrument was signed and sealed on behalf of said corporation and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Lynda A Herskovitz  
Notary Public

My Commission Expires: July 16, 1993

[Notarial Seal]



STATE OF Kentucky )  
 ) S  
COUNTY OF Jefferson )

On this 31st day of August, 1990, before me personally appeared Mary L. Scott, to me personally known, who, being by me duly sworn, says that he is Vice President of First National Bank of Louisville, that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Jana Doran Beasley  
Notary Public

My Commission Expires: My commission expires Feb. 16, 1993

[Notarial Seal]

ANNEX A  
 TO MEMORANDUM  
 OF NON-RECOURSE  
 NOTE AND SECURITY AGREEMENT  
 DATED AS OF AUGUST 31, 1990

<u>Equipment Description</u>	<u>Equipment Numbers</u>		
4,000 cubic foot, 100-ton capacity, five-pocket, rapid discharge open top coal hopper railcars with Electro- pneumatically controlled hopper gates. Built by Ortner circa 1971 and 1977.	HLMX 601	644	690
	602	646	691
	603	647	696
	604	648	697
	605	649	698
	606	650	699
	607	651	704
	608	652	705
	609	653	708
	610	655	712
	611	656	714
	612	657	715
	613	658	716
	614	659	718
	615	660	719
	616	661	723
	617	662	
	618	663	
	619	664	
	620	665	
	621	666	
	622	667	
	624	668	
	625	669	
	626	670	
	627	671	
	628	672	
	629	673	
	630	674	
	631	675	
	632	676	
	633	677	
	634	678	
635	679		
636	680		
637	681		
638	682		
639	683		
640	684		
641	685		
642	686		
643	688		

ANNEX A  
TO MEMORANDUM  
OF NON-RECOURSE  
NOTE AND SECURITY AGREEMENT  
DATED AS OF AUGUST 31, 1990

CONTINUED

Equipment Description

Equipment Numbers

Sixty-five (65) 3,800 cubic foot,  
100-ton capacity, roller-bearing,  
five-pocket, open top rapid  
discharge coal railcars, built by  
Ortner circa 1978, 1980 and 1981.

HLMX 623	80001
645	80002
654	80003
721	80004
724	80005
725	80006
726	80007
727	80008
728	80009
729	80010
730	80011
731	80012
732	80013
733	80014
197810	80015
197815	80016
197818	80017
197819	80018
197821	80019
197823	80020
197831	81001
197881	81002
197886	81003
197896	81004
197897	81006
197954	81012
	81014
	81019
	81021
	81023
	81024
	81029
	81032
	81035
	81036
	81041
	81053
	81065
	81067

NON-RECOURSE NOTE AND SECURITY AGREEMENT

Date: August 31, 1990

FOR VALUE RECEIVED, the undersigned debtor, HELM FINANCIAL CORPORATION, a California corporation (hereinafter referred to as the "Debtor"), hereby promises to pay to the order of FIRST NATIONAL BANK OF LOUISVILLE ("Secured Party") the principal sum of [REDACTED] or the unpaid amount of all principal advances made hereon in not more than forty (40) monthly installments of principal and interest. The first four (4) installments shall be in the amount of \$ [REDACTED], the next twelve (12) installments shall be in the amount of \$ [REDACTED] and the final twenty four (24) installments shall be in the amount of \$ [REDACTED]. Interest shall accrue at the rate of [REDACTED] percent on the unpaid principal balance of this Note existing from time to time until all principal and accrued interest have been paid in full. The first monthly installment of principal, plus accrued interest, shall be due and payable on September 1, 1990, and remaining installments of principal, together with interest accrued thereon, shall be due and payable on the 1st day of each month thereafter with the final installment plus any accrued and unpaid interest due on December 1, 1993. Principal and interest are payable in lawful money of the United States at the Secured Party's principal banking office located at 101 South Fifth Street, Louisville, Kentucky 40202. Interest shall be calculated on the basis of a 360-day year comprised of twelve 30-day months.

Section 1. Grant of Security Interest

As security therefor, Debtor hereby gives the Secured Party a security interest in and lien on all of the Debtor's rights, title and interest in the property described in Exhibit "A" attached hereto and made a part hereof which property is now owned by Debtor or to be purchased by Debtor with the proceeds of this Note (hereinafter called the "Equipment"). As further security for this Note, Debtor hereby assigns to Secured Party (i) all monies due and to become due Debtor under the Lease Agreement dated as of July 13, 1988, as amended, (the "Lease") between Debtor and Tampa Electric Company (hereinafter the "Lessee") excluding any monies received by Debtor as indemnification by the Lessee for loss of tax benefits claimed by the Debtor, (ii) all of the Debtor's rights but not obligations under said Lease and (iii) the proceeds of any and all of the foregoing. The Equipment, the Lease, all monies due, the rights under the Lease and the proceeds thereof are herein collectively defined to be the "Collateral".

Section 2. Representations and Warranties of the Debtor

Debtor hereby represents and warrants that:

(a) this Note and Security Agreement has been duly authorized, executed and delivered by the Debtor and constitutes a legal, valid and binding agreement and obligation of the Debtor enforceable according to its terms, except as limited by applicable insolvency, moratorium or other similar laws or equitable principles affecting the rights of creditors generally,

(b) neither the execution and delivery of this Note and Security Agreement or the Lease nor the consummation of the transactions herein contemplated nor the fulfillment of, nor compliance with, the terms and provisions hereof will conflict with, or result in a breach of, any of the terms, conditions or provisions of the Articles of Incorporation or the bylaws of the Debtor or of any bond, debenture, note, mortgage, indenture, agreement or other instruments to which the Debtor is a party or by which it or its property may be bound, or constitute (with the giving of notice or the passage of time or both) a default thereunder, or result in the creation or imposition of any lien, charge, security interest or other encumbrance of any nature whatsoever upon the Collateral pursuant to the terms of any such agreement or instrument,

(c) it is a corporation duly organized and validly existing under the laws of the jurisdiction of its formation, is duly qualified to do business in each jurisdiction (including the jurisdiction where the Equipment is, or is to be located) where failure to so qualify would materially adversely affect Debtor's business,

(d) the Debtor has good title, as conveyed to it, to the Collateral free and clear of all security interests, liens and encumbrances, except for the respective interests of the Secured Party and the Lessee,

(e) the Lease is a valid and binding agreement of the Debtor and the Lessee, except as limited by applicable insolvency, moratorium or other similar laws or equitable principles affecting the rights of creditors and lessors generally,

(f) the Lease constitutes the entire agreement between the Debtor and the Lessee and the Debtor has delivered to the Secured Party the original of the Lease,

(g) no other assignment or security interest has been or will be granted with respect to the Collateral or the monies assigned hereunder, however, Debtor may grant subordinate interests in the residual value of the Equipment to other parties, and,

(h) the rents payable under the Lease assigned hereby to Secured Party are not, to the best knowledge of Debtor, subject to any defenses, setoffs or counterclaims.

### Section 3. Covenants of Debtor

The Debtor agrees:

(a) that all payments to be made by the Debtor hereunder shall be made to:

First National Bank of Louisville  
P.O. Box 36000  
Louisville, Kentucky 40233  
ATTN: Leasing Industry Financing

(b) that all right, title and interest of the Debtor in and to the Collateral and any payments with respect thereto are and shall be subject and subordinate to all of the right, title and interest of the Secured Party therein,

(c) not to take any material action with respect to its right, title and interest in and to the Collateral without the prior written consent of the Secured Party, which will not be unreasonably withheld,

(d) to execute and deliver any and all papers or documents which Secured Party may reasonably request from time to time in order to carry out the purposes hereof, or to facilitate the collection of monies due or to become due from the Lessee,

(e) that the Debtor will duly fulfill or cause to be fulfilled all of the obligations if any to be performed and assumed by it under the Lease including, but not limited to, its warranty of quiet enjoyment, and shall remain liable thereunder and that it will not, without Secured Party's prior written consent, modify, rescind, cancel or accept the surrender of the Lease or waive any of the provisions thereof or extend the time of payment for the rent thereunder,

(f) to keep the Collateral free and clear of, or discharge within forty-five (45) days of the creation of, all mortgages, pledges, liens, charges, security interests and all other encumbrances whatsoever, except those created by

this Note and Security Agreement, provided however that a property tax lien may remain on the Collateral in excess of the forty-five (45) day period set forth above so long as the Debtor or the Lessee discharges the lien on or before the date a penalty attaches for nonpayment of the tax, provided further that the following liens, mortgages, pledges, charges, security interests and other encumbrances may remain on the Collateral in excess of the forty-five (45) day period:

i) liens for taxes (other than property taxes), assessments, or similar charges, incurred in the ordinary course of business, that are not yet due and payable;

ii) liens of mechanics, materialmen, warehousemen, carriers, or other like liens, securing obligations incurred in the ordinary course of business that are not yet due and payable;

iii) liens existing as of the date hereof or which the Secured Party has knowledge and has consented to in writing;

iv) the following, if the validity or amount thereof is being contested in good faith by appropriate and lawful proceedings, so long as levy and execution thereon have been stayed and continue to be stayed and they do not in the aggregate materially detract from the value of the Collateral, or materially impair the use thereof in the operation of Debtor's or Lessee's business:

a) claims or liens for taxes, assessments or charges due and payable and subject to interest or penalty;

b) claims, liens or encumbrances upon the Collateral including any attachment of the Collateral or other legal process prior to adjudication of a dispute on the merits;

c) claims or liens of merchants, materialmen, warehousemen, carriers, or other like liens; and

d) adverse judgments on appeal.

(g) to keep or cause the Lessee to keep the Equipment in good repair and operating condition without any cost or liability to Secured Party,

(h) that all accessions which are or become attached to or part of the Equipment are or shall become subject to the terms of this Note and Security Agreement, to the extent permitted in the Lease,

(i) to notify Secured Party upon its knowledge of any Lessee defaults in the payment or performance of any of its obligations under the Lease,

(j) not to sell, assign, transfer, mortgage or in any way encumber the Collateral, nor secrete or abandon the Equipment without the prior written notice to the Secured Party,

(k) to allow Secured Party and its representatives free access and right of inspection of the Equipment at all reasonable times, and in the event of loss or damage to the Equipment, to send written notice thereof to the Secured Party,

(l) that it will not remove its records concerning the Lease except to a jurisdiction where the Uniform Commercial Code shall be in effect, and upon thirty (30) days' prior written notice to the Secured Party, and will permit Secured Party and its representatives to examine Debtor's books and records with respect to the Collateral and make extracts therefrom and copies thereof at any reasonable time and from time to time,

(m) that it shall not permit the Equipment to be or become fixtures under applicable law,

(n) to keep or cause the Lessee to keep the Equipment insured against public liability and loss by fire, theft and casualty, by self-insurance or by insurers and in form, amount and coverage customary for such Equipment in businesses similar to Lessee's business;

(o) to pay or cause Lessee to pay all charges, including without limitation, taxes and assessments, levied or assessed against Debtor which if unpaid would constitute an attachment on the Collateral or any portion thereof, provided however that should Lessee fail to make such payments as required pursuant to the Lease, Debtor shall have forty-five (45) days after the due date thereof to make said payments unless an attachment will be imposed on said Equipment prior to the end of said forty-five (45) day period in which event payment shall be made by Debtor prior to imposition of the attachment unless such attachment may not be foreclosed within such forty-five (45) day period.

#### Section 4. Rights of Secured Party

The Debtor hereby irrevocably constitutes and appoints Secured Party and any officer thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Debtor or in its own name, with the written consent of Debtor unless and until a default shall have occurred hereunder, for the purpose of carrying out the terms of this Note and Security Agreement to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Note and Security Agreement and, without limiting the generality of the foregoing the Debtor hereby gives Secured Party the power and right, on behalf of the Debtor, to endorse any loss payment or returned premium check and to make, settle and release any claim under any insurance policy with respect to the Collateral, and to do, at the Secured Party's option, at any time, or from time to time, all acts and things which the Secured Party deems necessary to protect, preserve or realize upon the Collateral and the Secured Party's security interest therein in order to effect the intent of this Note and Security Agreement, all as fully and effectively as the Debtor might do. The Debtor hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof, except for actions taken in which Secured Party is negligent or the action is due to Secured Party's willful misconduct. This power of attorney is a power coupled with an interest, shall be irrevocable and shall terminate only upon payment in full of the obligations and termination of this Note and Security Agreement. The powers conferred on Secured Party thereunder are solely to protect the Secured Party's interests in the Collateral and shall not impose any duty upon it to exercise any such powers. Secured Party shall be accountable only for amounts that it actually receives as a result of the exercise of such powers, and neither it nor any of its officers, directors, employees or agents shall be responsible to the Debtor for any action taken or omitted to be taken in good faith or in reliance on the advice of counsel except for its own negligence or willful misconduct.

#### Section 5. Collection of Rent

Debtor shall notify the Lessee that all rents payable under the Lease shall be paid to Secured Party's address or, in the event a lock box agreement is in effect between Debtor and Secured Party, to the address specified in said agreement. The amounts from time to time received by the Secured Party as rental under the Lease shall be applied to the amount of principal and interest then due and payable on this Note and Security Agreement. All sums received by the Secured Party from the Lessee due to the loss or destruction of the Collateral shall be applied to the remaining principal and interest then outstanding on this Note and Security Agreement in accordance with the

formula specified in Section 6(b) hereof, with any excess paid by the Secured Party to Debtor. Any insurance proceeds as regards the Collateral shall be applied according to the terms of the Lease, but in the event the insurance proceeds are not used to replace or repair the Collateral for any reason whatsoever, said proceeds shall be paid to the Secured Party and applied to the principal and interest then outstanding on this Note and Security Agreement, with any excess paid by the Secured Party to Debtor.

The Secured Party may, upon occurrence of an Event of Default hereunder, notify the Lessee that the Lease has been assigned to the Secured Party and that all rental payable thereunder shall be paid directly to the Secured Party. The Secured Party may also direct Debtor to so notify any Lessee, and Debtor agrees to follow any such directions. All rental received by Debtor from the Lessee so notified shall be received and held by Debtor in trust for the Secured Party and shall be delivered to the Secured Party immediately upon receipt thereof by Debtor in the same form as received except for Debtor's endorsement when necessary. In the event Debtor fails to endorse any instrument given in payment of rental, the Secured Party is hereby irrevocably authorized to endorse the same on Debtor's behalf.

#### Section 6. Prepayment

Debtor may not voluntarily prepay the indebtedness evidenced by this Note and Security Agreement in whole or in part; provided, however, that the Debtor may voluntarily prepay that portion of this Note and Security Agreement secured by a Lease which has been terminated prior to the end of its term due to:

- (a) a default by the Lessee under the terms of the Lease;
- (b) a Casualty Occurrence, as defined in the Lease, in which event the voluntary prepayment shall be limited to that portion of unpaid principal under this Note and Security Agreement, together with accrued interest thereon, proportionately equal to the percentage that the original purchase price of the items of Equipment suffering such event of loss bears to the original purchase price of the Equipment then subject to the Lease, provided, however, that payments of principal and interest shall continue to be payable under this Note and Security Agreement together with any additional interest required pursuant to Section 7 hereof with regard to payments of principal and interest remaining unpaid after the same have become due and payable;
- (c) An early termination of the Lease under the terms of the Lease or as negotiated between the Debtor and the Lessee. In the event of a voluntary prepayment of the outstanding principal balance of this Note and Security Agreement due to early termination, the Debtor shall also

pay Secured Party a prepayment penalty not to exceed five percent (5.0%) of the then outstanding principal balance hereunder.

In lieu of prepaying this Note and Security Agreement pursuant to the above terms, the Debtor may offer to the Secured Party and the Secured Party may accept a substitute Lease or Leases of like quality and term. Secured Party shall not unreasonably refuse to accept a substitute lease of like quality and term.

Each of the remaining principal installments due hereunder shall be reduced in the proportion that the principal amount of the prepayment made pursuant to this Section bears to the unpaid principal amount outstanding immediately prior to the prepayment.

Section 7. Late Payment Rate

Any payment not made on or before the due date shall accrue delinquent interest at the late rental payment rate set forth in Section 2 of the Lease or the maximum applicable legal rate, whichever is lower.

Section 8. Limitations of Liability; Indemnity

Notwithstanding any other provision of this Note and Security Agreement, all obligations of Debtor hereunder are non-recourse; provided however,

(a) Secured Party shall have recourse to Debtor for:

(i) any claims arising out of the breach by Debtor of any of its representations, warranties, covenants and undertakings set forth herein (other than the payment of principal and interest provided for in this Note and Security Agreement), and

(ii) all sums due Secured Party hereunder from and after the date (y) the Lessee withholds any monies due under the Lease, which are assigned to Secured Party hereunder or (z) the Lease is terminated prior to the full payment to the Secured Party of all sums due hereunder, which termination is either by the terms of the Lease or by force of law, such withholding or termination being due to any action or inaction by Debtor which results in the loss of use of or quiet enjoyment of the Collateral by the Lessee, including, but not limited to, the maintenance requirement of Debtor under the terms of the Lease.

However, nothing in this paragraph shall be, or be deemed to be, a release or impairment of the indebtedness evidenced by this

Note and Security Agreement, or the Secured Party's security interest in the Collateral, or the assignment of rentals due under the Lease or to preclude the Secured Party from resorting to the Collateral in case of any default hereunder subject to Lessee's rights under the Lease or from enforcing any of its rights under this Note and Security Agreement or the Lease in respect of the Collateral, and

(b) Debtor agrees to indemnify and save harmless Secured Party against any charges or claim made against Secured Party, and against any expense, loss or liability which the Lessee would be obligated to indemnify or save Secured Party harmless from pursuant to Section 9 of the Lease but for Debtor's sole or joint negligence. The indemnities contained in this paragraph shall survive the payment or performance of all other obligations under this Agreement or the termination of this Agreement.

Section 9. Events of Default

Any of the following events shall constitute an "Event of Default" hereunder:

(a) Debtor shall fail to make any payment due hereunder within fifteen (15) days after written notice that the same has become due,

(b) an Event of Default under and as defined in the Lease shall have occurred and be continuing,

(c) Debtor shall fail to perform or observe any other covenant, condition or agreement to be performed or observed by Debtor hereunder or in any agreement or certificate furnished to Secured Party in connection herewith and such failure shall continue unremedied for a period of thirty (30) days after notice thereof to Debtor unless Debtor is using due diligence, in the opinion of the Secured Party's counsel, to correct such default,

(d) any representation or warranty made by Debtor herein or in any document or certificate furnished to the Secured Party in connection herewith shall be materially incorrect when made,

(e) any report, certificate or other instrument furnished by Debtor in connection with this Note and Security Agreement shall prove to be materially false or misleading and which Debtor knew was false or misleading prior to giving such information,

(f) the Debtor shall have become insolvent or bankrupt or admit in writing its inability to pay any of its debts as they mature or make an assignment for the benefit of creditors, or a receiver or trustee shall have been appointed with respect to the Debtor or any of the Debtor's estate, and which receiver or trustee shall remain undischarged for ninety (90) days after appointment, and/or,

(g) bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings, or other proceedings for relief under the United State Bankruptcy Code or any bankruptcy law or similar law now or hereafter in force for the relief of debtors, shall be instituted by or against the Debtor and be allowed against the Debtor or be consented to or fail to be dismissed within ninety (90) days of such institution.

#### Section 10. Remedies

If an Event of Default hereunder shall have occurred and be continuing, all of the payments hereunder shall become immediately due and payable, without notice or demand, subject to Section 8 hereof, the non-recourse provisions of this Note and Security Agreement, and Sections 11 and 13 hereof, and it shall be then lawful for and, Debtor hereby authorizes and empowers Secured Party, with the aid and assistance of any persons:

(a) to enter upon the premises, or such other place as the Equipment may be found and take possession of and carry away the Equipment as permitted by applicable law, at any time or times, dispose of same and apply the proceeds thereof to the balance hereof or any other obligations arising hereunder, all to the extent permitted by and in accordance with law and the terms and conditions of the Lease,

(b) to file any claim or take any other action or proceeding in any court of law or equity for the purpose of collecting any and all monies due under the Lease,

(c) upon the occurrence and continuance of a default by Lessee, to pay or discharge taxes, liens, security interests or other encumbrances levied or placed on or threatened against the Collateral, to effect any repairs or any insurance called for by the terms of this Note and Security Agreement or the Lease and to pay all or any part of the premiums therefor and the costs thereof, and

(d) upon the occurrence and continuance of any Event of Default under the terms of the Lease:

(i) to receive payment of and receipt for any and all monies, claims and other amounts due and to become due

at any time in respect of or arising out of any Collateral,

(ii) to commence and prosecute any suits, actions or proceedings at law or in equity in any court of competent jurisdiction to collect the Collateral or any part thereof and to enforce any other right in respect of the Collateral, and

(iii) to settle, compromise or adjust any suit, action or proceeding described above and, in connection therewith, to give such discharges or releases as the Secured Party may deem appropriate.

All rights, remedies and options conferred upon Secured Party hereunder or by law shall be cumulative and may be exercised successively or concurrently and are not alternative or exclusive of any other such rights, remedies or options. No express or implied waiver by the Secured Party of any default or Event of Default hereunder shall in any way be, or be construed to be, a waiver of any future or subsequent default or Event of Default. The failure or delay of the Secured Party in exercising any rights granted it hereunder upon any occurrence of any of the contingencies set forth herein shall not constitute a waiver of any such right upon the continuation or recurrence of any such contingencies or similar contingencies and any single or partial exercise of any particular right by the Secured Party shall not exhaust the same or constitute a waiver of any other right provided herein.

Section 11. Right to Cure

Anything herein to the contrary notwithstanding, in the case of any default occurring hereunder due to the occurrence of an Event of Default under the Lease, Secured Party shall not, without the prior written consent of Debtor, exercise any remedy or remedies provided herein or in the Lease in respect thereof during the ten (10) business day period next following notice to Debtor by Secured Party of such Event of Default. During such period, Debtor shall have the right to cure, on behalf of Lessee, such Event of Default under the Lease. Each separate Event of Default occurring subsequent to such an Event of Default which was theretofore cured by Debtor shall be subject to the period during which Secured Party may not exercise its remedies as herein above provided.

No party exercising any such right to cure shall obtain any lien, charge or encumbrance of any kind upon any Equipment or any rentals or other amounts payable therefore under the Lease in respect of any sums paid in connections with the exercise of such right or the curing of such Event of Default, nor shall any claims of such party against Lessee for the repayment of such

sums so advanced impair the prior right of Secured Party to the sums payable by Lessee under the Lease; provided however, that if no default hereunder shall then have occurred and be continuing and if all obligations then due and owing shall have been made, at the time of receipt by Secured Party from Lessee of an overdue installment of rent in respect of which Debtor shall have made payment to Secured Party pursuant to this paragraph and/or any interest payable by Lessee in respect of the late payment thereof, such installment or other sum and interest thereon shall be released to Debtor.

Section 12. Successors and Assigns

This Note and Security Agreement shall inure to the benefit of the successors and assigns of Secured Party.

Section 13. Rights Under Lease

Notwithstanding any of the provisions of this Agreement to the contrary, neither Debtor nor Secured Party shall take any action contrary to the rights of the Lessee under the Lease except in accordance with the provisions of the Lease.

Section 14. Miscellaneous

Any monies coming into the possession of Secured Party hereunder, whether paid by Debtor or the Lessee or derived from insurance or the proceeds of any sale of the Collateral, shall be applied in whole or in part to the obligations of Debtor subject to the terms and conditions of the Lease and Debtor's right to specify any such application is hereby waived except as provided in Section 11 hereof. If any monies at any time are payable to Debtor hereunder, the same shall be deposited as Debtor or Debtor's transferee or assignee may direct.

This Note and Security Agreement may not be amended, waived, or discharged, except by an agreement in writing signed by the party against which or whom enforcement of the amendment, waiver, or discharge is sought. In case any one or more of the provisions contained in this Agreement shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby. Any provision of this Note and Security Agreement which is prohibited or unenforceable in any jurisdiction shall be, as to such jurisdiction, ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. Time and exactitude are of the essence hereof.

Secured Party may at any time assign to a subsidiary or affiliate all or any portion of this Note and Security Agreement, without notice to Debtor, or to an unrelated third party upon notice to Debtor. Debtor may not assign the Note and Security Agreement, except to an affiliate, without prior written notice to Secured Party. Upon full payment of the sums due hereunder and the satisfaction of all obligations of the Debtor hereunder, the Secured Party shall upon Debtor's request execute termination statements for all outstanding filed financing statements relating to its security interest. This Note and Security Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. It is the intention of the parties that the provisions of this Note and Security Agreement shall be governed by the laws of the Commonwealth of Kentucky.

The term Debtor shall be deemed to include successors and assigns of Debtor.

All notices to be made hereunder shall be in writing and,

(a) if to Debtor, addressed to it at One Embarcadero Center, Suite 3500, San Francisco, California 94111 and,

(b) if to Secured Party, addressed to it at P.O. Box 36000, Louisville, Kentucky 40233: Attention: Leasing Industry Financing.

Either party hereto may change the address to which notice to such party shall be sent by giving notice of such change to the other party to this Note and Security Agreement.

Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Note and Security Agreement. The words "herein", "hereof", "hereby", "here to", "hereunder" and words of similar import refer to this Note and Security Agreement as a whole and not to any particular section, subsection, paragraph, clause or other subdivision hereof.

The principal place of business of the Debtor is One Embarcadero Center, Suite 3500, San Francisco, California 94111 and the Debtor shall notify the Secured Party and execute additional financing statements, to be filed at Debtor's expense, should such address change.

**FIRST NATIONAL BANK OF LOUISVILLE**

**HELM FINANCIAL CORPORATION**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT A

Equipment Description:

Reporting Marks:

Car Numbers:

MEMORANDUM OF  
NON-RECOURSE NOTE AND SECURITY AGREEMENT

RECORDATION NO. 16999  
SEP 11 1990 - 11 15 AM  
INTERSTATE COMMERCE COMMISSION

THIS MEMORANDUM OF NON-RECOURSE NOTE & SECURITY AGREEMENT is intended to evidence the Non-Recourse Note & Security Agreement dated as of August 31, 1990 (the "Note and Security Agreement") between Helm Financial Corporation, a California corporation (the "Debtor"), and First National Bank of Louisville, (the "Secured Party"), for the purpose of satisfying the requirements of recordation with the Interstate Commerce Commission under Section 49 of U.S.C. 11303. The Debtor is the owner of the rapid discharge cars more fully described in Annex A hereto (the "Unit(s)"). The Debtor has granted a security interest in the Units to the Secured Party upon the terms and conditions provided in the Note and Security Agreement, attached hereto as Annex B.

IN WITNESS WHEREOF, the Debtor and the Secured Party, each pursuant to due authority, have executed this Memorandum of Note and Security Agreement, as of this 31st day of August, 1990.

DEBTOR

HELM FINANCIAL CORPORATION

By:  JF

Title: President

By: 

Title: Executive Vice President

SECURED PARTY

FIRST NATIONAL BANK OF LOUISVILLE

By: 

Title: Vice President

STATE OF CALIFORNIA )  
 ) S  
COUNTY OF SAN FRANCISCO )

On this 28<sup>th</sup> day of AUGUST, 1990, before me, William M. Peterson, personally appeared RICHARD C. KIRCHWETZ to me personally known, who, being by me duly sworn, says that he is PRES. & EXEC. V.P. of HELM FINANCIAL CORPORATION, that said instrument was signed and sealed on behalf of said corporation and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Lynda A. Hertz  
Notary Public

My Commission Expires: July 16, 1993

[Notarial Seal]



STATE OF Kentucky )  
 ) S  
COUNTY OF Jefferson )

On this 31st day of August, 1990, before me personally appeared Mary L. Scott, to me personally known, who, being by me duly sworn, says that he is Vice President of First National Bank of Louisville, that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Laura Dana Beatty  
Notary Public

Notary Public, State at Large, KY.  
My commission expires Feb 16, 1993

My Commission Expires: \_\_\_\_\_

[Notarial Seal]

11/27/00  
4:00 PM  
11/27/00

ANNEX A  
 TO MEMORANDUM  
 OF NON-RECOURSE  
 NOTE AND SECURITY AGREEMENT  
 DATED AS OF AUGUST 31, 1990

<u>Equipment Description</u>	<u>Equipment Numbers</u>		
4,000 cubic foot, 100-ton capacity, five-pocket, rapid discharge open top coal hopper railcars with Electro- pneumatically controlled hopper gates. Built by Ortner circa 1971 and 1977.	HLMX 601	644	690
	602	646	691
	603	647	696
	604	648	697
	605	649	698
	606	650	699
	607	651	704
	608	652	705
	609	653	708
	610	655	712
	611	656	714
	612	657	715
	613	658	716
	614	659	718
	615	660	719
	616	661	723
	617	662	
	618	663	
	619	664	
	620	665	
	621	666	
	622	667	
	624	668	
	625	669	
	626	670	
	627	671	
	628	672	
	629	673	
	630	674	
	631	675	
	632	676	
	633	677	
	634	678	
	635	679	
636	680		
637	681		
638	682		
639	683		
640	684		
641	685		
642	686		
643	688		

ANNEX A  
TO MEMORANDUM  
OF NON-RECOURSE  
NOTE AND SECURITY AGREEMENT  
DATED AS OF AUGUST 31, 1990

CONTINUED

Equipment Description

Equipment Numbers

Sixty-five (65) 3,800 cubic foot,  
100-ton capacity, roller-bearing,  
five-pocket, open top rapid  
discharge coal railcars, built by  
Ortner circa 1978, 1980 and 1981.

HLMX 623	80001
645	80002
654	80003
721	80004
724	80005
725	80006
726	80007
727	80008
728	80009
729	80010
730	80011
731	80012
732	80013
733	80014
197810	80015
197815	80016
197818	80017
197819	80018
197821	80019
197823	80020
197831	81001
197881	81002
197886	81003
197896	81004
197897	81006
197954	81012
	81014
	81019
	81021
	81023
	81024
	81029
	81032
	81035
	81036
	81041
	81053
	81065
	81067

NON-RECOURSE NOTE AND SECURITY AGREEMENT

Date: August 31, 1990

FOR VALUE RECEIVED, the undersigned debtor, HELM FINANCIAL CORPORATION, a California corporation (hereinafter referred to as the "Debtor"), hereby promises to pay to the order of FIRST NATIONAL BANK OF LOUISVILLE ("Secured Party") the principal sum of [REDACTED] or the unpaid amount of all principal advances made hereon in not more than forty (40) monthly installments of principal and interest. The first four (4) installments shall be in the amount of \$ [REDACTED], the next twelve (12) installments shall be in the amount of \$ [REDACTED] and the final twenty four (24) installments shall be in the amount of \$ [REDACTED]. Interest shall accrue at the rate of [REDACTED] percent on the unpaid principal balance of this Note existing from time to time until all principal and accrued interest have been paid in full. The first monthly installment of principal, plus accrued interest, shall be due and payable on September 1, 1990, and remaining installments of principal, together with interest accrued thereon, shall be due and payable on the 1st day of each month thereafter with the final installment plus any accrued and unpaid interest due on December 1, 1993. Principal and interest are payable in lawful money of the United States at the Secured Party's principal banking office located at 101 South Fifth Street, Louisville, Kentucky 40202. Interest shall be calculated on the basis of a 360-day year comprised of twelve 30-day months.

Section 1. Grant of Security Interest

As security therefor, Debtor hereby gives the Secured Party a security interest in and lien on all of the Debtor's rights, title and interest in the property described in Exhibit "A" attached hereto and made a part hereof which property is now owned by Debtor or to be purchased by Debtor with the proceeds of this Note (hereinafter called the "Equipment"). As further security for this Note, Debtor hereby assigns to Secured Party (i) all monies due and to become due Debtor under the Lease Agreement dated as of July 13, 1988, as amended, (the "Lease") between Debtor and Tampa Electric Company (hereinafter the "Lessee") excluding any monies received by Debtor as indemnification by the Lessee for loss of tax benefits claimed by the Debtor, (ii) all of the Debtor's rights but not obligations under said Lease and (iii) the proceeds of any and all of the foregoing. The Equipment, the Lease, all monies due, the rights under the Lease and the proceeds thereof are herein collectively defined to be the "Collateral".

Section 2.        Representations and Warranties of the Debtor

Debtor hereby represents and warrants that:

(a) this Note and Security Agreement has been duly authorized, executed and delivered by the Debtor and constitutes a legal, valid and binding agreement and obligation of the Debtor enforceable according to its terms, except as limited by applicable insolvency, moratorium or other similar laws or equitable principles affecting the rights of creditors generally,

(b) neither the execution and delivery of this Note and Security Agreement or the Lease nor the consummation of the transactions herein contemplated nor the fulfillment of, nor compliance with, the terms and provisions hereof will conflict with, or result in a breach of, any of the terms, conditions or provisions of the Articles of Incorporation or the bylaws of the Debtor or of any bond, debenture, note, mortgage, indenture, agreement or other instruments to which the Debtor is a party or by which it or its property may be bound, or constitute (with the giving of notice or the passage of time or both) a default thereunder, or result in the creation or imposition of any lien, charge, security interest or other encumbrance of any nature whatsoever upon the Collateral pursuant to the terms of any such agreement or instrument,

(c) it is a corporation duly organized and validly existing under the laws of the jurisdiction of its formation, is duly qualified to do business in each jurisdiction (including the jurisdiction where the Equipment is, or is to be located) where failure to so qualify would materially adversely affect Debtor's business,

(d) the Debtor has good title, as conveyed to it, to the Collateral free and clear of all security interests, liens and encumbrances, except for the respective interests of the Secured Party and the Lessee,

(e) the Lease is a valid and binding agreement of the Debtor and the Lessee, except as limited by applicable insolvency, moratorium or other similar laws or equitable principles affecting the rights of creditors and lessors generally,

(f) the Lease constitutes the entire agreement between the Debtor and the Lessee and the Debtor has delivered to the Secured Party the original of the Lease,

(g) no other assignment or security interest has been or will be granted with respect to the Collateral or the monies assigned hereunder, however, Debtor may grant subordinate interests in the residual value of the Equipment to other parties, and,

(h) the rents payable under the Lease assigned hereby to Secured Party are not, to the best knowledge of Debtor, subject to any defenses, setoffs or counterclaims.

Section 3. Covenants of Debtor

The Debtor agrees:

(a) that all payments to be made by the Debtor hereunder shall be made to:

First National Bank of Louisville  
P.O. Box 36000  
Louisville, Kentucky 40233  
ATTN: Leasing Industry Financing

(b) that all right, title and interest of the Debtor in and to the Collateral and any payments with respect thereto are and shall be subject and subordinate to all of the right, title and interest of the Secured Party therein,

(c) not to take any material action with respect to its right, title and interest in and to the Collateral without the prior written consent of the Secured Party, which will not be unreasonably withheld,

(d) to execute and deliver any and all papers or documents which Secured Party may reasonably request from time to time in order to carry out the purposes hereof, or to facilitate the collection of monies due or to become due from the Lessee,

(e) that the Debtor will duly fulfill or cause to be fulfilled all of the obligations if any to be performed and assumed by it under the Lease including, but not limited to, its warranty of quiet enjoyment, and shall remain liable thereunder and that it will not, without Secured Party's prior written consent, modify, rescind, cancel or accept the surrender of the Lease or waive any of the provisions thereof or extend the time of payment for the rent thereunder,

(f) to keep the Collateral free and clear of, or discharge within forty-five (45) days of the creation of, all mortgages, pledges, liens, charges, security interests and all other encumbrances whatsoever, except those created by

this Note and Security Agreement, provided however that a property tax lien may remain on the Collateral in excess of the forty-five (45) day period set forth above so long as the Debtor or the Lessee discharges the lien on or before the date a penalty attaches for nonpayment of the tax, provided further that the following liens, mortgages, pledges, charges, security interests and other encumbrances may remain on the Collateral in excess of the forty-five (45) day period:

i) liens for taxes (other than property taxes), assessments, or similar charges, incurred in the ordinary course of business, that are not yet due and payable;

ii) liens of mechanics, materialmen, warehousemen, carriers, or other like liens, securing obligations incurred in the ordinary course of business that are not yet due and payable;

iii) liens existing as of the date hereof or which the Secured Party has knowledge and has consented to in writing;

iv) the following, if the validity or amount thereof is being contested in good faith by appropriate and lawful proceedings, so long as levy and execution thereon have been stayed and continue to be stayed and they do not in the aggregate materially detract from the value of the Collateral, or materially impair the use thereof in the operation of Debtor's or Lessee's business:

a) claims or liens for taxes, assessments or charges due and payable and subject to interest or penalty;

b) claims, liens or encumbrances upon the Collateral including any attachment of the Collateral or other legal process prior to adjudication of a dispute on the merits;

c) claims or liens of merchants, materialmen, warehousemen, carriers, or other like liens; and

d) adverse judgments on appeal.

(g) to keep or cause the Lessee to keep the Equipment in good repair and operating condition without any cost or liability to Secured Party,

(h) that all accessions which are or become attached to or part of the Equipment are or shall become subject to the terms of this Note and Security Agreement, to the extent permitted in the Lease,

(i) to notify Secured Party upon its knowledge of any Lessee defaults in the payment or performance of any of its obligations under the Lease,

(j) not to sell, assign, transfer, mortgage or in any way encumber the Collateral, nor secrete or abandon the Equipment without the prior written notice to the Secured Party,

(k) to allow Secured Party and its representatives free access and right of inspection of the Equipment at all reasonable times, and in the event of loss or damage to the Equipment, to send written notice thereof to the Secured Party,

(l) that it will not remove its records concerning the Lease except to a jurisdiction where the Uniform Commercial Code shall be in effect, and upon thirty (30) days' prior written notice to the Secured Party, and will permit Secured Party and its representatives to examine Debtor's books and records with respect to the Collateral and make extracts therefrom and copies thereof at any reasonable time and from time to time,

(m) that it shall not permit the Equipment to be or become fixtures under applicable law,

(n) to keep or cause the Lessee to keep the Equipment insured against public liability and loss by fire, theft and casualty, by self-insurance or by insurers and in form, amount and coverage customary for such Equipment in businesses similar to Lessee's business;

(o) to pay or cause Lessee to pay all charges, including without limitation, taxes and assessments, levied or assessed against Debtor which if unpaid would constitute an attachment on the Collateral or any portion thereof, provided however that should Lessee fail to make such payments as required pursuant to the Lease, Debtor shall have forty-five (45) days after the due date thereof to make said payments unless an attachment will be imposed on said Equipment prior to the end of said forty-five (45) day period in which event payment shall be made by Debtor prior to imposition of the attachment unless such attachment may not be foreclosed within such forty-five (45) day period.

Section 4. Rights of Secured Party

The Debtor hereby irrevocably constitutes and appoints Secured Party and any officer thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Debtor or in its own name, with the written consent of Debtor unless and until a default shall have occurred hereunder, for the purpose of carrying out the terms of this Note and Security Agreement to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Note and Security Agreement and, without limiting the generality of the foregoing the Debtor hereby gives Secured Party the power and right, on behalf of the Debtor, to endorse any loss payment or returned premium check and to make, settle and release any claim under any insurance policy with respect to the Collateral, and to do, at the Secured Party's option, at any time, or from time to time, all acts and things which the Secured Party deems necessary to protect, preserve or realize upon the Collateral and the Secured Party's security interest therein in order to effect the intent of this Note and Security Agreement, all as fully and effectively as the Debtor might do. The Debtor hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof, except for actions taken in which Secured Party is negligent or the action is due to Secured Party's willful misconduct. This power of attorney is a power coupled with an interest, shall be irrevocable and shall terminate only upon payment in full of the obligations and termination of this Note and Security Agreement. The powers conferred on Secured Party thereunder are solely to protect the Secured Party's interests in the Collateral and shall not impose any duty upon it to exercise any such powers. Secured Party shall be accountable only for amounts that it actually receives as a result of the exercise of such powers, and neither it nor any of its officers, directors, employees or agents shall be responsible to the Debtor for any action taken or omitted to be taken in good faith or in reliance on the advice of counsel except for its own negligence or willful misconduct.

Section 5. Collection of Rent

Debtor shall notify the Lessee that all rents payable under the Lease shall be paid to Secured Party's address or, in the event a lock box agreement is in effect between Debtor and Secured Party, to the address specified in said agreement. The amounts from time to time received by the Secured Party as rental under the Lease shall be applied to the amount of principal and interest then due and payable on this Note and Security Agreement. All sums received by the Secured Party from the Lessee due to the loss or destruction of the Collateral shall be applied to the remaining principal and interest then outstanding on this Note and Security Agreement in accordance with the

formula specified in Section 6(b) hereof, with any excess paid by the Secured Party to Debtor. Any insurance proceeds as regards the Collateral shall be applied according to the terms of the Lease, but in the event the insurance proceeds are not used to replace or repair the Collateral for any reason whatsoever, said proceeds shall be paid to the Secured Party and applied to the principal and interest then outstanding on this Note and Security Agreement, with any excess paid by the Secured Party to Debtor.

The Secured Party may, upon occurrence of an Event of Default hereunder, notify the Lessee that the Lease has been assigned to the Secured Party and that all rental payable thereunder shall be paid directly to the Secured Party. The Secured Party may also direct Debtor to so notify any Lessee, and Debtor agrees to follow any such directions. All rental received by Debtor from the Lessee so notified shall be received and held by Debtor in trust for the Secured Party and shall be delivered to the Secured Party immediately upon receipt thereof by Debtor in the same form as received except for Debtor's endorsement when necessary. In the event Debtor fails to endorse any instrument given in payment of rental, the Secured Party is hereby irrevocably authorized to endorse the same on Debtor's behalf.

#### Section 6. Prepayment

Debtor may not voluntarily prepay the indebtedness evidenced by this Note and Security Agreement in whole or in part; provided, however, that the Debtor may voluntarily prepay that portion of this Note and Security Agreement secured by a Lease which has been terminated prior to the end of its term due to:

- (a) a default by the Lessee under the terms of the Lease;
- (b) a Casualty Occurrence, as defined in the Lease, in which event the voluntary prepayment shall be limited to that portion of unpaid principal under this Note and Security Agreement, together with accrued interest thereon, proportionately equal to the percentage that the original purchase price of the items of Equipment suffering such event of loss bears to the original purchase price of the Equipment then subject to the Lease, provided, however, that payments of principal and interest shall continue to be payable under this Note and Security Agreement together with any additional interest required pursuant to Section 7 hereof with regard to payments of principal and interest remaining unpaid after the same have become due and payable;
- (c) An early termination of the Lease under the terms of the Lease or as negotiated between the Debtor and the Lessee. In the event of a voluntary prepayment of the outstanding principal balance of this Note and Security Agreement due to early termination, the Debtor shall also

pay Secured Party a prepayment penalty not to exceed five percent (5.0%) of the then outstanding principal balance hereunder.

In lieu of prepaying this Note and Security Agreement pursuant to the above terms, the Debtor may offer to the Secured Party and the Secured Party may accept a substitute Lease or Leases of like quality and term. Secured Party shall not unreasonably refuse to accept a substitute lease of like quality and term.

Each of the remaining principal installments due hereunder shall be reduced in the proportion that the principal amount of the prepayment made pursuant to this Section bears to the unpaid principal amount outstanding immediately prior to the prepayment.

Section 7. Late Payment Rate

Any payment not made on or before the due date shall accrue delinquent interest at the late rental payment rate set forth in Section 2 of the Lease or the maximum applicable legal rate, whichever is lower.

Section 8. Limitations of Liability; Indemnity

Notwithstanding any other provision of this Note and Security Agreement, all obligations of Debtor hereunder are non-recourse; provided however,

(a) Secured Party shall have recourse to Debtor for:

(i) any claims arising out of the breach by Debtor of any of its representations, warranties, covenants and undertakings set forth herein (other than the payment of principal and interest provided for in this Note and Security Agreement), and

(ii) all sums due Secured Party hereunder from and after the date (y) the Lessee withholds any monies due under the Lease, which are assigned to Secured Party hereunder or (z) the Lease is terminated prior to the full payment to the Secured Party of all sums due hereunder, which termination is either by the terms of the Lease or by force of law, such withholding or termination being due to any action or inaction by Debtor which results in the loss of use of or quiet enjoyment of the Collateral by the Lessee, including, but not limited to, the maintenance requirement of Debtor under the terms of the Lease.

However, nothing in this paragraph shall be, or be deemed to be, a release or impairment of the indebtedness evidenced by this

Note and Security Agreement, or the Secured Party's security interest in the Collateral, or the assignment of rentals due under the Lease or to preclude the Secured Party from resorting to the Collateral in case of any default hereunder subject to Lessee's rights under the Lease or from enforcing any of its rights under this Note and Security Agreement or the Lease in respect of the Collateral, and

(b) Debtor agrees to indemnify and save harmless Secured Party against any charges or claim made against Secured Party, and against any expense, loss or liability which the Lessee would be obligated to indemnify or save Secured Party harmless from pursuant to Section 9 of the Lease but for Debtor's sole or joint negligence. The indemnities contained in this paragraph shall survive the payment or performance of all other obligations under this Agreement or the termination of this Agreement.

Section 9. Events of Default

Any of the following events shall constitute an "Event of Default" hereunder:

(a) Debtor shall fail to make any payment due hereunder within fifteen (15) days after written notice that the same has become due,

(b) an Event of Default under and as defined in the Lease shall have occurred and be continuing,

(c) Debtor shall fail to perform or observe any other covenant, condition or agreement to be performed or observed by Debtor hereunder or in any agreement or certificate furnished to Secured Party in connection herewith and such failure shall continue unremedied for a period of thirty (30) days after notice thereof to Debtor unless Debtor is using due diligence, in the opinion of the Secured Party's counsel, to correct such default,

(d) any representation or warranty made by Debtor herein or in any document or certificate furnished to the Secured Party in connection herewith shall be materially incorrect when made,

(e) any report, certificate or other instrument furnished by Debtor in connection with this Note and Security Agreement shall prove to be materially false or misleading and which Debtor knew was false or misleading prior to giving such information,

(f) the Debtor shall have become insolvent or bankrupt or admit in writing its inability to pay any of its debts as they mature or make an assignment for the benefit of creditors, or a receiver or trustee shall have been appointed with respect to the Debtor or any of the Debtor's estate, and which receiver or trustee shall remain undischarged for ninety (90) days after appointment, and/or,

(g) bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings, or other proceedings for relief under the United State Bankruptcy Code or any bankruptcy law or similar law now or hereafter in force for the relief of debtors, shall be instituted by or against the Debtor and be allowed against the Debtor or be consented to or fail to be dismissed within ninety (90) days of such institution.

#### Section 10. Remedies

If an Event of Default hereunder shall have occurred and be continuing, all of the payments hereunder shall become immediately due and payable, without notice or demand, subject to Section 8 hereof, the non-recourse provisions of this Note and Security Agreement, and Sections 11 and 13 hereof, and it shall be then lawful for and, Debtor hereby authorizes and empowers Secured Party, with the aid and assistance of any persons:

(a) to enter upon the premises, or such other place as the Equipment may be found and take possession of and carry away the Equipment as permitted by applicable law, at any time or times, dispose of same and apply the proceeds thereof to the balance hereof or any other obligations arising hereunder, all to the extent permitted by and in accordance with law and the terms and conditions of the Lease,

(b) to file any claim or take any other action or proceeding in any court of law or equity for the purpose of collecting any and all monies due under the Lease,

(c) upon the occurrence and continuance of a default by Lessee, to pay or discharge taxes, liens, security interests or other encumbrances levied or placed on or threatened against the Collateral, to effect any repairs or any insurance called for by the terms of this Note and Security Agreement or the Lease and to pay all or any part of the premiums therefor and the costs thereof, and

(d) upon the occurrence and continuance of any Event of Default under the terms of the Lease:

(i) to receive payment of and receipt for any and all monies, claims and other amounts due and to become due

at any time in respect of or arising out of any Collateral,

(ii) to commence and prosecute any suits, actions or proceedings at law or in equity in any court of competent jurisdiction to collect the Collateral or any part thereof and to enforce any other right in respect of the Collateral, and

(iii) to settle, compromise or adjust any suit, action or proceeding described above and, in connection therewith, to give such discharges or releases as the Secured Party may deem appropriate.

All rights, remedies and options conferred upon Secured Party hereunder or by law shall be cumulative and may be exercised successively or concurrently and are not alternative or exclusive of any other such rights, remedies or options. No express or implied waiver by the Secured Party of any default or Event of Default hereunder shall in any way be, or be construed to be, a waiver of any future or subsequent default or Event of Default. The failure or delay of the Secured Party in exercising any rights granted it hereunder upon any occurrence of any of the contingencies set forth herein shall not constitute a waiver of any such right upon the continuation or recurrence of any such contingencies or similar contingencies and any single or partial exercise of any particular right by the Secured Party shall not exhaust the same or constitute a waiver of any other right provided herein.

#### Section 11. Right to Cure

Anything herein to the contrary notwithstanding, in the case of any default occurring hereunder due to the occurrence of an Event of Default under the Lease, Secured Party shall not, without the prior written consent of Debtor, exercise any remedy or remedies provided herein or in the Lease in respect thereof during the ten (10) business day period next following notice to Debtor by Secured Party of such Event of Default. During such period, Debtor shall have the right to cure, on behalf of Lessee, such Event of Default under the Lease. Each separate Event of Default occurring subsequent to such an Event of Default which was theretofore cured by Debtor shall be subject to the period during which Secured Party may not exercise its remedies as herein above provided.

No party exercising any such right to cure shall obtain any lien, charge or encumbrance of any kind upon any Equipment or any rentals or other amounts payable therefore under the Lease in respect of any sums paid in connections with the exercise of such right or the curing of such Event of Default, nor shall any claims of such party against Lessee for the repayment of such

sums so advanced impair the prior right of Secured Party to the sums payable by Lessee under the Lease; provided however, that if no default hereunder shall then have occurred and be continuing and if all obligations then due and owing shall have been made, at the time of receipt by Secured Party from Lessee of an overdue installment of rent in respect of which Debtor shall have made payment to Secured Party pursuant to this paragraph and/or any interest payable by Lessee in respect of the late payment thereof, such installment or other sum and interest thereon shall be released to Debtor.

Section 12. Successors and Assigns

This Note and Security Agreement shall inure to the benefit of the successors and assigns of Secured Party.

Section 13. Rights Under Lease

Notwithstanding any of the provisions of this Agreement to the contrary, neither Debtor nor Secured Party shall take any action contrary to the rights of the Lessee under the Lease except in accordance with the provisions of the Lease.

Section 14. Miscellaneous

Any monies coming into the possession of Secured Party hereunder, whether paid by Debtor or the Lessee or derived from insurance or the proceeds of any sale of the Collateral, shall be applied in whole or in part to the obligations of Debtor subject to the terms and conditions of the Lease and Debtor's right to specify any such application is hereby waived except as provided in Section 11 hereof. If any monies at any time are payable to Debtor hereunder, the same shall be deposited as Debtor or Debtor's transferee or assignee may direct.

This Note and Security Agreement may not be amended, waived, or discharged, except by an agreement in writing signed by the party against which or whom enforcement of the amendment, waiver, or discharge is sought. In case any one or more of the provisions contained in this Agreement shall be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby. Any provision of this Note and Security Agreement which is prohibited or unenforceable in any jurisdiction shall be, as to such jurisdiction, ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction. Time and exactitude are of the essence hereof.

Secured Party may at any time assign to a subsidiary or affiliate all or any portion of this Note and Security Agreement, without notice to Debtor, or to an unrelated third party upon notice to Debtor. Debtor may not assign the Note and Security Agreement, except to an affiliate, without prior written notice to Secured Party. Upon full payment of the sums due hereunder and the satisfaction of all obligations of the Debtor hereunder, the Secured Party shall upon Debtor's request execute termination statements for all outstanding filed financing statements relating to its security interest. This Note and Security Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. It is the intention of the parties that the provisions of this Note and Security Agreement shall be governed by the laws of the Commonwealth of Kentucky.

The term Debtor shall be deemed to include successors and assigns of Debtor.

All notices to be made hereunder shall be in writing and,

- (a) if to Debtor, addressed to it at One Embarcadero Center, Suite 3500, San Francisco, California 94111 and,
- (b) if to Secured Party, addressed to it at P.O. Box 36000, Louisville, Kentucky 40233: Attention: Leasing Industry Financing.

Either party hereto may change the address to which notice to such party shall be sent by giving notice of such change to the other party to this Note and Security Agreement.

Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Note and Security Agreement. The words "herein", "hereof", "hereby", "here to", "hereunder" and words of similar import refer to this Note and Security Agreement as a whole and not to any particular section, subsection, paragraph, clause or other subdivision hereof.

The principal place of business of the Debtor is One Embarcadero Center, Suite 3500, San Francisco, California 94111 and the Debtor shall notify the Secured Party and execute additional financing statements, to be filed at Debtor's expense, should such address change.

**FIRST NATIONAL BANK OF LOUISVILLE**

**HELM FINANCIAL CORPORATION**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT A

Equipment Description:

Reporting Marks:

Car Numbers: