

# Contribution Agreements Among Guarantors (With Form)

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**Brian D. Hulse**

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## Who pays when? And how much?

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**WHEN A** closely held limited liability company or corporation borrows money, the lender often requires the members or shareholders to guarantee the loan. If one of the guarantors pays on the guaranty, that guarantor is entitled to contribution payments from the other guarantors. However, the law about the relative proportion of the loan that each guarantor is obligated to pay is often different from what the guarantors would have agreed upon if they had considered the issue in an informed way at the time they gave the guaranties. To avoid uncertainty and litigation, guarantors should always enter into a contribution agreement setting out their relative contribution obligations in the event the guaranties are called upon.

Consider the simple example of three members of a limited liability company (the "borrower"), which borrows \$3 million from a bank (the "lender") to finance the purchase of a commercial property. The loan is secured by a mortgage on the property and the three members of the borrower (the "guarantors") jointly and severally guarantee the entire loan. One guarantor owns a 60 percent interest in the borrower, one owns 30 percent and one owns 10 percent. The loan goes into default and the lender demands payment from the guarantors. The guarantor owning a 10 percent interest in the borrower pays the entire loan balance and then asks the other guarantors to pay their fair shares of the amount the paying guarantor paid to the lender.

Even in the absence of a contribution agreement, the paying guarantor is entitled under common law contribution principles to repayment of a part of the amount paid to the lender. However, the amount the paying guarantor is entitled to recover from the other guarantors depends on the answers to a number of questions that should be addressed in a well-drafted contribution agreement. In the absence of such an agreement, the answers can be unclear and can vary from state to state. The guarantors should also be mindful of the federal income tax implications of their contribution obligations, especially for the ability to allocate losses of a borrower that is a partnership or a limited liability company taxed as a partnership.

**GENERAL RULES ABOUT RELATIVE LIABILITY** • Generally, co-obligors with respect to a common obligation are obligated to contribute equally to payment of the debt if the borrower does not pay it. *Restatement of Suretyship and Guaranty* (“Restatement”), section 57(1). Under this general rule, each of the three guarantors in the example above would be required to pay one-third of the total debt.

In the example above, the paying guarantor might well believe that, because he or she owned only 10 percent of the borrower, he or she should not have to pay more than 10 percent of the guaranteed debt. Some courts have agreed with that view and have allocated the contribution obligation in accordance with the relative interests of the guarantors in the underlying business or property. *See, e.g., Brown v. Goldsmith*, 437 P.2d 247 (Okla. 1968). However, most cases have held that the guarantors must pay equally despite their widely differing ownership interests. *See, e.g., Brill v. Swanson*, 36 Wash. App. 396, 674 P.2d 211 (1984).

Some courts state a general rule that when co-guarantors have received unequal benefits from the guaranteed obligation, the contribution liability of each should be based on the benefit that each has received. *See, e.g., Steele v. Grot*, 232 Ga. App. 847,

503 S.E.2d 92 (1998). These cases offer support for an argument that, when the guarantors own unequal percentage interests in the borrower, they received benefits from the loan in proportion to their ownership interests. The Restatement says only that the general rule of per capita liability is “subject to any express or *implied* agreement” (emphasis added) among the guarantors and recognizes that some cases have found an implied agreement to contribute based on relative ownership interests in the borrower. Restatement, section 57(1) and related comment c. However, it has also been held that such unequal ownership of the underlying business does not constitute a sufficiently direct benefit to result in a deviation from the general rule of equal per capita contribution.

**ISSUES RELATING TO MARRIED INDIVIDUAL GUARANTORS** • Suppose one of the guaranties in the above example is executed by a single person, one by both spouses of a married couple, and one by a married person whose spouse does not execute the guaranty. Is the married couple treated as two guarantors for purposes of apportioning per capita contribution liability or are they together treated as only one? Obviously, the answer to this question can have substantial consequences for the guarantors’ relative liabilities.

There is little law on this issue. Comment e to Section 57 of the Restatement says that: “Where there are different groups of cosureties, each group is considered as a unit in determining the amount of contribution.” It does not, however, suggest what attributes make a “group” for this purpose. The only case cited in the comment is *Mansfield v. McReary*, 263 Or. 41, 497 P.2d 654 (1972), *rehearing denied*, 263 Or. 41, 501 P.2d 69 (1972), in which the Oregon Supreme Court held that a married couple executing a guaranty should be regarded as one guarantor rather than two for purposes of allocating per capita contribution liability.

To avoid potential litigation, a contribution agreement among any group of co-guarantors that includes married individuals should clearly address this issue. If any married guarantor's spouse does not sign the guaranty, it is important that the agreement also address the issue of whether the other guarantors will have recourse to the community property, entireties property or other form of marital property of that guarantor and his or her spouse or whether recourse will be limited to the guarantor spouse's separate property. If the agreement provides for recourse to the marital property, it is advisable that the non-guarantor spouse also join in or consent to the contribution agreement to the extent required under applicable state law in order to give effect to these provisions.

**PARTIAL GUARANTIES** • It is not uncommon for some or all guarantors of a loan to guarantee only a part of the loan amount. Such guarantors are referred to in this article as “partial guarantors” to distinguish them from “full guarantors,” whose guaranty liability is for the full amount of the loan. When the maximum liability of a partial guarantor is less than that guarantor's share of the debt under the general per capita calculation, the shares of full guarantors of the loan should be recalculated by deducting the limited guarantor's maximum liability from the amount of the total debt and reallocating the resulting amount among the full guarantors on a per capita basis. Restatement, section 2(a).

A similar calculation can be built in to a contribution agreement involving both partial guarantors and full guarantors. Without such a provision, the partial guarantor could be exposed to greater liability under the contribution agreement than under the guaranty. While that may be appropriate in some situations, it should not occur inadvertently.

When all the guarantors are partial guarantors, the contribution agreement can allocate their liabilities in accordance with the maximum amounts of their guaranties or on some other appropriate

basis such as their relative interests in the property as agreed among the parties.

**BAD ACT CARVEOUT GUARANTIES** • It is common in some types of real estate loans for the lender to require affiliates of the borrower to enter into “bad acts” or “carveout” guaranties. These guaranties require the guarantor to pay the lender for certain losses resulting from specified actions or omissions of the borrower. Typically such carveouts will include such things as misapplication of rents, waste, and failure to pay property taxes or to keep the property insured. There may also be carveouts for which the guarantor can be subjected to full liability for the entire amount of the loan. When the guarantors execute only carveout guaranties, it may be appropriate to allocate liability under the contribution agreement based on each guarantor's involvement in the action that triggers liability under the guaranties.

**EFFECT OF DEFENSES TO PAYMENT OF THE LOAN** • Generally, a contribution agreement should permit guarantors to pay the lender without asserting any alleged defenses available to the borrower and still recover contribution payments from the other guarantors. It should also protect the guarantors who do not favor asserting defenses from being subjected to contribution to pay the cost of unsuccessful defenses pursued by another guarantor. This approach protects each guarantor from being exposed to another guarantor's desire to pursue defenses to payment that may expose all the guarantors to substantial increases in the guaranteed loan amount due to the costs of litigation and additional interest (probably at a higher default rate) being added to the loan balance as a direct result of the dispute.

It is also possible that a particular guarantor may have defenses to paying the lender due to defects in its guaranty that do not exist in the other guaranties. The contribution agreement should

provide that each guarantor is obligated to pay contribution payments to the others notwithstanding any valid defenses to payment of the lender that are available to fewer than all the guarantors.

### **EFFECT OF WAIVERS IN THE GUARANTIES**

• Guaranty documents typically contain extensive waivers of suretyship rights and other rights of the guarantors. Guarantors sometimes argue that certain waivers in the guaranty result in a waiver of the right of contribution among the co-guarantors. In some cases, nonpaying guarantors have argued that guaranty provisions saying that the lender may release one or more guarantors without impairing its recourse against the others results in a waiver of contribution rights in favor of a paying guarantor. Courts have reached inconsistent results on this argument. *Cf., First American Bank of New York v. Fallova Shredder Co., Inc.*, 155 Misc.2d 143, 587 N.Y.S.2d 119 (1992) (no waiver of contribution rights found) with *United States v. Immordino*, 534 F.2d 1378 (10th Cir. 1976) (waiver found). The lesson of these cases is that a contribution agreement should provide that any waivers in the guaranty are for the benefit of the lender only and may not be enforced by the guarantors to avoid payment of contribution.

### **INSOLVENCY, DEATH, AND UNAVAILABILITY**

• When the lender seeks payment on the guaranties, one or more of the guarantors may have become insolvent or died or may not be amenable to service of process. In such an event, liability among the remaining guarantors should be adjusted accordingly. Restatement Section 57 provides that: “When, because of insolvency, lack of personal jurisdiction, or other reasonable circumstances, the contribution obtained from a cosurety after reasonable collection efforts is less than that cosurety’s contributive share, the contributive shares of the other cosuretities as among themselves are recalculated pursuant to subsection 2(a) [the rule dealing with limited guarantors that is

discussed above] as though the secondary obligation of the former cosurety limited its liability to the contribution obtained from that cosurety.” A contribution agreement should expressly provide for such a recalculation of shares in the event that any of the guarantors is unavailable to contribute.

### **INTEREST AND ATTORNEYS’ FEES**

• Absent an agreement providing otherwise, a guarantor successfully pursuing a contribution action against co-guarantors is not entitled to an award of attorneys’ fees. *Appleford v. Snake River Mining, Milling & Smelting Company*, 210 Pac. 26 (1922); *Wetzler v. Cantor*, 192 B.R. 119 (Bankr. D. Md. 1996). Without an agreement about the rate of interest on contribution claims, a paying guarantor is entitled to interest at the legal rate on judgments. *Appleford*, supra. A contribution agreement should provide for an award of attorneys’ fees and costs to the prevailing party in any contribution action and should specify the interest rate that the contribution claims will bear. It should also provide that interest runs from the date any guarantor pays the lender so there is no implication that it runs only from the date of judgment or from the date the paying guarantor demands payment. It may, however, be appropriate to require the paying guarantor to make demand within some reasonable time in order to be able to recover interest before demand.

### **GOVERNING LAW, JURISDICTION AND VENUE**

• In the absence of a contribution agreement that specifies that it is governed by the law of an appropriate state related to the transaction, it may be unclear which state’s law governs the contribution obligations of the guarantors and time and expense may be wasted litigating choice of law issues. If multiple countries are involved, the conflict of laws issues multiply. *See, e.g., Takahashi, Claims for Contribution and Reimbursement in an International Context* (Oxford University Press 2000). The contribution agreement should specify that the law

of an appropriate state governs the agreement and should provide that the parties submit to jurisdiction and venue in an appropriate forum.

**TAX CONSIDERATIONS** • The use of a contribution agreement can have important federal income tax effects on the parties if the borrower is a partnership or a limited liability company.

Each partner in a partnership (which includes a member of a limited liability company classified as a partnership for tax purposes) includes its share of the partnership's liabilities in the adjusted tax basis of its partnership interest. Because a partner's tax basis affects the amount of partnership losses that can be claimed by the partner as well as the partner's gain or loss on a sale of the partnership interest, it is important to have a clear understanding of how liabilities are allocated among the partners. Generally, the amount included in each partner's basis is the amount of the liability for which the partner bears the "economic risk of loss." *See generally*, Treas. Reg. §1.752-2. A partner bears the economic risk of loss for a partnership liability to the extent that, if the partnership liquidated, the partner would be obligated to make a payment to any person (or a contribution to the partnership) and would not be entitled to reimbursement from another partner. In this constructive liquidation analysis, the partnership's assets are generally presumed to be worthless. To determine whether a partner is obligated to make a payment or contribution, and is entitled to reimbursement from another partner, the partnership agreement, contractual obligations outside the partnership agreement and payment obligations imposed by state law are considered. Thus, absent a contribution agreement or other contractual agreement, the economic risk of loss of partners providing joint and several guaranties of a partnership liability is determined under common law contribution principles.

In the example used throughout this article, if the members of the borrower LLC did not have a

contribution agreement and if applicable law provided for equal per capita contribution, each member/guarantor would include in its tax basis for the LLC interest \$1 million by virtue of the guaranty (in addition to any tax basis derived from capital contributions, income allocations, etc.). However, if the members entered into a contribution agreement providing for contribution percentages equal to their percentage interests in the borrower, the 60 percent member would include \$1,800,000 of the loan in its tax basis as a result of the guaranty, the 30 percent member would include \$900,000 in its tax basis and the 10 percent member would include \$300,000 in its tax basis.

**RELATED SITUATIONS** • The following are some examples of relationships in which similar issues may arise because the parties involved may be called upon to pay disproportionate shares of a common debt:

- Parties that give collateral or post letters of credit to secure another party's debt;
- Co-owners of a property that are jointly and severally liable for a loan on the property or for indemnities to a purchaser of the property;
- General partners in a partnership, each of which is fully liable for the partnership's obligations.

The considerations discussed in this article arise in these situations and the parties involved in them should consider entering into an appropriate agreement providing for contribution in the event that they pay disproportionately on the relevant debt. Some of these arrangements can raise special issues making a contribution agreement even more important than in the coguarantor situation. For example, if several parties grant collateral to secure another party's debt, a foreclosure on the collateral (or a sale of the collateral by the owner in order to pay the debt) may trigger a capital gains tax. Should that tax factor into the amount of contribution payments? In some cases, perhaps it should,

but the parties should at least consider the issue and deal with it clearly in the contribution agreement.

Another trap was highlighted in two recent cases involving situations in which the co-owners took on liability for a loan to finance their property or business, but did so in different ways from one another. *Morgan Creek Residential v. Kemp*, 153 Cal. App. 4th, 63 Cal. Rptr. 3d 232 (2007) involved two guarantors of a loan and another party that provided a letter of credit to secure the same loan, but did not guarantee it. After the lender drew on the letter of credit, the party that provided the letter of credit and had to reimburse the issuing bank for the draw sued the guarantors for contribution. The court held that, because of the differing nature of the obligations represented by the letter of credit and the guaranties, the party that provided the letter of credit was not entitled to contribution from the guarantors. Similarly, in *Irish v. Woods*, 864 N.E. 2d 1117 (Ind. App. 2007), one owner of an LLC co-signed a promissory note while the other

owner signed a guaranty of the note. The co-signer paid the lender and sought contribution from the guarantor. The court held that he was not entitled to contribution because the fact that he signed the note rather than a guaranty of the note indicated that, as between the two owners, he should be liable for the entire debt. While the decisions in both these cases are open to question, properly drafted contribution agreements could have avoided their harsh results.

**CONCLUSION** • The issues discussed above highlight the need for a contribution agreement when multiple parties guarantee a loan or other obligation. The guarantors should also enter into a reimbursement agreement with the borrower setting the terms under which the borrower is obligated to reimburse the guarantors if they pay on their guaranties; however, if the guarantors pay on their guaranties, it is unlikely that the borrower will be in a position to reimburse them in full.

## APPENDIX

### CONTRIBUTION AGREEMENT

This Agreement is made as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and among \_\_\_\_\_ (“AAA”), \_\_\_\_\_ (“BBB”), and \_\_\_\_\_ (“CCC”).

AAA, BBB, and CCC are referred to collectively as “Guarantors” and individually as a “Guarantor.”

A. Each Guarantor owns an equity interest in \_\_\_\_\_ (“Borrower”).

B. Substantially concurrently with the execution and delivery of this Agreement, \_\_\_\_\_ (together with its successors and assigns as holders of the Loan described below, “Lender”) is making a loan (the “Loan”) to Borrower pursuant to a [\*\*\_\_\_\_\_ Loan Agreement\*\*] dated on or about the date of this Agreement (the “Loan Agreement”). The Loan Agreement and all promissory notes, security documents and other instruments and agreements entered into in connection with the Loan, including the Guaranties described below, are referred to as the “Loan Documents.”

C. As a condition to making the Loan, Lender is requiring that Guarantors guarantee [\*\*certain matters in connection with\*\*] the Loan and Borrower’s obligations under the Loan Documents pursuant to one or more guaranties dated on or about the date of this Agreement. The guaranty of the Loan made by each Guarantor is referred to in this Agreement as a “Guaranty”, whether embodied in one or more than one document, and such Guaranties are referred to, collectively, as the “Guaranties.” [\*\*The Guaranty executed by \_\_\_\_\_ (“Partial Guarantor”) is limited to a maximum of \$\_\_\_\_\_ of the principal amount of the Loan.\*\*]

D. In addition to the Guaranties, Lender is requiring that Guarantors enter into an [\*\*Environmental Indemnity Agreement\*\*] (the “Environmental Agreement”) in connection with the Loan.

E. Guarantors are unwilling to enter into the Guaranties and the Environmental Agreement absent an agreement among them that all obligations and liabilities associated with the Guaranties and the Environmental Agreement are to be borne as provided in this Agreement. For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Guarantors agree as follows:

### **Contributive Shares**

(a) If any Guarantor (a “Paying Guarantor”) from time to time makes any good faith payment in connection with its Guaranty for which it has not been reimbursed in full by Borrower (such unreimbursed amount, a “Payment”), each other Guarantor (a “Contributing Guarantor”) will have an unconditional obligation to pay to the Paying Guarantor an amount (if any) (the “Required Contribution Amount”) so that, after payment of the Required Contribution Amount by each Contributing Guarantor, all obligations and liabilities under the Guaranties will have been borne by Guarantors in the following percentages (taking into account any and all prior Payments and Required Contribution Amounts and with the exceptions provided in Section 3 of this Agreement entitled “Non-Reimbursable Amounts”): AAA \_\_\_\_\_ percent; BBB \_\_\_\_\_ percent; CCC \_\_\_\_\_ percent.

As to each Guarantor, the percentage specified for such Guarantor above is referred to as such Guarantor’s “Contributive Share.”

(b) Each Contributing Guarantor will pay each Required Contribution Amount to the Paying Guarantor within 10 days after receipt of a written demand therefor (a “Contribution Demand Notice”) from the Paying Guarantor. Alternatively, if the liability of the Contributing Guarantor to Lender under the Contributing Guarantor’s Guaranty has not been fully satisfied, the Contributing Guarantor may promptly pay any remaining amount of such liability to Lender and the Guarantors’ final Required Contribution Amounts will be determined taking such Payment into account.

(c) Each payment made by a Guarantor pursuant to the Environmental Agreement will be subject to contribution by the other Guarantors on the same basis as provided in this Agreement for contribution in connection with Payments made under the Guaranties and will, in all respects, be calculated and limited [\*\*(except to the extent otherwise provided with respect to Partial Guarantor in the immediately following paragraph (d))\*\*] as if such payment pursuant to the Environmental Agreement were a Payment under a Guaranty.

(d) If any Guarantor is at any time reimbursed by Borrower in whole or in part for any Payment as to which such Guarantor has collected a Required Contribution Amount from any other Guarantor, such other Guarantor shall be entitled to recover from the payee Guarantor such amount as is necessary in order that each Guarantor has borne a share of the total net Payments in accordance with the percentages set forth in paragraph (a) above.

(e) [Add one of the following alternative provisions if there are any Partial Guarantors:] [\*\*Alternative 1: In no event will Partial Guarantor’s aggregate Required Contribution Amounts exceed the maximum amount for which Partial Guarantor could be held liable to Lender under Partial Guarantor’s Guaranty. If Partial Guarantor’s aggregate Required Contribution Amounts ever total such maximum amount, then all remaining Payments under the Guaranties by other Guarantors (the “Full Guarantors”) will be shared among the Full Guarantors pro rata on the basis of the ratio that each Full Guarantor’s Contribu-

tive Share bears to the total Contributive Shares of all the Full Guarantors and their Required Contribution Amounts with respect to such Payments will be calculated in that manner. [Notwithstanding anything to the contrary, Partial Guarantor's contributions in respect of payments made under the Environmental Agreement will not be limited as provided in the foregoing provisions of this paragraph (d).]\*\*] OR [\*\*Alternative 2: Notwithstanding the fact that Partial Guarantor has guaranteed only a part of the Loan amount as to Lender, Partial Guarantor will be required to contribute all Required Contribution Amounts provided for in this Agreement even if the aggregate thereof exceeds the maximum amount for which Partial Guarantor could be held liable to Lender under Partial Guarantor's Guaranty.\*\*]

**Insolvency, Etc.** When, because of insolvency, lack of personal jurisdiction, or other reasonable circumstances, the contribution obtained from a Guarantor (the "Unavailable Guarantor") under this Agreement after reasonable collection efforts is less than the Unavailable Guarantor's full contribution required under the other provisions of this Agreement, the Contributive Shares of the other Guarantors as among themselves will be recalculated as though the Contributive Share of the Unavailable Guarantor were limited to the amount of contribution actually collected from the Unavailable Guarantor and the Contributive Shares of the other Guarantors will be adjusted upward pro rata in accordance with their original Contributive Shares as set forth in Section 1 of this Agreement. Notwithstanding the foregoing, nothing contained in this section will relieve any Unavailable Guarantor from such Unavailable Guarantor's full obligations and liabilities under the other provisions of this Agreement.

**Non-Reimbursable Amounts.** Notwithstanding anything to the contrary, a Guarantor shall not be entitled to contribution with respect to, and shall bear the entire cost of, any Payment to the extent that such Payment arose out of any of the following: (a) the gross negligence, willful misconduct or bad faith of such Guarantor; (b) a breach by such Guarantor of any Loan Document provision specifically applicable to such Guarantor (such as, without limitation, a violation of any transfer restriction applicable to such Guarantor or such Guarantor's owners); or (c) any unreasonable defense to payment under such Guarantor's Guaranty asserted by such Guarantor, which defense is asserted without the consent or participation of the other Guarantors. To the extent that more than one Guarantor (each an "Involved Guarantor"), but less than all Guarantors, are responsible for any of the actions described in the foregoing clauses (a), (b) or (c), the Involved Guarantors shall be entitled to contribution only from one another with respect to Payments arising therefrom and the Contributive Shares of the Involved Guarantors with respect to such Payments only will be adjusted upward pro rata in accordance with their original Contributive Shares as set forth in Section 1 of this Agreement.

**Interest.** All amounts owing under this Agreement will bear interest from the date accrued (by Payment by a Guarantor in connection with such Guarantor's Guaranty) until paid (and without regard to the date any Contribution Demand Notice is given so long as the giving of such notice is not unreasonably delayed to the material prejudice of the recipient) at a rate equal to the lesser of \_\_\_ percent per annum or the highest rate permitted by applicable law.

**No Limitation on Other Rights.** Except to the extent inconsistent with the express terms of this Agreement, the right to contribution provided in this Agreement will be in addition to, and not in limitation of, any other claims, rights or remedies of reimbursement, subrogation, contribution, exoneration or indemnification or similar claims, rights or remedies, whether arising in equity, under contract, by statute, under common law or otherwise.

**Absolute Obligation; Discounted Purchase of Loan by Guarantor.** Each Guarantor specifically acknowledges that such Guarantor is obligated to pay such Guarantor's Required Contribution Amount



with respect to each Payment, as an absolute, unconditional and irrevocable obligation, as primary obligor and not as a surety, and regardless of whether:

- (a) such Guarantor's own Guaranty or any other Loan Document is unexecuted, undelivered, released, terminated, invalid, unenforceable or ineffective for any reason or payment thereunder is subject to any defense, setoff, recoupment, claim, counterclaim or similar limitation; or
- (b) the Payment is paid (i) pursuant to order of a court or arbitration panel, (ii) in settlement of a disputed claim, (iii) under an agreement with Lender or any other Guarantor settling or establishing the amount thereof, or (iv) in any other manner in good faith; or
- (c) any Guarantor has received an assignment of the Loan, the Loan Documents, or any interest in either thereof, from Lender, provided that, if any Guarantor (a "Purchasing Guarantor") receives an assignment of the Loan Documents in return for a payment (the "Purchase Price") of less than the full amount owing under the Loan Documents, the Purchasing Guarantor will not be entitled to recover more by enforcing the Loan Documents than the Purchasing Guarantor would have been able to recover had the Purchasing Guarantor made a Payment under the applicable Guaranty in an amount equal to the Purchase Price in full settlement of the Loan and without receiving an assignment of the Loan Documents.

**Payment, Settlement or Defense of Guaranties.** While each Guarantor will from time to time in good faith attempt to inform the other Guarantors of the status of the Guaranties and any Payment or potential Payment thereon, each Guarantor will be free to litigate, settle or otherwise satisfy or discharge such Guarantor's Guaranty in good faith as such Guarantor may from time to time deem appropriate, and any failure by a Guarantor to advise, notify, or consult with any other Guarantor will not be a defense to, or in any way diminish, discharge or derogate from such other Guarantor's obligation to pay each Required Contribution Amount determined pursuant to this Agreement.

**Revocation or Amendment of Guaranties.** No Guarantor's obligations under this Agreement will be diminished or modified by revocation or amendment of such Guarantor's Guaranty unless this Agreement is amended in writing by all Guarantors, in their sole discretion, to take account of such revocation or amendment and to adjust the Contributive Shares. If, without the prior written consent of the other Guarantors, any Guarantor enters into any amendment of such Guarantor's Guaranty that increases the amount such Guarantor ultimately pays under the Guaranty, the nonconsenting Guarantors will not be required to pay their Contributive Shares of such increase. No amendment of a Guarantor's Guaranty reducing the amount for which such Guarantor could be held liable under such Guaranty will affect any Guarantor's Contributive Share, Required Contribution Amount or other obligations under this Agreement.

**Effect of Waivers in Guaranties.** All waivers contained in the Guaranties (whether of contribution rights, indemnification or exoneration rights, suretyship defenses or other rights of any Guarantor) shall be deemed to be waivers only in favor of Lender and shall in no event be enforceable by any Guarantor to defeat any claim by a Paying Guarantor for payment of another Guarantor's Required Contribution Amount pursuant to this Agreement. Without limiting the generality of the foregoing, no provision of any Guaranty providing that Lender may release less than all Guarantors, fail to pursue one or more Guarantors or otherwise not seek recovery against any one or more Guarantors without impairing its rights against other Guarantors shall in any way reduce the obligations of any Guarantor under this Agreement and each Guarantor shall remain fully liable for such Guarantor's Required Contribution Amount notwithstanding any such provision.

**Recourse to Marital Property.** Each married person who executes this Agreement expressly agrees that recourse under this Agreement may be had against his or her separate property and, to the greatest extent permitted by applicable law, against all marital property of such person and such person's spouse (whether community property, entireties property or other form of marital property). [Consider whether any spouse of a Guarantor should join in or consent to this Agreement in order to give effect to this provision.]

**Legal Expenses.** If any party brings a legal action to enforce the provisions of this Agreement or otherwise reasonably incurs attorneys' fees or other legal expenses to enforce this Agreement, the substantially prevailing party or parties will be entitled to recover from the party or parties that do not substantially prevail all costs and expenses, including but not limited to attorneys' fees and disbursements, reasonably incurred by the substantially prevailing party or parties in connection with such action or enforcement including but not limited to those incurred in connection with trial and appellate court proceedings, post-judgment collection proceedings, settlement negotiations, and bankruptcy or other insolvency proceedings.

**Governing Law; Jurisdiction and Venue.** This Agreement will be governed by and construed in accordance with the internal laws of the State of \_\_\_\_\_. Jurisdiction and venue of any litigation arising out of this Agreement will be exclusively in the \_\_\_\_\_ Court of the State of \_\_\_\_\_ for \_\_\_\_\_ County or the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_. Each Guarantor submits to the personal jurisdiction of such courts and waives any argument that either such court is an inconvenient forum.

**Binding Effect.** This Agreement will inure to the benefit of Guarantors and their successors, and will be binding upon Guarantors and their successors; provided, however, that each Guarantor's obligations under this Agreement are personal in nature and may not be delegated by such Guarantor.

**No Third Party Beneficiaries.** This Agreement is solely for the benefit of Guarantors and their successors. Neither Lender nor any other person or entity will be a beneficiary of any of the provisions of this Agreement, and the parties specifically deny any intention to benefit any third party.

**Entire Agreement; Amendment.** This Agreement contains the final expression of the complete understanding of the parties with respect to the subject matter of this Agreement. There are no oral or other agreements that modify the terms of this Agreement. This Agreement may be amended only by a written instrument executed by the party sought to be charged with the amendment.

**Notices.** Guarantors will give all notices and demands under this Agreement in writing sent by United States mail, registered or certified postage prepaid, or by a reputable overnight courier service (such as Federal Express), with such notice addressed to the recipient at the recipient's address set forth below. Such notices will be effective three days after deposit in the United States mail as provided above or upon delivery by reputable overnight courier service as indicated in the records of such service.

**Counterparts; Electronic Delivery of Signatures.** This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which when so executed and delivered will be deemed to be an original and all of which when taken together will constitute one and the same Agreement. Delivery of any executed counterpart of a signature page to this Agreement by fax, email or other electronic means will be as effective as delivery of a complete, executed original counterpart of this Agreement.

[Signatures]