21-2726

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARC S. KIRSCHNER, solely in his capacity as
Trustee of the Millennium Lender Claim Trust,

Plaintiff-Appellant,

v.

JP MORGAN CHASE BANK, N.A., JP MORGAN SECURITIES LLC, CITIBANK, N.A., BANK OF MONTREAL, BMO CAPITAL MARKETS CORP., SUNTRUST ROBINSON HUMPHREY, INC., SUNTRUST BANK, CITIGROUP GLOBAL MARKETS INC.,

Defendants-Appellees,

CITIGROUP GLOBAL MARKETS INC.,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 17-cv-6334 (HON. PAUL G. GARDEPHE)

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE LOAN SYNDICATIONS AND TRADING ASSOCIATION, BANK POLICY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND SECURITY INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLEES

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Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Local Rule 29.1, the Loan Syndications and Trading Association ("LSTA"), the Bank Policy Institute ("BPI"), the Chamber of Commerce of the United States of America (the "Chamber"), and the Securities Industry and Financial Markets Association ("SIFMA") (collectively, "Amici") respectfully move for leave to file the attached Brief of Amici Curiae in support of defendants-appellees in this appeal. In support of this motion, Amici state as follows:

1. The Loan Syndications and Trading Association ("LSTA") is a not-for-profit financial-services trade association that represents a broad and diverse membership involved in the origination, syndication, and trading (on both the buy-side and sell-side) of commercial loans. Its members include commercial banks, investment banks, broker-dealers, mutual funds, insurance companies, fund managers, hedge funds, and other institutional lenders. LSTA's mission is to promote a fair, orderly, efficient, and growing corporate loan market and to provide leadership in advancing and balancing the interests of all loan market participants. To that end, LSTA has promulgated a code of conduct and a set of principles governing the use of confidential information, which have existed for many years and are broadly accepted by market participants. It provides industry guidance on the origination and trading of syndicated loans and associated regulatory issues and creates and maintains industry-standard documentation,

including model credit agreement and assignment provisions, for the primary and secondary loan markets. LSTA has filed amicus briefs in numerous cases raising legal questions affecting the loan market, including, among others, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017); *Bank of America, N.A. v. Caulkett*, 575 U.S. 790 (2015); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012); *In re MPM Silicones, LLC*, 874 F.3d 787 (2d Cir. 2017); *Marblegate Asset Management, LLC v. Education Management Finance Corp.*, 846 F.3d 1 (2d Cir. 2017); and *In re DBSD North America*, *Inc.*, 634 F.3d 79 (2d Cir. 2011).

2. The Bank Policy Institute ("BPI") is a nonpartisan policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal, regional, and foreign banks that routinely originate, purchase, and sell loans in the United States. Collectively, BPI's members make 68% of the nation's loans, employ almost 2 million Americans, and are an engine for financial innovation and economic growth. BPI's goal is a system that allows the nation's foremost banks to best serve their customers and perform their vital economic role while also holding sufficient capital and liquidity to ensure that the risks they take are borne by their shareholders and creditors, not by taxpayers. BPI thus takes a strong interest in legal developments that could have a significant impact on the U.S. banking industry. It regularly files amicus briefs in cases implicating such issues, including, for example, *Goldman Sachs*

Group, Inc. v. Arkansas Teacher Retirement System, 141 S. Ct. 1951 (2021); *Obduskey v. McCarthy & Holthus LLP,* 139 S. Ct. 1029 (2019); *Hymes v. Bank of America, N.A.*, No. 21-403 (2d Cir. filed June 11, 2021); and *Siegel v. HSBC North America Holdings Inc.,* 933 F.3d 217 (2d Cir. 2019).

3. The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has filed amicus briefs in numerous cases involving lending, securities, and related issues, including, for example, *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021); *Seila Law LLC v. Consumer Financial Protection Bureau,* 140 S. Ct. 2183 (2020); *Liu v. SEC*, 140 S. Ct. 1936 (2020); *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019); *SEC v. Rio Tinto PLC*, No. 21-2042 (2d Cir. filed Nov. 24, 2021); *Hymes v. Bank of America, N.A.*, No. 21-403 (2d Cir. filed

June 11, 2021); *XY Planning Network, LLC v. SEC*, 963 F.3d 244 (2d Cir. 2020); and *Prime International Trading Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019).

4. The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed-income markets and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA is the U.S. regional member of the Global Financial Markets Association. SIFMA has filed amicus briefs in many cases presenting issues affecting the securities and financial markets, including, for example, *Pivotal Software, Inc. v. Superior Court of California*, No. 20-1541 (S. Ct. filed Aug. 23, 2021); *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021); *Citibank, N.A. v. Brigade Capital Management, LP,* No. 21-487 (2d Cir. filed May 6, 2021); *In re Bernard L. Madoff Investment Securities LLC*, 12 F.4th 171 (2d Cir. 2021); *Jander v. Retirement Plans Committee of IBM*, 962 F.3d 85 (2d Cir. 2020); and *XY Planning Network, LLC v. SEC*, 963 F.3d 244 (2d Cir. 2020).

5. Collectively, amici represent the interests of all participants in the corporate loan market, including borrowers, lenders, arrangers and agents for syndicated loans, and sellers and buyers of such loans on the secondary market. They have substantial experience and expertise regarding the workings of the market for such loans. And they share a deep concern, which goes beyond the interests of the parties to a particular dispute, with ensuring that the market continues to operate fairly and efficiently and to serve as an important source of capital for American businesses. They accordingly have a keen interest in a central question in this case: whether leveraged term loans made to businesses, and syndicated through a bank agent to a group of institutional lenders, are "securities." (Amici take no position regarding any other issue presented by this appeal.)

6. Amici therefore seek leave to submit the attached brief to provide background that is critically important to answering the question whether syndicated term loans are securities. Amici focus on the characteristics of such loans as borrowers, lenders, and regulators have long understood them, the settled practices that have developed in the primary and secondary markets for such loans, and the potential consequences to the market and the broader economy of holding that syndicated term loans such as the one in this case are securities.

7. This motion is unopposed. All of the defendants-appellees have consented to the filing of the attached brief. Counsel for plaintiff-appellant has stated that he takes no position regarding the relief sought in this motion.

May 19, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

2. Exclusive of the exempted portions of the motion, as provided in Fed. R. App. P. 32(f), the motion contains 1,199 words.

3. The motion has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned counsel has relied on the word-count feature of the word-processing system with which it was prepared.

/s/ Danielle Spinelli
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Dated: May 19, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae Loan Syndications and Trading Association, Bank Policy Institute, Chamber of Commerce of the United States of America, and Securities Industries and Financial Markets Association each states that it does not have a parent corporation and that no publicly held company owns 10 percent or more of its stock.

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INTEREST OF AMICI CURIAE[1]

The Loan Syndications and Trading Association ("LSTA") is a not-for-profit financial-services trade association that represents a broad and diverse membership involved in the origination, syndication, and trading (on both the buy-side and sell-side) of commercial loans. Its members include commercial banks, investment banks, broker-dealers, mutual funds, insurance companies, fund managers, hedge funds, and other institutional lenders. LSTA's mission is to promote a fair, orderly, efficient, and growing corporate loan market and to provide leadership in advancing and balancing the interests of all loan market participants. To that end, LSTA has promulgated a code of conduct and a set of principles governing the use of confidential information, which have existed for many years and are broadly accepted by market participants. It provides industry guidance on the origination and trading of syndicated loans and associated regulatory issues and creates and maintains industry-standard documentation, including model credit agreement and assignment provisions, for the primary and secondary loan markets.

The Bank Policy Institute ("BPI") is a nonpartisan policy, research, and advocacy group, representing the nation's leading banks and their customers.

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[1] This brief was not authored in whole or in part by counsel for a party in this matter. No person other than amici, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

BPI's members include universal, regional, and foreign banks that routinely originate, purchase, and sell loans in the United States. Collectively, BPI's members make 68% of the nation's loans, employ almost 2 million Americans, and are an engine for financial innovation and economic growth. BPI's goal is a system that allows the nation's foremost banks to best serve their customers and perform their vital economic role while also holding sufficient capital and liquidity to ensure that the risks they take are borne by their shareholders and creditors, not by taxpayers. BPI thus takes a strong interest in legal developments that could have a significant impact on the U.S. banking industry.

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Collectively, amici represent the interests of all participants in the corporate loan market, including borrowers, lenders, arrangers and agents for syndicated loans, and sellers and buyers of such loans on the secondary market. They accordingly share a keen interest in a central question in this case: whether leveraged term loans made to businesses, and syndicated through a bank agent to a group of institutional lenders, are "securities." Amici submit this brief to provide background that is critically important to answering that question, focusing on the characteristics of such loans as borrowers, lenders, and regulators have long understood them.

PRELIMINARY STATEMENT

This case involves a bank loan syndicated to a group of institutional lenders. Such loans play a critical role in ensuring the flow of capital to American

businesses; the U.S. syndicated loan market currently amounts to approximately $2.5 trillion.[2] For multiple reasons, such syndicated loans, including leveraged term loans like the one at issue in this case, are not "securities" within the meaning of federal and state securities laws.

This Court has held that a loan participation that was in relevant respects very similar to modern syndicated term loans was not a security. *See Banco Espanol de Credito v. Security Pac. Nat'l Bank*, 973 F.2d 51, 54-56 (2d Cir. 1992). While the loan market has changed significantly since 1992, this Court's reasoning in *Banco Espanol* applies equally to syndicated term loans like that here. Indeed, the growth and standardization of the syndicated term loan market, the settled expectations of market participants, and the more robust and refined regulatory schemes implicating syndicated term loans and distinguishing them from securities—all of which have developed over the last thirty years—militate even more strongly than in *Banco Espanol* against deeming such loans to be securities. Borrowers, lenders, and regulators all understand that syndicated term loans are not securities and participate in (or oversee) the loan market on that understanding.

[2] Federal Reserve Board, *Shared National Credit Program: 1st and 3rd Quarter 2021 Reviews* (Feb. 2022) ("*Shared National Credit Program*"), https://www.occ.treas.gov/publications-and-resources/publications/shared-national-credit-report/files/shared-national-credit-report-2021.pdf.

That makes perfect sense. While syndicated term loans share some features with one type of debt security, high-yield bonds, they have several key characteristics that are incompatible with the regulatory scheme governing securities such as bonds. To start, the members of a loan syndicate are *lenders*: Each member has its own contractual lending relationship directly with the borrower. Likewise, syndicated term loans are not marketed to the public. Rather, the participants in a loan syndicate are sophisticated institutions that are charged with conducting their own due diligence and agree by contract to do so. And, in contrast to investors in the securities markets, participants in a loan syndicate may receive and rely on confidential information—which sometimes includes material nonpublic information ("MNPI") under the securities laws—in deciding whether to lend.

Borrowers and lenders that choose to enter the syndicated term loan market could often issue or purchase high-yield bonds instead. But the two separate markets exist because the two types of debt are different, and both borrowers and lenders can have good reasons for choosing loans over bonds (or vice versa). Syndicated term loans are typically secured by a senior lien on the borrower's assets; bonds are much less likely to be secured. That makes such loans less risky for the lender and less expensive for the borrower. Because syndicated term loans involve a smaller group of lenders (and any particular lender can be vetoed by the

borrower), their terms and conditions—such as payment schedules, interest rate spreads, and covenants and restrictions—are more easily amended than the terms of a bond indenture. Borrowers may also prefer a syndicated term loan to issuing bonds precisely because they have the authority to approve each lender in the syndicate, thereby giving them the ability to limit the lenders with whom they negotiate and to whom they disclose confidential information.

The SEC has consistently viewed syndicated term loans as distinct from securities, declining to regulate such loans under the securities disclosure and fraud laws. That distinction reflects the recognition that treating syndicated term loans as securities would not serve the main purpose of the securities laws—to protect investors who cannot conduct their own due diligence and thus must rely on publicly available information. The heightened disclosure regime applicable to securities, intended to correct that informational disadvantage, is unnecessary in a market where the lenders are sophisticated institutions that decide based on their own due diligence, and in full awareness of potential informational asymmetries, to lend large sums of money to a particular borrower.

Regulators implementing the Volcker Rule have likewise recognized the difference between syndicated loans and securities, allowing banks to own interests in securitization vehicles that hold syndicated term loans, but not in similar

vehicles that hold securities, precisely because syndicated term loans do not present the same risk profile as securities.

A holding that a syndicated term loan like that in this case is a security would thus contravene a basic premise of the existing marketplace and regulatory regime, upending the settled expectations of borrowers and lenders, and wreaking havoc in the vitally important market for syndicated loans.

ARGUMENT

I. THE SYNDICATED TERM LOAN MARKET

A syndicated loan is simply a loan to a corporate entity provided by a group of lenders, rather than a single lender. Typically, such a loan will be arranged and administered by a commercial bank or investment bank. The arranger will then syndicate the loan to a group of other institutions, each of which lends part of the funds and thus takes on part of the risk. Fitch Ratings, *The 2021 Annual Manual: U.S. Leveraged Finance Primer* 7 (July 2021) ("*Fitch Manual*"), https://www.fitchratings.com/research/corporate-finance/the-2021-annual-manual-us-leveraged-finance-primer-09-07-2021. Each member of the syndicate is a lender, with a direct contractual relationship with the borrower. Bellucci & McCluskey, *The LSTA's Complete Credit Agreement Guide* § 2.2.1 (2d ed. 2017) ("[i]n a syndicated credit facility, each lender undertakes a separate commitment to the borrower" and is "individually obligated" to lend).

Many syndicated loans are "leveraged," meaning that they are made to businesses with a relatively higher credit risk (often defined as businesses with a credit rating of BB+ or lower). *Fitch Manual* 7. Nearly 70% of American businesses fall into that category, including—to name just a few—Delta Airlines, American Airlines, Hilton Hotels, and Bass Pro Shops, along with many other major employers in the industrial and service sectors. About $1.4 trillion in leveraged syndicated loans supports such "non-investment-grade" but economically and socially critical businesses. *S&P/LSTA Leveraged Loan Index Analysis* (Mar. 2022), https://www.lsta.org/content/sp-lsta-leveraged-loan-index-analysis-march-2022; SIFMA, *Leveraged Loans Fact Sheet* (June 25, 2021), https://www.sifma.org/resources/research/leveraged-loans-fact-sheet.

Broadly syndicated loans ("BSLs") are the largest segment of the leveraged loan market. BSLs are loans made to large corporations, generally in an amount of $500 million to $1 billion or more. *Fitch Manual* 8. BSLs fall into two categories: (1) "pro rata" loans, which include revolving credit facilities and certain term loans and are typically held by banks, and (2) "institutional" loans, which are term loans that are typically held by non-bank financial institutions or entities, such as collateralized loan obligations ("CLOs"), fund managers, mutual funds, and insurance companies; such an institutional loan is also known as a "term loan B." *Id.* at 11; *see* Bellucci & McCluskey § 2.1.1.2. The loan at issue here is a term

loan B, and this brief will thus focus on that type of loan (while using the phrase "syndicated term loans" for simplicity). But these arguments also apply to pro rata loans and investment-grade syndicated loans, which are plainly not securities.

Syndicated term loans have some central characteristics that, from the point of view of borrowers and lenders, distinguish them from other types of debt, including their closest analogue in the debt securities market, high-yield bonds. While syndicated term loans and high-yield bonds have some features in common, "key distinguishing characteristics of each of the two markets continue to differentiate [them] in important ways." Bellucci & McCluskey § 11.6.

For instance, syndicated term loans are generally secured by a first-priority lien (or, occasionally, a second lien) on the borrower's assets—meaning that the lenders have the first claim to those assets' proceeds. *Fitch Manual* 9. In contrast, high-yield bonds are typically (although not always) unsecured. *Id.* at 37 (comparing high-yield bonds and leveraged loans). Secured debt is safer for the lender and, as a consequence, almost always cheaper for the borrower.

In addition, syndicated term loans typically allow borrowers to prepay before the loans' maturity date, although some impose a relatively small penalty if the buyer prepays within the first year or two. *Fitch Manual* 11; Bellucci & McCluskey § 4.11. In contrast, bonds typically bar borrowers from prepaying their debt before a certain date or require borrowers who prepay to make the

bondholders whole for all or a substantial part of their lost interest over the term of the bonds. *Fitch Manual* 36 ("[B]onds have less early repayment flexibility compared with loans due to higher call premiums and no-call provisions for a longer period."); Bellucci & McCluskey § 4.6 ("The ability to prepay a loan facility is … one of the big advantages of credit agreements over bond indentures.").

More broadly, syndicated term loans offer borrowers greater flexibility in their initial terms and in post-closing amendments. "The loan market is unique in that it can flex, bend, shape and warp itself on the fly to match the needs of borrowers with the requirements of lenders." S&P Global, *Leveraged Loan Primer* 10 (2020) ("*Leveraged Loan Primer*"), https://www.spglobal.com/marketintelligence/en/documents/lcd-primer-leveraged-loans_ltr_updated.pdf. Both "[d]uring syndication and after the loan has closed, all of the terms of a loan are subject to negotiation." *Id.* at 20. Simply put, "bank loans are easier to renegotiate than corporate bonds." De Fiore & Uhlig, *Bank Finance versus Bond Finance*, 43 J. Money, Credit & Banking 1399, 1400 (2011); *see also* Bellucci & McCluskey § 9.1.1 ("[I]f a default occurs, there is greater difficulty in first locating and then obtaining waivers from a disparate and anonymous bondholder group than from lenders under a credit agreement.").

Syndicated term loans and debt securities like bonds also differ substantially in the way they are originated or issued and traded. As noted, syndicated term loans are typically arranged by a bank, which then seeks lenders to become part of the syndicate. The arranger prepares an information memorandum describing the loan, which typically includes, among other things, a list of terms and conditions, an industry overview, and a financial model. Precisely because loans are not securities, an information memorandum is not expected to provide information as comprehensive as would be contained in an offering memorandum for bonds; rather, lenders explicitly agree to rely on their own due diligence (as discussed further below) and on the representations made by the borrower in the credit agreement. Bellucci & McCluskey § 9.1.2.

Moreover, syndicated term loans are not offered to the public as an investment vehicle. Rather, "[b]ecause loans are not securities," only banks and other qualified institutional lenders can lend through a syndicated term loan. *Leveraged Loan Primer* 10. In addition, the borrower has the ability to "disqualify" particular lenders from participation in the syndicate. Bellucci & McCluskey § 11.2.2. And the borrower's consent is typically required for a lender to assign its interest to a third party. *Id.* Bonds do not give the issuer the same control over who holds its debt.

Also, unlike bonds, syndicated term loans may be originated, syndicated, and traded on the basis of confidential information, which can include MNPI within the scope of the securities laws. *See* LSTA, *Statement of Principles for the Communication and Use of Confidential Information by Loan Market Participants* (Nov. 16, 2017) ("*Confidentiality Principles*"), https://www.lsta.org/content/lsta-confidentiality-principles-3/. While the borrower may make confidential information available to all members of the lending syndicate, lenders can choose whether to be on the "private side" and access such information, or to be on the "public side" and decline access to such information so they can continue to trade in the borrower's securities without violating insider-trading laws. *Id.* at 3-4. This means that there will often be disparities in the information held by different lenders. "Public side" participants have consciously "elected to make decisions with respect to a loan without accessing … information available to private side [participants], even though such information may be material to a decision whether to acquire or dispose of such [a] loan." *Id.* at 3.

Finally, participants in the syndicated loan market—unlike investors in securities—"are expected to have the capacity to independently evaluate their transactions in the loan market, to make informed decisions regarding the amount of due diligence that is appropriate under the circumstances, and to undertake such due diligence deemed appropriate by them." LSTA, *Code of Conduct* § II.B.9

(Dec. 14, 2020) ("*Code of Conduct*"), https://www.lsta.org/content/lsta-code-of-conduct. Lenders entering a syndicate do so on the express understanding that they—and not the arranger, administrative agent, or borrower—are responsible for conducting their own analysis of the borrower's credit risk and the terms of the loan and for determining what information they need to do so. And the same is true when loans are transferred on the secondary market. The standard terms and conditions for such transactions provide that each party acknowledges that the other may have information about the borrower that may be material to the decision to enter the transaction; that it has chosen to enter the transaction notwithstanding that it may lack such information; and that no liability attaches to either party for nondisclosure of such information, as long as the representations and warranties in the agreement itself are accurate. LSTA, *Par/Near Par Trade Confirmation Standard Terms and Conditions* § 15 (Dec. 1, 2021) ("*Par Trade Confirmation*") (reproduced in Addendum). In short, the syndicated term loan market operates on the understanding that the parties do not need or expect a mandatory disclosure regime like that applicable to bonds and other securities.

II. SYNDICATED TERM LOANS ARE NOT SECURITIES

The federal securities laws were first enacted in the wake of the 1929 stock market crash and the ensuing Great Depression, in which many ordinary Americans lost their life savings, as investments they believed to be safe quickly

became valueless. *See, e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). The laws' fundamental purpose is to protect investors who may not have access to the information necessary to gauge the value of a particular investment, or the risk associated with it, from being defrauded by unscrupulous sellers who exploit their informational advantage. *See, e.g.*, *Randall v. Loftsgaarden*, 478 U.S. 647, 659 (1986) (1933 Securities Act aimed "'to prevent … exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation'" and "'to place adequate and true information before the investor'"); *Lorenzo v. SEC*, 139 S. Ct. 1094, 1103 (2019) ("[T]he basic purpose" of the securities laws is "'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*,'" to "'meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profit.'").

In light of that purpose, the Supreme Court has set out four factors relevant to whether a particular instrument is a "security" under the 1933 and 1934 Acts: (1) "the motivations that would prompt a reasonable seller and buyer to enter into" the transaction—that is, whether the transaction has a "commercial" or "investment" purpose; (2) "the 'plan of distribution' of the instrument"—that is, "whether it is an instrument in which there is 'common trading for speculation or investments'"; (3) "the reasonable expectations of the investing public"; and

(4) whether "the existence of another regulatory scheme" makes "application of the Securities Act unnecessary." *Reves v. Ernst & Young*, 494 U.S. 56, 66-67 (1990). The Court noted that, under these factors, "notes evidencing loans by commercial banks for current operations" are not securities. *Id.* at 65.

In *Banco Espanol*, this Court applied the *Reves* factors and concluded that loan participations that were similar in many respects to modern syndicated loans were not securities. Applying those factors to syndicated term loans, in light of the understandings shared by market participants and regulators, yields the same result.

A. Syndicated Term Loans Have A Commercial Purpose

The loan participations at issue in *Banco Espanol* were short-term unsecured notes sold to participants by the original lender. Addressing the first *Reves* factor—the purpose of the transaction—this Court concluded that the loan participations were motivated overall by "'the promotion of commercial purposes' rather than an investment in a business enterprise." 973 F.2d at 55. It explained that the borrower was "motivated by a need for short-term credit at competitive rates to finance its current operations" and the loan participants "sought a short-term return on excess cash." *Id.*

Syndicated term loans are not materially different. From the borrowers' side, the proceeds of such a loan may be used to refinance existing debt or provide

dividends to shareholders, but they may also be working capital loans, whose proceeds are used to fund ongoing business operations. From the syndicate participants' side, it is important to emphasize that, just as with traditional bank loans, syndicate members are *lenders*: They have a direct contractual relationship with the borrower, not merely a relationship with the arranger or agent bank in charge of the syndication and administration of the loan. Bellucci & McCluskey § 2.2.1. Borrowers frequently engage with the lenders to seek their consent to amend or waive the terms of the loan and regularly provide updated confidential information to the syndicate. And while the lenders in the syndicate are "investing" in the sense that they hope to receive a return on their capital in the form of interest, that is equally true of traditional, non-syndicated bank loans, which are unquestionably not securities. *See Reves*, 494 U.S. at 65; *Banco Espanol*, 973 F.2d at 54-55.

B. Syndicated Term Loans Are Not Distributed To The General Public

The second *Reves* factor—"the plan of distribution of the instrument"—weighs strongly against treating syndicated term loans as securities. As discussed above, syndicated term loans are not marketed or available to the general public. No natural person can own part of a syndicated term loan. Rather, the lenders are sophisticated financial institutions. Moreover, a borrower may veto any institution from participating in the syndication. Bellucci & McCluskey § 11.2.3. And the

borrower's consent is typically required for any syndicate member to assign its interests to a new lender. *Id.* § 11.2.2. The borrower's ability to control the entities that hold its debt distinguishes a syndicated loan from bonds, which can trade without meaningful restriction in public markets.

Similar factors led this Court to conclude that the loan participation in *Banco Espanol* was not a security. The Court observed that "only institutional and corporate entities were solicited," and participations could not be resold without the originating lender's consent, "thus limiting eligible buyers to those with the capacity to acquire information about the debtor." *Banco Espanol*, 973 F.2d at 55. Participants in the syndicated term loan market are likewise "only institutional and corporate entities," and their interests can generally be assigned only with the borrower's consent. Moreover, syndicate members both have "the capacity to acquire information about [a] debtor" and know that it is their responsibility to seek out that information. *Id.*

C. Market Participants Understand That Syndicated Term Loans Are Not Securities

In *Banco Espanol*, each loan participant entered into an agreement with the loan originator acknowledging that it had "'made its own credit analysis'" based on the information it deemed appropriate, without relying on the originator. 973 F.2d at 53. This Court concluded that the loan participants would not have

reasonably perceived the loan participation as a security. That is even clearer in the context of modern syndicated lending.

As discussed above, a lender that becomes part of a syndicate does so on the express understanding that it is responsible for conducting its own due diligence on the borrower and that it is not relying on any other party to provide it with any information that would be material to its decision to lend, unless the credit agreement specifically provides to the contrary. The LSTA's Code of Conduct, which is broadly accepted in the industry, provides that loan market participants "are expected to have the capacity to independently evaluate their transactions in the loan market, to make informed decisions regarding the amount of due diligence that is appropriate under the circumstances, and to undertake such due diligence." *Code of Conduct* § II.B.9.

Standard credit-agreement provisions likewise make clear that "each syndicate member makes its own credit decisions and determinations as to what actions to take under the credit agreement, and … syndicate members do not rely upon the administrative agent or any other lender in that regard." Bellucci & McCluskey § 10.1. Moreover, the agent is not "required to disclose information in [its] possession to the lenders, except as specifically provided in the credit agreement." *Id.* § 10.1.3. Thus, "[t]he agent need not inform the lenders of

material adverse information discovered by the [agent] … in the course of [its] business dealings (whether before or after the closing)." *Id.*

Similarly, the LSTA's principles for the use of confidential information in the syndicated loan market recognize that loans may be originated and traded based in part on confidential information or even MNPI and set out guidelines for originating and syndicating loans and trading loans in the secondary market based on such information. *Confidentiality Principles* 4; *see Par Trade Confirmation* § 15 (standard documentation of trade in secondary market providing that parties are not liable to one another for failure to disclose MNPI).

None of this means that syndicated term loan market participants have no recourse against one another for false representations or fraud. For example, a borrower's materially false representation in a credit agreement or related agreement is an event of default, enabling lenders to accelerate the debt. (That is rarely true of bonds, precisely because bonds are subject to the securities laws' disclosure regime.) Bellucci & McCluskey § 9.1.2. But syndicate members and their assignees fully understand when they decide to lend that they are not operating under the securities laws' disclosure or liability regimes. Market participants know loans may be originated and traded based on confidential information, and they warrant that they can and will decide for themselves what information they need and conduct their own due diligence. Those basic market

principles all but compel the conclusion that syndicated term loans are not securities.

D. The Regulatory Scheme Reflects The Understanding That Syndicated Term Loans Are Not Securities

The current regulatory regime also reflects the understanding that syndicated term loans are not securities. The SEC has been well aware of syndicated term loans (and their relatives, loan participations) for decades. In fact, it filed a brief in *Banco Espanol* arguing that, while loan participations typically are not securities, the particular loan participation in that case was a security for purposes of the 1933 Act. SEC Brief, *Banco Espanol de Credito v. Security Pac. Nat'l Bank*, Nos. 91-7563, 91-7571, 1992 WL 12667357 (2d Cir. Jan. 22, 1992). Notably, the SEC conceded that "[t]raditional loan participations" were not securities, noting that the participants "typically have the opportunity to engage in one-to-one negotiation with the lead lender and at times with the borrower, can inspect all information, public and non-public, relevant to a credit decision, and consequently are able to do their own analysis of the borrower." *Id.* at *3. The SEC argued only that the special characteristics of the *Banco Espanol* loan participation, in which "purchasers were not … in a position to approach … borrowers … and conduct their own examination," made it a security. *Id.* at *4. Of course, this Court rejected that argument. It follows *a fortiori* that syndicated term loans, where members of the syndicate *are* able, and indeed expected, to "inspect all

information, public and non-public, relevant to a credit decision" and "do their own credit analysis of the borrower," *id.* at *3, are not securities for purposes of the 1933 and 1934 Act disclosure and liability regimes.

Indeed, the SEC has never taken the position that syndicated term loans are securities for disclosure and liability purposes.[3] Nor has Congress done so, even in the wake of the 2008 financial crisis, when it enacted major financial reforms such as the Dodd-Frank Act. For the reasons set out above, that makes sense. There is no need to subject syndicated term loans to the requirements of the securities laws, because institutional lenders who join a syndicate have both the ability and the opportunity to conduct their own investigations into the credit risk posed by the borrower—and fully understand that it is their responsibility to do so.

Congress' enactment of the Volcker Rule and related agency rulemakings further reflect the fundamental distinction between syndicated term loans and securities. The Volcker Rule restricts a banking entity's ability to engage in

[3] The SEC has stated that certain loan participations are "securities" under the Investment Company Act of 1940 for purposes of the rule that an investment company with more than a certain amount of its assets in loan participations is not a diversified company unless those participations are securities. *Putnam Diversified Premium Income Trust*, SEC No-Action Letter, 1989 WL 246124, at *1 (July 10, 1989). The letter made clear, however, that whether loan participations are securities under the 1933 and 1934 Acts is a distinct question subject to a different analysis. *See id.* at *6 (noting that the SEC had previously concluded that "the definition of security under the 1940 Act is not the same as the definition of a security under the 1933 Act and the 1934 Act").

proprietary trading and have certain ownership interests in, or relationships with, hedge funds or private equity funds (referred to by regulators as "covered funds"). 12 U.S.C. § 1851(a)(1). It also provides, however, that "[n]othing in this section shall be construed to limit or restrict the ability of a banking entity … to sell or securitize loans in a manner otherwise permitted by law." *Id.* § 1851(g)(2). To effectuate this statutory mandate, the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), the Federal Reserve Board, and the SEC have promulgated rules that exclude "loan securitizations" from the definition of "covered fund" and make clear that "loans" and "securities" are distinct. A "[l]oan securitization" vehicle is an entity that issues securities backed primarily by "loans"; it may not own any "security," with a handful of narrow exceptions. 12 C.F.R. § 248.10(c)(8). In turn, the regulations define a "loan" as "any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative." 12 C.F.R. § 44.2(t). That regulatory scheme reflects the recognition that such loan securitizations "do not raise the same types of concerns as other types of securitization vehicles." 79 Fed. Reg. 5536, 5688 (Jan. 31, 2014).

The quintessential loan securitization is a CLO, a vehicle that exists to securitize syndicated term loans. Following enactment of the Volcker Rule in 2014, many CLOs held only syndicated term loans and cash equivalents, to ensure

that they fell within the definition of "loan securitization." Today, syndicated term loans remain CLOs' primary assets. Indeed, CLOs hold about 65% of such loans, S&P Global, *Leveraged Loan Primer*, https://www.spglobal.com/marketintelligence/en/pages/toc-primer/lcd-primer#sec8ci, and as of the end of 2021, represented an $850 billion market, Pellejero, *CLOs Wrap Up Record Year*, Wall St. J. (Jan. 1, 2022). Yet regulators have never suggested that CLOs might not be "loan securitizations" because syndicated term loans might actually be securities. To the contrary, the CLO market rests on the basic premise that syndicated term loans are, in fact, loans and not securities.

Finally, banks' origination and syndication of syndicated term loans are regulated, but under an entirely different regime from the securities laws. Bellucci & McCluskey § 11.6 ("An alternate regulatory regime exists in the loan market in the form of banking regulators that actively monitor the syndicated loan market and regularly review the loan operations of regulated institutions who continue to dominate the arranging of syndicated loans."). Each of the federal banking agencies—the OCC, the FDIC, and the Federal Reserve Board—has promulgated enforceable standards relating to bank internal controls, internal audit systems, loan documentation practices, and credit underwriting. 12 C.F.R. Part 30 (OCC); *id.* Part 364 (FDIC); *id.* Part 208, Appendix D-1 (Federal Reserve). The agencies have created examination manuals and handbooks that provide detailed guidance

to banking agency examiners for conducting lending-related inspections of banks and bank affiliates.[4] They have also issued guidance for regulated institutions highlighting the agencies' focus on bank leveraged-lending activities in the supervisory and examination context. *Interagency Guidance on Leveraged Lending*, 78 Fed. Reg. 17,766 (Mar. 22, 2013).[5] And the Shared National Credit Program annually reviews and assesses the risk level of syndicated loans of $100 million or more that are shared by three or more regulated financial institutions, to guard against potential systemic risk.[6]

In *Banco Espanol*, this Court relied on OCC's "policy guidelines addressing the sale of loan participations" to support its conclusion that the loan participation there was not a security. 973 F.2d at 55. The current regulatory scheme

[4] FDIC, *Division of Supervision Manual of Examination Policies* §§ 3.2-38 to 3.2-41, 3.2-66 to 3.2-69, https://www.fdic.gov/regulations/safety/manual/section3-2.pdf; Federal Reserve, *Commercial Bank Examination Manual* §§ 2045.1 to 2045.4, 2080.1 to 2080.4, https://www.federalreserve.gov/publications/files/cbem-2000-201801.pdf; OCC, *Comptroller's Handbook: Commercial Loans*, https://www.occ.treas.gov/publications/ publications-by-type/comptrollers-handbook/commercial-loans/pub-ch-commercial-loans.pdf.

[5] The guidance advises that "[f]inancial institutions purchasing participations and assignments in leveraged lending transactions should make a thorough, independent evaluation of the transaction and the risks involved," applying "the same standards of prudence, credit assessment and approval criteria, and in-house limits that would be employed if the purchasing organization were originating the loan." 78 Fed. Reg. at 17,772. It thus recognizes that loan market participants can and should conduct their own evaluation of the borrower and its creditworthiness.

[6] *See Shared National Credit Program*.

demonstrates even more clearly that syndicated term loans are not securities, not only through federal banking regulators' oversight of such loans, but also through the SEC's determination not to treat syndicated term loans as securities for disclosure and liability purposes, and the recognition embodied in Volcker Rule regulations that loan securitizations such as CLOs are different from and do not pose the same risks as vehicles that hold securities. Taken as a whole, the regulatory scheme demonstrates that regulators are well aware of syndicated term loans but correctly recognize that they are not securities and that loan market participants are adequately protected without the mandatory disclosure regime and liability standard of the securities laws.

III. TREATING SYNDICATED TERM LOANS AS SECURITIES WOULD JEOPARDIZE A TRILLION-DOLLAR-PLUS MARKET THAT IS VITAL TO THE ECONOMY

As discussed above, all participants in the loan market have long understood that syndicated term loans are not securities under federal or state securities laws, and that the underwriting, syndication, and trading of such loans are not subject to the disclosure requirements for securities or to liability under the securities laws. Likewise, regulators have not treated syndicated loans as securities for disclosure or liability purposes and have recognized their very different characteristics. Plaintiffs now ask this Court to upend that settled understanding. The Court should decline to do so. In addition to contravening this Court's precedent,

such a holding would have a devastating effect on the $1.4 trillion market for leveraged syndicated term loans—the lifeblood of a large sector of American business—as well as on the broader $2.5 trillion market for syndicated loans.

As an initial matter, subjecting syndicated term loans to the securities laws would introduce enormous practical complications and impose very significant compliance costs on loan market participants. Loan market participants would be obligated to comply with securities laws at the state and federal level as well as the rules of securities industry self-regulatory organizations, such as FINRA, subjecting them to a patchwork of rules that may have different requirements.

For instance, a borrower would be required to register syndicated term loans under the securities laws unless the loans qualified for an exemption. *See* 15 U.S.C. § 77e. Subjecting loans to securities registration could disrupt loan origination and sales in the secondary market. Even if syndicated loans could qualify for a private placement exemption from registration, the costs associated with complying with such an exemption are much higher than costs associated with the traditional loan origination and syndication process. Exemptions from registration are often contingent upon conducting extensive due diligence, crafting and disseminating tailored disclosures on an ongoing basis, and obtaining auditors' comfort letters and opinions from counsel. Each of these processes would impose additional costs and constraints on borrowers.

In addition, if syndicated term loans were deemed to be securities, loan syndication and trading activity would have to be conducted through registered broker-dealers, and any market participant that receives compensation tied to loan transactions would have to determine if it needs to register as a broker-dealer. *See* 15 U.S.C. § 78c(a)(4)-(5); *id.* § 78o; *SEC v. Margolin,* 1992 WL 279735 (S.D.N.Y. Sept. 30, 1992); *BondGlobe, Inc.*, SEC Letter, 2001 WL 103418 (Feb. 6, 2001) (denying no-action request and highlighting receipt of securities transaction-related compensation as a hallmark of broker-dealer activity). Broker-dealers are subject to extensive SEC and FINRA regulations that could cause significant disruptions to loan transactions. For example, unlike securities transactions, which generally are settled within two days, secondary trades in loans often take ten or more days to settle. *See* 17 C.F.R. § 240.15c6-1; 87 Fed. Reg. 10,436 (Feb. 24, 2022). If syndicated term loans were securities, their extended settlement cycle would implicate margin, net capital, and other rules that apply to the settlement of securities transactions; imposition of these rules would complicate loan transactions and burden market participants with additional costs. *See, e.g.*, 17 C.F.R. § 240.15c3-1; FINRA Rule 4210; 12 C.F.R. Part 220 (Regulation T).

Treating syndicated term loans as securities would also profoundly disrupt customary arrangements between borrowers and other loan market participants that have developed over many years, and deprive both borrowers and lenders of the

significant benefits that flow from the ability to choose between different instruments with different characteristics and regulatory regimes. For instance, borrowers could lose important rights commonly found in bespoke loan agreements but not in bond indentures, such as the right to approve or reject the sale or assignment of a loan, effectively eliminating a borrower's ability to control the members of the syndicate.

Moreover, the syndicated term loan market currently allows borrowers to share with lenders important financial and corporate information that may be MNPI. As discussed above, lenders can choose whether to receive such information ("private side" lenders) or not to receive it, so that the lender can continue trading in the borrower's securities ("public side" lenders). When a private-side lender trades with a public-side lender, the public-side lender acknowledges that there may be an informational asymmetry due to the other party's possession of MNPI, but that it is choosing to rely on its own due diligence and enter into the transaction regardless. *See Par Trade Confirmation* § 15. Such provisions are generally disfavored by securities regulators because they are seen as a way of contracting around the protections provided by the securities laws. *See SEC v. Barclays Bank*, Litig. Rel. No. 20132, 2007 WL 1559227 (May 30, 2007); *see also* 15 U.S.C. § 78cc. As a result, if syndicated term loans were deemed to be securities, the loan market would likely become a "public-only" market, where no

lender receives access to confidential information, and borrowers who want to provide potential MNPI to lenders on a confidential basis would be unable to do so—eliminating one of the key features of syndicated term loans that make them desirable to borrowers and lenders.

It is no answer to say that borrowers can substitute high-yield bonds for syndicated term loans. Borrowers and lenders—and hence the broader economy—have benefited substantially from the ability to choose the market that best suits their needs. As discussed, the two kinds of debt instruments differ significantly both in their terms and in the way they are originated and traded, and those differences are important to market participants. Lenders with a lower appetite for risk can choose syndicated term loans, which typically offer lower credit risk because they are secured. Lenders with greater risk-tolerance can choose high-yield bonds, which are riskier and almost always pay a higher interest rate. Borrowers, too, can choose the type of debt best suited for their needs: higher-priced unsecured debt that trades based on public information and has less flexible terms (bonds), or cheaper secured debt that can be obtained based on confidential information and offers more flexible terms (loans).

Depriving borrowers and lenders of that choice will make it far more difficult for businesses to gain quick access to funding on flexible, bespoke terms, and for lenders to pool funds quickly and easily to offer financing to borrowers that

might not qualify for other types of loans. It would also have tangible effects on the economy. Syndicated term loans support business growth by providing funding for major projects that might otherwise go unfunded. Cutting off an important source of capital could have serious consequences for leveraged companies, as well as significant ripple effects throughout the economy.

None of this makes any sense. The participants in the syndicated term loan market—both the original syndicate members and those in the secondary market—are well aware that these loans are not regulated as securities, and fully appreciate the need to conduct appropriate diligence in order to assess the risk associated with the extension of credit. As sophisticated players, they are more than capable of conducting that diligence and enforcing their legal rights. Participants in the bond market, by contrast, may well rely on the protections of the securities laws to ensure that the issuer has affirmatively disclosed information that a reasonable investor would consider material. The American economy has been well served by different regulatory schemes, each suited to the circumstances of the particular financial products at issue. That counsels strongly against holding that syndicated term loans are securities and thus taking a step that the SEC has not taken; overturning the reasonable, settled expectations of market participants; and profoundly disrupting the origination and trading of loans that have become a critical source of capital for modern commerce.

CONCLUSION

This Court should hold that syndicated term loans are not securities.

May 19, 2022

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Local Rule 32.1(a)(4), and Fed. R. App. P. 29(a)(5).

2. Exclusive of the exempted portions of this brief, as provided in Fed. R. App. P. 32(f), this brief contains 6,952 words.

3. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font and complies with the requirements of Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g)(1), the undersigned counsel has relied on the word-count feature of the word-processing system with which it was prepared.

/s/ Danielle Spinelli
DANIELLE SPINELLI

Dated: May 19, 2022

ADDENDUM

PAR/NEAR PAR TRADE CONFIRMATION STANDARD TERMS AND CONDITIONS

December 1, 2021

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Standard Terms and Conditions for Par/Near Par Trade Confirmations
(Published by The Loan Syndications and Trading Association, Inc.® as of December 1, 2021)

The following are the Standard Terms and Conditions for Par/Near Par Trade Confirmations ("Standard Terms and Conditions") published by the Loan Syndications and Trading Association, Inc.® (the "LSTA") as of December 1, 2021. Capitalized terms used and not defined in these Standard Terms and Conditions shall have the respective meanings ascribed thereto in the LSTA Par/Near Par Trade Confirmation (the "Confirmation") which incorporates these Standard Terms and Conditions by reference. Annex I sets forth the capitalized terms defined in these Standard Terms and Conditions or in the Confirmation and the respective sections herein, if any, in which such capitalized terms are defined. As used herein, the term "Transaction" means the transaction(s) contemplated by the Confirmation.

1. **Target Settlement/Settlement Date/Transfer of Debt:** The transfer of the Purchase Amount (as defined below) of the Debt (as defined below) specified in the Confirmation shall be effected as soon as practicable on or after the Trade Date. Any alternative agreement between Buyer and Seller as to a targeted date of settlement shall be specified in the Confirmation. The date payment of the Purchase Price (as defined below) occurs against such transfer is the "Settlement Date" hereunder. Trades that do not settle on a timely basis are subject to the provisions regarding compensation for delayed settlement in accordance with the provisions of Section 6, "Compensation for Delayed Settlement," below[1].

   Unless an alternative election is made in the "Form of Purchase" section of the Confirmation, the form of purchase of the Purchase Amount of the Debt shall be an assignment.

   If Buyer and Seller are unable to effect settlement of the Transaction as specified in the Confirmation, a valid and binding obligation to settle the trade nevertheless continues to exist between Buyer and Seller. If a Transaction that is to be settled by assignment cannot be settled on such basis, such Transaction shall be settled as a participation; provided that if settlement by participation cannot be effected, the Transaction shall be settled on the basis of a mutually agreeable alternative structure or other arrangement that affords Buyer and Seller the economic equivalent of the agreed-upon trade; provided, further, that if "Assignment Only" is elected in the "Form of Purchase" section of the Confirmation (an "Assignment Only Election") and the Transaction cannot be settled on such basis, Buyer and Seller shall not settle the Transaction as a participation but shall instead settle on the basis of a mutually agreeable alternative structure or other arrangement that affords Buyer and Seller the economic equivalent of the agreed-upon trade.

2. **Purchase Amount/Type of Debt:** The amount(s) and type(s) of debt specified in the "Purchase Amount/Type of Debt" section of the Confirmation shall be the "Purchase Amount" and "Debt", respectively, hereunder. Unless otherwise specified in the Confirmation, any Debt identified as (a) term loan indebtedness is fully funded Debt with no further funding obligations, and (b) revolving credit, delayed draw facilities or letter of credit facilities may be subject to further funding and the Purchase Amount may include both funded principal and unfunded commitments (including commitments to participate in delayed draw facilities or letters of credit). If a commitment is indicated, Buyer is assuming all unfunded commitments relating to the Purchase Amount of the Debt unless otherwise specified in the Confirmation. Unless otherwise specified in the Confirmation, Buyer is assuming the obligation to purchase (or to cause a designee to purchase) the Debt as such Debt may be reorganized, restructured, converted or otherwise modified.

[1] Any reference in the Standard Terms and Conditions to "*Section 6, 'Compensation for Delayed Settlement,'*" includes for the avoidance of doubt Section 6.A, "Paper Requirements" or Section 6.B, "Settlement Platform Requirements", as applicable.

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3. **Permanent Reductions:** The economic benefit of permanent commitment reductions and permanent repayments of principal (collectively, "Permanent Reductions") shall be allocated as provided in Section 4, "Purchase Price Calculation," below.

4. **Purchase Price Calculation:** Except as otherwise set forth in the next succeeding paragraph of this Section 4 with regard to a Multi-Currency Commitment (as defined below), Buyer shall pay Seller a purchase price (the "Purchase Price") (or, if such calculations produce a negative number, Seller shall pay Buyer a Purchase Price) for the Purchase Amount of the Debt on the Settlement Date equal to (a) the Purchase Rate multiplied by the funded principal amount of such Purchase Amount as of the Settlement Date minus (b) (100% minus the Purchase Rate) multiplied by the unfunded commitments (if any), which shall include the face amount of any issued but undrawn letter of credit, assumed by Buyer as of the Settlement Date minus (c) (100% minus the Purchase Rate) multiplied by any Permanent Reductions on or after the Trade Date minus (d) any Non-Recurring Fees (as defined below) received by Seller on or before the Settlement Date. The Purchase Price shall be further adjusted by delayed compensation (if any), payable in accordance with Section 6, "Compensation for Delayed Settlement," below, and Assignment Fees or Consent to Transfer Fees (each as defined below) payable in accordance with Section 8, "Assignment Fees and Consent to Transfer Fees," below.

   With respect to a Multi-Currency Commitment, Buyer shall pay Seller a Purchase Price (or, if such calculations produce a negative number, Seller shall pay Buyer a Purchase Price) for the Purchase Amount of the revolving or delayed draw commitment portion, as the case may be, of the Debt on the Settlement Date equal to (a) 100% multiplied by the funded principal amount of such revolving or delayed draw loans as of the Settlement Date in the applicable currency of the funded portion of the revolving or delayed draw loans minus (b) (100% minus the Purchase Rate) multiplied by the Purchase Amount as of the Settlement Date in the Master Currency (as defined below) minus (c) (100% minus the Purchase Rate) multiplied by any Permanent Reductions on or after the Trade Date minus (d) any Non-Recurring Fees received by Seller on or before the Settlement Date. For purposes of the calculation referred to in clause (b) above, the applicable foreign exchange rate shall be the spot rate effective on a Business Day (as defined below) that is no earlier than three (3) Business Days prior to the Settlement Date, as agreed upon by the parties. The Purchase Price shall be further adjusted by delayed compensation (if any), payable in accordance with Section 6, "Compensation for Delayed Settlement," below, and Assignment Fees or Consent to Transfer Fees payable in accordance with Section 8, "Assignment Fees and Consent to Transfer Fees," below. Except for the foregoing specific computations, all other computations shall otherwise be made in the relevant currency in accordance with the calculations set forth in the immediately preceding paragraph of this Section 4.

   As used herein:

   "Master Currency" means the currency in which the Facility is principally denominated.

   "Multi-Currency Commitment" means a commitment that is, as of the Settlement Date, subject to one or more borrowings in one or more currencies other than the Master Currency.

5. **Interest Payments and Fees:** Interest and accruing ordinary course fees (such as commitment, facility and letter of credit fees) payable in connection with the Purchase Amount of the Debt pursuant to the Credit Documents, whether accruing before, on or after the Trade Date are referred to herein as "Interest and Accruing Fees;" provided that Interest and Accruing Fees shall not include any paid-in-kind interest, fees or other amounts paid or payable in kind in connection with the Purchase Amount of the Debt pursuant to the Credit Documents (such amounts, including any paid-in-kind interest, fees or other amounts paid or payable in kind in connection with the Purchase Amount of the Debt pursuant to the Adequate Protection Order (as defined below), "PIK Interest"). Amendment, consent, waiver and other similar non-ordinary course fees that are payable in connection with the Purchase Amount of the Debt pursuant to the Credit Documents from and after the Trade Date, and any other amounts payable in connection with the Purchase Amount of the

Debt pursuant to the Credit Documents from and after the Trade Date not constituting Interest and Accruing Fees or PIK Interest are referred to herein as "Non-Recurring Fees."

All Interest and Accruing Fees are calculated at the contractual rates as in effect at the relevant time(s) under the Credit Documents. Any upfront fee shall be paid by the party and on the date specified in the Confirmation.

Unless otherwise specified in the "Trade Specific Other Terms of Trade" section of the Confirmation, all Non-Recurring Fees and unreimbursed fee or expense claims related to the Purchase Amount of the Debt under or in connection with the Credit Documents, the Adequate Protection Order or the transactions related thereto or contemplated thereby shall be for the account of Buyer. Unless otherwise specified in the "Trade Specific Other Terms of Trade" section of the Confirmation, all PIK Interest shall be allocated on a "trades flat" basis as follows, regardless of how Interest and Accruing Fees and Adequate Protection Payments (as defined below) are allocated: (a) PIK Interest that is capitalized or accreted prior to the Trade Date shall be included in the principal portion of the Purchase Amount and shall be subject to the application of Section 4, "Purchase Price Calculation," above; (b) PIK Interest that is capitalized or accreted on or after the Trade Date shall be for the account of Buyer for no additional consideration; and (c) PIK Interest that has accrued but not yet capitalized or accreted as of the Settlement Date shall be for the account of Buyer upon capitalization or accretion for no additional consideration.

Unless otherwise specified in the "Trade Specific Other Terms of Trade" section of the Confirmation, "Settled Without Accrued Interest" shall apply. Subject to the application of Section 6, "Compensation for Delayed Settlement," below, all Interest and Accruing Fees and, if applicable, Adequate Protection Payments, accrued but unpaid before the Settlement Date shall be for the account of Seller. Buyer shall pay to Seller any portion of such Interest and Accruing Fees and, if applicable, Adequate Protection Payments promptly upon any receipt thereof by Buyer; so long as such amounts are received by Buyer (a) on or before the due date thereof or the expiration of any applicable grace period, each as specified in the Credit Documents and, if applicable, the Adequate Protection Order, as in effect on the Trade Date (or, if no such grace period exists (other than due to any acceleration of the Debt pursuant to the Credit Documents following a Filing Date), the expiration of thirty (30) days from such due date), and (b) before a default by any obligor(s) in connection with any other payment obligations of such obligor(s) under the Credit Documents. Otherwise, such Interest and Accruing Fees and, if applicable, Adequate Protection Payments (if and when paid, whether to Seller or Buyer) and any other accrued amounts due from and after the Settlement Date shall be for the account of Buyer, and Seller shall not be entitled to any part thereof.

If "Paid on Settlement Date" is specified in the "Trade Specific Other Terms of Trade" section of the Confirmation, subject to the application of Section 6, "Compensation for Delayed Settlement," below, (a) all Interest and Accruing Fees and, if applicable, Adequate Protection Payments, paid by the obligor(s) to but excluding the Settlement Date shall be for the account of Seller and (b) an amount equal to the accrued but unpaid amount of Interest and Accruing Fees and, if applicable, Adequate Protection Payments, to but excluding the Settlement Date (such amount referred to in clause (b) of this sentence referred to hereinafter as the "Paid On Settlement Date Amount") shall be paid by Buyer to Seller on the Settlement Date to the extent the Transaction settles by assignment. If the obligor(s) thereafter pay(s) the Paid On Settlement Date Amount to Buyer, Buyer shall be entitled to keep such amount. If, however, the Paid On Settlement Date Amount is paid to Seller by the obligor(s), Seller shall promptly pay such amount to Buyer. If the obligor(s) fail(s) to pay all or a portion of the Paid On Settlement Date Amount on or prior to the scheduled due date thereof (taking into account any applicable grace period) in accordance with the Credit Documents or the Adequate Protection Order (in each case as in effect on the Settlement Date) (such amount referred to as the "Unpaid On Settlement Date Amount"), then (a) Seller shall be required to promptly reimburse Buyer, upon demand by Buyer, the Unpaid On Settlement Date Amount, plus interest that would accrue for each day on such amounts at the Federal Funds Rate (as defined below) in effect for such date of demand, and (b) the Unpaid On Settlement Date Amount shall be for the account of Buyer, and Seller shall not be entitled to any part thereof.

Partial payments of interest shall be applied in the inverse order of payment dates unless otherwise specified in the Credit Documents.

Any party that has received funds to which the other party is entitled under this Section 5 shall pay over such funds to the other party (a) on the Settlement Date, if such funds were received on or prior to the Settlement Date, by way of a credit to the other party in the Purchase Price calculations, or (b) on or before the date that is two (2) Business Days after receipt, if such funds were received after the Settlement Date.

As used herein:

"Adequate Protection Order" means any order of the relevant bankruptcy court authorizing or ordering any obligor(s) to make adequate protection payments to the lenders.

"Adequate Protection Payments" means, with respect to the Purchase Amount of the Debt, amounts (other than PIK Interest) authorized and/or ordered to be paid as adequate protection for Interest and Accruing Fees on the loans and obligations owed under the Credit Documents under an Adequate Protection Order.

"Business Day" means any day that is not a Saturday, a Sunday or any other day on which the Federal Reserve Bank of New York is closed.[2] In addition, solely for purposes of determining the Commencement Date (as defined below), Business Day excludes any day on which the New York Stock Exchange is closed.[3] . For purposes of determining the SOFR (as defined below), Business Day means any day on which SOFR is published by the SOFR Administrator.

"Credit Agreement" means the credit agreement specified in the Confirmation (including any amendments, supplements or other modifications executed in connection therewith from time to time).

"Credit Documents" means the Credit Agreement and all guarantees, security agreements, mortgages, deeds of trust, letters of credit, reimbursement agreements, waivers, amendments, modifications, supplements, forbearances, intercreditor agreements, subordination agreements and all other agreements, documents or instruments executed and delivered in connection therewith, in each case, as amended, supplemented or otherwise modified from time to time.

"Federal Funds Rate" means, for any date, the weighted average (rounded upwards, if necessary, to the next 1/100 of 1%) of the rates set by the Federal Reserve Bank of New York on overnight federal funds transactions with members of the Federal Reserve System, as published on the next succeeding Business Day in The Wall Street Journal (Eastern Edition), or, if such rate is not so published for any day that is a Business Day, the average (rounded upwards, if necessary, to the next 1/100 of 1%) of the quotations for such day for such transactions received by the parties from three federal funds brokers of recognized standing selected by the parties. For a day that is not a Business Day, the Federal Funds Rate shall be the rate applicable to federal funds transactions on the immediately preceding day for which such rate is reported.

"Filing Date" means the date of the filing of a petition for relief under title 11 of the United States Code by or against any obligor(s) under the Credit Documents.

[2] The Holiday Schedule for the Federal Reserve Bank of New York may be found at www.newyorkfed.org/aboutthefed/holiday_schedule.html.

[3] The Holiday Schedule for the New York Stock Exchange may be found at www.nyse.com/Frameset.html?displayPage=/about/1022963613686.html.

6. Compensation for Delayed Settlement:

(a) Method of Settlement Determines Delayed Compensation Requirements. The Settlement Platform Requirements described in Section 6.B below shall apply where the parties use an Electronic Settlement Platform (as defined in Section 6.B) to effect settlement of the Transaction, and in all other circumstances, the Paper Requirements (as defined and described in Section 6.A) shall apply. Unless otherwise agreed upon by Seller and Buyer and specified in the Trade Specific Other Terms of Trade, the Transaction shall settle pursuant to the Settlement Platform Requirements.

(b) General Circumstances Not Impacting Delayed Compensation Requirements. Notwithstanding whether Buyer has satisfied its Paper Requirements or Buyer Settlement Platform Requirements (as defined in Section 6.B), Section 6(c) shall apply in any of the circumstances set forth below:

(i) Failure to Obtain Consents. Third-party consents or acknowledgements to or other approvals required pursuant to the transfer and eligibility provisions of the Credit Agreement or otherwise for settlement of any assignment have not been obtained; provided, however, that notwithstanding the failure to obtain such consents, acknowledgements or approvals, Buyer shall still be required to timely satisfy its Delayed Compensation Requirements in order for Section 6(c) to apply to the Transaction.

(ii) Participations. "Participation" is set forth in the "Form of Purchase" section of the Confirmation.

(iii) Due Diligence Information. Buyer has not timely performed its Delayed Compensation Requirements as a result of Seller not providing Buyer with required "know your customer" information or other information for the purpose of onboarding and approving Seller as a counterparty (collectively, "Onboarding Information") that has been requested by Buyer on or prior to the date any of Buyer's applicable Delayed Compensation Requirements are due, including, without limitation, Seller not confirming and verifying the accuracy of any wire instructions set forth by Seller for receipt of payment of the Purchase Price[4]; provided, however, upon Buyer's receipt of any such Onboarding Information, Buyer will promptly finalize counterparty onboarding requirements in a commercially reasonable manner to facilitate prompt settlement of the Transaction and/or remit payment of the Purchase Price to the verified wire instructions (but in no event shall the payment of the Purchase Price occur more than one (1) Business Day following the verification by Buyer of Seller's wire instructions (to the extent the Assignment Agreement has been made effective on the registry on or prior to the date of such verification by Buyer)).[5]

(c) Delayed Compensation Calculations. If this Section 6(c) is applicable to the Transaction and settlement occurs on a Delayed Settlement Date, then the following shall apply:

(i) Buyer shall pay Seller (or if Seller is required to pay Buyer the Purchase Price, Seller shall pay Buyer) on the Delayed Settlement Date an amount equal to interest that would accrue for each day during the Delay Period at the Cost of Carry Rate (as defined below) on an amount equal to the Purchase Price calculated as of the Commencement Date according to the

[4] To the extent Buyer requests certain Onboarding Information on or prior to the date of Buyer's obligation to perform any of its Delayed Compensation Requirements, Buyer shall also be allowed to subsequently request additional Onboarding Requirements after such date to the extent the response from Seller requires Buyer to obtain additional Onboarding Information.

[5] *See* Know Your Customer Considerations for Syndicated Lending and Loan Trading, published by the LSTA on October 22, 2018 providing guidelines for the application of customer identification programs, foreign correspondent account due diligence and other considerations for primary and secondary loan transactions. Such guidelines can be found at https://www.lsta.org/content/know-your-customer-considerations-for-syndicated-lending-and-loans-kyc-guidelines/.

applicable method described in Section 4, "Purchase Price Calculation," above (but without adjustment for delayed compensation payable hereunder or any Assignment Fees or Consent to Transfer Fees) substituting the phrase "Commencement Date" for the phrase "Settlement Date" appearing therein (and utilizing the loan and commitment amounts outstanding on the Commencement Date); provided that if the Purchase Price so calculated as of the Delayed Settlement Date (but without adjustment for delayed compensation payable hereunder or any Assignment Fees or Consent to Transfer Fees (the "Gross Purchase Price"), and which calculation may result in a payment obligation for the party other than the party obligated under the calculation made as of the Commencement Date) has increased or decreased more than 25% from the Purchase Price so calculated as of the Commencement Date, then such payment or payments (as applicable) shall be calculated based on the Gross Purchase Price so calculated on each day during the Delay Period.

(ii) If the Debt is a Performing Loan and the terms relating to "Settled Without Accrued Interest" set forth in Section 5 are applicable to the Transaction, then a credit to the Purchase Price shall be given by Seller to Buyer on the Delayed Settlement Date (free of any withholding, setoff, recoupment or deduction of any kind except as required by law and regardless of whether paid or otherwise credited to Seller) in an amount equal to Interest and Accruing Fees and, if applicable, Adequate Protection Payments accrued with respect to the Purchase Amount of the Debt and allocable to the Delay Period. If the obligor(s) fail(s) to pay on or prior to the scheduled due date thereof (taking into account any applicable grace period) in accordance with the Credit Documents or the Adequate Protection Order (in each case as in effect on the Delayed Settlement Date), any Interest and Accruing Fees or Adequate Protection Payments that were credited to Buyer on the Delayed Settlement Date pursuant to this Section 6(c)(ii), then Buyer shall, upon demand by Seller, pay Seller an amount equal to the portion of such Interest and Accruing Fees or Adequate Protection Payments that were not paid to Seller, plus interest that would accrue for each day on such amounts at the Federal Funds Rate (as defined above) in effect for such date of demand.

(iii) If (a) the Debt is a Performing Loan, (b) the terms relating to "Paid on Settlement Date" set forth in Section 5 are applicable to the Transaction and (c) the Assignment Effective Date occurs on a Delayed Settlement Date, then the "Paid On Settlement Date Amount" shall be deemed to mean an amount equal to the accrued but unpaid amount of Interest and Accruing Fees and, if applicable, Adequate Protection Payments, to (but excluding) the Commencement Date. All Interest and Accruing Fees and, if applicable, Adequate Protection Payments, accrued and paid by the obligor(s) with respect to the Purchase Amount of the Debt and allocable to the Delay Period shall be for the account of Buyer and shall be credited to Buyer by Seller on the Delayed Settlement Date. All Interest and Accruing Fees and, if applicable, Adequate Protection Payments, accrued but unpaid by the obligor(s) with respect to the Purchase Amount of the Debt and allocable to the Delay Period shall be for the account of Buyer. In the event Seller receives, on or after the Delayed Settlement Date, any such accrued but unpaid amounts referenced in the immediately preceding sentence, Seller shall promptly forward such amounts to Buyer.

(d) Definitions.

"Administrative Agent" means the administrative agent set forth in the Credit Agreement (and any successor or replacement entity thereto).

"Affiliate" means, with respect to a specified Entity, another Entity that directly or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Entity specified.

"Allocation" means an allocation of new or additional money commitments (whether funded or unfunded) provided to prospective lenders under the Credit Agreement in connection with the syndication of the Facility (including, without limitation, in connection with an Amendment Agreement and/or any add-on or incremental component of the Facility).

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"Amendment Agreement" means an amendment, supplement or other modification of the Credit Agreement.

"Assignment Effective Date" means the date on which the books and records of the Administrative Agent and/or the Borrower records the assignment and transfer of legal title of the Purchase Amount of the Debt from Seller to Buyer.

"Bankruptcy Code" means the Bankruptcy Reform Act of 1978, 11 U.S.C. §§101 et seq., as amended.

"Commencement Date" means for:

(i) a Pre-Trigger Trade, the date four (4) Business Days after the Pre-Trigger Trade Ready Date;

(ii) a Post-Trigger Trade, the date four (4) Business Days after the Post-Trigger Trade Ready Date;

(iii) an Early Day Trade, the date four (4) Business Days after the Early Day Trade Ready Date; and

(iv) a Secondary Trade, the date seven (7) Business Days after the Trade Date.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an Entity, whether through the ability to exercise voting power, by contract or otherwise. "Controlled" has a meaning correlative thereto.

"Cost of Carry Rate" means, for the Delay Period:

(i) (a) the sum of all the individual daily simple SOFRs for each day in the period from (and including) the date two (2) Business Days before the Commencement Date and to (but excluding) the date that is two (2) Business Days before the Delayed Settlement Date divided by (b) the total number of days in such period plus (ii) a spread adjustment equal to 11.448 basis points.

"Credit Linked Deposits" means a deposit made by a lender into a designated account pursuant to the Credit Agreement in connection with the unutilized portion of such lender's commitment to the Borrower under the Credit Agreement.

"Delayed Compensation Requirements" means either the Paper Requirements or the Settlement Platform Requirements, as applicable.

"Delay Period" means the period from (and including) the Commencement Date to (but excluding) the Delayed Settlement Date.

"Delayed Settlement Date" means the date following the Commencement Date on which settlement of the Transaction occurs.

"Early Day Trade" means a trade in which the Trade Date is a date on or before the sixth (6th) Business Day following the Trigger Date in a Facility originally syndicated pursuant to an Allocation whereby a buyer would not have been capable of receiving the economic benefit of any interest and accruing ordinary course fees under the standard terms and conditions of a Primary Allocation Confirmation.

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"Early Day Trade Ready Date" means the date that is ten (10) Business Days after the Trigger Date.

"Effective Date" means the date the Credit Agreement or Amendment Agreement, as applicable, becomes effective.

"Facility" means the specific facility and/or tranche name under the Credit Agreement related to the Debt as specified in the Confirmation.

"Performing Loan" means any Debt (including, without limitation, Credit Linked Deposits) with respect to which either (i) Interest and Accruing Fees are being paid as of the Commencement Date on the terms specified in the Credit Documents as in effect on the Trade Date or (ii) if the Borrower is a debtor under the Bankruptcy Code, Adequate Protection Payments are being paid as of the Commencement Date.

"Post-Trigger Allocation" means any Allocation that is made and communicated by the Administrative Agent (or an Affiliate of the Administrative Agent) to prospective lenders under or in connection with the syndication of the Facility after the Trigger Date.

"Post-Trigger Allocation Date" means the date on which a Post-Trigger Allocation is made and communicated to prospective lenders.

"Post-Trigger Trade" means a trade in which the Trade Date occurs either on the Post-Trigger Allocation Date or the Business Day immediately following the Post-Trigger Allocation Date of a Facility previously allocated to prospective lenders by means of a Post-Trigger Allocation and in connection therewith, a prospective lender would have been capable of receiving the economic benefit of interest and accruing ordinary course fees under the standard terms and conditions of a Primary Allocation Confirmation.

"Post-Trigger Trade Ready Date" means the date that is five (5) Business Days after the Post-Trigger Allocation Date.

"Pre-Trigger Allocation" means any Allocation that is made and communicated by the Administrative Agent (or an Affiliate of the Administrative Agent) to prospective lenders under or in connection with the syndication of the Facility on or before the Trigger Date.

"Pre-Trigger Trade" means a trade in which the Trade Date is a date on or before the first (1st) Business Day following the Trigger Date of a Facility previously allocated to prospective lenders by means of a Pre-Trigger Allocation and in connection therewith, a prospective lender would have been capable of receiving the economic benefit of interest and accruing ordinary course fees under the standard terms and conditions of a Primary Allocation Confirmation.

"Pre-Trigger Trade Ready Date" means the date that is five (5) Business Days after the Trigger Date.

"Primary Allocation Confirmation" means an agreement substantially in the form of the LSTA Primary Allocation Confirmation published by the LSTA as in effect on the Trade Date.

"Secondary Trade" means any trade other than a Pre-Trigger Trade, a Post-Trigger Trade or an Early Day Trade.

"Settlement Platform Requirements" means the requirements set forth in Section 6.B which shall be applicable when Seller and Buyer effect settlement of the Transaction on an Electronic Settlement Platform.

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"SOFR" means a rate equal to the secured overnight financing rate as administered by the SOFR Administrator.

"SOFR Administrator" means the Federal Reserve Bank of New York (or a successor administrator of the secured overnight financing rate).

"Trigger Date" means the Effective Date; provided, however, if (a) there is no funding of any Facility on the Effective Date and (b) prior to the Settlement Date any Facility subsequently funds, then under such circumstances, the "Trigger Date" shall be deemed the first date on which any Facility subsequently funds.

6.A Paper Requirements.

(a) Applicability of Delayed Compensation to Transaction when Transaction Does Not Settle on Electronic Settlement Platform.

(i) General Rule. Section 6(c) shall apply to the Transaction if and only if Buyer (A) has satisfied the Paper Requirements (as defined below) applicable to Buyer and (B) pays the Purchase Price to Seller (to the extent the Purchase Price is a positive number) in accordance with the timing requirements set forth in Section 6.A(c) below. If Buyer either fails to satisfy its Paper Requirements by the applicable dates or fails to timely pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number), then Section 6(c) shall not apply to the Transaction.

(ii) Return of Net Credited Amount. To the extent Buyer either fails to comply with its Paper Requirements or fails to timely pay the Purchase Price, but nonetheless pays a purchase price to Seller (or is paid a purchase price to the extent the calculation is a negative number) based upon a funding calculation which assumed Section 6(c) applied (the "DC Purchase Price Calculation"), the parties agree that to the extent the actual Purchase Price which does not take into account Section 6(c) calculations is greater than (or less than to the extent the calculation is a negative number) the DC Purchase Price Calculation (such amount referred to as the "Net Credited Amount") then upon demand by Seller to Buyer, Buyer will remit to Seller the Net Credited Amount within two (2) Business Days of such demand.

(b) Circumstances Not Impacting Paper Requirements. Notwithstanding the general rule requirements set forth in Section 6.A(a)(i) above, Section 6(c) shall apply in any of the circumstances set forth below:

(i) Seller Fails to Deliver Confirmation and Assignment Agreement. Where Seller is the Drafting Party, Seller does not timely comply with its obligations set forth in the definition of Paper Requirements to deliver (A) the Confirmation, which includes the Trade Details and (B) the Assignment Agreement;

(ii) Purchase Price Calculation Error. If (A) Buyer has not timely paid the Purchase Price to Seller (to the extent the Purchase Price is a positive number) because Buyer reasonably believes in good faith that the calculation of the Purchase Price prepared by Seller is incorrect, (B) Buyer has provided Seller with notice detailing such reasonably believed calculation error on or prior to the Business Day on which payment of the Purchase Price is due in accordance with Section 6.A(c) and (C) Buyer has timely complied with all other Paper Requirements;

(iii) Material Errors in Assignment Agreement. If Seller is the Drafting Party and Buyer timely executes and delivers the Confirmation to Seller, but Buyer refrains from timely executing the Assignment Agreement in accordance with the Paper Requirements and Buyer notifies Seller that the form of Assignment Agreement provided to Buyer has a material error no later than (A) three (3) Business Days after the Trigger Date for Pre-Trigger Trades, (B) three (3) Business Days after the Trade Date for either Post-Trigger Trades or Secondary Trades or (C) six (6) Business

Days after the Trade Date for Early Day Trades; provided, however, to the extent the error is fixed by Seller (after receipt of timely notification from Buyer) for (A) Pre-Trigger Trades by no later than four (4) Business Days after the Trigger Date, (B) either Post-Trigger Trades or Secondary Trades by no later than four (4) Business Days after the Trade Date, or (C) Early Day Trades by no later than eight (8) Business Days after the Trade Date, then Buyer shall be obligated to timely satisfy Buyer's Paper Requirements[6] and pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) in accordance with the timing requirements set forth in Section 6.A(c) below; or

(iv) New CLO Issuers. If Buyer has notified Seller that it is a New CLO Issuer before the Commencement Date, Buyer may, in its sole discretion, select, at any time during the Delay Period, a CLO Blackout Period during which time Seller (to the extent Seller is the party responsible for obtaining required consents as set forth in Section 10 below) shall notify and direct the Administrative Agent not to effectuate and record the Assignment Agreement during the CLO Blackout Period and Section 6(c) shall continue to apply to the Transaction.[7] To the extent Buyer is the party responsible for obtaining required consents and Buyer has notified Seller that it is a New CLO Issuer before the Commencement Date, Buyer shall be entitled to notify and direct the Administrative Agent not to effectuate and record the Assignment Agreement during the CLO Blackout Period and Section 6(c) shall continue to apply to the Transaction. In either foregoing case, notwithstanding the establishment of a CLO Blackout Period, Buyer shall still remain required to timely comply with all of Buyer's other Paper Requirements and timely pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) in order for Section 6(c) to apply.

(c) Notification of Assignment Effective Date; Payment Timing.

(i) Where Seller is the party responsible for obtaining any required consents or acknowledgments pursuant to the terms of Section 10 below and the Transaction does not settle by the Commencement Date, Seller shall (a) sign and deliver a copy of Seller's executed signature page to the Assignment Agreement to Buyer at any time during the Delay Period, and (b) notify Buyer of a proposed Delayed Settlement Date ("Proposed Delayed Settlement Date") by no later than 6:00 p.m. (New York time) on the Business Day immediately preceding the Proposed Delayed Settlement Date. Seller may only provide advanced notification of a Proposed Delayed Settlement Date to the extent Seller reasonably determines in good faith that all required consents, acknowledgments, and other actions will have been satisfied to settle the Transaction on the Proposed Delayed Settlement Date.

(A) If Seller does not timely provide Buyer with advanced notification of a Proposed Delayed Settlement Date then Buyer shall be obligated to pay the Purchase Price no later than the Business Day immediately following the date Seller provides Buyer with notice of the Assignment Effective Date.

(B) If Seller timely provides Buyer with advanced notification of a Proposed Delayed Settlement Date and Seller further provides Buyer with notice of the Assignment Effective Date (1) on or prior to 11:00 a.m. (New York time), then Buyer shall be obligated to pay the Purchase Price on the date of such Assignment Effective Date or (2) after 11:00 a.m. (New York time), then Buyer shall be obligated to pay the

[6] A material error would include, for example, a reference to the wrong Credit Agreement, Borrower or Facility name. However, a material error would not include, for example, a reference to a Purchase Amount that is different than set forth on the Confirmation to the extent such Purchase Amount has been adjusted subsequent to the Trade Date as a result of any Permanent Repayments or PIK Interest.

[7] In the event the Buyer entity (the "Warehouse Buyer") originally set forth on a Confirmation is replaced by a new Buyer entity (the "End CLO Buyer") during the CLO Blackout Period (and a new Confirmation and Assignment Agreement will need to be prepared and executed with the only change being made to reflect the End CLO Buyer as the Buyer), the End CLO Buyer shall be deemed to have satisfied its Paper Requirements to the extent the Warehouse Buyer had previously satisfied its Paper Requirements.

Purchase Price no later than the Business Day immediately following the Assignment Effective Date.

(ii) Where Buyer is the party responsible for obtaining any required consents or acknowledgments pursuant to the terms of Section 10 below and the Transaction does not settle by the Commencement Date, to the extent Buyer receives notice of the Assignment Effective Date either (A) on or prior to 11:00 a.m. (New York time), then Buyer shall be obligated to pay the Purchase Price on the Assignment Effective Date or (B) after 11:00 a.m. (New York time), then Buyer shall be obligated to pay the Purchase Price no later than the Business Day immediately following the Assignment Effective Date.

(d) Definitions.

"CLO Blackout Period" means a period of not more than five consecutive Business Days preceding and, to the extent specified, including, the effective date of the indenture under which a New CLO Issuer issues notes; provided that such New CLO Issuer may designate only one such period as a CLO Blackout Period before such effective date.

"Drafting Party" means the party responsible for preparing the Confirmation and the Assignment Agreement.

"New CLO Issuer" means a special purpose entity newly formed to issue collateralized loan obligations under an indenture.

"Paper Requirements" means:

(i) where Seller is the Drafting Party

(A) the obligation of Seller to deliver to Buyer (I) the Confirmation, which includes the Trade Details, on or before one (1) Business Day after the Trade Date and (II) the Assignment Agreement (x) for Pre-Trigger Trades and Early Day Trades, on or before one (1) Business Day after the later of (i) the Trade Date or (ii) the Trigger Date and (y) for Post-Trigger Trades and Secondary Trades, one (1) Business Day after the Trade Date; and

(B) to the extent Seller timely performs and satisfies its obligations set forth in clause (i)(A) of this definition, the obligation of Buyer to execute and deliver to Seller, for purposes of settling the Transaction, (I) the Confirmation and (II) the Assignment Agreement to Seller on or before (x) four (4) Business Days prior to the Commencement Date for Pre-Trigger Trades, Post-Trigger Trades and Early Day Trades or (y) two (2) Business Days prior to the Commencement Date for Secondary Trades;

(ii) where Buyer is the Drafting Party and Buyer has delivered to Seller (A) the Confirmation which includes the Trade Details on or before one (1) Business Day after the Trade Date and (B) the Assignment Agreement (x) for Pre-Trigger Trades and Early Day Trades on or before one (1) Business Day after the later of (i) the Trade Date or (ii) the Trigger Date or (y) for Post-Trigger Trades and Secondary Trades on or before one (1) Business Day after the Trade Date, the obligation of Buyer to, upon receipt from Seller of Seller's executed signature pages to such Confirmation and Assignment Agreement, deliver, within one (1) Business Day of such receipt, (x) Buyer's signature to the Confirmation to Seller and (y) the Assignment Agreement executed by both Buyer and Seller to the Administrative Agent for purposes of settling the Transaction; or

(iii) where Buyer is the Drafting Party and Buyer has not delivered to Seller (A) the Confirmation, which includes the Trade Details on or before one (1) Business Day after the Trade Date and (B) the Assignment Agreement, on or before (x) for Pre-Trigger Trades and Early Day

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Trades, one (1) Business Day after the later of (i) the Trade Date or (ii) the Trigger Date or (y) for Post-Trigger Trades and Secondary Trades, one (1) Business Day after the Trade Date, Seller may notify Buyer (a "Buyer Failure Notice") by no later than (x) for Pre-Trigger Trades and Early Day Trades, three (3) Business Days after the later of the Trade Date or the Trigger Date or (y) for Post-Trigger Trades and Secondary Trades, three (3) Business Days after the Trade Date that Buyer has failed to deliver such documents to Seller; provided, further:

(A) if a Buyer Failure Notice is timely provided by Seller and Buyer thereafter delivers to Seller (A) the Confirmation executed by Buyer, which includes the Trade Details and (B) the Assignment Agreement executed by Buyer, in each case, on or before (x) for Pre-Trigger Trades and Early Day Trades, five (5) Business Days after the later of the Trade Date or the Trigger Date or (y) for Post-Trigger Trades and Secondary Trades, five (5) Business Days after the Trade Date, Buyer shall be deemed to have satisfied its Paper Requirements; provided, further, that upon receipt by Buyer from Seller of Seller's executed signature pages to such Confirmation and Assignment Agreement, Buyer shall be obligated to deliver, within one (1) Business Day of such receipt from Seller, the Assignment Agreement to the Administrative Agent for purposes of settling the Transaction; otherwise, Buyer shall not be deemed to have satisfied its Paper Requirements and Section 6(c) shall not apply to the Transaction;

(B) if a Buyer Failure Notice is timely provided by Seller and Buyer thereafter does not deliver (A) the Confirmation executed by Buyer, which includes the Trade Details or (B) the Assignment Agreement executed by Buyer, in each case, on or before (x) for Pre-Trigger Trades and Early Day Trades, five (5) Business Days after the later of the Trade Date or the Trigger Date or (y) for Post-Trigger Trades and Secondary Trades, five (5) Business Days after the Trade Date, Buyer shall be deemed not to have satisfied its Paper Requirements and Section 6(c) shall not apply to the Transaction; or

(C) if a Buyer Failure Notice is not timely provided by Seller to Buyer then Buyer shall be deemed to have satisfied its Paper Requirements.

"Trade Details" means the agreed-upon terms of trade, including, without limitation, the Trade Date, the Borrower, the Credit Agreement, the Facility, the Purchase Amount of the Debt and the Purchase Rate.[8]

6.B Settlement Platform Requirements.

(a) Applicability of Delayed Compensation to Transaction when Transaction Settles on an Electronic Settlement Platform.

(i) General Rule. Section 6(c) of the Standard Terms and Conditions shall apply to a Transaction settling on an Electronic Settlement Platform in circumstances where the Trade Details have been timely submitted to an Electronic Settlement Platform (and a corresponding Confirmation has been contemporaneously generated by the Electronic Settlement Platform setting forth such Trade Details)[9], if and only if (A) Buyer (i) has either executed online or submitted via

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[8] The parties acknowledge that the "Trade Details" for Pre-Trigger Trades and Early Day Trades entered into on a Trade Date prior to the Trigger Date may not include the date of the Credit Agreement and such information will be updated on the Trigger Date.

[9] The parties acknowledge that the Confirmation generated by the Electronic Settlement Platform may generate the name of the "buyer" or "seller" therein at a master entity name level and that the buy-side or sell-side party to the Transaction shall be required, to the extent applicable, to sub-allocate the Transaction into the legal entity name(s) to

electronic mail its signature pages to both the Confirmation and Assignment Agreement to the applicable Electronic Settlement Platform and (ii) selected a Proposed Settlement Date of no later than the applicable Commencement Date and selected Persisted[10] in connection therewith, in each case, on or before (x) four (4) Business Days prior to the applicable Commencement Date in the case of a Pre-Trigger Trade, a Post-Trigger Trade or an Early Day Trade or (y) two (2) Business Days prior to the Commencement Date for Secondary Trades, and (B) Buyer pays the Purchase Price to Seller (to the extent the Purchase Price is a positive number) in accordance with the timing requirements set forth in Section 6.B(d) below (collectively (A) and (B) referred to herein as the "Buyer Settlement Platform Requirements").

(ii) Return of Net Credited Amount. To the extent Buyer fails to comply with the Buyer Settlement Platform Requirements but nonetheless pays a purchase price to Seller (or is paid a purchase price to the extent the calculation is a negative number) based upon a DC Purchase Price Calculation (as defined in Section 6.A(a)(ii)), the parties agree that to the extent a Net Credited Amount (as defined in Section 6.A(a)(ii)) exists then, upon demand by Seller to Buyer, Buyer will remit to Seller the Net Credited Amount within two (2) Business Days of such demand.

(b) Obligation to Submit Trade Details. It is the obligation of the Dealer (in its capacity as either Seller or Buyer) to submit the Trade Details for the Transaction to the Electronic Settlement Platform by no later than one (1) Business Day after the Trade Date; provided, however, in the event both parties to the Transaction are Dealers, Seller shall be responsible for submitting the Trade Details to the Electronic Settlement Platform by no later than one (1) Business Day after the Trade Date; and provided, further, in the event neither party to a Transaction is a Dealer then Seller shall be responsible for submitting the Trade Details to the Electronic Settlement Platform by no later than one (1) Business Day after the Trade Date.

(c) Circumstances Not Impacting Delayed Compensation. Notwithstanding the general rule requirements set forth in Section 6.B(a)(i) above, Section 6(c) shall apply in any of the circumstances set forth below:

(i) Seller/Dealer Fails to Timely Submit the Trade Details to Electronic Settlement Platform. Where either (A) Seller is the Dealer or (B) neither party to the Transaction is a Dealer, and the Trade Details for the Transaction are not submitted to the Electronic Settlement Platform by Seller, in either case of (A) or (B), by one (1) Business Day after the Trade Date;

(ii) Buyer/Dealer Fails to Timely Submit the Trade Details to Electronic Settlement Platform. If Buyer is the Dealer and the Trade Details for the Transaction are not submitted to the Electronic Settlement Platform by the Buyer/Dealer by one (1) Business Day after the Trade Date, then Seller may provide a notice setting forth the Trade Details to the Buyer/Dealer (a "Dealer Failure Notice") no later than three (3) Business Days after the Trade Date;

(A) If a Dealer Failure Notice is timely provided by Seller, then the Buyer/Dealer must (i) submit the Trade Details to the Transaction into the Electronic Settlement Platform within (w) for Early Day Trades, ten (10) Business Days after the Trigger Date, (x) for Pre-Trigger Trades, five (5) Business Days after the Trigger Date, (y) for Post-Trigger Trades, five (5) Business Days after the Post-Trigger Allocation Date or (z) for Secondary Trades, five (5) Business Days after the Trade Date and (ii) satisfy the Buyer Settlement Platform Requirements. To the extent the

which Buyer or Seller intends to sub-allocate to the Transaction to enable the Buyer to timely satisfy its Buyer Settlement Platform Requirements.

[10] Subject to the exception for New CLO Issuers set forth in Section 6.B(c)(vi), to the extent that any time during the Delay Period the Buyer subsequently removes its Persisted election, the Buyer shall be deemed to have failed to satisfy its Buyer Settlement Platform Requirements with respect to the Transaction.

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Buyer/Dealer timely complies with its obligations in (i) and (ii) set forth in the immediately preceding sentence, then Section 6(c) shall apply to the Transaction;

(B) If a Dealer Failure Notice is timely provided by Seller and the Buyer/Dealer does not (i) submit the Trade Details to the Transaction into the Electronic Settlement Platform within (w) for Early Day Trades, ten (10) Business Days following the Trigger Date, (x) for Pre-Trigger Trades, five (5) Business Days after the Trigger Date, (y) for Post-Trigger Trades, five (5) Business Days after the Post-Trigger Allocation Date or (z) for Secondary Trades, five (5) Business Days after the Trade Date or (ii) satisfy the Buyer Settlement Platform Requirements, then Section 6(c) shall not apply to the Transaction; or

(C) If a Dealer Failure Notice is not timely provided by Seller, then Section 6(c) shall apply to the Transaction;

(iii) Purchase Price Calculation Error. If (A) Buyer has not timely paid the Purchase Price to Seller (to the extent the Purchase Price is a positive number) because Buyer reasonably believes in good faith that the calculation of the Purchase Price generated by the Electronic Settlement Platform is incorrect, (B) Buyer has provided Seller with notice detailing such reasonably believed calculation error on or prior to the Business Day on which payment of the Purchase Price is due in accordance with Section 6.B(d) and (C) Buyer has timely complied with all other Buyer Settlement Platform Requirements;

(iv) Force Majeure. If Buyer is unable to timely satisfy its Buyer Settlement Platform Requirements as a result of any act or circumstance relating to the functionality of the Electronic Settlement Platform which (A) is outside the control of Buyer, (B) cannot be prevented or overcome by Buyer and (C) prevents Buyer from being able to perform its Buyer Settlement Platform Requirements; provided, however, under such circumstances Buyer agrees to use commercially reasonable efforts to mitigate the effects of any such act or circumstance and to remedy any inability to perform its Buyer Settlement Platform Requirements as promptly as reasonably practicable;

(v) Material Error in Assignment Agreement. If Buyer timely executes online or submits via electronic mail its signature page to the Confirmation but refrains from timely executing online or submitting via electronic mail its signature page to the Assignment Agreement in accordance with the Buyer Settlement Platform Requirements to the extent the form of Assignment Agreement generated by the Electronic Settlement Platform has a material error; provided, however, Buyer shall be required to notify and use commercially reasonable efforts to have the material error fixed by no later than (A) three (3) Business Days after the Trigger Date for Pre-Trigger Trades, (B) three (3) Business Days after the Trade Date for either Post-Trigger Trades or Secondary Trades, or (C) six (6) Business Days after the Trade Date for Early Day Trades, and to the extent such error for trades is fixed by the Electronic Settlement Platform for (A) Pre-Trigger Trades by no later than four (4) Business Days after the Trigger Date, (B) either Post-Trigger Trades or Secondary Trades by no later than four (4) Business Days after the Trade Date, or (C) Early Day Trades by no later than eight (8) Business Days after the Trade Date, then Buyer shall be obligated to timely satisfy Buyer's Settlement Platform Requirements[11] and pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) in accordance with the timing requirements set forth in Section 6.B(d); or

(vi) New CLO Issuers. If applicable, prior to the Commencement Date, Buyer may indicate on the Electronic Settlement Platform that it is a New CLO Issuer. To the extent Buyer

[11] A material error would include, for example, a reference to the wrong Credit Agreement, Borrower or Facility name. However, a material error would not include, for example, a reference to a Purchase Amount that is different than set forth on the Confirmation to the extent such Purchase Amount has been adjusted subsequent to the Trade Date as a result of any Permanent Repayments or PIK Interest.

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timely makes such indication, Buyer may, in its sole discretion, select at any time during the Delay Period a CLO Blackout Period on the Electronic Settlement Platform during which CLO Blackout Period the Administrative Agent will be unable to make the Assignment Agreement effective on the registry. In such circumstances, Section 6(c) shall continue to apply to the Transaction only to the extent Buyer timely complies with all of Buyer's other Buyer Settlement Platform Requirements.[12]

(d) Notification of Assignment Effectiveness; Payment Timing.

(i) Buyer shall be obligated to fund the Purchase Price based upon the following timeframes during the course of a Business Day in which the parties receive notification of the Assignment Effective Date via the Electronic Settlement Platform ("Electronic Assignment Notification"):

(A) For an Electronic Assignment Notification received on or before 11:00 a.m. (New York time), to the extent Buyer (i) has not elected an Advance Notification Setting, the Assignment Effective Date shall be the same Business Day on which the Electronic Assignment Notification has been provided and Buyer shall be obligated to pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) on such Assignment Effective Date; or (ii) has elected an Advance Notification Setting of one (1) Business Day, the Assignment Effective Date shall be the Business Day immediately following the date on which such Electronic Assignment Notification has been provided and Buyer shall be obligated to pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) on such Assignment Effective Date.

(B) For an Electronic Assignment Notification received after 11:00 a.m. (New York time) but on or before 6:00 p.m. (New York time), the Assignment Effective Date shall be the Business Day immediately following the date on which the Electronic Assignment Notification has been provided and Buyer shall be obligated to pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) on such Assignment Effective Date.

(C) For an Electronic Assignment Notification received after 6:00 p.m. (New York time), to the extent Buyer (i) has not elected an Advance Notification Setting, the Assignment Effective Date shall be the Business Day immediately following the date on which such Electronic Assignment Notification has been provided and Buyer shall be obligated to pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) on such Assignment Effective Date or (ii) has an Advance Notification Setting of one (1) Business Day, the Assignment Effective Date shall be two (2) Business Days following the date such Electronic Assignment Notification is provided and Buyer shall be obligated to pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) on such Assignment Effective Date.

(ii) Notwithstanding the timeframe requirements set forth in clause (i) of this Section 6.B(d) above, Seller and Buyer may mutually agree to override such terms on the Electronic Settlement Platform and have the Assignment Agreement made effective on a different Business Day than contemplated in clause (i) above (the "Override Date") and, to the extent the

[12] In the event the Warehouse Buyer originally set forth on a Confirmation is substituted for an End CLO Buyer during the CLO Blackout Period (and a new Confirmation and Assignment Agreement is thus required to be generated by the Electronic Settlement Platform with the only change made to reflect the End CLO Buyer as the Buyer), the End CLO Buyer shall be deemed to have satisfied clause (A) of the Buyer Settlement Platform Requirements (as set forth in Section 6.B(a)(i)) to the extent the Warehouse Buyer had previously satisfied clause (A) of the Buyer Settlement Platform Requirements (as set forth in Section 6.B(a)(i)).

Administrative Agent makes the Assignment Agreement effective on the Override Date (the "Override Assignment Effective Date"), the Buyer shall then be obligated to pay the Purchase Price to Seller (to the extent the Purchase Price is a positive number) no later than the Override Assignment Effective Date.

(e) Advance Notification Setting; Limited Forfeiture of Delayed Compensation.

(i) Buyer shall not have an Advance Notification Setting established on an Electronic Settlement Platform of more than one (1) Business Day. To the extent Buyer has an Advance Notification Setting of more than one (1) Business Day, then Section 6(c) shall not apply to the Transaction.

(ii) To the extent Buyer has an Advance Notification Setting of one (1) Business Day and the Electronic Assignment Notification is received on a Business Day either (A) on or before 11:00 a.m. (New York time) or (B) after 6:00 p.m. (New York time), then the calculation of the number of calendar days during the Delay Period shall be automatically reduced by one calendar day regardless of whether Buyer timely funds the Purchase Price in accordance with Section 6.B(d)(ii) above and timely complies with Buyer's other Buyer Settlement Platform Requirements.

(f) Further Assurances. Buyer agrees to take such action and perform, or cause to be taken and performed, all such further actions as are reasonably necessary to carry out the intent and purpose of this Section 6.B.

(g) Definitions.

"Advance Notification Setting" means a setting on an Electronic Settlement Platform whereby Buyer elects to receive advance notice prior to the Assignment Agreement being recorded on the books and records of the Administrative Agent and/or the Borrower.

"Dealer" means (a) an entity that buys and sells loans as principal, for its own account, or for the account of its client and holds itself out to the market as standing ready in the ordinary course of its business to purchase from customers and sell to customers loans, in its capacity as a dealer or market maker in such loans and (b) is in fact regularly engaged in the business of making a market in loans extended to corporate borrowers.

"Electronic Settlement Platform" means an electronic settlement platform used to facilitate the transfer of syndicated loans such as ClearPar, Virtus Trade Settlement or any other electronic settlement platform utilized by loan market participants to electronically settle the transfer of syndicated loans.

"Persisted" means the election by Buyer on an Electronic Settlement Platform whereby a Buyer represents that it is financially able to settle the Transaction on any Business Day from and including the applicable Commencement Date until and including the Delayed Settlement Date without interruption.

"Proposed Settlement Date" means the date proposed and submitted by Buyer to the Electronic Settlement Platform as the date the payment of the Purchase Price shall occur in connection with the settlement of the Transaction and the effectiveness of the Assignment Agreement.

7. **Breakfunding:** No breakfunding compensation shall be paid for settlement of a Transaction on a day other than an interest payment date in respect of the Debt unless otherwise specified in the Confirmation.

8. **Assignment Fees and Consent to Transfer Fees:** Unless otherwise specified in the Confirmation, (a) any recordation, processing or similar fee payable to the Administrative Agent or

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otherwise under the Credit Agreement in connection with an assignment ("Assignment Fees") shall be split equally between Buyer and Seller and shall be paid in such amount as specified in the Credit Agreement and (b) any transfer fee payable to the grantor in connection with the transfer of a participation ("Consent To Transfer Fees") shall be paid by Seller in such amount as specified in the applicable participation agreement (or if not so specified, in a reasonable amount requested by the grantor).

9. **Costs and Expenses:** Each of Buyer and Seller shall bear its respective costs and expenses in connection with the Transaction. Seller shall be responsible for all costs, fees and expenses in respect of the Purchase Amount of the Debt that are chargeable to lenders under the terms of the Credit Documents and that are attributable to any period prior to but excluding the Settlement Date. Buyer shall be responsible for all costs, fees and expenses in respect of the Purchase Amount of the Debt that are chargeable to lenders under the terms of the Credit Documents and that are attributable to any period from and after the Settlement Date.

10. **Transfer Documentation:** In the case of an assignment, the parties shall execute an assignment (or similar) agreement in the form stipulated in the Credit Agreement (if so stipulated) or, in the absence of same, a reasonably acceptable assignment agreement containing customary provisions for the purchase and sale of par/near par loan assets (the "Assignment Agreement"). In the case of a participation, unless otherwise specified in the Confirmation, the parties shall execute a participation agreement substantially similar to the LSTA form of Participation Agreement for Par/Near Par Trades most recently published by the LSTA and in existence on the Trade Date. Any such referenced assignment agreement or participation agreement is hereinafter referred to as the "Transfer Documentation." Unless otherwise specified in the Trade Specific Other Terms of Trade section of the Confirmation, the Transfer Documentation shall be prepared, and any required consents shall be obtained, by Seller.

11. **Credit Documents; Confidentiality Agreement:** If (a) "Yes" is specified in the Confirmation with respect to Credit Documents, (b) Buyer is not a lender on the Trade Date and (c) Buyer has requested such documents on or prior to the Trade Date, then Seller shall use commercially reasonable efforts to furnish Buyer, or provide access to Buyer, as promptly as practicable on or after the Trade Date, a true and complete copy of the Credit Agreement (including exhibits and schedules thereto) and all intercreditor agreements, subordination agreements, waivers and amendments executed in connection therewith, in each case as currently in effect, and any other Credit Documents reasonably requested by Buyer. If required by the Credit Agreement and/or requested by Seller, prior to Buyer's receipt of any such Credit Documents, Buyer shall execute and deliver to Seller a confidentiality agreement in the form stipulated in the Credit Agreement or, in the absence of same, a mutually acceptable confidentiality agreement containing customary terms.

    The effectiveness of the trade is not subject to receipt by Buyer of Credit Documents prior to the Trade Date. Seller may provide to Buyer the requested Credit Documents at any time on or prior to the execution and delivery of the Transfer Documentation.

12. **Participations:** If the Transaction is settled as a participation: (a) unless otherwise specified in the "Trade Specific Other Terms of Trade" section of the Confirmation, subject to the terms of the Credit Documents, Seller shall grant or refrain from granting voting rights to Buyer on and after the Settlement Date, and if voting rights are granted, Seller shall vote or refrain from voting pursuant to and to the extent provided under the terms of a participation agreement substantially similar to the LSTA Form of Participation Agreement for Par/Near Par Trades most recently published by the LSTA and in existence on the Trade Date, and (b) unless the parties agree otherwise at the time of trade, Seller may require Buyer to post with Seller collateral for any unfunded portion of a revolving loan/commitment in which Buyer participates (and "Yes" shall be specified in the "Collateral Annex Applicable" section of the Confirmation and opposite "Collateral Annex Applicable" in the Transaction Summary of such participation agreement), and (c) subject to the terms of the Credit Documents, upon the request of either Seller or Buyer, each party shall use

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commercially reasonable efforts and take such actions as are necessary, as soon as reasonably practicable, to cause Buyer or any actual or prospective transferee or subparticipant mutually acceptable to Seller and Buyer with respect to all or any portion of the participated Debt to become a lender of record under the Credit Agreement with respect thereto, all pursuant to and to the extent provided under the terms of a participation agreement substantially similar to the LSTA Form of Participation Agreement for Par/Near Par Trades most recently published by the LSTA and in existence on the Trade Date (and "Yes" shall be specified opposite "Elevation" in the Transaction Summary of such participation agreement).

13. **Syndicate Information:** Unless otherwise specified in the Confirmation, Buyer represents to Seller that (a) Buyer is sophisticated, understands the nature and importance of Syndicate Information (as defined in the Statement of Principles for the Communication and Use of Confidential Information by Loan Market Participants, as amended, supplemented or otherwise modified from time to time) and the manner in which such information can be obtained and has requested such information from Seller in connection with the Transaction, if it so desired such information and (b) where it has not requested Syndicate Information in connection with such Transaction it has otherwise obtained such information as it has deemed appropriate under the circumstances to make an informed decision regarding the Transaction without reliance on Seller. If Buyer has requested Seller to provide Syndicate Information, and Seller has agreed to provide such information to Buyer, unless otherwise agreed, Seller represents to Buyer that Seller has used reasonable efforts to maintain Syndicate Information and that it has disclosed to Buyer all material Syndicate Information retained by it as of the Trade Date. Unless otherwise specified, Buyer acknowledges to Seller that (i) such Syndicate Information has been disclosed to it, (ii) the Syndicate Information so disclosed may not be complete because Seller may not have retained all such information and (iii) Buyer has taken all steps it deems necessary under the circumstances to assure that it has the information it deems appropriate to make an informed decision regarding the Transaction. Subject to the foregoing, if Buyer has requested Seller to provide Syndicate Information, and Seller has agreed to provide such information to Buyer, Seller shall use commercially reasonable efforts to provide to Buyer (if Buyer is not already a lender as of the Trade Date) notice with respect to all amendments and waivers of the Credit Documents arising between the Trade Date and the Settlement Date (but Seller need not solicit a vote from Buyer with respect to any such amendment or waiver). Buyer agrees to keep all Syndicate Information disclosed to it confidential in accordance with the terms of the confidentiality provisions of the Credit Agreement. Buyer acknowledges that Syndicate Information may include material non-public information concerning any obligors(s), or the securities of the obligor(s), that it has developed compliance procedures regarding the use of material non-public information and that it will handle such material non-public information in accordance with applicable law, including federal and state securities laws.

14. **Principal/Agency Status:** Each of Buyer and Seller shall indicate in the Confirmation whether it is acting as a principal or an agent in the Transaction. If applicable, each of Buyer and Seller shall identify in the Confirmation (or in separate Confirmations) the specific funds that are counterparties and the appropriate allocations in respect thereof. A Buyer or Seller that holds itself out in the Confirmation as a "principal" is directly liable for the completion of the Transaction. A principal may, however, specify in the Confirmation that it is acting as a riskless principal if it has on or prior to the Trade Date agreed with the other party that its obligation to complete the Transaction is subject to successful completion of the purchase from or sale to a third party of the Debt specified in the Confirmation ("Riskless Principal").

A Buyer or Seller that holds itself out to a counterparty in the Confirmation as an "agent" acts on behalf of one or more principals to the Transaction. A Buyer or Seller that holds itself out as an agent in the Confirmation and discloses the identity of such principal(s) in the Confirmation (a) is not liable to such counterparty for the successful completion of the Transaction (unless the parties otherwise agree), and (b) except as expressly provided herein, shall have no liability or obligation to such counterparty in connection with the Transaction. A Buyer or Seller that holds itself out as an agent and does not disclose the identity of such principal(s) in the Confirmation will be liable to

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the counterparty as agent for an undisclosed principal to the extent provided under applicable New York law. A Buyer or Seller that indicates in the Confirmation its status as an agent represents to the counterparty that it is authorized to bind its principal(s) to the terms of the Transaction.

15. Nonreliance: Each of Buyer and Seller represents and warrants to the other that (a) it is a sophisticated buyer or seller (as the case may be) with respect to the Transaction, (b) it has, or has access to, such information as it deems appropriate under the circumstances concerning, among other things, the obligor(s)'s business and financial condition to make an informed decision regarding the transfer of the Debt, and (c) it has independently and without reliance on the other party, and based on such information as it has deemed appropriate, made its own analysis and decision to enter into the Transaction, except that Buyer and Seller have each relied upon the express representations, warranties, covenants, agreements and indemnities made by the other in the Confirmation. Each of Buyer and Seller acknowledges that the other has not given it any investment advice or opinion on whether the Transaction is prudent. Except as otherwise provided in the Confirmation and these Standard Terms and Conditions (including with respect to Syndicate Information), Buyer has not relied, and will not rely, on Seller to furnish or make available any documents or other information regarding the credit, affairs, financial condition, or business of the obligor(s), or any other matter concerning the obligor(s). Each of Buyer and Seller acknowledges that (i) the other party currently may have, and later may come into possession of, information regarding the Debt or the obligor(s) that is not known to it and that may be material to a decision to enter into the Transaction ("Excluded Information"), (ii) it has determined to enter into the Transaction notwithstanding its lack of knowledge of the Excluded Information, and (iii) the other party shall have no liability to it, and it hereby to the extent permitted by law waives and releases any claims it may have against the other party, with respect to the nondisclosure of the Excluded Information; provided that the Excluded Information shall not and does not affect the truth or accuracy of the representations or warranties of such party in the Confirmation or these Standard Terms and Conditions.

16. Buy-in/Sell-out: If, in the case (i) of an Assignment Only Election, (ii) where an election of "Assignment" is made in the "Form of Purchase" section of the Confirmation or (iii) where no election is made in the "Form of Purchase" section of the Confirmation, where the transfer and eligibility provisions of the Credit Agreement permit an assignment of the Purchase Amount of the Debt to Buyer, Buyer and Seller are unable to effect settlement on or prior to the BISO Trigger Date (as defined below) due to the failure of either Buyer or Seller to perform its Settlement Delivery Obligations (as defined below) on or before the BISO Trigger Date, then the performing party may send to the nonperforming party, at any time thereafter, a written notice (a "BISO Notice") advising of the performing party's intent to terminate its obligations under the Confirmation and to effect a cover transaction in respect of the specified Debt, unless within five (5) Business Days following delivery of such BISO Notice (the "Cure Period"), the nonperforming party has performed its Settlement Delivery Obligations or, if the nonperforming party is Seller, the nonperforming party has performed its Upstream BISO Obligations (as defined below). Such cover transaction is a "buy in" if Buyer purchases the specified Debt from a counterparty other than the original Seller, and is a "sell out" if Seller sells the specified Debt to a counterparty other than the original Buyer. Such BISO Notice shall be substantially in the form most recently published by the LSTA and in existence on the Trade Date[13], and the nonperforming party receiving such BISO Notice shall promptly acknowledge receipt of same; provided that any failure by the nonperforming party to acknowledge the receipt of the BISO Notice sent in accordance with the provisions of Section 20, "Notices," below shall in no way diminish the effectiveness thereof. If the nonperforming party does not perform its Settlement Delivery Obligations or, if the nonperforming party is Seller, its Upstream BISO Obligations prior to the expiration of the Cure Period, (i) except for the rights and obligations under this Section 16, Section 17, "Buy-in Damages," below and Section 18, "Sell-out Damages," below, and subject to the following paragraph, the obligations of the parties under the Confirmation shall be terminated; (ii) the performing party shall use reasonable commercial efforts to identify a

[13] Note that the form of BISO Notice, if sent by Seller, shall include a representation that Seller holds the specified Debt as of the date of delivery of such BISO Notice.

third-party substitute counterparty and to agree to trade terms for the cover transaction with such counterparty; (iii) if such a substitute counterparty is identified and such trade terms are agreed upon, the performing party shall effect the cover transaction with such substitute counterparty, the trade date of the cover transaction (the "Close-Out Trade Date") being the date of execution by the parties thereto of the trade confirmation for such cover transaction, which transaction shall not be conditioned upon the cover price thereunder not being disputed by the nonperforming party hereunder (the "Close-Out Confirmation"). Notice of the cover price shall be sent to the nonperforming party within one (1) Business Day following the Close-Out Trade Date. If the nonperforming party disputes the reasonableness of the cover price, it shall send written notice to the performing party of such dispute no later than the second Business Day after receipt of notice of such cover price. **Such price dispute shall be submitted to binding arbitration pursuant to, and shall be governed in all respects by, the "Rules Governing Arbitration between Loan Traders with regard to Cover Price for Trades that Do Not Settle by BISO Trigger Date" (the "Arbitration Rules") in existence on the Trade Date.** Such written submission notice (the "Arbitration Notice") shall be substantially in the form most recently published by the LSTA and in existence on the Trade Date. With respect to any arbitration conducted pursuant to the Arbitration Rules, Buyer and Seller waive any right to a hearing and acknowledge that the arbitrators shall not be required to take an oath.

Notwithstanding the foregoing, if the performing party fails to identify such a substitute counterparty or agree upon such cover transaction trade terms within ten (10) Business Days following the expiration of the Cure Period, then the performing party will promptly notify the nonperforming party in writing of such failure and (i) subject to (iii) below, the obligations of the parties under the Transaction shall remain in full force and effect, (ii) subject to (iii) below and if the Transaction under (i) cannot be settled on such basis, both parties will in good faith consider other alternatives to settle or resolve the failed trade by mutual consent and (iii) the performing party may not send any further BISO Notices or effect any further cover transaction in connection with the Transaction without the nonperforming party's consent.

As used herein:

"BISO Trigger Date" means (a) for Early Day Trades, the date that is fifteen (15) Business Days after the later of the Trade Date and the Trigger Date and (b) for Secondary Trades the date that is fifteen (15) Business Days after the Trade Date.

"Settlement Delivery Obligations" means the obligation of Seller and Buyer, as applicable, (i) to execute and deliver to the other party the Confirmation and (ii) to execute and deliver to the other party (and for the party charged with obtaining required consents, to the Administrative Agent) for purposes of settling the Transaction its signature to the Assignment Agreement.

For the avoidance of doubt:

(1) except for the provisions of this subsection (1) itself, the provisions of this Section 16 will not apply if, prior to the Close-Out Trade Date, the parties otherwise have settled the Transaction on the basis of a mutually agreeable alternative structure or other arrangement that affords Buyer and Seller the economic equivalent of the agreed-upon trade;

(2) the provisions of this Section 16 will not apply to a Transaction with respect to which either (A) "Participation" is elected in the "Form of Purchase" section of the Confirmation or (B) on or before the BISO Trigger Date (x) either party has given written notice to the other party that it has reasonably determined pursuant to the transfer and eligibility provisions of the Credit Agreement that, or (y) the parties have mutually agreed that, the Transaction cannot settle by assignment but must settle by participation;

(3) the failure to obtain necessary third-party consents or acknowledgements to or other approvals for settlement of any assignment required pursuant to the transfer and eligibility

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provisions of the Credit Agreement shall not constitute a failure by Seller or Buyer to perform its Settlement Delivery Obligations;

(4) the party failing to perform its Settlement Delivery Obligations in the time and manner described above is the "nonperforming party";

(5) the party performing its Settlement Delivery Obligations in the time and manner described above is the "performing party";

(6) the performing party may exercise, but shall be under no obligation to exercise, its rights under this Section 16, and in so exercising such rights the performing party need not establish that it acted in good faith or engaged in commercially reasonable conduct prior to its performing its Settlement Delivery Obligations in the time and manner described above and the exercise of rights by the performing party under this Section 16 shall not be subject to any defense of the nonperforming party's having acted in good faith or having engaged in commercially reasonable conduct provided the performing party has performed its Settlement Delivery Obligations in the time and manner described above;

(7) if neither party performs its Settlement Delivery Obligations in the time and manner described above then there is no "performing party";

(8) no exercise of rights under this Section 16 shall preclude, before consummation of a cover transaction under this Section 16 and payment of applicable damages under Section 17, "Buy-in Damages," below or Section 18, "Sell-out Damages," below as applicable or other settlement on the basis of a mutually agreeable alternative structure or other arrangement, the exercise of any other right or remedy provided by law;

(9) notwithstanding subsection (3) above, Seller shall not be deemed to be a performing party hereunder and its Settlement Delivery Obligations shall not be satisfied unless Seller also holds the specified Debt as of the date of its delivery of the BISO Notice;

(10) if the party charged with preparing or otherwise producing the Assignment Agreement has not done so on or before the date that is two (2) Business Days prior to the BISO Trigger Date, and after such date but on or before the BISO Trigger Date the other party has sent written notice to such nondelivering party certifying that it is ready, willing and able to execute and deliver its signature to such assignment agreement to the nondelivering party for purposes of settling the Transaction, then the certifying party shall be (i) deemed to be a performing party hereunder and to have satisfied its Settlement Delivery Obligations by the BISO Trigger Date and (ii) entitled to exercise but not obligated to exercise its rights as a performing party under this Section 16;

(11) if (i) Buyer is the performing party, (ii) as of the date of Seller's receipt from Buyer of the BISO Notice Seller does not hold the specified Debt and (iii) prior to the expiration of the Cure Period Seller (A) delivers to Buyer a fully executed copy of the trade confirmation or trade confirmation(s) (with the purchase price and purchase rate thereunder redacted) which Seller has entered into to purchase not less than the principal amount of the specified Debt on terms containing the provisions set forth in this Section 16 through Section 21, "Confidentiality of Terms of Transaction," below, and with a trade date or trade dates not later than the date that is five (5) Business Days after the Trade Date (individually and collectively, the "Upstream Confirmation") and (B) certifies in writing to Buyer simultaneously with such delivery that (a) to the extent of the Purchase Amount of the Debt, the Upstream Confirmation has not been delivered previously and will not be delivered subsequently to satisfy obligations under another trade confirmation analogous to Upstream BISO Obligations hereunder, (b) Seller has performed or will perform by the time required under the Upstream Confirmation as the performing party thereunder all obligations under the Upstream Confirmation analogous to its Settlement Delivery

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Obligations hereunder, (c) if the counterparty(ies) under the Upstream Confirmation has (have) not performed or shall have not performed by the time(s) required under the Upstream Confirmation as a performing party thereunder all obligations thereunder analogous to Settlement Delivery Obligations hereunder, Seller has delivered or will deliver to such counterparty(ies) prior to the expiration of the Cure Period, in each case as the performing party thereunder, a notice analogous to the BISO Notice hereunder in order to commence against such counterparty(ies) the exercise of its rights as a performing party analogous to those rights under this Section 16, (d) Seller will use reasonable commercial efforts to commence the buy-in(s) promptly upon the failure of such counterparty(ies) under the Upstream Confirmation to perform obligations analogous to Settlement Delivery Obligations or Upstream BISO Obligations hereunder prior to the expiration of the period thereunder analogous to the Cure Period hereunder and (e) upon Buyer's timely request, Seller will provide further written certification or other evidence that it has performed the foregoing actions and fully enforced its rights analogous to those contained in this Section 16 as a performing party under the Upstream Confirmation (such delivery and certification, "Upstream BISO Obligations"), then subject to subsection (8) above, Buyer shall not be entitled to exercise any further rights as a performing party against Seller under this Section 16 without Seller's consent; and

(12) the provisions of this Section 16 shall not apply to either a Pre-Trigger Trade or a Post-Trigger Trade.

17. **Buy-in Damages:** Seller shall pay to Buyer on the settlement date (as determined in accordance with the Close-Out Confirmation) of the buy-in cover transaction (a) if the buy-in cover price exceeds the original Purchase Price for the specified Debt, the amount of such excess[14], plus (b) any delayed compensation payable in accordance with Section 6, "Compensation for Delayed Settlement," above with respect to the Purchase Price for each day from (and including) the Commencement Date for the failed trade to (but excluding) the date that is the earlier of (i) the actual settlement of the buy-in cover transaction or (ii) seven (7) Business Days following the Close-Out Trade Date. If the foregoing calculations produce a negative number, Buyer shall pay the net payment to Seller.

18. **Sell-out Damages:** Buyer shall pay to Seller on the settlement date (as determined in accordance with the Close-Out Confirmation) of the sell-out cover transaction (a) if the sell-out cover price is less than the original Purchase Price for the specified Debt, the amount of such shortfall[15], plus (b) any delayed compensation payable in accordance with Section 6, "Compensation for Delayed Settlement," above with respect to the Purchase Price for each day from (and including) the Commencement Date for the failed trade to (but excluding) the date that is the earlier of (i) the actual settlement of the sell-out cover transaction or (ii) seven (7) Business Days following the Close-Out Trade Date. If the foregoing calculations produce a negative number, Seller shall pay the net payment to Buyer.

19. **ERISA Representations:**

(a) Seller represents to Buyer that at least one of the following is true: (1) no interest in the Purchase Amount of the Debt is being sold by or on behalf of one or more "employee benefit plans" (as defined in ERISA) that is subject to Title I of ERISA, a "plan" as defined in Section 4975 of the Code or any entity whose assets include (for purposes of ERISA Section 3(42) or otherwise for purposes of Title I of ERISA or Section 4975 of the Code)

[14] If the original Purchase Price for the specified Debt exceeds the buy-in cover price, then Buyer shall pay to Seller the amount of such excess.

[15] If the original Purchase Price for the specified Debt is less than the sell-out cover price, then Seller shall pay to Buyer the amount of such shortfall.

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the assets of any such "employee benefit plan" or "plan," (collectively, "Benefit Plans"), (2) the transaction exemption set forth in one or more PTEs, such as PTE 84-14 (a class exemption for certain transactions determined by independent qualified professional asset managers), PTE 95-60 (a class exemption for certain transactions involving insurance company general accounts), PTE 90-1 (a class exemption for certain transactions involving insurance company pooled separate accounts), PTE 91-38 (a class exemption for certain transactions involving bank collective investment funds), and PTE 96-23 (a class exemption for certain transactions determined by in-house asset managers) is applicable with respect to the sale of the Purchase Amount of the Debt, or (3) the Purchase Amount of the Debt is being sold by the Seller from a fund managed by a Qualified Professional Asset Manager within the meaning of Part VI of PTE 84-14, such Manager made the investment decision on behalf of the Seller to sell the Purchase Amount of the Debt to the Buyer as contemplated by this Confirmation, and the sale of the Purchase Amount of the Debt hereunder satisfies the requirements of sub-sections (b) through (g) of Part I of PTE 84-14, and to the best knowledge of the individual making the investment decision to transfer the Purchase Amount of the Debt on behalf of the Seller, the requirements of subsection (a) of Part I of PTE 84-14 are satisfied.

(b) Buyer represents to Seller that at least one of the following is true: (1) no interest in the Purchase Amount of the Debt is being acquired by or on behalf of an entity that is, or at any time while the Purchase Amount of the Debt is held thereby will be, one or more Benefit Plans, (2) the transaction exemption set forth in one or more PTEs, such as PTE 84-14 (a class exemption for certain transactions determined by independent qualified professional asset managers), PTE 95-60 (a class exemption for certain transactions involving insurance company general accounts), PTE 90-1 (a class exemption for certain transactions involving insurance company pooled separate accounts), PTE 91-38 (a class exemption for certain transactions involving bank collective investment funds), and PTE 96-23 (a class exemption for certain transactions determined by in-house asset managers) is applicable with respect to the purchase and holding of the Purchase Amount of the Debt and the exercise of Buyer's rights thereunder, or (3) the funds being used by Buyer to purchase the Purchase Amount of the Debt are from a fund managed by a Qualified Professional Asset Manager within the meaning of Part VI of PTE 84-14, such Manager made the investment decision on behalf of the Buyer to purchase the Purchase Amount of the Debt from the Seller as contemplated by this Confirmation, and the purchase of the Purchase Amount of the Debt hereunder satisfies the requirements of sub-sections (b) through (g) of Part I of PTE 84-14, and to the best knowledge of the individual making the investment decision to purchase the Purchase Amount of the Debt on behalf of the Buyer, the requirements of subsection (a) of Part I of PTE 84-14 are satisfied. In addition, if the Transaction is settled as a participation, Buyer further represents to Seller that less than 25%, in the aggregate (computed in accordance with Department of Labor Regulation 2510.3-101(f) as modified by Section 3(42) of ERISA), is being acquired by or on behalf of, or at any time while the participation is held thereunder will be held by, Benefit Plans.

As used herein:

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations promulgated thereunder.

"PTEs" means the prohibited transaction class exemptions issued by the U.S. Department of Labor, as such exemptions may be amended from time to time.

20. Notices: Except for any Arbitration Notice, which shall be in writing and sent by the nonperforming party to both the performing party (at the address and facsimile number specified on the face or in the "Trade Specific Other Terms of Trade" section of the Confirmation or at such other address and facsimile number as the nonperforming party and the performing party shall agree) and the LSTA (at the address and facsimile number specified on the face of the Arbitration Notice or at such other

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address and facsimile number as the nonperforming party and the LSTA shall agree) (a) by hand or by certified mail and (b) by telecopier and shall be effective on such receipt thereof, all other communications between Seller and Buyer in respect of, or notices, requests, directions, consents or other information sent under, the Confirmation (including without limitation all notices other than the Arbitration Notice sent under Section 16, "Buy-in/Sell-out," above) shall be in writing, hand delivered or sent by overnight courier, electronic transmission or telecopier, addressed to the relevant party at its address, electronic mail or facsimile number specified on the face or in the "Trade Specific Other Terms of Trade" section of the Confirmation or at such other address, electronic mail or facsimile number as Seller or Buyer (as applicable) may subsequently request in writing. All such communications and notices shall be effective upon receipt.

21. **Confidentiality of Terms of Transaction**: Both parties shall maintain the confidentiality of the terms of the Transaction unless otherwise required by law or regulatory authority, or other legal process, except that the parties may disclose the terms of the Transaction to their respective affiliates, and the directors, officers, employees, agents, advisors, counsel and auditors of such parties and such parties' affiliates and in connection with the enforcement of the parties' rights and obligations hereunder. Buyer shall be permitted to make any necessary disclosures to prospective purchasers from Buyer regarding the terms of the Transaction (other than the Purchase Rate or Purchase Price), provided that such purchasers shall be subject to substantially the same confidentiality restrictions. To the extent the Confirmation constitutes an Upstream Confirmation, Buyer shall be permitted to make any necessary disclosures described in Section 16, "Buy-in/Sell-out," above to prospective purchasers of all or part of the specified Debt from Buyer regarding the terms of the Transaction (other than the Purchase Rate or Purchase Price), provided that such purchasers shall be subject to substantially the same confidentiality restrictions.

22. **Binding Effect:** By execution of a Confirmation incorporating by reference the Standard Terms and Conditions, each of Buyer and Seller agrees to be legally bound to any other transaction between them (whether entered into before, on or after the Trade Date) with respect to the assignment, purchase, sale and/or participation of commercial and/or bank par/near par loans, or any interest therein, upon reaching agreement to the terms thereof (whether by telephone, exchange of electronic messages or otherwise, directly or through their respective agents, and whether the subject of a confirmation), subject to all the other terms and conditions set forth in any confirmation relating to such transaction, or otherwise agreed. Each of Buyer and Seller further agrees that any such transaction shall be governed by and construed in accordance with the laws of the State of New York, without regard to any conflicts of law provisions that would require the application of the laws of any other jurisdiction. Neither party will assert as a defense to liability under such agreement the lack of a writing signed by it that would otherwise be required to satisfy any statute of frauds, including §1-206 of the New York Uniform Commercial Code, or any comparable statute (collectively, the "Statute of Frauds"). Nothing herein shall be deemed a waiver of any claim or defense other than the Statute of Frauds that either party may have regarding such agreement.

    Each of Buyer and Seller shall record on the trade date of each transaction between the parties and retain in its files a written or electronically recorded trade ticket or similar internal record containing or reflecting evidence of agreement to such transaction, including (a) the date of the agreement, (b) a description of the type of debt including obligor(s) and purchase amount, (c) the identity of the other party to the transaction, and (d) the purchase price or purchase rate.

23. **Governing Law; Confirmation Controls:** The Confirmation and the Standard Terms and Conditions shall be governed by and construed in accordance with the laws of the State of New York (without regard to any conflicts of law provision thereof that would require the application of the laws of any other jurisdiction). In case of any conflict between the terms of the Confirmation and these Standard Terms and Conditions, the Confirmation shall govern and control.

24. **Execution by Electronic Transmission:** It is understood by the parties that the custom in the loan trading market is to execute and deliver any confirmations, confidentiality agreements,

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Transfer Documentation and other transaction documents by telecopy, telefax, e-mail attachment or other means of electronic transmission. The parties agree that all telecopied, telefaxed, e-mailed or electronically transmitted confirmations, confidentiality agreements, Transfer Documentation and other transaction documents, including the Confirmation, and signatures thereto, shall be duplicate originals.

25. Electronic Records and Signatures: It is agreed by the parties that, notwithstanding the use herein or in the Confirmation of the words "writing," "execution," "signed," "signature," or other words of similar import, the parties intend that the use of electronic signatures and the keeping of records in electronic form be granted the same legal effect, validity or enforceability as a signature affixed by hand or the use of a paper-based record keeping system (as the case may be) to the extent and as provided for in any applicable law including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act.[16]

26. Taxes: (1) With respect to the payment of any funds or other property pursuant to the Transaction, whether from Seller to Buyer or from Buyer to Seller, the party required to make such payment (the "Remitting Party") may withhold therefrom any amount required by law or pursuant to FATCA to be withheld, and any amount so withheld shall be treated for all purposes of the Confirmation as having been paid to the recipient of the payment from which the amount was withheld (the "Receiving Party").

(2) Notwithstanding anything to the contrary herein, if the Remitting Party is required to remit amounts received in respect of interests in the Debt or Credit Documents (including Proceeds), the Remitting Party shall (subject to the Remitting Party's right to withhold pursuant to paragraph (1) of this Section) remit to the Receiving Party the amount that the Remitting Party would have received in respect of such interests in the Debt or Credit Documents (including Proceeds) in the absence of any withholding (including any FATCA withholding) that has occurred prior to such remittance, except to the extent that (i) such withholding was imposed as a result of the Receiving Party's failure to comply with any of its obligations under paragraph (3) or paragraph (4) of this Section, (ii) withholding would have been imposed on the Receiving Party had the Receiving Party held such interests in the Debt or Credit Documents (including Proceeds) directly or (iii) FATCA withholding was imposed solely as a result of the Receiving Party's status under FATCA.

(3) The Receiving Party shall furnish to the Remitting Party such forms, certifications, statements and other documents as the Remitting Party may reasonably request to evidence the Receiving Party's exemption from the withholding of any tax imposed by the United States of America or any other jurisdiction, whether domestic or foreign, or to enable the Remitting Party to comply with any applicable laws or regulations relating thereto, and the Remitting Party may refrain from remitting such payment until such forms, certifications, statements and other documents have been so furnished.

(4) Without limiting the generality of the foregoing, if a payment pursuant to the Transaction or a payment under any interests in the Debt or Credit Documents (including Proceeds) would be subject to withholding imposed by FATCA if the Receiving Party were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Internal Revenue Code of 1986 (as amended, and the rules and regulations promulgated under it) (the "Code"), as applicable, or any applicable intergovernmental agreement or regulation), or on account of any of the Receiving Party's "recalcitrant account holders" within the meaning of Section 1471(d)(6) of the Code, the Receiving Party shall deliver to the Remitting Party, at such time or times reasonably requested by the Remitting Party, such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the Code) and such additional documentation reasonably requested by the Remitting Party as may be necessary

[16] To help ensure effectiveness of this provision, parties should manually or electronically sign the initial confirmation between them and retain a hard copy in their records.

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for the Remitting Party to comply with its obligations under FATCA and to determine that the Receiving Party has complied with the Receiving Party's obligations under FATCA or to determine the amount required to be deducted and withheld from such payment. Each party agrees that if any form or certification it previously delivered expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify the other party in writing of its legal inability to do so.

As used herein:

"FATCA" means Sections 1471 through 1474 of the Code (or any amended or successor version), any current or future regulations or official interpretations thereof, any agreements entered into pursuant to Section 1471(b)(1) of the Code, any applicable intergovernmental agreements entered into in connection with the implementation of such Sections of the Code and any applicable fiscal or regulatory legislation, rules or practices adopted pursuant to any such intergovernmental agreements.

"Proceeds" means if, prior to the Settlement Date, the Debt has been reorganized, restructured, converted or otherwise modified, any and all payments or other distributions received by Seller with respect to the Debt pursuant to such reorganization, restructuring, conversion or other modification.

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