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**Supply Chain Issues and Inflation:  
Past, Present, and Future**

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# **Global Supply Chains: Building Efficiency and Resilience**

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This paper explores some fundamental concepts related to supply chains. In particular, it examines what a supply chain is, why supply chains have become global over the past several decades, the benefits and challenges of global supply chains, the impact of supply chain disruptions, what firms have done to make themselves resilient to these disruptions, and technologies that are transforming and improving supply chains.

## **I. Definition of Supply Chain**

A supply chain refers to the interconnected network of individuals, organizations, resources, activities, and technologies involved in the production and distribution of goods and services. It encompasses the flow of materials, information, and finances from the initial sourcing of raw materials to the final delivery of products to end customers.

## **II. Global Nature of Supply Chains**

Over the years, supply chains have become increasingly global for several reasons:

- A. Market Expansion:** Companies have sought to expand their markets beyond domestic boundaries to tap into new customer bases and increase their revenue potential. Global supply chains enable companies to reach customers in different countries and regions, thereby facilitating market expansion.
- B. Access to Resources:** Global supply chains allow companies to access resources, including raw materials, components, and talent, from around the world. By sourcing inputs from different locations, companies can benefit from cost advantages, specialized expertise, and diverse supply options.

- C. Cost Efficiency:** Global supply chains often offer cost advantages through lower production costs, economies of scale, and favorable labor and resource markets. Companies can optimize their operations by locating different stages of production in countries or regions where raw material and labor costs are lower, leading to cost savings and improved competitiveness.
- D. Technological Advancements:** Technological advancements, particularly in transportation and communication, have significantly facilitated global supply chains. Faster and more efficient transportation methods, such as containerization and air freight, have reduced the time and cost associated with shipping goods across long distances. Advanced communication technologies have enhanced real-time collaboration, coordination, and information exchange among supply chain partners across different locations.
- E. Trade Liberalization:** The reduction of trade barriers, such as tariffs and quotas, through international agreements and trade organizations, has encouraged the global flow of goods and services. Trade liberalization has enabled companies to access foreign markets and establish international supply chains with reduced trade barriers and increased market integration.

### **III. Benefits and Challenges of Global Supply Chains**

Global supply chains have many benefits. They have allowed firms to reduce costs, offer lower prices and more variety to consumers, and have improved the standard of living in poorer countries through increased trade. However, global supply chains also come with challenges. Companies need to navigate various complexities, such as cultural differences, regulatory compliance, logistics management, and coordination across geographically dispersed partners.

Additionally, disruptions like the COVID-19 pandemic have highlighted vulnerabilities in global supply chains, emphasizing the need for resilience, agility, and contingency planning.

#### **IV. Causes of Supply Chain Disruptions and Their Impact**

Supply chain disruptions occur due to both supply and demand shocks. A supply shock is an event that disrupts the supply of goods and services in a market, such as natural disasters, trade disputes, labor strikes, or other factors that cause a sudden and unexpected reduction in the supply of goods and services. When a supply shock occurs, the supply chain is disrupted due to a lack of inputs, materials, or finished products. For example, the 2012 port strike in Los Angeles delayed movement of goods through the port and resulted in major supply chain disruptions. Similarly, the 2011 earthquake and tsunami in Japan disrupted automobile supply chains globally for several months and resulted in numerous shortages.

A demand shock is an event that causes a sudden and unexpected increase or decrease in demand for goods and services. Demand shocks may be due to changes in consumer preferences, shifts in population demographics, or other factors that cause a significant increase or decrease in demand. For example, demand for many products, including consumer electronics, declined dramatically as a result of the 2008 recession and resulted in major supply chain disruptions in the electronics industry. Many firms in the industry had substantial excess inventories that they had to sell at a discount or even write off.

Interestingly, in the past few years, both supply *and* demand shocks and massive disruptions in supply chains due to COVID-19 have taken place. Initially, in 2020, demand declined suddenly for many products, such as cars, which resulted in excess inventories. However, demand for electronics, cleaning products, and other items increased dramatically, resulting in shortages. In both cases, supply could not immediately adjust to demand. At the same time, there

were supply shocks because many factories globally had to close for some time due to COVID protocols. In the case of products like electronics for which demand was increased, many shortages resulted due to both supply and demand shocks. However, in 2021 and 2022, demand for cars started increasing, but there were supply shortages, especially of semiconductor chips which cars require. Conversely, demand for electronics started softening in 2022, but many firms had increased production which resulted in excess inventories. Many retailers also overordered products in anticipation of increasing demand and were stuck with excess inventories in 2022.

Supply chain disruptions caused by both supply and demand shocks can result in excess inventories or shortages. Neither is a good outcome, but such disruptions are inevitable to an extent because there is always uncertainty in demand. Sometimes there is uncertainty in supply too. Excess inventories result in price discounts, while shortages lead to lost sales. Both outcomes result in reduced profits. Moreover, shortages can result in higher prices and inflation which may dampen consumer sentiment. Understanding the nature and timing of supply and demand shocks is important for businesses to make appropriate adjustments to their supply chains and pricing strategies to manage risks and maintain profitability.

## **V. Building Resilience in Supply Chains**

Now let's look at what firms can do to make supply chains more resilient to disruptions and if doing so comes at the expense of supply chain efficiency.

The best way to deal with demand fluctuations and small supply delays is to hold safety inventory. This is sufficient for most demand fluctuations which are about 20% to 30%. Based on decades of research, there are excellent optimization methods available for determining how much safety stock to protect against demand fluctuations and small supply delays. These have been incorporated in many software programs used by firms. In fact, new approaches using machine

learning have been developed to further optimize where to hold inventory, how much inventory to hold, etc.

Research in supply chain management, however, has shown that holding a lot of inventory is not a good approach to address major supply disruptions, especially when they occur very rarely (say once in ten or twenty years) and last for a long time. There are a number of things that firms can do to deal with major supply disruptions that have been shown to be very effective.

One of the best things is to have multiple supply sources in just a few different geographical locations. Research shows that having even two or three suppliers in different locations provides a substantial advantage. If one of them is closer to the market served, then this turns out to be very helpful. Moreover, the two or three supply sources don't have to have the same amount of capacity. One can be a low-cost supply source which is the major supply source and is used to satisfy most of the demand. The other source can be a smaller supplier that meets only 10% to 20% of the demand. It may be a higher cost source; but if it's closer to the demand locations, it can be used to react to demand fluctuations more quickly. In this way, you get the best of both worlds, where most of your demand is met from low-cost supply sources that may be far away, and a smaller fraction of your demand is satisfied from the higher cost supply source that can quickly react to demand fluctuations. Having two such sources also protects you against supply disruptions at one location because the second source should have some excess capacity which is deployed if and when needed to meet demand fluctuations.

The second thing that firms have done to address major supply disruptions is to carefully monitor information and material flows, as well as the supplier network. Doing so requires visibility into the entire supply chain network at both upstream and downstream entities. Understanding the inventory levels in the supply chain, supplier capacity, supplier capabilities,

and demand at downstream entities is extremely valuable in making supply chains resilient. During the COVID-19 pandemic, one of the biggest challenges faced in the U.S. was lack of information about and visibility into the inventories of medical equipment and supplies (ventilators, masks, etc.) in various national and state stockpiles. This lack of visibility resulted in shortages and excess inventory. Clearly there's some information which is private that suppliers or distributors may not be willing to share, but certainly you can have visibility into your company's inventory at distributors or retailers. Similarly, when you have long-term contracts with your suppliers, they are your partners, and you can always have sufficient visibility. This has been true for a long time in auto and electronics supply chains.

A third thing that companies can do is to have contingent supply chains. Working collaboratively, companies can reserve excess capacity at one or more of their suppliers; if something goes wrong at one supply source, they can immediately start working with the other one to increase production. Such contingency planning can also be pursued if demand is much higher than anticipated. These "capacity options" can be paid for and then exercised on an as-needed basis.

Finally, firms can simulate their supply chains and use the simulation to stress test them. What happens if a supply source (e.g., a factory) is shut down for a few weeks or a few months? How long can the supply chain function smoothly before there are significant shortages? What is the impact of multiple suppliers on supply chains? What is the impact of holding inventory at different stages in a supply chain? The use of simulations and digital twins to do such what-if analysis is an excellent vehicle for supply chain resiliency planning.

## **VI. Technologies Transforming Supply Chains**



Technology is transforming supply chains in a variety of ways, making them faster, more efficient, and more resilient. Here are some of the major technological forces changing supply chains:

- A. Artificial Intelligence (AI) and Machine Learning (ML):** Large quantities of data are being generated throughout the supply chain due to digitization of supply chains. AI and ML are being used to gain insights into patterns and trends, make accurate predictions, and automate various aspects of the supply chain, from demand forecasting and inventory management to logistics and delivery. This not only increases efficiency but also reduces the risk of human error. For example, Amazon.com uses machine learning, optimization, and simulation to manage all aspects of its vast and complex supply chain (O'Neill 2022).
- B. Internet of Things (IoT) and Smart Containers:** Internet of Things (IoT) technology can be used to track and monitor goods in real time. Smart containers equipped with sensors can monitor the condition of goods, such as temperature, humidity, and vibration levels, and alert companies to any issues (Becha et al. 2020). This technology is especially useful in the food and pharmaceutical industries, where maintaining the correct conditions is crucial.
- C. Digital Twins for Supply Chain Optimization:** A digital twin is a virtual replica of a physical product, process, or system. By creating a digital twin or virtual model of a supply chain, companies can run simulations to anticipate potential problems and solutions by analyzing different scenarios and finding the most efficient ways to respond to disruptions and optimize supply chains (Noble 2022). Also, companies can test the

impact of changes to supply chains, such as adding suppliers, changing inventory levels, or using different transportation modes.

**D. Blockchain:** Blockchain technology can provide a secure and transparent record of transactions in the supply chain. Use of this technology can help prevent fraud and counterfeiting and can also enhance trust and collaboration among the different parties in the chain.

**E. Drones and Autonomous Vehicles:** These technologies are increasingly being used for delivery, especially for the “last mile.” They can significantly speed up delivery times and reduce costs, especially in remote or difficult-to-reach areas.

**F. 3D Printing for On-Demand Manufacturing:** 3D printing allows for goods to be produced on-demand, closer to the point of consumption, reducing the need for long, complex supply chains and large inventories. In the automotive and aerospace industries, companies are using 3D printing to produce spare parts on-demand, reducing both lead times and inventory costs (Formlabs 2022). This also makes supply chains more responsive to demand changes.

**G. Cloud Computing:** Cloud-based platforms and applications can provide a scalable and flexible infrastructure for managing supply chains. They can also facilitate collaboration and information sharing among the different parties in the chain.

**H. Cybersecurity:** As supply chains become more digital and interconnected, they are also becoming more vulnerable to cyberthreats. Therefore, cybersecurity measures are increasingly important to ensure the integrity and reliability of the supply chain.

In summary, technology is making supply chains more transparent, agile, and efficient. The same technology, however, is also creating new challenges and risks, such as cybersecurity

threats and the need for new skills and competencies. Thus, companies need to be proactive in adopting these technologies and managing their implications.

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## **Liquidity Levers and Supply Chain Solutions in a Challenging Market**

By: Sunny Singh and Jonathan Mitnick<sup>1</sup>  
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Traditionally, when a company encounters liquidity issues, there are several common levers it can pull related to its supply chain to “buy time” with its counterparties and improve liquidity. A distressed company can stretch payment terms with its vendors in order to increase liquidity and available cash. Alternatively, a distressed company can approach its original equipment manufacturers (OEMs), or other members of its vertical supply chain, for financial support. Approaching an OEM or supply chain member goes much smoother when a company has already lined up the support of its senior lender, which signals to the OEM or supply chain member that the senior lender (i) sees going concern value in the company, and (ii) will enable a consensual, rather than litigious, resolution.

Current supply chain challenges, as well as those that afflicted companies in a wide variety of industries during the COVID-19 pandemic, have changed how companies utilize those traditional methods of managing distress. Recent supply chain challenges have given vendors, rather than customers, the upper hand in demanding payment terms that are vendor-favorable, because vendors have leverage in a supply-constrained market. In addition, vendors are not newcomers to the market; they are very familiar with the five red flags of company distress—liens, seizing of credit, collection activity, personnel churn, and adverse communications from creditors or competitors. Especially in a supply-constrained environment where everyone is vying for the vendor’s goods, a vendor will actually tighten payment terms when it senses signs of distress.

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<sup>1</sup> Sunny Singh is a partner and Jonathan Mitnick is an associate at Simpson Thacher & Bartlett LLP.

This is particularly important when a company starts telegraphing that it is considering an in-court restructuring, as vendors will seek to “preference-proof” their payments. Section 547 of the Bankruptcy Code enables a debtor to recover payments made within ninety days of the petition date, subject to certain statutory defenses.<sup>2</sup> Vendors will require cash-on-delivery or pre-payment in order to ensure that the payments are not recoverable as preferential transfers. Such actions will only serve to exacerbate the company’s financial distress, accelerating its decline.

Two examples from recent retail bankruptcies bear this out. In the First Day Declaration that accompanied the chapter 11 petition of Party City, the company said that Party City owed millions of dollars to suppliers, who either shortened payment terms or asked for cash on delivery.<sup>3</sup> These requests further accelerated Party City’s liquidity issues, which led to its bankruptcy filing. Likewise, Revlon stated in its First Day Declaration that vendors had tightened credit, which worsened the company’s liquidity issues.<sup>4</sup> Revlon was hit by supply chain issues on other fronts as well: It struggled to source the ingredients and components for its products because it could not compete with better-financed competitors, who were able to make higher offers to suppliers and pay up front for products. These, combined with other challenges, forced Revlon into bankruptcy.<sup>5</sup>

Other common methods companies use to increase liquidity are currently under stress, and therefore companies are turning to creative (and sometimes litigation-generating) methods to raise capital. Traditionally, a cash-strapped company will turn to a traditional bank, an asset-based loan

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<sup>2</sup> See generally 11 U.S.C. § 547.

<sup>3</sup> Declaration of David Orlofsky, Chief Restructuring Officer of Party City Holdco Inc., in Support of Chapter 11 Petitions and First Day Motions, ¶ 52, *In re Party City Holdco Inc.*, Case No. 23-90005 (DRJ), Docket No. 11 (Bankr. S.D. Tex. filed Jan. 17, 2023).

<sup>4</sup> Declaration of Robert M. Caruso, Chief Restructuring Officer, (I) in Support of First Day Motions and (II) Pursuant to Local Bankruptcy Rule 1007-2, ¶ 133, *In re Revlon, Inc.*, Case No. 22-10760 (DSJ), Docket No. 30 (Bankr. S.D.N.Y. 2023), *appeal docketed* (hereinafter referred to as “Revlon First Day Declaration”).

<sup>5</sup> *Id.* ¶ 113.

“ABL”) lender, or even a non-bank direct lender to increase liquidity. However, given rising interest rates, the terms that a bank or ABL lender will offer may be prohibitively expensive for a distressed company. And with respect to an ABL, the current inflationary environment, which has dampened consumer discretionary spending, is likely to lead to lower valuations of retail inventory, which is the primary collateral of an ABL.

Due to the challenges of securing traditional financing, companies have turned to novel liquidity solutions. For example, Bed Bath and Beyond was tracking toward bankruptcy but was able to stave it off (temporarily) by raising equity from a hedge fund.<sup>6</sup> Likewise, many companies have engaged in “liability management transactions,” including “uptiering” or “drop-down” transactions (or some combination of the two), in order to increase liquidity.<sup>7</sup>

These transactions have led to a proliferation of litigation about whether they breach the express terms of the contract and the implied covenant of good faith and fair dealing, especially when the opportunity for improved economics through an uptier or a drop-down is not offered to all lenders equally.<sup>8</sup> Additionally, these solutions may be temporary stopgap solutions, as many of

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<sup>6</sup> Declaration of Holly Etlin, Chief Restructuring Officer and Chief Financial Officer of Bed Bath & Beyond Inc., in Support of the Debtors’ Chapter 11 Petitions and First Day Motions, ¶¶ 53–58, *In re Bed Bath & Beyond Inc.*, Case No. 23-13359 (VFP), Docket No. 10 (Bankr. D.N.J filed on Apr. 23, 2023).

<sup>7</sup> In a typical “uptiering” transaction, the company incurs new money “super-priority” loans provided by a group of existing lenders, and the participating lenders’ existing loans are exchanged for *pari passu* or second-priority loans, while non-participating lenders’ existing loans are effectively subordinated to the new tranches of debt. In a typical “drop-down” transaction, the company designates an unrestricted subsidiary and transfers assets to that subsidiary (so that they will be unencumbered by existing liens), and the subsidiary incurs new financing that is secured by the contributed assets. The new financing is structurally senior to existing loans vis-à-vis the contributed assets. *See generally* Vincent S.J. Buccola & Greg Nini, *The Loan Market Response to Dropdown and Uptier Transactions* (June 29, 2022), SSRN: <https://ssrn.com/abstract=4143928> or <http://dx.doi.org/10.2139/ssrn.4143928>.

<sup>8</sup> *See, e.g., In re Serta Simmons Bedding, LLC*, No. 23-90020, 2023 WL 3855820 (Bankr. S.D. Tex. June 6, 2023), *appeal filed* [Docket No. 1048] (June 7, 2023); *Bayside Cap. Inc. v. TPC Grp. Inc. (In re TPC Grp. Inc.)*, Adv. Proc. No. 22-50372 (CTG), 2022 WL 2498751 (Bankr. D. Del. July 6, 2022), *request for stay denied*, 2022 WL 2952518 (D. Del. July 26, 2022); *LCM XXII Ltd. v. Serta Simmons Bedding, LLC*, No. 21 Civ. 3987 (KPF), 2022 WL 953109 (S.D.N.Y. Mar. 29, 2022); *Audax Credit Opportunities Offshore v. Tmk Hawk Parent*, Index No. 565123/2020, 150 N.Y.S.3d 894 (N.Y. Sup. Ct. 2021).

the companies that engaged in uptier or drop-down transactions filed for bankruptcy not long after the transaction closed.<sup>9</sup>

Given the challenges that distressed companies face in the current environment, how can a distressed company successfully navigate supply chain and financial challenges? First, a company must communicate to the market and its supply chain partners that it is facing financial distress—not economic distress—and the message must be credible. “Financial distress” means that the company is overleveraged and burdened with debt, but the underlying business model is sound, and it can be a profitable company with a right-sized capital structure. “Economic distress” means that a company has poor operating performance and may be a “zombie company” that is no longer viable in the marketplace.

A company would obviously prefer to be in mere financial, rather than economic, distress. However, a study in 2016 showed that the distinction between financial and economic distress also led to different downstream effects of a bankruptcy on a company’s supply chain partners.<sup>10</sup> In the study, Kolay et al. reviewed the financial performance of suppliers that went through bankruptcy—with either financial or economic distress—by looking at the suppliers’ economic figures in their public filings. The authors found that companies in financial distress, which were highly likely to reorganize under chapter 11, also created smaller spillover costs for their supply chain partners. In contrast, companies in economic distress, which were likely to be liquidated in asset sales or otherwise in bankruptcy, generated large spillover costs for their supply chain partners.

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<sup>9</sup> See, e.g., *In re Serta Simmons Bedding, LLC*, Case No. 23-90020 (DRJ) (Bankr. S.D. Tex. Jan 23, 2023); *In re TPC Grp. Inc.*, Case No. 22-10493 (CTG) (Bankr. D. Del. June 1, 2022); *In re Chinos Holdings, Inc.* (“*J. Crew*”), No. 20-32185 (KLP) (Bankr. E.D. Va. May 4, 2020).

<sup>10</sup> Madhuparna Kolayet al., *Spreading the Misery? Sources of Bankruptcy Spillover in the Supply Chain*, 51 *J. of Fin. & Quantitative Analysis*, 1955, 1988 (2016).

Based on this research, distressed companies should very early on be sure that any messaging around its distress be couched in purely financial, rather than operational, terms. Supply chain partners that anticipate a financial restructuring, and a resulting trading partner that is even stronger than before, are not likely to cause greater distress by tightening payment terms or requiring cash on delivery. Additionally, the findings indicate that a distressed company and senior lenders have leverage to motivate OEMs to pitch in and ensure a successful restructuring rather than a liquidation—because a liquidation will hit the bottom line of an OEM as well.

Companies with purely financial distress are not out of the woods though. Because such companies are overleveraged and lack liquidity, they face more difficulty effectuating operational changes or new technology to manage supply chain challenges. Warehousing and inventory banking, which companies typically use to manage their supply chains, are more difficult to employ with cramped liquidity. Likewise, a financially distressed company will have a harder time ordering products in advance, to mitigate shipping delays.

More broadly, implementing supply chain initiatives (like new factories and distribution centers) costs money and is an investment that financially distressed companies cannot afford to make. For example, Nordstrom implemented new technology to track inventory in stores, which enabled it to ship items to customers sooner and avoid shipping delays.<sup>11</sup> Nordstrom also implemented a host of other supply chain-related operational enhancements, including moving outsourced work closer to sites where the products will be needed (“near-shoring”) and opening new distribution centers. These enhancements were costly in the short term, affecting the

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<sup>11</sup> Liz Young, *Apparel Retailers Turn to Chips to Track Merchandise in Stores*, WALL ST. J. (Mar. 28, 2023), <https://www.wsj.com/articles/apparel-retailers-expand-use-of-chips-to-track-merchandise-in-stores-21c37ce5>.



company's profits.<sup>12</sup> However, they enabled Nordstrom to weather the storm and continue providing products to customers and remain a viable business.

A comparison of two retail companies—Guess and Revlon—illustrates the negative interaction between supply chain challenges and financial distress. Guess had a strong capital structure going into 2022, which allowed the company to address supply chain issues. In order to manage these issues, Guess flexed its delivery terms and ordered products earlier (which necessarily required the use of additional capital).<sup>13</sup> The company also invested in improvements to its own supply chain infrastructure. Because Guess handled supply chain issues and even improved its infrastructure, in a subsequent earnings call management discussed the opportunity for strategic acquisitions of competitors that did not weather the supply chain issues as well.<sup>14</sup> Guess's strong capital structure and flexibility not only helped it survive the challenges, but positioned it to buy potentially distressed competitors.

In contrast, Revlon was already a heavily indebted company that had long struggled with liquidity issues.<sup>15</sup> It also faced operational challenges due to direct-to-consumer competition that consumers favored.<sup>16</sup> Revlon effectuated an IP drop-down transaction in order to raise financing, which helped delay its bankruptcy filing.<sup>17</sup> However, suppliers were tightening payment terms,

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<sup>12</sup> See Form 10-K for FY 2022, NORDSTROM (Jan. 28, 2023), <https://investor.nordstrom.com/sec-filings/sec-filing/10-k/0000072333-23-000037>.

<sup>13</sup> See recording of Q3 2023 Guess Earnings Conference Call, GUESS (last modified Nov. 22, 2022), <https://investors.guess.com/events/event-details/q3-2023-guess-earnings-conference-call>.

<sup>14</sup> See recording of Q4 2023 Guess Earnings Conference Call, GUESS (last modified Mar. 14, 2023), <https://investors.guess.com/events/event-details/q4-2023-guess-earnings-conference-call>.

<sup>15</sup> Revlon First Day Declaration, *supra*, at ¶ 10.

<sup>16</sup> *Id.* ¶ 47.

<sup>17</sup> *Id.* ¶¶ 60–66.

which led to even less liquidity and a downward spiral of distress.<sup>18</sup> Revlon ultimately had to file for chapter 11 bankruptcy protection and confirmed a plan through which its lenders received the equity.<sup>19</sup>

This comparison also highlights the impact of vertical integration and technology on a company's viability going forward. In response to the supply chain challenges, companies are innovating to make their own supply chains more efficient. Such innovation requires capital investment. Companies that cannot spare the money, or those that simply cannot maintain a viable business to compete with new technologies or ways of doing business, will face greater difficulties in overcoming supply chain disruption.

The supply chain challenges over the last three years have made the traditional tools for managing financial distress harder to utilize and have prompted novel and aggressive ways of improving liquidity. Companies that are not in financial distress have been able to better weather the difficulties using operational improvements and vertical integration and may even be able to capitalize by strategically acquiring distressed competitors. Those that are in financial distress, but have a viable underlying business, will have an easier time convincing suppliers not to tighten payment terms, which would further exacerbate their distress. Companies in financial distress may even be acquired by suppliers or customers, but those in economic distress will be less attractive targets for acquisition.

*The opinions expressed are those of the authors and do not necessarily reflect the views of their employer, its clients, or any respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

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<sup>18</sup> *Id.* ¶ 133.

<sup>19</sup> Vince Sullivan, *Revlon's Chapter 11 Plan Confirmed Over US Trustee's Objections*, Law360 (Apr. 3, 2023), <https://www.law360.com/articles/1592906/revlon-s-ch-11-plan-confirmed-over-us-trustee-s-objections>.

# **The Impact of Supply Chain Disruptions and Shocks on the Automobile Industry and Suppliers<sup>1</sup>**

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This paper begins with a review of the workout process for automobile suppliers and related automotive entities. It then explores the impact that COVID-19 has had on the automobile industry and its suppliers, including an examination of the demand shocks and supply disruption occasioned by shelter-in-place orders issued after the onset of the pandemic. The paper concludes with a discussion of the efforts undertaken to stabilize the industry and the current challenges in the aftermath of COVID-19.

## **Before COVID-19**

For automobile suppliers, the slide into financial distress normally occurs over time, sometimes over a period of years. As a result of the cyclical nature of the automobile business, practices have developed to ensure continuity of business and the supply of parts while the supplier, the customers, and their banks work through the challenges.

There are typical warning signs indicating the financial distress of a business, including the following:

- the filing of federal or state tax liens against a supplier or customer;
- freezing of supplier or customer bank accounts;
- delays between the delivery of invoices and receipt of payment;
- bounced checks;
- reduction in labor force;

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<sup>1</sup> I would like to express special thanks to the Honorable John T. Gregg of the United States Bankruptcy Court, Western District of Michigan, and Alicia B. Masse of B. Riley Financial (amasse@brileyfin.com) for information that assisted in the creation of this paper.

- upper management turnover;
- commencement of collection lawsuits against a supplier or customer; and
- rumors in the industry.

Vendors to a troubled supplier can respond to the failure of the supplier to make payments in a number of ways—from initiating litigation to negotiating an accommodation agreement with the troubled supplier, the supplier’s customers, and the supplier’s financing bank. However, the alternatives are limited. If the litigation route is chosen, a lawsuit will commonly allege a breach of contract claim and seek a money judgment against the troubled supplier.

Customers of a troubled supplier also have alternatives. Often the supplier will demand price increases and threaten to stop shipping goods under long-term contracts unless its demands are met. The failure to ship may threaten production by shutting down assembly lines, causing the customer to suffer significant damages. To keep the supplier from taking these actions, the customer may file a lawsuit seeking a mandatory injunction requiring the supplier to continue or resume shipments. Such a suit is usually grounded on the fact that the customer has no adequate remedy at law. A complaint will often be accompanied by a request for a temporary restraining order mandating the continuation of shipments immediately upon the filing of the action.

Confronted with these limited alternatives, vendors, customers, the troubled supplier, and the supplier’s financing source will often enter into negotiations to provide for continued operations. The goal of these negotiations is to maintain the financially distressed supplier’s operations until another source can be secured. The troubled supplier’s business assets may be sold to a third party, or the supplier might be merged into an existing, stable entity. In some instances, the supplier can be reorganized.

## Access and Accommodation Agreements<sup>2</sup>

The agreements negotiated among the troubled supplier, the customers, primary secured creditors, and unsecured trade creditors are often memorialized in an accommodation agreement. Such an agreement provides for the continuation of the business while the supplier attempts to restructure or prepare for an orderly liquidation of its assets. Most accommodation agreements have some common provisions.

- 1) Customers concerned with a potential shutdown will seek to re-source the parts at issue to a new supplier. Such re-sourcing may be opposed by the supplier and its bank, as the loss of the revenue stream might negatively impact the troubled supplier and the bank's collateral base. Accommodation agreements will often prohibit or limit re-sourcing but allow customers to prepare for possible re-sourcing in the event that the supplier defaults or shuts down.
- 2) Prices are often increased and payment terms accelerated to strengthen the supplier's cash flow.
- 3) The troubled supplier may not have sufficient working capital, and customers might have to advance funds to the supplier to enable it to continue operations. In addition, customers often give up (or limit) rights of staff for a period of time to help a troubled supplier.
- 4) There is frequently recognition of the customer's ownership of the tooling in the supplier's possession in order to confirm that the tooling is the customer's exclusive property and subject to a bailment in favor of the customer. Further, if the supplier is producing tooling, the customer will seek to have all parties discharge and release their rights related to the tooling upon payment for same.
- 5) The accommodation agreement will often include provisions compelling the customer to purchase raw material, work in process, and finished goods from the troubled supplier pursuant to a predetermined formula in the event of a default by the supplier or the cessation of business.
- 6) The troubled supplier is commonly required to build an inventory bank for customers to ensure a supply of parts while those parts are being re-sourced to a different supplier.

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<sup>2</sup> A sample access and accommodation agreement is attached.

The accommodation agreement typically will be accompanied by an access agreement which provides that if the troubled supplier shuts down or defaults, customers will have immediate access to the supplier's plant to manufacture components until they have built a sufficient inventory bank and made arrangements for re-sourcing of the parts.

This well-orchestrated dance has worked well in the automobile supplier area for quite a while, but, as with everything, change will occur.

## **COVID-19**

Over the last three years, the automotive supply chain has encountered extraordinary challenges. A series of shocks has gripped the auto industry: a global pandemic, a shutdown in Q2 of 2020, a microchip shortage, increased salary expense coupled with significant commodity cost increases (rubber, seat foam, resin, metal, etc.), and shipping port gridlock. Original equipment manufacturers (OEMs) have significantly revised terms and conditions. Electric vehicles (EVs) have accelerated the pace of auto evolution, and consumer frustration with vehicle prices and availability is leading to deteriorating demand.

As a result of the shelter-in-place orders in 2020, both domestically and internationally, the demand for automobiles tanked, and sales were dismal. There was some slight improvement in the second half of 2020, which some saw as an indication of recovery. This proved, however, not to be the case. Despite a brief upturn in the latter half of 2021, the industry continued to face challenges, with consistent downgrades to forecasts for production levels through the end of 2022. In 2022, the global light vehicle production data were 10% under the projected output of 91.1 million units, with an actual output of 82.0 million units. Many suppliers entered 2023 on a downswing. While 2023 production is forecasted to be higher than it was in 2022, actual sales and production have not met projections thus far.

Of equal importance is the divergence of performance between suppliers and OEMs. While supplier margins decreased substantially from 2019 to 2022, OEM performance actually improved over that period of time. Inventory levels were low, and fewer incentives were provided; thus, OEMs sold more profitable, higher priced vehicles, which bolstered their results.

### **Where We Are Now**

Traditionally, supplier insolvency was caused by mismanagement, lack of capital, reductions in volume, or some other problem that could be isolated and corrected. In contrast, the “new normal” presents a number of different challenges, including inflation, high interest rates, and labor shortages, which must be examined to determine an appropriate response. A one-size-fits-all solution will not work; rather, the actions taken must be customized to address the issues being encountered.

In the past, customers could threaten to re-source parts to a different supplier in response to their concerns about continuity of production. Such a threat does not carry as much weight as it did in the past. In many instances, the potential replacement supplier is being faced with the same set of problems as those of the current supplier. Moreover, re-sourcing generally requires an OEM to procure new tooling, because tooling is fragile and can break when moved in a re-source. Notably, replacement tooling is often made in foreign countries, such as Mexico or China. In addition, pandemic-related shutdowns, shipping port gridlock, and other issues have made it much more difficult (and time consuming) for an OEM to obtain replacement tooling, which makes the threat to re-source a hollow one. If the current supplier’s production problems are the result of an increase in interest rate, increases in raw material costs, labor shortage, or increased labor cost, the replacement supplier will probably have the same or similar problems. This will change the dynamic and leverage these negotiations in favor of the troubled supplier.

Moreover, the actual negotiations surrounding new contracts for the production of future parts will probably change. Historically, suppliers have sought long-term, open-ended contracts. These contracts have ensured production of a minimum number of units over a period of time, provided continuity and revenue, and allowed for more certainty in business planning. The rapid increase in raw material costs over the last few years has now altered negotiations, resulting in shorter-term contracts or those with price escalation clauses in the event that certain events occur (e.g., drastic cost increases in materials or components).

A supplier's ability to restructure will now hinge on the viability of this business model, the supplier's capacity to meet evolving challenges, its agility to address the changes that will continue to occur as we work through the post-COVID period, and the conversion from internal combustion engines to alternatives like EVs.



## ACCESS AND ACCOMMODATION AGREEMENT

████████████████████ (“Supplier”), ██████████ (██████████ or “Customer”), and ██████████ (“Lender”) enter into this Access and Accommodation Agreement (the “Agreement”) on June \_\_\_\_, 2006.

### RECITALS

A. Pursuant to various purchase orders and/or supply contracts issued by the Customer to Supplier, together with all replacement, substitute and new purchase orders and supply contracts, and accepted by Supplier (the “Purchase Orders”), Supplier is obligated to manufacture certain Component Parts (as defined below) for the Customer.

B. ██████████ (“Lender”) provides substantially all of Supplier’s working capital and fixed asset financing in the form of loans secured by liens and security interests on all assets.

C. Supplier has advised Customer that its operations face certain financial problems which could cause an interruption in the production of the Component Parts. Supplier has further informed the Customer that without certain accommodations, Supplier may be unable to continue production of the Component Parts and may result in a shutdown of Supplier’s operations.

D. The Customer has requested that Supplier provide it with certain assurances and acknowledgments to induce the Customer to defer from immediately exercising their respective rights under the Purchase Orders.

E. Supplier acknowledges that any material delay in production of the Component Parts or material default under the Purchase Orders will cause the Customer irreparable harm.

F. In consideration for providing the above referenced accommodations, the Customer has requested that Supplier provide the Customer with certain acknowledgements and assurances in order to ensure an uninterrupted supply of Component Parts to satisfy the Customer’s production requirements and resourcing efforts in the event Supplier fails to comply with the terms of this Agreement.

G. Subject to the terms of this Agreement, Lender and the Customer have agreed to provide certain accommodations to Supplier.

H. The Customer and the Lender will execute a Subordinated Participation Agreement of even date herewith indicating Customer’s participation in the advancement of working capital for the use of the Supplier.

**BASED ON THE FOREGOING RECITALS** which are incorporated as representations and warranties of the parties, and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Supplier and the Customer agree as follows:

## **TERMS AND CONDITIONS**

### **1. Defined Terms.**

In addition to those terms defined elsewhere in this Agreement, the following terms have the indicated meaning unless the context otherwise requires:

“Accounts” means any “account” or “chattel paper,” as defined in Sections 9-106 and 9-105, respectively, of the Code, owned now or hereafter by Supplier, and shall also mean and include (i) all accounts receivable, contract rights, book debts, notes, drafts, instruments, documents, acceptances, payments under leases and other forms of obligations, now owned or hereafter received or acquired by or belonging or owing to Supplier (including under any trade name, styles, or division thereof) whether arising out of goods sold or leased or services rendered by Supplier or from any other transaction, whether or not the same involves the sale of goods or services by Supplier (including, without limitation, any such payment obligation or right to payment which might be characterized as an account, contract right, general intangible, or chattel paper under the Uniform Commercial Code in effect in any jurisdiction); (ii) all monies due to or to become due to Supplier under all contracts for the sale or lease of goods or the performance of services by Supplier (whether or not yet earned by performance on the part of Supplier) now in existence or hereafter arising; and (iii) deposit accounts, insurance refunds, tax refunds, tax refund claims and related cash and cash equivalents, not owned or hereafter received or acquired by or belonging or owing to Supplier.

“Code” means the Uniform Commercial Code as in effect in the State of Michigan as of the date of this Agreement.

“Component Parts” shall mean all goods to be manufactured or produced for or sold to the Customer pursuant to the terms of the Purchase Orders.

“Contract Rights” means all rights of Supplier (including to payment) under each Contract (defined below).

“Contract” means, collectively, any licensing agreement and any and all other contracts, supply agreements, or other agreements in or under which Supplier may now or hereafter have any right, title, or interest and which pertain to the lease, sale, or other disposition by Supplier of Equipment, Inventory, fixtures, real property, or the right to use or acquire personal property, as any of the same may from time to time be amended, supplemented, or otherwise modified.

“Default” shall mean any of the following events:

- (a) Supplier acknowledges in writing that it is unable to timely satisfy the respective delivery requirements of Component Parts as required by the Purchase Orders and related releases of the Customer;
- (b) Supplier ceases to satisfy the Customer's requirements pursuant to releases issued by the Customer to Supplier in accordance with the Purchase Orders so as to result in a substantial likelihood of an imminent interruption of one or more of the Customer's assembly operations;
- (c) Supplier fails or refuses for any reason to ship or produce Component Parts, the consequence of which is that production at one or more of Customer's assembly operations is interrupted:
- (d) Supplier makes an assignment for the benefit of creditors or a similar transfer of or action involving a material portion of the Operating Assets or the Real Estate, or a trustee, custodian or receiver is appointed over all or substantially all of Supplier's property;
- (e) Any secured or lien creditor commences a foreclosure action or otherwise seeks to enforce its liens, security interests and/or mortgages in or against a material portion of the Operating Assets and a court order or other relief is granted such that there is a substantial likelihood of an imminent interruption of one or more of Customer's assembly operations;
- (f) Supplier breaches any provision of this Agreement, including without limitation, Supplier's failure to produce an inventory bank as required by this Agreement such that there is a substantial likelihood that Customer's production at any one or more of its assembly operation may be interrupted.
- (g) Any acknowledgment, representation or warranty of Supplier to Lender or the Customer set forth in this Agreement is materially false or misleading at the time given or deemed given.
- (h) Supplier halts production of Component Parts for a period of time greater than 48 hours. or
- (i) Supplier's lenders cease to provide financing to Supplier.

"Documents" means all "documents" as defined in Section 9-105(f) of the Code.

"Equipment" means any "equipment," as that term is defined in Section 9-109(2) of the Code, now or hereafter owned by Supplier, and shall also mean and include all machinery, equipment, vehicles, furnishings, and fixtures (as such terms are defined in Sections 9-313(a) of the Code) now owned or hereafter acquired by Supplier, including without limitation, all items of machinery and equipment of any kind, nature and

description, whether affixed to real property or not, as well as all additions to, substitutions for, replacements of or accessions to any of the foregoing items and all attachments, components, parts (including spare parts), and accessories whether installed thereon or affixed thereto.

“General Intangibles” means all “general intangibles,” as such term is defined in Section 9-106 of the Code, now or hereafter owned by Supplier, including, without limitation, Participating Customer lists, rights in intellectual property, goodwill, trade names, service marks, trade secrets, patents, trademarks, copyrights, applications therefore, permits, licenses, now owned or hereafter acquired by Supplier, but excluding items described in the definition of Accounts.

“Instruments” means all “instruments” as defined in Section 9-105(i) of the Code.

“Intellectual Property” means all now existing or hereafter acquired patents, trademarks, copyrights, inventions, licenses, discoveries, processes, know-how, techniques, trade secrets, designs, specifications and the like (regardless of whether such items are now patented or registered, or registerable, or patentable in the future), and all technical, engineering, or other information and knowledge, production data and drawings, including, without limitation, all items, rights and property defined as Intellectual Property under 11 U.S.C. Section 101, as amended from time to time.

“Inventory” means any “inventory,” as that term is defined in Section 9-109(4) of the Code, wherever located, now owned or hereafter acquired by Supplier or in which Supplier now has or hereafter may acquire any right, title or interest including, without limitation, all goods and other personal property now or hereafter owned by Supplier which are leased or held for sale or lease or are furnished or are to be furnished under a contract of service or which constitute raw materials, work in process or materials used or consumed or to be used or consumed in Supplier’s business, or in the processing, packaging or shipping of the same, and all finished goods.

“Obligations” means all loans, past and future advances, debts, liabilities, and every duty and performance owed by Supplier to the Customer under the Purchase Orders, and this Agreement, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, obtained by assignment or otherwise, with all interest thereon including, without limitation, the obligation to provide the Customer or their designee(s) the “Right of Access” as defined below.

“Operating Assets” means all assets necessary or helpful for production of Component Parts, wherever located, including Equipment, Contract Rights and General Intangibles (other than deposit accounts, insurance refunds, tax refunds, tax refund claims and related cash equivalents), but specifically excluding any Accounts, Inventory, Documents, Instruments, Chattel Paper and Proceeds of such excluded items and proceeds of General Intangibles as defined below.

“Proceeds” shall have the meaning provided it under the Code and, in any event, shall include, but not be limited to: (i) any and all proceeds of any insurance, indemnity, warranty, or guaranty payable to Supplier from time to time with respect to any of the Collateral; (ii) any and all payments (in any form whatsoever) made or due and payable to Supplier from time to time in connection with any requisition, confiscation, condemnation, seizure, or forfeiture of all or any part of the Collateral by any governmental body, authority, bureau, or agency (or any Person acting under color of governmental authority); and (iii) any and all other amounts from time to time paid or payable under or in connection with any of the Collateral.

“Real Estate” means all real property leased or owned by the Supplier.

“Requirement of Law” means the charter and By-Laws or other organizational or governing documents of any entity, and any material law, treaty, rule or regulation or determination of arbitration or a court or other governmental authority, in each case applicable to or binding upon any applicable person or entity of its property or to which such entity or person or any of its property is subject.

## **2. Forbearance.**

A. Lender has agreed to forbear from enforcing any and all of their rights against Supplier or any of Supplier’s assets, including any rights arising under the Loan Documents as a result of any existing defaults thereunder, through the Funding Period but only for so long as the other parties to this Agreement are materially complying with the terms of this Agreement. For purposes of the Agreement, “Funding Period” means the period commencing on the date of execution of the First Amendment to the Credit Facility and expiring on the earlier of (a) the occurrence of a Default as defined above, (b) termination of the First Amendment to the Credit Agreement, (c) a sale of all or substantially all of Supplier’s assets or (d) [REDACTED]

B. Subject to no “Default” occurring under the Access and Security Agreement, and provided that Lender materially complies with the terms of this Agreement, the Customer agrees to forbear from resourcing existing business from Supplier during the Funding Period subject to (i) Supplier performing pursuant to the terms of the applicable Purchase Orders, (ii) the expiration of the Purchase Orders, and (iii) Supplier providing to Customer and Lender an acceptable budget updated on a weekly basis; provided, however, the foregoing shall not prohibit the Customer from taking action to prepare for resourcing at the expiration or termination of the Funding Period, nor shall be the foregoing prohibit resourcing to which Supplier and the relevant Customer mutually agree and provided further that any Purchase Order that would otherwise expire during the Funding Period will be extended through the end of the Funding Period if the relevant Customer has additional requirements for the Component Parts covered by the Purchase Order. For purposes of this Agreement, “resourcing” will not include changes in releases due to normal business fluctuations, cessation of production due to product or program changes, cancellations or modifications, or changes in of removal of factory assist/offload business upon expiration or termination of any agreements related to the sourcing of such factory assist/offload business with Supplier.

C. Limitation on Setoffs.

(a) As to all *bona fide* Customer accounts receivable generated on or after the date of Supplier's execution of the First amendment to the Credit Agreement (collectively the "Customer Accounts"), Customer agrees, for the benefit of Lender and any Trustee only, to suspend and not to assert any defenses, rights and claims for setoffs and/or recoupment, including in connection with any prior, existing or future defaults under any purchase orders including, without limitation, the Purchase Orders or contracts or arising under otherwise applicable law, other than to the extent of the Allowed Setoffs (as defined below). "Allowed Setoffs" shall mean any setoff or recoupment, whether for defective or nonconforming products, quality problems, unordered or unreleased parts returned to Supplier, short shipments, misshipments, improper invoices, mispricing, duplicate payments, billing errors, or vendor hostage payments ("Vendor Payments") (provided that Customer may only assert setoffs for Vendor Payments against accounts payable arising more than 3 business days after Lender's receipt of written notice from Customer advising that a vendor hostage payment has been made to Supplier's vendor(s) and the amount of such payments) but excluding any consequential or special damages. Provided, however, under no circumstances shall Allowed Setoffs, exclusive of Vendor Payments, exceed ten percent (10%) of the face amount of any *bona fide* invoice or accounts receivable. Provided further, that once Allowed Setoffs are asserted against a particular invoice or account receivable, no further Allowed Setoffs may be taken against such invoices or accounts receivable, and if an invoice or account receivable is paid, Customer shall have no right to thereafter assert a setoff or recoupment in respect of such payment(s). For further clarification, with respect to Vendor Payments made by Customer, if Customer has made such payments to a Supplier's vendor because the vendor refuses to ship to Supplier, Customer must give Lender written notice of the claimed setoff and such setoff can only be asserted against accounts payable arising from shipments made by Supplier more than 3 business days after Lender's receipt of such written notice.

(b) Subject to the agreements in this paragraph which are intended for the sole benefit of Lender, Customer reserves and does not waive any rights and interests it may have, but for this Agreement, including the right to assert affirmative claims against Supplier, and the right to cancel or terminate purchase orders or other contracts in accordance with their respective terms and conditions.

**3. Production**

A. Continued Production. Supplier will continue to produce Component Parts under the terms of the respective Purchase Orders and according to the Customer's shipping schedules, including any Component Parts for inventory banks to the extent requested, in the quantities set forth in the applicable shipping schedules and with the same quality level, as existed prior to the Effective Date.

B. Parts Bank.

Supplier agrees to produce for Customer a four week parts bank for each of the Component Parts (the "Parts Banks") to the extent the Customer requests Parts Banks production. The Customer in turn agrees to accept and purchase the Parts Banks as and when delivered subject to all normal production and quality reviews.

C. Protection of Production.

The Customer shall have the unlimited right to, among other things, enter into discussions, negotiations, and agreements regarding the production of the Component Parts by any potential alternative supplier(s), including without limitation, any current or former agents, consultants, directors, employees, or officers of Supplier.

**4. Tooling Acknowledgment.**

Supplier acknowledges and agrees that, exclusive of "Unpaid Tooling" (as defined below), all tooling, dies, test and assembly fixtures, jigs, gauges, patterns, casting patterns, cavities, molds, and documentation including engineering specifications and test reports together with any accessions, attachments, parts, accessories, substitutions, replacements, and appurtenances used by Supplier in connection with its manufacture of the Component Parts for the Customer, including without limitation the items listed on Schedule A hereto (collectively the "Customer Tooling") is owned by the Customer and is being held by Supplier and, to the extent Supplier has transferred the Tooling to third parties, by such third parties, as bailee at will. "Unpaid Tooling" means all items that would otherwise fall within the definition of Customer Tooling except that either a respective Customer has not made full payment of the applicable Purchase Order price or it is not subject to a Customer Purchase Order, provided, however, that each item of Unpaid Tooling will become and be considered Customer Tooling under the terms of this Agreement once it has been paid for in full without setoff or recoupment by the Customer either in accordance with the terms of the applicable Purchase Order or the immediately following paragraph. Additionally, Customer Tooling does not include any tooling manufactured by Supplier in the future under a Purchase Order for a Customer unless and until such tooling has been fully paid for (without setoff or recoupment) by the Customer.

Upon termination of the Funding Period, the Customer will have the right (but not the obligation) to purchase any Unpaid Tooling that is not subject to a Customer Purchase Order for a price mutually agreeable to the Customer, Supplier and Lender not to exceed Supplier's actual cost. Supplier will cooperate with the Customer in determining which Unpaid Tooling not subject to a Purchase Order is necessary or useful for production of the Component Parts, and all parties will use their best efforts to agree upon such prices for such Unpaid Tooling by July 31, 2005. The Customer will not remove Unpaid Tooling until a price has been agreed upon. In the event of a dispute, the Customer will pay the actual cost as proposed by Supplier, with any difference between that cost and the price proposed by the Customer to be held in escrow by Lender pending resolution of such dispute. Such payment will be made by the Customer to Lender for Supplier's account within three (3) business days of the day the Customer takes possession of the Unpaid Tooling by removing it from Supplier's facility.

Supplier acknowledges and agrees that any and all Customer Tooling now being utilized to manufacture parts for the Customer, whether pursuant to direct agreements between Supplier and the Customer or agreements between Supplier and third parties, is subject to the terms of this Agreement and included within the definition of Customer Tooling. Neither Supplier, nor any other person or entity other than the Customer (or their affiliates), has any right, title or interest in the Customer Tooling other than Supplier's right, subject to the Customer's unfettered discretion, to utilize the Customer Tooling in the manufacture of the Component Parts pursuant

to the terms of the Purchase Orders. Subject to the terms of this Agreement, the Customer and its affiliates and designee(s) shall have the right to take immediate possession of the Customer Tooling at any time without payment of any kind from the Customer to Supplier should the Customer elect to exercise such right, and Supplier agrees to cooperate with each Customer in its taking possession of the Customer Tooling. Upon written notice to Supplier, the Customer (or its designees) shall have the right to enter the premises of Supplier ten (10) days after the sending of the written notice and take possession of any and all Customer Tooling, and Supplier agrees to provide the Customer or its designee(s) with such access; provided however, the Customer agrees to forbear from exercising this right during the Funding Period. The Customer's right of possession of Customer Tooling shall not terminate or otherwise affect their respective obligations with respect to Customer Tooling or Unpaid Tooling, including, without limitation, any obligation to make payment to Supplier, Supplier will allow the Customer, its employees, agents and consultants access to inspect the Customer Tooling and the Unpaid Tooling at mutually convenient times upon request.

#### **5. Access to Information.**

Supplier agrees that the Customer, Lender and their respective agents and representatives, consultants, officers and employees shall have full access to Supplier's operations, books, records, officers and employees at any time during business hours, or outside of business hours upon reasonable request, for the purposes of monitoring Supplier's compliance with the terms of this Agreement and any other agreements and contracts between Customer and/or Other Customers and Supplier and/or Supplier and Lender and Supplier will fully cooperate with the consultants of the respective parties. Supplier further acknowledges and agrees that it will preserve and protect Customer's confidential and/or proprietary information, including any intellectual property (i.e. patents, trademarks, copyrights, inventions, licenses, discoveries, processes, know-how, trade secrets, designs, specifications and the like) from unauthorized use and disclosure beyond Customer and Supplier. This right of access to information will not extend to any proprietary information of Other Customers.

Supplier shall provide Customer a copy of its unaudited financial statements (or audited financial statements if such are prepared) at such times as they are provided to Lender (or any replacement lenders). Supplier further agrees to meet as reasonably requested by Customer to provide updates of its financial condition, and any material changes to its operations, financial condition, lending relationship, and supplier relationships in form, content and presentation as requested by Customer.

#### **6. Bankruptcy Court Approvals.**

Supplier hereby agrees that if a bankruptcy petition is filed by or against it, Supplier will exercise its best efforts in good faith to obtain the Bankruptcy Court's entry of a final order under 11 U.S.C. § 361 or § 363 and § 105, binding on any subsequently appointed chapter 11 or chapter 7 trustee, confirming the Customer's rights under this Agreement and authorizing Supplier to enter into same, which order shall be sought simultaneously with the Cash Collateral Order.



**7. Rights of the Customer; Limitations on the Customer's Obligations.**

Unless the Customer exercises the Right of Access, in which case the Customer shall have the obligations outlined in paragraphs 2 and 3 above, the Customer shall not have any obligation or liability by reason of or arising out of this Agreement nor shall the Customer be required or obligated in any manner to perform or fulfill any of the obligations of Supplier.

**8. Right of Access.**

A. General. Supplier hereby grants the Customer or its designee(s) the right, without creating an obligation, to use and occupy the Operating Assets and Real Estate to manufacture Component Parts ("Right of Access") for a period of up to 180 days ("Occupancy Period") upon the occurrence of a Default. The Customer may invoke the Right of Access by delivering written notice to Supplier (with a copy to the Lender) indicating its intention to invoke the Right of Access. The Customer shall have no right to sell, transfer, or dispose of the Operating Assets or the Real Estate as part of the Right of Access. The exercise of the Right of Access by the Customer shall be subject to the terms of this Agreement. Alternatively, upon the occurrence of a Default, the Customer may resource its production from the Supplier after giving notice to Supplier (with a copy to the Lender.)

B. The Customer's Obligations. If the Customer invokes the Right of Access for itself or its designee(s), the Customer shall:

- (i) use reasonable care in the custody and preservation of Supplier's assets, and indemnify, defend and hold Supplier, its officers and directors, harmless from any physical damage to property or physical injury suffered by third parties caused by the Customer or their designee's use of the Operating Assets and Real Estate during the Occupancy Period;
- (ii) indemnify, defend and hold the Lender harmless from any damage to property or injury suffered by third parties caused by the Customer or their designee's use of the Operating Assets and Real Estate during the Occupancy Period;
- (iii) insure and maintain the Operating Assets and the Real Estate in the same condition as existed on the date the Customer exercised the Right of Access, ordinary wear and tear excepted;
- (iv) in lieu of the Purchase Order price, pay the actual costs and expenses incurred in connection with the manufacturing of Component Parts during the Occupancy Period including, without limitation, utilities and other overhead expenses, prorated property taxes and assessments attributable to the Operating Assets and Real Estate, and any payments due on account of any of the Operating Assets which are leased from third parties and leased Real Estate; and

- (v) subject to the Customer's or its designee's right to use and occupy the Operating Assets and Real Estate during the Occupancy Period, afford Supplier's representatives (and representatives of the Lender secured creditors or mortgagees of the Operating Assets and/or Real Estate) reasonable access to inspect the Operating Assets and the Real Estate, to prepare for a liquidation of the Operating Assets and Real Estate at the end of the Occupancy Period, and to sell any asset other than the Operating Assets and Real Estate prior to expiration of the Occupancy Period.

C. If the Customer invokes its Right of Access, Supplier shall comply with the following:

- (i) If the Customer exercise the Right of Access, at the Customer's election in their sole discretion, Supplier shall use its best efforts to continue to employ those of its employees which the Customer determine are necessary to maintain production of Component Parts (the "Retained Employees") and, in turn, lease the Retained Employees to the Customer or the Customer's designee(s), and the Customer or its designee(s) shall reimburse Supplier for all costs and expenses relating to Supplier's employment of the Retained Employees incurred during the Occupancy Period. Without limiting the generality of the foregoing, the Customer or their designee(s) shall reimburse Supplier all amounts incurred by Supplier to meet its regular payroll obligations, including salaries, wages, payroll taxes, workers' compensation, unemployment insurance, disability insurance, welfare, pension and other payments and contributions required to be made by Supplier with respect to the Retained Employees, which are incurred during the Occupancy Period, but in no event will the Customer be liable for any costs for unfunded pension liability or other obligations relating to service prior to the time the Customer exercises the Right of Access. Notwithstanding the foregoing under no circumstances will the Customer be responsible for reimbursing Supplier for costs and expenses relating to Supplier's employment of the Retained Employees to the extent the Retained Employees are performing services unrelated to the production of the Component Parts;
- (ii) During the Occupancy Period, Supplier shall not increase compensation or benefits of the Retained Employees without the consent of the Customer except as may be required by applicable law or pre-existing contract;
- (iii) Supplier shall indemnify, defend and hold the Customer their designee(s) and their respective employees and agents harmless from any and all costs, expenses (including reasonable attorneys' fees), losses, damages, liabilities or injury arising form claims or liabilities arising or accruing prior to the date of the Customer's exercise of the Right of Access, regardless of when such claims are asserted; and

- (iv) During the Occupancy Period, Supplier agrees that the Customer and its designee(s) and respective agents and representatives shall have access to Supplier's books and records for the purposes of confirming and calculating the amounts due, if any, from the Customer under this Agreement.

D. Right to Terminate. The Customer shall have the absolute right to terminate the Right of Access upon ten (10) business days' written notice to Supplier and the Lender. Upon expiration of the notice period, the Occupancy Period will terminate and, except for the Customer's obligations under subparagraph b(i) and payment of any amounts payable under subparagraphs b(i) through (vi) above not paid as of the termination of the Occupancy Period, the Customer shall have no further obligations or liabilities to Supplier or Lender on account of the Right of Access.

**E. Specific Performance. IN CONNECTION WITH ANY ACTION OR PROCEEDING TO ENFORCE THE RIGHT OF ACCESS, SUPPLIER ACKNOWLEDGES THAT THE CUSTOMER WILL NOT HAVE AN ADEQUATE REMEDY AT LAW, THAT THE OPERATING ASSETS AND REAL ESTATE ARE UNIQUE AND THAT THE CUSTOMER SHALL BE ENTITLED TO SPECIFIC PERFORMANCE OF SUPPLIER'S OBLIGATIONS TO AFFORD THE PARTICIPATING CUSTOMER ITS RIGHT OF ACCESS UNDER THIS AGREEMENT.**

F. Appointment of Receiver. In addition to any rights and remedies the Customer may have under the terms of this or any other agreement between the Customer and Supplier, the Customer shall have the right to the appointment of a Receiver to effectuate the Right of Access. In connection with any hearing on the appointment of a receiver, Supplier agrees that at least forty-eight (48) hours actual notice of any request for a hearing on such appointment shall be adequate notice and that the only issue to be litigated at the hearing will be whether or not a Default has occurred.

**G. Irreparable Harm; Limitation of Notice. SUPPLIER ACKNOWLEDGES THAT THE CUSTOMER WILL SUFFER IRREPARABLE HARM IF THE CUSTOMER INVOKES THE RIGHT OF ACCESS AND SUPPLIER FAILS TO COOPERATE WITH THE CUSTOMER IN ALLOWING THE PARTICIPATING CUSTOMER TO EXERCISE THE RIGHT OF ACCESS UNDER THIS AGREEMENT. ACCORDINGLY, PROVIDED THAT SUPPLIER RECEIVES AT LEAST TWENTY-FOUR (24) HOURS' ACTUAL NOTICE OF ANY REQUEST FOR HEARINGS IN CONNECTION WITH PROCEEDINGS INSTITUTED BY THE CUSTOMER, SUPPLIER WAIVES, TO THE FULLEST EXTENT POSSIBLE UNDER APPLICABLE LAW, THE RIGHT TO NOTICE IN EXCESS OF 24 HOURS IN CONNECTION WITH ANY JUDICIAL PROCEEDINGS INSTITUTED BY THE CUSTOMER TO ENFORCE THE RIGHT OF ACCESS.**

## **9. Inventory Purchase Agreement.**

A. Subject to the terms of this Agreement, upon the occurrence of a Trigger Event (as defined below), Customer will purchase all of Supplier's raw materials (including purchased components), work in process and finished goods inventory related to Customer's Component Parts, which are usable (as defined below) and merchantable (as defined below) (collectively, the "Customer Inventory") from (i) Lender (if Lender obtains possession of and the right to sell such inventory by way of repossession, voluntary surrender, judicial intervention or otherwise), (ii) a debtor in possession, a trustee, receiver or interim receiver or similar party lawfully acting for the benefit of Lender, Supplier or Supplier's creditors (collectively, a "Trustee"), for Lender's benefit, or (iii) Supplier, if Lender so elects and all applicable provisions of this Agreement are timely satisfied.

B. Notwithstanding anything contained in this Agreement to the contrary, Customer will only be required to purchase Customer Inventory pursuant to this Agreement if: (i) a Default occurs prior to the expiration of this Agreement, and (ii) the Lender, Supplier or the Trustee acting for the Lender's benefit, as the case may be, can sell and deliver the Customer Inventory to Customer free and clear of all liens and security interests within thirty (30) days after the Lender notifies the Customer of its intent to invoke this Agreement; provided, however, the determination of whether or not the Customer Inventory is usable and merchantable shall be determined as of the date on which Customer is allowed to take possession of such inventory.

C. Customer shall purchase quantities of Customer Inventory required to satisfy the applicable Unsatisfied Releases (defined below). If, at the time of a Default, Customer's Unsatisfied Releases for a particular Component Part are less than (i) the number of the particular finished Component Parts in Supplier's possession, plus (ii) the quantity of the Component Parts that could be manufactured from work in process and raw materials in Supplier's possession, then Customer will purchase such Customer Inventory in the following order of precedence: first, finished product; second, work in process; and, third, raw materials. For example, if Customer's aggregate Unsatisfied Releases for a particular Component Part as of the date of a Trigger Event total 150 units, and Lender takes possession of, or a Trustee has the right to sell, 75 units of Customer Inventory in the finished good state, 50 units of the Customer Inventory in the work in process state, and raw materials sufficient to manufacture an additional 100 units of the subject Component Part, assuming the referenced items are otherwise merchantable and usable (and the terms of the Agreement are otherwise timely satisfied), Customer will purchase on account of the particular Customer Inventory, 75 units of finished goods, 50 units of work in process and 25 units of raw materials. Notwithstanding the foregoing, if a particular finished Component Part requires multiple items of raw material, the fact that Supplier does not have an equal quantity of each item on hand shall not affect Customer's obligation to purchase the raw materials.

D. The term "merchantable" means merchantable as that term is defined in U.C.C. § 2-314 and in conformance with applicable purchase order or supply contract specifications. The term "usable" means finished goods, raw materials and work in process (as the case may be) relating to the Component Parts that are not obsolete and are usable by Customer (or the Customer's alternative supplier(s) of the Component Parts) in connection with manufacturing the Component Parts for which the Customer has or will have Unsatisfied Releases; provided that all inventory that is otherwise merchantable will be deemed usable to the extent of quantities of Component Parts specified in any Unsatisfied Releases. The term "Unsatisfied Releases" means

the quantity of Component Parts provided in the releases, fabrication, raw material or similar authorizations issued by Customer, minus the quantities of Component Parts shipped by Supplier after receipt of such releases and authorizations; provided, however, in no event shall Unsatisfied Releases be less than 90 days' average purchases for the Component Parts currently produced by Supplier over the one year period preceding a Default.

#### **10. Purchase Price.**

The price for Customer Inventory to be purchased under this Agreement (the "Purchase Price") will be calculated as follows:

- i. for raw materials – 100% of the cost of the raw materials, with cost based on Supplier's actual cost.
- ii. for work in process – 100% of the existing selling price for the Component Part in question pro-rated on a percentage of completion basis.
- iii. for finished Component Parts – 100% of the existing selling price to Customer.

All prices are F.O.B. Supplier. For purposes of subparagraph (b) above, percentage of completion shall be based on the mutual agreement of Customer and Lender, or the Trustee, as the case may be, or if such agreement cannot be reached within fifteen (15) days after notice of a Trigger Event, Customer and Lender, or the Trustee, as the case may be, shall each select an independent accountant (whose fees and costs shall be paid by the respective party who retained each accountant) and they shall jointly determine the appropriate percentages of completion for the work in process inventory; if the two independent accountants cannot agree, disputes will be referred to binding arbitration with all costs and expenses shared equally. Should either Lender, or the Trustee, as the case may be, or Customer fail to appoint an accountant within ten (10) days after the fifteen (15) day deadline referred to above, the applicable percentages of completion shall be determined by the independent accountant selected by Customer or Lender, or the Trustee, as the case may be, acting alone. Customer agrees to pay the Purchase Price for Customer Inventory purchased pursuant to this Agreement without setoff or deduction for any claims or rights Customer may otherwise have against Supplier, Lender or Trustee, as the case may be, which rights and claims Customer otherwise reserves and does not waive.

#### **11. License.**

Supplier hereby grants the Customer a non-exclusive worldwide, irrevocable, fully paid right and license to use any Intellectual Property to develop and manufacture the Component Parts for the Customer's use and/or use by third parties (the "License"). The Customer's right to use the License shall include the right to sublicense third parties for the manufacture of Component Parts, provided, however, that any sublicensee must satisfy the terms of this Agreement and sublicensing will have not effect on the Customer's obligation under this Agreement.

A. Right to Use License. Although the License is being granted to the Customer as of the date set forth above, each Customer agrees that neither it nor its sub-licensees will utilize the License unless:

(i) A Default occurs; and

(ii) The Customer invokes the Right to Access (and then it will only use the License during the Occupancy Period).

B. No Royalty. For all purposes, Supplier has been fully paid for the License and other rights granted to the Customer under this Agreement and no royalties, fees, payments, charges or other consideration shall be due from the Customer on account of the License or this Agreement or the Customer's (or sublicensee's) use of the License or other rights granted pursuant to this Agreement. The above is not intended to relieve the Customer in any way of payment obligations under paragraphs 2 and 3 above.

C. Protection of Ownership. The Customer shall treat and preserve the Intellectual Property in accordance with the same practices employed by the Customer to safeguard its own respective intellectual property against unauthorized use and disclosure and will only use such information, data and trade secrets during the Occupancy Period in connection with producing Component Parts. The foregoing obligations of the Customer shall not be applicable to information which is now or becomes hereafter available to the public through no action, conduct, admission or fault of the Customer. The provisions of this paragraph shall survive termination of this Agreement.

## **12. Remedies.**

Upon a Default and the expiration of any applicable cure periods, the Customer shall have all rights and remedies provided in this Agreement, in any other agreements with Supplier, and all rights and remedies available to it under applicable law. Further, in connection with the Customer's rights and remedies under this Agreement:

A. If the Customer exercises the Right of Access, the Customer shall be treated as a secured party in possession and the Customer's use and occupancy of the Operating Assets will not be deemed to be acceptance of such assets in satisfaction of the Obligations;

B. Supplier waives any right it may have to require the Customer to foreclose its security interests and liens and/or reduce the Obligations to a monetary sum; and

C. All of the Customer's rights and remedies under this Agreement are cumulative and not exclusive of any rights and remedies under any other agreement or under applicable law.

## **13. Injunctive Relief.**

Given that the Customer will incur significant damages if Supplier fails to timely satisfy its obligations to the Customer and the Customer's assembly plant operation will be negatively

impacted, and because the Customer does not have adequate remedy at law and would be irreparably harmed by such events, Supplier agrees that the Customer shall be entitled to injunctive relief (both prohibitive and mandatory) in connection with any violations by Supplier of any terms or conditions of this Agreement. The Customer agrees to provide Lender notice of any proceeding seeking injunctive relief simultaneous with providing such notice to Supplier.

**14. Representations and Warranties.** Supplier represents and warrants to the Customer that:

A. Title; No Other Security Interests. Except for the liens and security interest granted to the Lender and liens of record, Supplier owns the Operating Assets free and clear of all liens, claims and security interests.

B. Address. Supplier's chief executive office and the location of the Collateral are set forth in paragraph 23 and shall not be changed without prior written notice to the Customer, but the Operating Assets, wherever located, are covered by this Agreement. Supplier must immediately advise the Customer in writing of any change in its name, trade name, address, or form of organization.

C. Trade Names. Any and all trade names under which Supplier transacts any part of its business, and all former names of Supplier, are those which have been previously disclosed to the Customer in writing.

D. Accuracy of Information. All information, certificates, or statements given to the Customer under this Agreement must be true and complete in all material respects, when given.

**15. Covenants.**

Supplier covenants and agrees with the Customer that from and after the date of this Agreement until the Obligations are paid in full:

A. Further Documentation. At any time from time to time, upon the written request of the Customer, and at Supplier's sole expense, Supplier will promptly and duly execute and deliver any and all such further instruments and documents and take such further action as the Customer may reasonably request for the purpose of obtaining the full benefits of this Agreement and of the rights and powers herein granted. Further, Supplier hereby grants the Customer a power of attorney to execute on its behalf and file necessary financing or continuation statements under the Uniform Commercial Code to perfect the security interest granted hereby and authorizes the filing of such financing statements.

B. Payment of Obligations. Prior to an exercise of the Right of Access by the Customer, if any, Supplier will pay promptly when due, all taxes, assessments and governmental charges or levies imposed upon the Collateral and the Real Estate or in respect of Supplier's income or profits, as well as all claims of any kind (including, without limitation, claims for labor, materials or supplies) against or with respect to the Collateral and Real Estate.

C. Sales or Dispositions of Assets; Certain Uses Prohibited. Supplier will not sell or otherwise dispose of any Operating Assets or the Real Estate except in the ordinary course of business. Further, Supplier will not use any of the Operating Assets or the Real Estate in any way which would materially adversely affect the Customer's Right of Access or the Customer's other rights and remedies under this Agreement. Supplier acknowledges and agrees that it will be reasonable for the Customer to withhold consent if the proposed sale or encumbrance impairs, or may impair, the Customer's rights under this or any other Agreement between the Customer and Supplier.

D. Limitations on Modifications of Agreements, etc. Supplier will not: (i) amend, modify, terminate, or waive any provision of any Contract which might materially and adversely affect the Customer's Right of Access; or (ii) fail to exercise promptly and diligently each and every right which it may have under each Contract in any manner which could materially and adversely affect the Customer's Right of Access or the Customer's other rights or remedies under this Agreement.

E. Maintenance of Insurance. Supplier must, at its expense, keep and maintain the Collateral and the Real Estate insured against all risk of loss or damage from fire, theft, malicious mischief, explosion, sprinklers, and all other hazards or risks of physical damage included within the meaning of the term "extended coverage" in amounts as are ordinarily insured against by other similar businesses and shall name the Customer as loss payee and additional insured thereon.

F. Right of Inspection; Cooperation. In addition to any rights the Customer may have under the Purchase Order, the Customer and their respective representatives shall, upon reasonable request and reasonable times, have the right to enter into and upon any premises where any of the Collateral and the Real Estate are located for the purpose of inspecting the same, observing their use or otherwise protecting the Customer's interests therein. The Customer will take reasonable steps to maintain the confidentiality of information obtained by the Customer except as required by law.

G. Notice of Default. Supplier will provide immediate notice to the Customer by way of facsimile transmission and overnight express mail service, of its or its attorneys' or agents' receipt of any notice of default under Supplier's agreements with the Lenders, or any other secured creditors including, but not limited to, taxing authorities. Supplier hereby grants to the Customer the option, but not the obligation, to exercise whatever rights to cure defaults that Supplier has under such agreements or by law.

## **16. Secured Party and Lessor Acknowledgments.**

A. Supplier will obtain the Lender's acknowledgment to the rights and interests granted to the Customer under this Agreement by providing a copy of a form substantially similar to Exhibit A executed by duly authorized representatives of the Lender.



B. Upon the request of the Customer, Supplier will use its best efforts to deliver to the Customer acknowledgments of the lessors of lease Real Property to the Customer's rights hereunder, in a form substantially similar to Exhibit A (attached).

**17. Amendment to Purchase Orders.**

The purpose of this Agreement is to preserve the rights and interests of the Customer under the Purchase Orders and, by entering into this Agreement, the Customer is not waiving or limiting any rights they have under the Purchase Orders. This Agreement shall be deemed to be incorporated by reference into, and shall constitute an amendment to all existing and future Purchase Orders regardless of whether any specific reference to this Agreement is made in any such Purchase Orders. To the extent that any term or provision in this Agreement is inconsistent with any term or condition of all such Purchase Orders, the terms and conditions of this Agreement shall control.

**18. Term.**

The rights granted to the Customer under this Agreement shall continue until the occurrence of any one or more of the following ("Termination Events"):

- (i) Supplier has satisfied all of its obligations to the Customer arising under this Agreement, the Accommodation Agreement and the Purchase Orders;
- (ii) The Customer fails to invoke the Right of Access prior to the expiration of the Purchase Orders, in which case this Agreement shall expire;
- (iii) The expiration of the Occupancy Period or when all of the Component Parts are resourced, whichever is earlier; or
- (v) Sale of the Operating Assets to a purchaser who agrees to perform the Purchase Orders on the existing terms (or such other terms as are mutually agreeable between the Customer and the purchaser) and who reasonably can demonstrate the ability to perform such Purchase Orders.

Notwithstanding the occurrence of a Termination Event and the termination of this Agreement thereby, Supplier's obligations to indemnify the Customer as set forth in Paragraph 3(c)(iii) shall survive termination of this Agreement. Further, if a secured creditor holding a security interest in substantially all of the Operating Assets commences an enforcement action against the Operating Assets and provides written notice of such action to the Customer, the Customer shall have 30 days after receipt of such notice to invoke the Right of Access; if the Customer fails to invoke the Right of Access within 30 days of its receipt of the notice, the Right of Access shall thereafter terminate.

**19. Confidential Information and Data.**

Without limiting the Customer's rights under this Agreement, to the extent the Operating Assets include or the Customer or its designee(s) otherwise comes into possession of or becomes aware of, Supplier's trade secrets or proprietary information during the Customer's exercise of the Right of Access, the Customer and its designee(s) must (a) keep the information, data, and trade secrets confidential; and (b) only use the information, data, and trade secrets during the Occupancy Period in connection with producing Component Parts. The provision of this paragraph shall survive termination of this Agreement.

**20. Severability.**

Should any provision of this Agreement be held invalid, prohibited or unenforceable in any one jurisdiction it shall, as to that jurisdiction only, be ineffective to the extent to such holding without invalidating the remaining provisions of this Agreement, and any such holding does not invalidate or render unenforceable that provision in any other jurisdiction wherein it would be invalid and enforceable.

**21. Authorization.**

The parties executing this Agreement as representatives warrant that they have the power and authority to execute this Agreement on behalf of the entity that they represent and that their signatures bind said entities to the terms of this Agreement.

**22. Section Headings.**

The Section headings used in this Agreement are for convenience of reference only and are not to affect the construction hereof or be taken into consideration in the interpretation of this Agreement. All references to Sections, Schedules, and Exhibits are to Sections, Schedules, and Exhibits in or to this Agreement unless otherwise specified.

**23. No Waiver; Cumulative Remedies.**

The Customer shall not by any act, delay, indulgence, omission, or otherwise be deemed to have waived any right or remedy under this Agreement or of any breach of the terms and conditions of this Agreement. A waiver by the Customer of any right or remedy under this Agreement on any one occasion shall not be construed as a bar to any right or remedy which the Customer would otherwise have had on a subsequent occasion. No failure to exercise nor any delay in exercising on the part of the Customer any right, power, or privilege under this Agreement, shall operate as a waiver, nor shall any single or partial exercise of any right, power or privilege under this Agreement preclude any other of future exercise thereof or the exercise of any other right, power or privilege. The rights and remedies under this Agreement are cumulative, may be exercised singly or concurrently, and are not exclusive of any rights and remedies provided by any other agreements or applicable law.

**24. Waivers and Amendments; Successors and Assigns.**

No term or provision of this Agreement may be waived, altered, modified, or amended except by a written instrument, duly executed by Supplier and the Customer. This Agreement and all of Supplier's obligations are binding upon the successors and assigns of Supplier, and together with the rights and remedies of the Customer under this Agreement, inure to the benefit of the Customer and their respective successors and assigns. Supplier may not assign or transfer any right or obligation under this agreement without the prior written consent of the Customer.

**25. Governing Law and Forum.**

This Agreement is made in the State of Michigan and shall be governed by, and construed and enforced in accordance with, the laws of the State of Michigan. The parties agree that the federal and state courts sitting in Wayne County, Michigan, have personal jurisdiction over the parties and that proper jurisdiction and venue for any dispute arising from or under this Agreement shall be in the federal or state courts sitting in Wayne County, Michigan.

**26. Notices.**

All notices, requests, and other communications that are required or may be given under this Agreement must be in writing, and shall be deemed to have been given on the date of delivery, if delivered by hand, telecopy or courier, or three (3) days after mailing, if mailed by certified or registered mail, postage prepaid, return receipt requested, addressed as set forth below (which addresses may be changed, from time to time, by notice given in the manner provided in this Section):

If given to Supplier, sent to:

[REDACTED]

with a copy to:

[REDACTED]

If given to Freightliner, sent to:

[REDACTED]

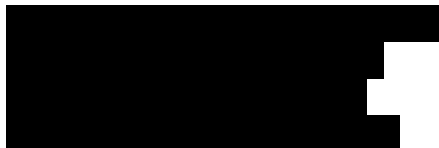
and

[REDACTED]

with a copy to:



If given to Lender, sent to:



**27. No Intended Third Party Beneficiary.**

The parties hereto acknowledge and agree that the rights and interests of the parties under this Agreement are intended to benefit solely the parties to this Agreement, and the Lender.

**28. Counterparts; Facsimile Signatures.**

This Agreement may be executed in any number of counterparts and by each party hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all of which together shall constitute one and the same instrument, and it shall not be necessary in making proof of this Agreement to produce or account for more than one such counterpart. For purposes of this Agreement, facsimile signatures shall also constitute originals.

**29. Entire Agreement; Conflicts.**

This Agreement together with any other agreements and schedules executed in connection with this Agreement constitutes the entire understanding of the parties in connection with the subject matter hereof. This Agreement may not be modified, altered, or amended except by an agreement in writing signed by the Customer and Supplier. Although this Agreement constitutes an Amendment to the Purchase Orders, the terms and conditions of the Purchase Orders shall be unaffected by this Agreement except to the extent that an inconsistency or conflict exists between the express terms of the Purchase Orders and this Agreement in which event the terms of this Agreement shall govern and control. To the extent any term or condition of this Agreement is inconsistent or in conflict with the terms of any other agreements between the parties, the terms of this Agreement shall govern and control.

**30. CONSULTATION WITH COUNSEL.**

**THE PARTIES HERETO ACKNOWLEDGE THAT THEY HAVE BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH COUNSEL BEFORE EXECUTING THIS AGREEMENT AND ARE EXECUTING SUCH AGREEMENT WITHOUT DURESS OR**

**COERCION AND WITHOUT RELIANCE ON ANY REPRESENTATIONS, WARRANTIES OR COMMITMENTS OTHER THAN THOSE REPRESENTATIONS, WARRANTIES AND COMMITMENTS SET FORTH IN THIS AGREEMENT.**

**31. WAIVER OF JURY TRIAL.**

**THE PARTIES HERETO ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL RIGHT, BUT THAT THIS RIGHT MAY BE WAIVED. THE PARTIES EACH HEREBY KNOWINGLY, VOLUNTARILY AND WITHOUT COERCION, WAIVE ALL RIGHTS TO A TRIAL BY JURY OR ALL DISPUTES ARISING OUT OF OR IN RELATION TO THIS AGREEMENT OR ANY OTHER AGREEMENTS BETWEEN THE PARTIES. NO PARTY SHALL BE DEEMED TO HAVE RELINQUISHED THE BENEFIT OF THIS WAIVER OF JURY TRIAL UNLESS SUCH RELINQUISHMENT IS IN A WRITTEN INSTRUMENT SIGNED BY THE PARTY TO WHICH SUCH RELINQUISHMENT WILL BE CHARGED.**



**WITNESSED**

\_\_\_\_\_

a \_\_\_\_\_ limited liability company

\_\_\_\_\_  
Name

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

\_\_\_\_\_  
Name

Its: \_\_\_\_\_

STATE OF \_\_\_\_\_ )

)SS

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ by \_\_\_\_\_, the duly authorized \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ limited liability company, on behalf of the company.

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

\_\_\_\_\_ County, \_\_\_\_\_

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

**EXHIBIT A**  
**LESSOR'S**  
**ACKNOWLEDGMENT AND CONSENT**

While not a party to the Access and Accommodation Agreement (“Access Agreement”) between [REDACTED] (the “Customer”) and [REDACTED] (“Supplier”) dated June \_\_\_\_, 2006 the undersigned leases certain real estate and/or equipment to Supplier, and, in such capacity, the undersigned acknowledges, consents to, and agrees with, and agrees to be bound by, the terms and conditions of the foregoing Agreement, including the Customer’s right to use the Operating Assets and the Real Estate During any Occupancy Period.

Name of Lessor

\_\_\_\_\_

Dated: June \_\_\_\_, 2006