

RE MRD 9-23-98

09-30-1998

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U.S. DEPARTMENT OF COMMERCE
Patent and Trademark Office

FORM PTO-1594

(Rev. 6-93)

OMB No. 0651-0011 (exp. 4/94) DOCUM



100843181

To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):
SnapTrack, Inc.
4040 Moorpark Avenue, Suite 250
San Jose, CA 95117

Individual(s) Association
 General Partnership Limited Partnership
 Corporation-State (California)
 Other _____

Additional name(s) of conveying party(ies) attached? Yes No

2. Name and address of receiving party(ies):
Name: **MMC/GATX Partnership No. 1, c/o GATX Capital Corporation**
Internal Address:

Street Address: **Embarcadero Center, Suite 2200**
City: **San Francisco, State: CA**
Zip: **94111**

Individual(s) citizenship
 Association
 General Partnership
 Limited Partnership
 Corporation-State
 Other

If assignee is not domiciled in the United States, a domestic representative designation is attached:
 Yes No
(Designations must be a separate document from assignment)
Additional name(s) & address(es) attached?
 Yes No

3. Nature of conveyance:
 Assignment Merger
 Security Agreement Change of Name
 Other: **Security Interest in Trademarks pursuant to a Loan and Security Agreement**
Execution Date: **December 30, 1997**

4. Application number(s) or trademark number(s):
A. Trademark Application No.(s)
75/164,631, 75/179,156, 75/186,202, 75/212,584, 75/212,909

B. Trademark Registration No.(s)
838488, 482968

Additional numbers attached? Yes No

5. Name and address of party to whom correspondence concerning document should be mailed:
Name: **Andrew J. Hirsch, Esq.**
Internal Address: **PC2-1**
Street Address:
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

6. Total number of applications and registrations involved: . [7]


7. Total fee (37 CFR 3.41) **\$190.00**
 Enclosed
 Authorized to be charged to deposit account

8. Deposit account number: **23-2415**
(Attorney Docket No.) 14637-049
(Attach duplicate copy of this page if paying by deposit account)

DO NOT USE THIS SPACE

9. Statement and signature.
To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Andrew J. Hirsch, Esq.
Name of Person Signing


Signature May 19, 1998
Date

Total number of pages including cover sheet, attachments, and document: [40]

Mail documents to be recorded with required cover sheet information to:
Commissioner of Patents & Trademarks, Box Assignments
Washington, D.C. 20231

TRADEMARK
REEL: 1793 FRAME: 0657

02-06-1998
100654368

OVER SHEET ONLY

RECEIVED
JAN 23 1998

U.S. DEPARTMENT OF COMMERCE
Patent and Trademark Office

To the Honorable Com documents or copy the

marks: Please record the attached original

1. Name of conveying party(ies): **MKP**
4040 Moorpark Avenue, Suite 250
San Jose, CA 95117
1-28-98
 Individual(s) Association
 General Partnership Limited Partnership
 Corporation-State (California)
 Other _____
Additional name(s) of conveying party(ies) attached? Yes No

2. Name and address of receiving party(ies):
Name: **MMC/GATX Partnership No. I,**
c/o GATX Capital Corporation
Internal Address:

Street Address: **Embarcadero**
Center, Suite 2200
City: **San Francisco,** State: **CA**
Zip: **94111**
 Individual(s) citizenship
 Association
 General Partnership
 Limited Partnership
 Corporation-State
 Other

If assignee is not domiciled in the United States, a domestic representative designation is attached:
 Yes No
(Designations must be a separate document from assignment)
Additional name(s) & address(es) attached?
 Yes No

3. Nature of conveyance:
 Assignment Merger
 Security Agreement Change of Name
 Other: **Security Interest in Trademarks**
pursuant to a Loan and Security Agreement
Execution Date: **December 30, 1997**
JM

4. Application number(s) or trademark number(s):
A. Trademark Application No.(s)
75/164,631, 75/179,156, 75/186,202,
75/212,584, 75/212,909
B. Trademark Registration No.(s)
838488, 482968, 25565/97,
25566/97
Additional numbers attached? Yes No

5. Name and address of party to whom correspondence concerning document should be mailed:
Name: **Andrew J. Hirsch, Esq.**
Internal Address: **PC2-1**
Street Address:
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

6. Total number of applications and registrations involved: . **[9]**
7. Total fee (37 CFR 3.41) **\$240.00**
 Enclosed
 Authorized to be charged to deposit account
8. Deposit account number: **23-2415**
(Attach duplicate copy of this page if paying by deposit account)

02/06/1998 VERDUM 00000025 D08:232415 75164631 DO NOT USE THIS SPACE
01 FEB 1998 44.00 CH
02 FEB 1998 290.00 CH

9. Statement and signature.
To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.

Andrew J. Hirsch, Esq. *[Signature]* January 26, 1998
Name of Person Signing Signature Date

Total number of pages including cover sheet, attachments, and document: **[40]**

Mail documents to be recorded with required cover sheet information to:
Commissioner of Patents & Trademarks, Box Assignments
Washington, D.C. 20231

TRADEMARK
REEL: 1793 FRAME: 0658

EXHIBIT A

SECURED PROMISSORY NOTE

\$ _____

Dated: _____, 1998

FOR VALUE RECEIVED, the undersigned, SNAPTRACK, INC. ("**Borrower**"), a California corporation, HEREBY PROMISES TO PAY to the order of MMC/GATX PARTNERSHIP NO. I, a California general partnership ("**Lender**"), the principal amount of _____ (\$_____) or such lesser amount as shall equal the aggregate outstanding principal balance of the Loan made by Lender to Borrower pursuant to the Loan and Security Agreement referred to below (the "**Loan Agreement**"), and to pay all other amounts due with respect to the Loan on the dates and in the amounts set forth in the Loan Agreement.

The principal amount of this Note shall be payable in thirty consecutive monthly installments of \$____ per month on the last Business Day of each month commencing on _____, 199__.

Interest on the unpaid principal amount of this Note from the date of this Note until such principal amount is paid in full shall accrue at the Loan Rate or, if applicable, the Default Rate. The Loan Rate for this Note is ____% per annum (based on a year of twelve 30 day months). All accrued interest shall be payable on the last Business Day of each calendar month, commencing _____, 199__.

Whenever any payment due hereunder shall fall on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall be included in the computation of interest or fees, as the case may be.

Principal, interest and all other amounts due with respect to the Loan, are payable in lawful money of the United States of America to Lender as follows: c/o GATX Capital Corporation, P.O. Box 71316, Chicago, Illinois 60694, in immediately available funds. The Loan made by Lender to Borrower and the interest rate applicable thereto, and all payments made with respect thereto, shall be recorded by Lender and, prior to any transfer hereof, endorsed on the grid attached hereto which is part of this Note.

This Note is the Note referred to in, and is entitled to the benefits of, the Loan and Security Agreement, dated as of December 30, 1997, between Borrower and Lender. The Loan Agreement, among other things, (a) provides for the making of secured Loans by Lender to Borrower from time to time in an aggregate principal amount set forth therein, the indebtedness of Borrower resulting from each such Loan being evidenced by a Note, and (b) contains provisions for acceleration of the maturity hereof upon the happening of certain stated events.

This Note and the obligation of Borrower to repay the unpaid principal amount of the Loan, interest on the Loan and all other amounts due Lender under the Loan Agreement is secured under the Loan Agreement.

Presentment for payment, demand, notice of protest and all other demands and notices of any kind in connection with the execution, delivery, performance and enforcement of this Note are hereby waived.

Borrower shall pay all reasonable fees and expenses, including, without limitation, reasonable attorneys' fees and costs, incurred by Lender in the enforcement or attempt to enforce any of Borrower's obligations hereunder not performed when due. This Note shall be governed by, and construed and interpreted in accordance with, the laws of the State of California.

IN WITNESS WHEREOF, Borrower has caused this Note to be duly executed by one of its officers thereunto duly authorized on the date hereof.

SNAPTRACK, INC.

By: _____
Name: _____
Title: _____

LOAN, INTEREST RATE AND PAYMENTS OF PRINCIPAL

<u>Date</u>	<u>Principal Amount</u>	<u>Interest Rate</u>	<u>Scheduled Payment Amount</u>	<u>Notation By</u>
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EXHIBIT B
LANDLORD'S WAIVER AND CONSENT

::ODMA\PCDOCS\SQL2\454698\5

TRADEMARK
REEL: 1793 FRAME: 0662

RECORDING REQUESTED BY
AND WHEN RECORDED RETURN TO:

MMC/GATX PARTNERSHIP NO. I
c/o GATX CAPITAL CORPORATION, Agent
Four Embarcadero Center, Suite 2200
San Francisco, CA 94111
Attn: Contract Administration

LANDLORD'S WAIVER AND CONSENT

THIS LANDLORD'S WAIVER AND CONSENT (this "Waiver"), dated as of _____, 199____, is executed by and between _____ ("Landlord") and MMC/GATX PARTNERSHIP NO. I, a California general partnership ("Lender").

RECITALS

A. Landlord and SNAPTRACK, INC. ("Tenant") are parties to a _____ [Lease Agreement], dated as of _____, 19____ (together with any other agreement between Landlord and Tenant relating to the Premises, as defined below, all as amended from time to time, to be referred to herein collectively as the "Lease"), pursuant to which Landlord has leased to Tenant that certain real property commonly known as _____, and more particularly described in Attachment 1 hereto (the "Premises").

B. Tenant and Lender intend to or have entered into a Loan and Security Agreement dated as of December 30, 1997, (the "Loan Agreement") pursuant to which Lender has agreed or will agree to make loans to Tenant from time to time secured by certain assets (the "Assets") which will be located on the Premises.

AGREEMENT

NOW, THEREFORE, in consideration of the above recitals and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, Landlord and Lender hereby agree as follows:

1. Waiver and Consent. Landlord hereby does irrevocably waive, disclaim and relinquish and assign to Lender any and all rights to impose, receive, assert or enforce any lien, encumbrance, charge, security interest, ownership interest, claim or demand of any kind against or involving the Assets, whether arising by common law, statute or consensually (under the Lease or otherwise) and whether now in existence or hereafter created, including, but not limited to, those for rent or other right of payment. This waiver, disclaimer, relinquishment and assignment shall survive the termination of the Lease. Landlord further agrees that (a) neither the Assets nor any item thereof shall become part of, or otherwise be or become a fixture attached to, the Premises, notwithstanding the manner of the Assets' annexation, the Assets' adaptability to the uses and purposes for which the Premises are used, and the intentions of the party making the annexation; (b) the Assets (or any item thereof) may be repossessed by Lender; (c) in connection with such repossession or otherwise, Lender, and any of its agents and employees, may enter upon the Premises for the purposes of preparing for transport, disassembling, dismantling, loading and/or removing the Assets (or any item thereof); and (d) the right of Lender to enter the Premises and the other rights granted to Lender in this Waiver shall not terminate until up to thirty (30) days after Lender receives written notice from Landlord of the termination of the Lease; provided, that if Lender exercises its rights hereunder, for any such period after the termination of the Lease, Lender shall pay to Landlord a pro rated rental payment for the space in which the Assets are located (at the last monthly rate payable by Tenant) for the period until the Assets are removed.

2. Costs. Lender agrees to indemnify and hold the Landlord harmless from any out-of-pocket costs incurred by Landlord for any physical damage to the Premises caused by Lender solely from the exercise of its rights under clauses (b) or (c) of Paragraph 1 above.

3. Lease Defaults. Landlord further agrees to provide Lender with telephonic confirmation of any default or event of default under the Lease upon inquiry by Lender.

4. Landlord's Representations and Warranties. Landlord hereby warrants and represents to Lender that (a) Landlord is the lessor under the Lease; (b) there are no other agreements between the parties affecting or relating to the Premises; (c) Landlord has all requisite power and authority to execute and deliver this Waiver and no consents from any third party are required to do so; (d) no event of default (nor any event which with the passage of time would constitute an event of default) has occurred under the Lease; (e) there exists no litigation affecting title to the Premises or any adverse claim with respect to the Premises of which Landlord has received notice; and (f) there is no condemnation proceeding pending with respect to any part of the Premises, nor any threat thereof, of which the Landlord has received notice.

5. Miscellaneous. This Waiver and all rights hereby granted to Lender hereunder shall remain in effect so long as there are any obligations owing by Tenant under the Loan Agreement or any present or future agreement between Tenant and Lender which involves the Assets. All the terms and provisions of this Waiver shall be binding on and inure to the benefit of the respective successors and assigns of Landlord and Lender. The rights and benefits of this Waiver may be assigned or transferred by Lender or to third parties who may become the lender, directly or indirectly, to Tenant. Lender shall provide subsequent written notice to Landlord and Tenant of the assignment or transfer. Headings in this Waiver are for convenience of reference only and are not part of the substance hereof. This Waiver shall be governed by and construed in accordance with the laws of the State of California.

IN WITNESS WHEREOF, Landlord and Lender have executed this Waiver as of the date and year first written above.

LANDLORD:

By: _____
Name: _____
Title: _____

LENDER:

MMC/GATX PARTNERSHIP NO. I

By: Meier Mitchell & Company, as general partner

By: _____
Name: _____
Title: _____

ATTACHMENT 1
LEGAL DESCRIPTION OF PREMISES

[To Be Provided By Tenant]

State of _____)
)
County of _____)

On _____, 199__ before me, the undersigned, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

State of _____)
)
County of _____)

On _____, 199__ before me, the undersigned, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

**EXHIBIT C
WARRANT**

EXHIBIT D
FORM OF OPINION OF COUNSEL

VENTURE LOAN AND SECURITY AGREEMENT

Agreement No. _____

Dated as of December 30, 1997

between

MMC/GATX PARTNERSHIP NO. I

Four Embarcadero Center

Suite 2200

San Francisco, CA 94111

as Lender

and

SNAPTRACK, INC.

a California corporation

4040 Moorpark Avenue

Suite 250

San Jose, California 95117

as Borrower

CREDIT AMOUNT: \$2,000,000

Treasury Note Maturity: 30 months

Loan Margin: 750 basis points

Commitment Termination Date: March 31, 1998

The defined terms and information set forth on this cover page are a part of the **Venture Loan and Security Agreement**, dated as of the date first written above (this "Agreement"), entered into by and between MMC/GATX PARTNERSHIP NO. I ("Lender") and the borrower ("Borrower") set forth above. The terms and conditions of this Agreement agreed to between Lender and Borrower are as follows:

**ARTICLE I
INTERPRETATION**

1.01. **Certain Definitions.** Unless otherwise indicated in this Agreement or any other Operative Document, the following terms, when used in this Agreement or any other Operative Document, shall have the following respective meanings:

"**Borrower's Home State**" shall mean the state in which Borrower's principal place of business is located.

"**Business Day**" shall mean any day other than a Saturday, Sunday or public holiday under the laws of California, Illinois or Borrower's Home State or other day on which banking institutions are authorized or obligated to close in California, Illinois or Borrower's Home State.

"**Claim**" has the meaning given to that term in Section 10.03.

"**Collateral**" has the meaning given to that term in Section 5.01(a).

"**Commitment Fee**" has the meaning given to that term in Section 2.04.

"**Commitment Termination Date**" shall mean the date specified on the cover page of this Agreement.

"**Credit Amount**" shall mean the maximum amount that Lender is committed to lend (if the conditions specified in Schedule 3 are satisfied), which amount is set forth following such term on the cover page of this Agreement.

"**Current Assets**" shall mean the aggregate amount of all of the consolidated assets of Borrower and its Subsidiaries that would, in accordance with GAAP, be classified on a balance sheet as current assets.

"**Current Liabilities**" shall mean the aggregate amount of all of the consolidated liabilities of Borrower and its Subsidiaries that would, in accordance with GAAP, be classified on a balance sheet as current liabilities.

"**Default**" shall mean any event which with the passing of time or the giving of notice or both would become an Event of Default hereunder.

"**Default Rate**" shall mean the per annum rate of interest equal to the higher of (i) 18% or (ii) the Prime Rate plus 6%, but such rate shall in no event be more than the highest rate permitted by applicable law.

"**Disclosure Schedule**" has the meaning set forth in the definition of the term "Permitted Liens."

"**Environmental Law**" shall mean the Resource Conservation and Recovery Act of 1987, the Comprehensive Environmental Response, Compensation and Liability Act, and any other federal, state or local statute, law, ordinance, code, rule, regulation, order or decree (in each case having the force of law) regulating or imposing liability or standards of conduct concerning any Hazardous Material, as now or at any time hereafter in effect.

"**Equipment Loan Agreement**" means the Loan and Security Agreement, dated as of the date hereof, between Lender and the Borrower.

"Equity Securities" of any Person shall mean (a) all common stock, preferred stock, participations, shares, partnership interests or other equity interests in and of such Person (regardless of how designated and whether or not voting or non-voting) and (b) all warrants, options and other rights to acquire any of the foregoing.

"Event of Default" has the meaning given to that term in Section 9.01.

"Funding Date" shall mean any date on which a Loan is made to or on account of Borrower under this Agreement.

"GAAP" shall mean generally accepted accounting principles and practices as in effect in the United States of America from time to time, consistently applied.

"Hazardous Material" means any hazardous, dangerous or toxic constituent material, pollutant, waste or other substance, whether solid, liquid or gaseous, which is regulated by any federal, state or local governmental authority.

"Indebtedness" shall mean, with respect to Borrower or any Subsidiary, the aggregate amount of, without duplication, (a) all obligations of such Person for borrowed money, (b) all obligations of such Person evidenced by bonds, debentures, notes or other similar instruments, (c) all obligations of such Person to pay the deferred purchase price of property or services (excluding trade payables aged less than 180 days), (d) all capital lease obligations of such Person, (e) all obligations or liabilities of others secured by a lien on any asset of such Person, whether or not such obligation or liability is assumed, (f) all obligations or liabilities of others guaranteed by such Person; and (g) any other obligations or liabilities which are required by GAAP to be shown as debt on the balance sheet of such Person. Unless otherwise indicated, the term **"Indebtedness"** shall include all Indebtedness of Borrower and the Subsidiaries.

"Intellectual Property" shall mean all of Borrower's right, title and interest in and to patents, patent rights (and applications therefor), trademarks and service marks (and applications and registrations therefor), inventions, copyrights, mask works (and applications and registrations therefor), trade names, trade styles, software and computer programs, trade secrets, methods, processes, know how, drawings, specifications, descriptions, and all memoranda, notes, and records with respect to any research and development, all whether now owned or subsequently acquired or developed by Borrower and whether in tangible or intangible form or contained on magnetic media readable by machine together with all such magnetic media.

"Investment" of any Person shall mean any loan or advance of funds by such Person to any other Person (other than advances to employees of such Person for moving and travel expense, drawing accounts and similar expenditures in the ordinary course of business), any purchase or other acquisition of any Equity Securities or Indebtedness of any other Person, any capital contribution by such Person to or any other investment by such Person in any other Person; provided, however, that Investments shall not include accounts receivable or other indebtedness owed by customers of such Person which are current assets and arose from sales or non-exclusive licensing in the ordinary course of such Person's business.

"Landlord Consent" shall mean a consent in the form of Exhibit C or such other form as Lender may agree to accept.

"Lien" shall mean any pledge, bailment, lease, mortgage, hypothecation, conditional sales and title retention agreements, charge, claim, encumbrance or other lien in favor of any Person.

"Loan" shall mean a loan advanced by Lender to Borrower under this Agreement.

"Loan Margin" shall mean the number of basis points set forth following such term on the cover page of this Agreement.

"Loan Rate" shall mean, with respect to the Loan, the per annum rate of interest (based on a year of twelve 30 day months) equal to the sum of (a) the U.S. Treasury note rate of a term equal to the Treasury Note Maturity as quoted in the Western Edition of *The Wall Street Journal* on the date the applicable Note is prepared, plus (b) the Loan Margin.

"Make-Whole Premium" shall mean an amount equal to the greater of (i) zero and (ii) the excess of (x) the sum of the present values, at the date of prepayment of the amount of each remaining scheduled payment of interest on and principal on the Loan, or portion of such payment, which will not be required to be made as a result of such prepayment (each such payment an "Amount Payable") (each such Amount Payable discounted separately at the Treasury Rate, determined on the date three (3) Business Days before the date of prepayment, compounded monthly, from the date such Amount Payable would be due), over (y) the principal amount of such Note to be prepaid. The "Treasury Rate" shall be the yield (as quoted in the Western Edition of *The Wall Street Journal* on the date which is three (3) Business Days prior to the date of prepayment) on U.S. Treasury securities adjusted to a constant maturity equal to the then remaining number of full months to maturity of the applicable Note.

"Note" or "Notes" shall mean the secured promissory note or notes, as applicable, of Borrower substantially in the form of Exhibit A.

"Obligations" has the meaning given to that term in Section 5.01.

"Operative Documents" shall mean this Agreement, the Notes, the Warrant, the Landlord Waiver and Consent(s) and all other documents, instruments and agreements executed and delivered in connection herewith or therewith or in respect of the closing of the transactions contemplated hereby or thereby.

"Payment Date" means the last Business Day of each calendar month.

"Permitted Indebtedness" shall mean and include:

- (a) Indebtedness of Borrower to Lender;
- (b) Indebtedness of Borrower under the Equipment Loan Agreement;
- (c) Indebtedness of Borrower secured by Liens permitted under clause (e) of the definition of Permitted Liens;
- (d) Indebtedness arising from the endorsement of instruments in the ordinary course of business;
- (e) Trade credit in the ordinary course of business;

(f) Indebtedness existing on the date hereof and set forth on the Disclosure Schedule;

(g) Subordinated Indebtedness; and

(h) Other Indebtedness of Borrower not exceeding Three Hundred Fifty Thousand Dollars (\$350,000) at any time.

"Permitted Investments" shall mean and include:

(a) Investments in marketable obligations issued or fully guaranteed by the United States and maturing not more than one (1) year from the date of issuance; and

(b) Investments in open market commercial paper rated at least "A1" or "P1" or higher by a national credit rating agency and maturing not more than one (1) year from the creation thereof.

(c) Investments pursuant to or arising under currency agreements or interest rate agreements entered into in the ordinary course of business;

(d) Investments consisting of money market or other deposit accounts of Borrower in which Lender has a perfected security interest; and

(e) Other Investments aggregating not in excess of Three Hundred Fifty Thousand Dollars (\$350,000) at any time.

"Permitted Liens" shall mean (a) the Lien created by this Agreement, (b) Liens for fees, taxes, levies, imposts, duties or other governmental charges of any kind which are not yet delinquent or which are being contested in good faith by appropriate proceedings which suspend the collection thereof (provided, however, that such proceedings do not involve any substantial danger of the sale, forfeiture or loss of any item of equipment and that Borrower has adequately bonded such Lien or reserves sufficient to discharge such Lien have been provided on the books of Borrower), (c) Liens identified on the disclosure schedule attached hereto as Schedule 2 ("Disclosure Schedule"), (d) Liens to secure payment of worker's compensation, employment insurance, old age pensions or other social security obligations of Borrower in the ordinary course of business of Borrower, (e) Liens upon any equipment or other personal property acquired by Borrower after the date hereof to secure (i) the purchase price of such equipment or other personal property or (ii) lease obligations or indebtedness incurred solely for the purpose of financing the acquisition of such equipment or other personal property; provided that (A) such Liens are confined solely to the equipment or other personal property so acquired, and (B) no such Lien shall be created, incurred, assumed or suffered to exist in favor of Borrower's officers, directors or shareholders holding five percent (5%) or more of Borrower's Equity Securities, (f) carriers', warehousemen's, mechanics', landlords', materialmen's, repairmen's or other similar Liens arising in the ordinary course of business which are not delinquent or remain payable without penalty or which are being contested in good faith and by appropriate proceedings, (g) Liens securing Subordinated Indebtedness, and (h) Liens incurred in connection with extensions, renewals or refinancings of Indebtedness secured by the Liens referenced in clauses (c), (e) and (g) above..

"Person" shall mean and include an individual, a partnership, a corporation, a business trust, a joint stock company, a limited liability company, an unincorporated association or other entity and any domestic or foreign national, state or local government, any political subdivision thereof, and any department, agency, authority or bureau of any of the foregoing.

"Prime Rate" shall mean the interest rate per annum publicly announced from time to time by Bank of America NT & SA (or its successor) as its reference rate, but such rate shall in no event be more than the highest interest rate permitted by applicable law.

"Subordinated Indebtedness" shall mean Indebtedness subordinated to the Obligations on terms and conditions acceptable to Lender in its sole discretion.

"Subsidiary" shall mean any corporation of which a majority of the outstanding capital stock entitled to vote for the election of directors (otherwise than as the result of a default) is owned by Borrower directly or indirectly through Subsidiaries.

"Term" shall mean the period from and after the date hereof until the payment or satisfaction in full of all Obligations under this Agreement and the other Operative Documents.

"Treasury Note Maturity" shall mean the period of months set forth following such term on the cover page of this Agreement.

"Warrant" shall mean a warrant to purchase securities of Borrower substantially in the form of Exhibit C.

1.02. **Headings.** Headings in this Agreement and each of the other Operative Documents are for convenience of reference only and are not part of the substance hereof or thereof.

1.03. **Plural Terms.** All terms defined in this Agreement or any other Operative Document in the singular form shall have comparable meanings when used in the plural form and vice versa.

1.04. **Construction.** This Agreement is the result of negotiations among, and has been reviewed by, Borrower and Lender and their respective counsel. Accordingly, this Agreement shall be deemed to be the product of all parties hereto, and no ambiguity shall be construed in favor of or against Borrower or Lender.

1.05. **Entire Agreement.** This Agreement, together with the terms set forth in each of the other Operative Documents, taken together, constitute and, contain the entire agreement of Borrower and Lender and, with regard to their respective subject matters, supersede any and all prior agreements, term sheets, negotiations, correspondence, understandings and communications among the parties, whether written or oral, with respect to their respective subject matters.

1.06. **Other Interpretive Provisions.** References in this Agreement to "Articles," "Sections," "Exhibits," "Schedules" and "Annexes" are to articles, sections, exhibits, schedules and annexes herein and hereto unless otherwise indicated. References in this Agreement and each of the other Operative Documents to any document, instrument or agreement shall include (a) all exhibits, schedules, annexes and other attachments thereto, (b) all documents, instruments or agreements issued or executed in replacement thereof, and (c) such document, instrument or agreement, or replacement or predecessor thereto, as amended, modified and supplemented from time to time and in effect at any given time. The words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement or any other Operative Document shall refer to this Agreement or such other Operative Document, as the case may be, as a whole and not to any particular provision of this Agreement or such other Operative Document, as the case may be. The words "include" and "including" and words of similar import when used in this Agreement or any other Operative Document shall not be construed to be limiting or exclusive. Unless otherwise indicated in this Agreement or any other Operative Document, all accounting terms used in this Agreement or any other Operative Document shall be construed, and all accounting and financial computations hereunder or thereunder shall be computed, in accordance with generally accepted accounting principles as in effect in the United States of America from time to time.

ARTICLE II
THE CREDIT

2.01. Credit Facility.

(a) **Commitment: Minimum Loan Amount.** On the terms and subject to the conditions hereof and relying upon the representations and warranties herein set forth as and when made or deemed to be made, Lender agrees to make Loans to Borrower in the aggregate principal amount of Two Million Dollars (\$2,000,000). The initial Loan shall be in a minimum principal amount of Seven Hundred Fifty Thousand Dollars (\$750,000) and each subsequent Loan shall be in the minimum principal amount of Two Hundred Thousand Dollars (\$200,000).

(b) **Loan Interest Rate.** Borrower shall pay interest on the unpaid principal amount of each Loan from the date of such Loan until such Loan is paid in full, at a per annum rate of interest equal to the Loan Rate determined in accordance with the definition of Loan Rate. The Loan Rate applicable to each Loan shall not be subject to change in the absence of manifest error. All computations of interest on Loans shall be based on a year of twelve 30 day months. If Borrower pays interest on any Loan which is determined to be in excess of the then legal maximum rate, then that portion of each interest payment representing an amount in excess of the then legal maximum rate shall be deemed a payment of principal and applied against the principal of the applicable Loan.

(c) **Payments of Principal and Interest.** With respect to each Loan, Borrower shall make thirty (30) consecutive payments, each on a Payment Date, beginning with the Payment Date specified in the applicable Note, in a principal amount equal to 3.33% of the aggregate outstanding principal amount of the Loan, plus accrued interest (at the rate applicable to such Loan as specified in the Note) on the unpaid principal balance of such Loan, until the Loan is paid in full. Payments of principal and interest on the Loans may not be prepaid except as set forth in Section 2.02(e).

2.02. Use of Proceeds: the Loans and the Notes: Disbursement.

(a) **Use of Proceeds.** The proceeds of the Loans shall be used solely for working capital or general corporate purposes of Borrower.

(b) **The Loans and the Notes.** The obligation of Borrower to repay the aggregate unpaid principal amount of and interest on each Loan shall be evidenced by a Note. Lender may, and is hereby authorized by Borrower to, endorse on a grid annexed to such Note appropriate notations regarding such Loan; **provided, however,** that the failure to make, or an error in making, any such notation shall not limit or otherwise affect the obligations of Borrower hereunder or under such Note.

(c) **Disbursement.** Subject to the satisfaction of the conditions set forth in this Agreement, Lender shall disburse the Loans by wire transfer to Borrower unless otherwise directed in writing by Borrower.

(d) **Termination of Commitment to Lend.** Notwithstanding anything to the contrary in the Operative Documents, Lender's obligation to lend the undisbursed portion of the Credit Amount to Borrower hereunder shall terminate on the earlier of (i) notice by Lender of the occurrence and continuance of any Event of Default hereunder, and (ii) the Commitment Termination Date.

(e) **Optional Prepayment.** Upon three (3) Business Days' prior written notice to Lender, Borrower may, at its option, at any time, prepay the Loans in their entirety at a prepayment price equal to the principal amount of the Loans so to be prepaid, plus interest accrued thereon through and including the date of such

prepayment, plus a premium equal to the Make-Whole Premium; *provided*, that any such prepayment shall be without premium or penalty if prior to May 15, 1998, Borrower closes a sale of its Equity Securities resulting in net proceeds to the Company of not less than \$2,000,000 (i) at a price per share (on a common equivalent basis) of not less than \$5.50 per share and (ii) at a Pre-Money Valuation of \$22,500,000. "Pre-Money Valuation" shall mean the product of (i) the per share price in such offering (on a common equivalent basis) multiplied by (ii) the aggregate number of shares of common stock outstanding immediately prior to such sale, including shares issuable upon conversion of convertible preferred stock and shares issuable upon the conversion of convertible debt which will be automatically converted upon such offering.

2.03. Other Payment Terms.

(a) Place and Manner. Borrower shall make all payments due to Lender in lawful money of the United States, in immediately available funds, at the address for payments and in the manner specified in Section 10.05(b).

(b) Date. Whenever any payment due hereunder shall fall due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall be included in the computation of interest or fees, as the case may be.

(c) Default Rate. If either (i) any amounts required to be paid by Borrower under this Agreement or the other Operative Documents (including principal or interest payable on any Loan, any fees or other amounts) remain unpaid after such amounts are due, or (ii) an Event of Default has occurred and is continuing, Borrower shall pay interest on the aggregate, outstanding principal balance hereunder from the date due or from the date of the Event of Default, as applicable, until such past due amounts are paid in full or until all Events of Defaults are cured, as applicable, at a per annum rate equal to the Default Rate, such rate to change from time to time as the Prime Rate shall change. All computations of such interest at the Default Rate shall be based on a year of 360 days and actual days elapsed.

2.04. Commitment Fee; Closing Fee. Lender has received a commitment fee from Borrower in the amount of \$7,000 (the "Commitment Fee"). Any portion of the Commitment Fee not utilized to pay Lender's expenses in connection with the negotiation, documentation and funding of the Loan (not to exceed \$7,000 for this Agreement and the Equipment Loan Agreement) will be applied by Lender to amounts due under the Note in the order in which such amounts are due. If the Loan is not made, any remaining balance of the Commitment Fee shall be retained by Lender. Upon execution of this Agreement, Borrower shall pay to Lender a fee in the amount of \$20,000 (the "Closing Fee"). Upon the funding of the initial Loan in the amount of \$750,000, the Closing Fee will be immediately returned to Borrower (without interest). If such initial Loan is not funded on or prior to March 31, 1998, the Closing Fee shall be retained by Lender.

ARTICLE III REPRESENTATIONS AND WARRANTIES

3.01. Representations and Warranties. Except as set forth in the Disclosure Schedule, Borrower makes the following representations and warranties to Lender as of the date hereof and again on each Funding Date:

(a) Organization and Qualification. Borrower is a corporation duly organized, validly existing and in good standing under the laws of its state of incorporation and is duly qualified to do business in Borrower's Home State. Borrower has no Subsidiaries.

(b) Authority. Borrower has all necessary corporate power, authority and legal right and has obtained all approvals and consents and has given all notices necessary to execute and deliver this Agreement and the other Operative Documents and to perform the terms hereof and thereof. Borrower has all requisite corporate power and authority to own and operate its properties and to carry on its businesses as now conducted.

(c) Conflict with Other Instruments, etc. Neither the execution and delivery of any Operative Document to which Borrower is a party nor the consummation of the transactions therein contemplated nor compliance with the terms, conditions and provisions thereof will conflict with or result in a breach of any of the terms, conditions or provisions of the charter or the bylaws of Borrower or, to its knowledge, any law or any regulation, order, writ, injunction or decree of any court or governmental instrumentality or any material agreement or instrument to which Borrower is a party or by which it or any of its properties is bound or to which it or any of its properties is subject, or constitute a default thereunder or result in the creation or imposition of any Lien, other than Permitted Liens.

(d) Title to Properties. Borrower has good and marketable title to the Collateral, free and clear of all Liens, other than Permitted Liens. Borrower has title and ownership of, or is licensed under, all Intellectual Property, with no known infringement of the rights of others. Borrower has not received any communications alleging that Borrower has violated, or by conducting its business as proposed, would violate any proprietary rights of any other Person. Borrower has no knowledge of any infringement or violation by it of the intellectual property rights of any third party and has no knowledge of any violation or infringement by a third party of any of its Intellectual Property. The Collateral and the Intellectual Property constitute substantially all of the assets and property of Borrower. Borrower does not own any right, title or interest in or to any real property or motor vehicles, other than motor vehicles leased for executives as part of a benefit arrangement.

(e) Authorization, Governmental Approvals, etc. The execution and delivery by Borrower of each Operative Document, the granting of the security interest in the Collateral, the issuance of the Warrant, the issuance of the securities into which the Warrant is exercisable, the issuance of any securities into which the securities issuable upon exercise of the Warrant are convertible, and the performance of the obligations herein and therein contemplated have each been duly authorized by all necessary action on the part of Borrower. No authorization, consent, approval, license or exemption of, and no registration, qualification, designation, declaration or filing with, or notice to, any Person by Borrower is, was or will be necessary to (i) the valid execution and delivery of any Operative Document to which Borrower is a party, (ii) the performance of Borrower's obligations under any Operative Document, or (iii) the granting of the security interest in the Collateral, except for filings in connection with the perfection of the security interest in any of the Collateral or the issuance of the Warrant. The Operative Documents have been or will be duly executed and delivered and constitute or will constitute legal, valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms, except as the enforceability thereof may be limited by bankruptcy, insolvency or other similar laws of general application relating to or affecting the enforcement of creditors' rights or by general principles of equity.

(f) Litigation. There are no actions, suits, proceedings or investigations pending or, to the knowledge of Borrower, threatened against or affecting Borrower, or the business or any property or asset owned by it, before any court or governmental department, agency or instrumentality which, if adversely determined, could reasonably be expected to have a material adverse effect on the financial condition, business or operations of Borrower.

(g) Security Interest. Assuming the proper filing of one or more financing statement(s) identifying the Collateral with the proper state and/or local authorities, the security interests in the Collateral granted to Lender pursuant to this Agreement (i) constitute and will continue to constitute first priority security interests (except

to the extent any other Permitted Lien existing on the date of this Agreement may create any priority to Lender's Lien under this Agreement) and (ii) are and will continue to be superior and prior to the rights in the Collateral of all other creditors of Borrower (except to the extent of such Permitted Liens).

(h) Executive Offices. The principal place of business and chief executive office of Borrower, and the office where Borrower will keep all records and files regarding the Collateral, is set forth on the cover page of this Agreement.

(i) Solvency, Etc. Borrower is Solvent (as defined below) and, after the execution and delivery of the Operative Documents and the consummation of the transactions contemplated thereby, Borrower will be Solvent. "Solvent" shall mean, with respect to any Person on any date, that on such date (a) the fair value of the property of such Person is greater than the fair value of the liabilities (including, without limitation, contingent liabilities) of such Person, (b) the present fair saleable value of the assets of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured, (c) such Person does not intend to, and does not believe that it will, incur debts or liabilities beyond such Person's ability to pay as such debts and liabilities mature and (d) such Person is not engaged in business or a transaction, and is not about to engage in a business or a transaction, for which such Person's property would constitute an unreasonably small capital.

(j) Catastrophic Events; Labor Disputes. None of Borrower or its properties is or has been affected by any fire, explosion, accident, strike, lockout or other labor dispute, drought, storm, hail, earthquake, embargo, act of God or other casualty that could reasonably be expected to have a material adverse effect on the financial condition, business or operations of Borrower. There are no disputes presently subject to grievance procedure, arbitration or litigation under any of the collective bargaining agreements, employment contracts or employee welfare or incentive plans to which Borrower is a party, and there are no strikes, lockouts, work stoppages or slowdowns, or, to the best knowledge of Borrower, jurisdictional disputes or organizing activity occurring or threatened which could reasonably be expected to have a material adverse effect on the financial condition, business or operations of Borrower.

(k) No Material Adverse Effect. No event has occurred and no condition exists which could reasonably be expected to have a material adverse effect on the financial condition, business or operations of Borrower since December 31, 1996.

(l) Accuracy of Information Furnished. None of the Operative Documents and none of the other certificates, statements or information furnished to Lender by or on behalf of Borrower in connection with the Operative Documents or the transactions contemplated thereby contains or, as of the date of such information, will contain any untrue statement of a material fact or omits or, as of the date of such information, will omit to state a material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. The Lender recognizes that all financial projections furnished to the Lender by or on behalf of Borrower in connection with the Operative Documents or the transactions contemplated thereby are not to be viewed as facts and that actual results during the period or periods covered by such projections may differ from the projected or forecasted results.

(m) Certain Agreements of Officers, Employees and Consultants.

(i) To the knowledge of Borrower, no officer, employee or consultant of Borrower is, or is now expected to be, in violation of any term of any employment contract, proprietary information agreement, nondisclosure agreement, noncompetition agreement, or any other contract or agreement or any restrictive covenant

relating to the right of any such officer, employee or consultant to be employed by Borrower because of the nature of the business conducted or to be conducted by Borrower or relating to the use of trade secrets or proprietary information of others, and to the best of Borrower's knowledge, after due inquiry, the continued employment of Borrower's officers, employees and consultants do not subject Borrower to any liability for any claim or claims arising out of or in connection with any such contract, agreement, or covenant.

(ii) To the knowledge of Borrower, no officers of Borrower, and no employee or consultant of Borrower whose termination, either individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect, has any present intention of terminating his or her employment or consulting relationship with Borrower.

ARTICLE IV REPORTING REQUIREMENTS

4.01. Furnishing Reports. Borrower shall furnish to Lender:

(a) Financial Statements. So long as Borrower is not subject to the reporting requirements of Section 12 or Section 15 of the Securities and Exchange Act of 1934, as amended, promptly as they are available, unaudited monthly and audited annual financial statements of Borrower and such other financial information as Lender may reasonably request from time to time. From and after such time as Borrower becomes a publicly reporting company, promptly as they are available and in any event: (i) at the time of filing of Borrower's Form 10-K with the Securities and Exchange Commission after the end of each fiscal year of Borrower, the financial statements of Borrower filed with such Form 10-K; and (ii) at the time of filing of Borrower's Form 10-Q with the Securities and Exchange Commission after the end of each of the first three fiscal quarters of Borrower, the financial statements of Borrower filed with such Form 10-Q.

(b) Notice of Defaults. As soon as possible, and in any event within five (5) Business Days after the discovery of a Default or Event of Default provide Lender with an Officer's Certificate of Borrower setting forth the facts relating to or giving rise to such Default or Event of Default and the action which Borrower proposes to take with respect thereto.

(c) Miscellaneous. Such other information as Lender may reasonably request from time to time.

ARTICLE V GRANT OF SECURITY INTEREST GENERAL PROVISIONS CONCERNING SECURITY

5.01. Grant of Security Interest. Borrower, in order to secure the payment of the principal and interest with respect to the Loans made pursuant to this Agreement, all other sums due under and in respect hereof and of the other Operative Documents, including fees, charges, expenses and attorneys' fees and costs and the performance and observance by Borrower of all other terms, conditions, covenants and agreements herein and in the other Operative Documents (all such amounts and obligations being herein sometimes called the "Obligations"), does hereby grant to Lender and its successors and assigns, a security interest in and to the following property (collectively, the "Collateral"): All right, title, interest, claims and demands of Borrower in and to:

(a) All goods and equipment now owned or hereafter acquired, including, without limitation, all laboratory equipment, computer equipment, office equipment, machinery, fixtures, vehicles (including motor

vehicles and trailers), and any interest in any of the foregoing, and all attachments, accessories, accessions, replacements, substitutions, additions, and improvements to any of the foregoing, wherever located;

(b) All inventory now owned or hereafter acquired, including, without limitation, all merchandise, raw materials, parts, supplies, packing and shipping materials, work in process and finished products including such inventory as is temporarily out of Borrower's custody or possession or in transit and including any returns upon any accounts or other proceeds, including insurance proceeds, resulting from the sale or disposition of any of the foregoing and any documents of title representing any of the above, and Borrower's books relating to any of the foregoing;

(c) All contract rights and general intangibles, including Intellectual Property, now owned or hereafter acquired, including, without limitation, goodwill, license agreements, franchise agreements, blueprints, drawings, purchase orders, customer lists, route lists, infringements, claims, computer programs, computer disks, computer tapes, literature, reports, catalogs, design rights, income tax refunds, payments of insurance and rights to payment of any kind;

(d) All now existing and hereafter arising accounts, contract rights, royalties, license rights and all other forms of obligations owing to Borrower arising out of the sale or lease of goods, the licensing of technology or the rendering of services by Borrower (subject, in each case, to the contractual rights of third parties to require funds received by Borrower to be expended in a particular manner), whether or not earned by performance, and any and all credit insurance, guaranties, and other security therefor, as well as all merchandise returned to or reclaimed by Borrower and Borrower's books relating to any of the foregoing;

(e) All documents, cash, deposit accounts, letters of credit, certificates of deposit, instruments, chattel paper and investment property, including, without limitation, all securities, whether certificated or uncertificated, security entitlements, securities accounts, commodity contracts and commodity accounts, and all financial assets held in any securities account or otherwise, wherever located, now owned or hereafter acquired and Borrower's books relating to the foregoing; and

(f) Any and all claims, rights and interests in any of the above and all substitutions for, additions and accessions to and proceeds thereof, including, without limitation, insurance, condemnation, requisition or similar payments.

5.02. Duration of Security Interest. Lender's security interest in the Collateral shall continue until (a) if no Loans are made, the Commitment Termination Date, or (b) if one or more Loans are made, the payment in full and the satisfaction of all Obligations, whereupon such security interest shall terminate. Lender, upon payment in full and the satisfaction of the Obligations, shall execute such further documents and take such further actions as may be necessary to effect the release and/or termination contemplated by this Section 5.02, including duly executing and delivering termination statements for filing in all relevant jurisdictions.

5.03. Possession of Collateral. Except as set forth in Section 5.04, so long as no Event of Default has occurred and is continuing, Borrower shall remain in full possession, enjoyment and control of the Collateral (except only as may be otherwise required by Lender for perfection of its security interest therein) and to manage, operate and use the same and each part thereof with the rights and franchises appertaining thereto; provided, however, that the possession, enjoyment, control and use of the Collateral shall at all times be subject to the observance and performance of the terms of this Agreement.

5.04 Location of Collateral. Without the prior written consent of Lender, the Collateral (other than Collateral, such as laptop computers, which is designed to be mobile from time to time in the ordinary course of business) is and shall remain in the possession of Borrower at Borrower's address stated on the cover page of this Agreement, except that, upon written notice to Lender, equipment Collateral valued at not more than \$50,000 may at any time be located at other locations for a period of up to ninety (90) days (which locations shall be specified in the notice to Lender). Location of equipment Collateral valued in excess of \$50,000 at other locations for periods in excess of ninety (90) days shall require the consent of Lender.

5.05 Lien Subordination. Lender agrees that the Liens granted to it hereunder shall be subordinate to the Liens of existing lenders and equipment lessors; provided that such Liens are confined solely to the equipment so financed and the proceeds thereof; and provided, further, that the Obligations hereunder shall not be subordinate in right of payment to any obligations to other lenders or equipment lessors and Lender's rights and remedies hereunder shall not in any way be subordinate to the rights and remedies of any such lenders or equipment lessors. Lender agrees to execute and deliver such agreements and documents as may be reasonably requested by Borrower from time to time which set forth the lien subordination described in this Section 5.05 and are reasonably acceptable to Lender. Lender shall have no obligation to execute any agreement or document which would impose obligations, restrictions or lien priority on Lender which are less favorable to Lender than those described in this Section 5.05.

ARTICLE VI AFFIRMATIVE COVENANTS

6.01. Affirmative Covenants.

(a) Payment of Taxes, etc. Borrower shall pay and discharge all taxes, assessments and governmental charges or levies imposed upon it or upon its income or profits, or upon any properties belonging to it, prior to the date on which penalties attach thereto, and all lawful claims which, if unpaid, might become a Lien upon any of its properties; provided that there shall be no requirement to pay any such tax, assessment, charge, levy or claim (i) which is being contested in good faith and by appropriate proceedings or which presents no risk of seizure, forfeiture, levy or other event which could jeopardize any Collateral or (ii) for which payment in full is bonded or reserved in Borrower's financial statements.

(b) Inspection Rights. Borrower shall, at any reasonable time and from time to time, permit Lender or any of its agents or representatives to inspect the Collateral, to examine and make copies of and abstracts from the records and books of account of, and visit the properties of, Borrower and to discuss the affairs, finances and accounts of Borrower with any of its officers or directors relating in each case to Lender's capacity as lender and secured party hereunder and with respect to the Collateral.

(c) Maintenance of Equipment and Similar Assets. Borrower shall keep and maintain all items of equipment and other similar types of personal property that form any significant portion or portions of the Collateral in good operating condition and repair (normal wear and tear excepted) and shall make all necessary replacements thereof and renewals thereto so that the value and operating efficiency thereof shall at all times be maintained and preserved. Borrower shall not permit any such material item of Collateral to become a fixture to real estate or an accession to other personal property, without the prior written consent of Lender. Borrower shall exercise commercially reasonable efforts to not permit any such material item of Collateral to be operated or maintained in violation of any applicable law, statute, rule or regulation. With respect to items of leased

equipment (to the extent Lender has any security interest in any residual Borrower's interest in such equipment under the lease), Borrower shall keep, maintain, repair, replace and operate such leased equipment in accordance with the terms of the applicable lease.

(d) **Insurance.**

(i) Borrower shall, obtain and maintain for the Term, at its own expense, (x) "all risk" insurance against loss or damage to the Collateral, (y) commercial general liability insurance (including contractual liability; products liability and completed operations coverages to be added at the earliest date Borrower produces a commercial product) reasonably satisfactory to Lender, and (z) such other insurance against such other risks of loss and with such terms, as shall in each case be reasonably satisfactory to or reasonably required by Lender (as to carriers, amounts and otherwise). The amount of the "all risk" insurance shall be at least equal to the lesser of (A) the existing Loan balances of all Loans from Lender, or (B) the full replacement costs of all insurable assets.

(ii) The deductible with respect to "all-risk" insurance required by clause (x) above and product liability insurance required by clause (y) above shall not exceed \$25,000; otherwise there shall be no deductible with respect to any insurance required to be maintained hereunder. The amount of commercial general liability insurance (other than products liability coverage and completed operations insurance) required by clause (y) above shall be at least \$2,000,000 per occurrence at Borrower's next insurance renewal date. The amount of the products liability and completed operations insurance required by clause (y) above shall be at least \$2,000,000 per occurrence. Each "all risk" policy shall: (x) name Lender as loss payee, and (y) provide that such insurance shall not be invalidated by any action of, or breach of warranty by, Borrower of a provision of any of its insurance policies. Each liability policy shall (w) name Lender as an additional insured in the full amount of Borrower's liability coverage limits (or the coverage limits of any successor to Borrower or such successor's parent which is providing coverage) and (x) provide that such insurance shall have cross-liability and severability of interest endorsements (which shall not increase the aggregate policy limits of Borrower's insurance). All insurance policies shall provide that Borrower's insurance shall be primary without a right of contribution of Lender's insurance, if any, and shall contain a clause requiring the insurer to give Lender at least 30 days' prior written notice of its cancellation (other than cancellation for non-payment for which 10 days' notice shall be sufficient). Borrower shall on or prior to the first Funding Date and prior to each policy renewal, furnish to Lender certificates of insurance or other evidence satisfactory to Lender that such insurance coverage is in effect.

ARTICLE VII
NEGATIVE COVENANTS

7.01. **Negative Covenants.** So long as the Obligations remain outstanding, Borrower shall not:

(a) **Name; Location of Chief Executive Office and Collateral.** Without thirty (30) days prior written notice to Lender, change its chief executive office or principal place of business or remove or cause to be removed from the location set forth on the cover page hereof or move any Collateral to a location other than that set forth on the cover page hereof, except for temporary use of Collateral at other locations as otherwise permitted hereunder.

(b) **Liens on Collateral.** Create, incur, assume or suffer to exist any Lien of any kind upon any Collateral, whether now owned or hereafter acquired, except Permitted Liens.

(c) **Dispositions of Collateral.** Convey, sell, offer to sell, lease, transfer, exchange or otherwise dispose of (collectively, a "**Transfer**") all or any part of the Collateral to any Person, other than: (i) transfers of inventory in the ordinary course of business; (ii) transfers of non-exclusive licenses and similar arrangements for the use of the property of Borrower in the ordinary course of business; or (iii) transfers of worn-out or obsolete equipment. It is expressly agreed and understood that the ordinary course of Borrower's business includes entering into agreements and arrangements with third parties for research, development, manufacturing, sale or marketing of products and the licensing of Intellectual Property in connection with such agreements and arrangements.

(d) **Distributions.** (i) Pay any dividends or make any distributions on its Equity Securities; (ii) purchase, redeem, retire, defease or otherwise acquire for value any of its Equity Securities (other than repurchases of Equity Securities of employees, directors or consultants upon termination of the relationship with the Company pursuant to the terms of employee stock purchase plans, employee restricted stock agreements or similar arrangements) in an aggregate amount not to exceed \$100,000; (iii) return any capital to any holder of its Equity Securities as such; (iv) make any distribution of assets, Equity Securities, obligations or securities to any holder of its Equity Securities as such; or (v) set apart any sum for any such purpose; provided, however, that Borrower may pay dividends payable solely in Common Stock.

(e) **Mergers or Acquisitions.** Merge or consolidate with or into any other Person or acquire or all or substantially all of the capital stock or assets of another Person.

(f) **Transactions With Affiliates.** Enter into any contractual obligation with any affiliate or engage in any other transaction with any affiliate except upon terms at least as favorable to Borrower as an arms-length transaction with unaffiliated Persons (but excluding salary and equity compensation arrangements in the ordinary course of business entered into with employees, directors or consultants).

(g) **Maintenance of Accounts.** Maintain any deposit accounts or accounts holding securities owned by Borrower except (i) accounts located at Bank of America NT & SA or Paine Webber Incorporated and (ii) other accounts with respect to which Lender takes such action as it deems necessary to obtain a perfected security interest in such account. Lender shall not unreasonably refuse to take such necessary action.

(h) **Indebtedness Payments.** Prepay, redeem, purchase, defease or otherwise satisfy in any manner prior to the scheduled repayment thereof any Indebtedness for borrowed money (other than amounts due under this Loan Agreement or the Notes or under the Equipment Loan Agreement or the Notes thereunder) or lease obligations, (ii) amend, modify or otherwise change the terms of any Indebtedness for borrowed money (other than the Obligations or the obligations under the Equipment Loan Agreement) or lease obligations so as to accelerate the scheduled repayment thereof or (iii) repay any notes to officers, directors or shareholders.

(i) **Subsidiaries.** Without the prior written consent of Lender, form any Subsidiary.

(j) **Indebtedness.** Create, incur, assume or permit to exist any Indebtedness except Permitted Indebtedness.

(k) **Investments.** Make any Investment except for Permitted Investments.

ARTICLE VIII
CONDITIONS PRECEDENT

8.01. Closing. At the time of execution and delivery of this Agreement, Borrower shall have duly executed and/or delivered to Lender the items set forth in Part I of Schedule 3.

8.02. Other Conditions. The obligation of Lender to make each Loan shall be subject to the execution and/or delivery to Lender of each of the items set forth in Part I of Schedule 3 and the satisfaction of by Borrower of each condition set forth in Part II of Schedule 3.

8.03. Covenant to Deliver. Borrower agrees (not as a condition but as a covenant) to deliver to Lender each item required to be delivered to Lender as a condition to a Loan, if the Loan is advanced. Borrower expressly agrees that the extension of a Loan prior to the receipt by Lender of any such item shall not constitute a waiver by Lender of Borrower's obligation to deliver such item.

ARTICLE IX
DEFAULT AND REMEDIES

9.01. Events of Default. An "Event of Default" shall mean the occurrence of one or more of the following described events:

(a) Borrower shall (i) default in the payment of principal of or interest on the Loan when the same is due, or (ii) default in the payment of any expense or other amount payable hereunder or thereunder for five (5) days after receipt of written notice from Lender that the same is due; or

(b) Borrower shall breach any provision of Section 7.01 or Section 6.01(d); or

(c) Borrower shall default in the performance of any material covenant, agreement or obligation (other than a covenant, agreement or obligation referred to in, Section 9.01(a) or Section 9.01(b)) contained in any Operative Document (other than the Warrant) and Borrower shall fail to cure within thirty (30) days after receipt of written notice from Lender any default in the performance of any such material covenant, agreement or obligation contained therein; or

(d) Borrower shall have breached the terms of the Warrant and shall fail to cure such breach within fifteen (15) days after receipt of written notice from Lender of such breach; or

(e) Any representation or warranty made herein or on a Funding Date by Borrower in any Operative Document, or any certificate or financial statement furnished pursuant to the provisions of any Operative Document, shall prove to have been false or misleading in any material respect as of the time made or furnished; or

(f) Any Operative Document shall in any material respect cease to be, or Borrower shall assert that any Operative Document is not, a legal, valid and binding obligation of Borrower enforceable in accordance with its terms; or

(g) A default shall exist under any agreement with any third party or parties which consists of the failure to pay any Indebtedness at maturity or which results in a right by such third party or parties, whether or not

exercised, to accelerate the maturity of any Indebtedness of Borrower in an amount in excess of Two Hundred Fifty Thousand Dollars (\$250,000); or

(h) A proceeding shall have been instituted in a court of competent jurisdiction seeking a decree or order for relief in respect of Borrower in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or for the appointment of a receiver, liquidator, assignee, custodian, trustee (or similar official) of Borrower or for any substantial part of its property, or for the winding-up or liquidation of its affairs, and such proceeding shall remain undismissed or unstayed and in effect for a period of sixty (60) consecutive days or such court shall enter a decree or order granting the relief sought in such proceeding; or

(i) Borrower shall commence a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, shall consent to the entry of an order for relief in an involuntary case under any such law, or shall consent to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian (or other similar official) of Borrower or for any substantial part of its property, or shall make a general assignment for the benefit of creditors, or shall fail generally to pay its debts as they become due, or shall take any corporate action in furtherance of any of the foregoing.

(j) A final judgment or order for the payment of money in excess of One Hundred Thousand Dollars (\$100,000) (exclusive of amounts covered by insurance issued by an insurer not an affiliate of Borrower) shall be rendered against Borrower and the same shall remain undischarged for a period of sixty (60) days during which execution shall not be effectively stayed, or any judgment, writ, assessment, warrant of attachment, or execution or similar process shall be issued or levied against a substantial part of the property of Borrower and such judgment, writ, or similar process shall not be released, stayed, vacated or otherwise dismissed within sixty (60) days after issue or levy.

9.02. Consequences of Event of Default.

(a) If an Event of Default specified under and of clauses (a) through (g) or (j) of Section 9.01 shall occur and be continuing, Lender may (i) declare the Loan, together with interest thereon, and all other liabilities of Borrower hereunder and under the other Operative Documents to be immediately due and payable, without presentment, demand, protest or further notice of any kind, all of which are hereby expressly waived, and (ii) terminate its commitment to make the Loan and terminate any commitment to advance money or extend credit to or for the benefit of Borrower pursuant to any other agreement or commitment extended by Lender to Borrower.

(b) If an Event of Default specified under clause (h) or (i) of Section 9.01 shall occur, then immediately and without notice (i) the Loan, together with interest thereon, and all other liabilities of Borrower hereunder and under the other Operative Documents shall automatically become due and payable, without presentment, demand, protest or notice of any kind, all of which are hereby expressly waived, and (ii) Lender's commitment hereunder to make the Loan and any other commitment of Lender to Borrower to advance money or extend credit pursuant to any other agreement or commitment shall be terminated.

9.03. Rights Regarding Collateral. Borrower agrees that when any Event of Default has occurred and is continuing, Lender shall have the rights, options, duties and remedies of a secured party as permitted by law and, in addition to and without limiting the foregoing, Lender may exercise (with notice to Borrower given promptly after such exercise) any one or more or all, and in any order, of the remedies herein set forth, including the following:

(a) Lender, personally or by agents or attorneys, shall have the right (subject to compliance with any applicable mandatory legal requirements) to require Borrower to assemble the Collateral and make it available to Lender at a place to be designated by Lender or to take immediate possession of the Collateral, or any portion thereof, and for that purpose may pursue the same wherever it may be found, and may enter any of premises of Borrower, with or without notice, demand, process of law or legal procedure, to the extent permitted by applicable law, and search for, take possession of, remove, keep and store the same, or use and operate or lease the same until sold. In furtherance of Lender's rights hereunder, Borrower hereby grants to Lender an irrevocable, non-exclusive license (exercisable without royalty or other payment by Lender) to use, license or sublicense any patent, trademark, trade name, copyright or other intellectual property in which Borrower now or hereafter has any right, title or interest together with the right of access to all media in which any of the foregoing may be recorded or stored; provided, however, that such license shall only be exercisable in connection with the disposition of Collateral upon Lender's exercise of its remedies hereunder.

(b) Lender may, if at the time such action may be lawful and always subject to compliance with any mandatory legal requirements, either with or without taking possession and either before or after taking possession, without instituting any legal proceedings whatsoever, having first given notice of such sale by registered or certified mail to Borrower once at least ten (10) Business Day's days prior to the date of such sale, and having first given any other notice which may be required by law, sell and dispose of the Collateral, or any part thereof in a commercially reasonable manner, at a private sale or at public auction, to the highest bidder, in one lot as an entirety or in separate lots, and either for cash or on credit and on such terms as Lender may determine, and at any place (whether or not it be the location of the Collateral or any part thereof) designated in the notice referred to above. To the extent permitted by applicable law, any such sale or sales may be adjourned from time to time by announcement at the time and place appointed for such sale or sales, or for any such adjourned sale or sales, without further published notice, and Borrower, Lender or the holder or holders of the Notes, or of any interest therein, may bid and become the purchaser at any such public sale.

(c) Lender may proceed to protect and enforce this Agreement and the other Operative Documents by suit or suits or proceedings in equity, at law or in bankruptcy, and whether for the specific performance of any covenant or agreement herein contained or in execution or aid of any power herein granted; or for foreclosure hereunder, or for the appointment of a receiver or receivers for any real property security or any part thereof, or for the recovery of judgment for the Obligations or for the enforcement of any other proper, legal or equitable remedy available under applicable law.

9.04. Waiver by Borrower. Upon the occurrence of an Event of Default, to the extent permitted by law, Borrower covenants that it will not at any time insist upon or plead, or in any manner whatsoever claim or take any benefit or advantage of, any stay or extension law now or at any time hereafter in force, nor claim, take nor insist upon any benefit or advantage of or from any law now or hereafter in force providing for the valuation or appraisal of the Collateral or any part thereof prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree, judgment or order of any court of competent jurisdiction; nor, after such sale or sales, claim or exercise any right under any statute now or hereafter made or enacted by any state or otherwise to redeem the property so sold or any part thereof, and, to the full extent legally permitted, except as to rights expressly provided herein, hereby expressly waives for itself and on behalf of each and every Person, except decree or judgment creditors of Borrower, acquiring any interest in or title to the Collateral or any part thereof subsequent to the date of this Agreement, all benefit and advantage of any such law or laws, and covenants that it will not invoke or utilize any such law or laws or otherwise hinder, delay or impede the execution of any power herein granted and delegated to Lender, but will suffer and permit the execution of every such power as though no such power, law or laws had been made or enacted.

9.05. Effect of Sale. Any sale, whether under any power of sale available to Lender or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of Borrower in and to the property sold, and shall be a perpetual bar, both at law and in equity, against Borrower, its successors and assigns, and against any and all persons claiming the property sold or any part thereof under, by or through Borrower, its successors or assigns.

9.06. Application of Collateral Proceeds. The proceeds and/or avails of the Collateral, or any part thereof, and the proceeds and the avails of any remedy hereunder (as well as any other amounts of any kind held by Lender at the time of, or received by Lender after, the occurrence of an Event of Default hereunder) shall be paid to and applied as follows:

(a) First, to the payment of reasonable costs and expenses, including all amounts expended to preserve the value of the Collateral, of foreclosure or suit, if any, and of such sale and the exercise of any other rights or remedies, and of all proper fees, expenses, liability and advances, including reasonable legal expenses and attorneys' fees, incurred or made hereunder by Lender;

(b) Second, to the payment to Lender of the amount then owing or unpaid on the Notes, and in case such proceeds shall be insufficient to pay in full the whole amount so due, owing or unpaid upon the Notes, then first, to the unpaid interest thereon, second, to unpaid principal thereof and third to the remaining balance of the Obligations under the Notes; such application to be made upon presentation of the Notes, and the notation thereon of the payment, if partially paid, or the surrender and cancellation thereof, if fully paid;

(c) Third, to the payment of other amounts then payable to Lender under any of the Operative Documents; and

(d) Fourth, to the payment of the surplus, if any, to Borrower, its successors and assigns, or to whomsoever may be lawfully entitled to receive the same.

9.07. Reinstatement of Rights. If Lender shall have proceeded to enforce any right under this Agreement or any other Operative Document by foreclosure, sale, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason or shall have been determined adversely, then and in every such case (unless otherwise ordered by a court of competent jurisdiction), Lender shall be restored to its former position and rights hereunder with respect to the property subject to the security interest created under this Agreement.

ARTICLE X MISCELLANEOUS

10.01. Modifications, Amendments or Waivers. The provisions of any Operative Document may be modified, amended or waived only by a written instrument signed by the parties thereto.

10.02. No Implied Waivers; Cumulative Remedies; Writing Required. No delay or failure of Lender in exercising any right, power or remedy hereunder shall affect or operate as a waiver thereof; nor shall any single or partial exercise thereof or any abandonment or discontinuance of steps to enforce such a right, power or remedy preclude any further exercise thereof or of any other right, power or remedy. The rights and remedies hereunder of Lender are cumulative and not exclusive of any rights or remedies which it would otherwise have. Any waiver, permit, consent or approval of any kind or character on the part of Lender of any breach or default

under this Agreement or any such waiver of any provision or condition of this Agreement must be in writing and shall be effective only in the specified instance and to the extent specifically set forth in such writing.

10.03. **Expenses; Indemnification.** Borrower agrees upon demand to pay or reimburse Lender for all liabilities, obligations and out-of-pocket expenses, including reasonable fees and expenses of counsel for Lender, from time to time arising in connection with the enforcement or collection of sums due under the Operative Documents. Borrower shall indemnify, reimburse and hold Lender, each of Lender's partners, and each of their respective successors, assigns, agents, officers, directors, shareholders, servants, agents and employees harmless from and against all liabilities, losses, damages, actions, suits, demands, claims of any kind and nature (including claims relating to environmental discharge, cleanup or compliance), all costs and expenses whatsoever to the extent they may be incurred or suffered by such indemnified party in connection therewith (including reasonable attorneys' fees and expenses), fines, penalties (and other charges of applicable governmental authorities), licensing fees relating to any item of Collateral, damage to or loss of use of property (including consequential or special damages to third parties or damages to Borrower's property), or bodily injury to or death of any person (including any agent or employee of Borrower) (each, a "Claim"), directly or indirectly relating to or arising out of the use of the proceeds of the Loan or otherwise, the falsity of any representation or warranty of Borrower or Borrower's failure to comply with the terms of this Agreement or any other Operative Document during the Term. The foregoing indemnity shall cover, without limitation, (i) any Claim in connection with a design or other defect (latent or patent) in any item of equipment included in the Collateral, (ii) any Claim for infringement of any patent, copyright, trademark or other intellectual property right, (iii) any Claim resulting from the presence on or under or the escape, seepage, leakage, spillage, discharge, emission or release of any Hazardous Materials on the premises of Borrower, including any Claims asserted or arising under any Environmental Law, or (iv) any Claim for negligence or strict or absolute liability in tort; provided, however, that Borrower shall not indemnify Lender for any liability incurred by Lender to the extent it results from Lender's gross negligence or willful misconduct. Such indemnities shall continue in full force and effect, notwithstanding the expiration or termination of this Agreement. Upon Lender's written demand, Borrower shall assume and diligently conduct, at its sole cost and expense, the entire defense of Lender, each of its partners, and each of their respective, agents, employees, directors, officers, shareholders, successors and assigns against any indemnified Claim described in this Section 10.03. Borrower shall not settle or compromise any Claim against or involving Lender without first obtaining Lender's written consent thereto, which consent shall not be unreasonably withheld.

10.04. **Waivers.** (a) Borrower shall give Lender written notice within one hundred eighty (180) days of obtaining knowledge of the occurrence of any claim or cause of action it believes it has, or may seek to assert to allege against Lender whether such claim is based in law or equity, arising under or related to this Agreement or any of the other Operative Documents or to the transactions contemplated hereby or thereby, or any act or omission to act by Lender with respect hereto or thereto, and that if it shall fail to give such notice to Lender with regard to any such claim or cause of action, Borrower shall be deemed to have waived, and shall be forever barred from bringing or asserting such claim or cause of action in any suit, action or proceeding in any court or before any governmental agency or authority or any arbitrator. (b) NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT OR ANYWHERE ELSE, BORROWER AGREES THAT IT SHALL NOT SEEK FROM LENDER UNDER ANY THEORY OF LIABILITY (INCLUDING ANY THEORY IN TORTS), ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES.

10.05. **Notices; Payments.** (a) All notices and other communications given to or made upon any party hereto in connection with this Agreement shall be in writing (including telexed, telecopied or telegraphic communication) and mailed (by certified or registered mail), telexed, telegraphed, telecopied or delivered to the respective parties, as follows:

Borrower: At the address set forth on the cover page of this Agreement.

Lender: MMC/GATX PARTNERSHIP NO. I
c/o GATX Capital Corporation
Four Embarcadero Center
Suite 2200
San Francisco, California 94111
Telephone No.: 415-955-3200
Telecopier No.: 415-955-3493
Attention: Contract Administration

with a copy of all financial information to:

MEIER MITCHELL & COMPANY
4 Orinda Way, Suite 200B
Orinda, California 94563

or in accordance with any subsequent written direction from either party to the other. All such notices and other communications shall, except as otherwise expressly herein provided, be effective when received; or in the case of delivery by messenger or overnight delivery service, when left at the appropriate address.

(b) Unless Lender specifies otherwise in writing, all payments shall be made to:

MMC/GATX PARTNERSHIP NO. I
c/o GATX Capital Corporation, as Agent
Box 71316
Chicago, Illinois 60694

10.06. Termination. This Agreement shall terminate at the end of the Term; provided, however, that the termination of this Agreement shall not affect any of the rights and remedies of Lender hereunder, it being understood and agreed that all such rights and remedies shall continue in full force and effect until payment of all amounts owed to Lender under or in connection with the Operative Documents, whether on account of principal, interest, fees or otherwise.

10.07. Severability. If any provision of any Operative Document is held invalid or unenforceable to any extent or in any application, the remainder of such Operative Document and all other Operative Documents, or the application of such provision to different Persons or circumstances or in different jurisdictions, shall not be affected thereby.

10.08. Survival. All representations, warranties, covenants and agreements of Borrower contained herein or made in writing in connection herewith shall survive the execution and delivery of the Operative Documents, the making of Loans hereunder, the granting of security and the issuance of the Notes.

10.09. Governing Law. THIS AGREEMENT, THE OTHER OPERATIVE DOCUMENTS AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HERETO AND THERETO SHALL BE GOVERNED BY AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA. ANY ACTION TO ENFORCE THIS AGREEMENT AGAINST BORROWER MAY BE BROUGHT IN CALIFORNIA OR, WITH REGARD TO COLLATERAL, MAY ALSO BE BROUGHT WHEREVER SUCH COLLATERAL IS LOCATED.

10.10. Successors and Assigns. This Agreement and the other Operative Documents shall be binding upon and inure to the benefit of Lender, all future holders of the Notes, Borrower and their respective successors and permitted assigns, except that Borrower may not assign or transfer its rights hereunder or any interest herein without the prior written consent of Lender. Lender may sell to any other financial entity (a "Participant") participation interests in Lender's rights under this Agreement and the other Operative Documents; provided that

notwithstanding the sale of participations, Lender shall remain solely responsible for the performance of its obligations under this Agreement, Lender shall remain the holder of the Notes for all purposes under this Agreement and Borrower shall continue to deal solely and directly with Lender in connection with this Agreement and the other Loan Documents. Lender may disclose the Operative Documents and any other financial or other information relating to Borrower or any Subsidiary to any potential Participant, provided that such Participant agrees to protect the confidentiality of such documents and information using the same measures that it uses to protect its own confidential information.

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

10.12. Further Assurances. Borrower will, at its own expense, from time to time do, execute, acknowledge and deliver all further acts, deeds, conveyances, transfers and assurances, and all financing and continuation statements and similar notices, reasonably necessary or proper for the perfection of the security interest being herein provided for in the Collateral, whether now owned or hereafter acquired.

10.13. Power of Attorney in Respect of the Collateral. Borrower does hereby irrevocably appoint Lender (which appointment is coupled with an interest), the true and lawful attorney-in-fact of Borrower with full power of substitution, for it and in its name (a) to perform (but Lender shall not be obligated to and shall incur no liability to Borrower or any third party for failure to perform) any act which Borrower is obligated by this Agreement to perform, (b) to ask, demand, collect, receive, receipt for, sue for, compound and give acquittance for any and all rents, issues, profits, avails, distributions, income, payment draws and other sums in which a security interest is granted under Section 5.01 with full power to settle, adjust or compromise any claim thereunder as fully as if Lender were Borrower itself, (c) to receive payment of and to endorse the name of Borrower to any items of Collateral (including checks, drafts and other orders for the payment of money) that come into Lender's possession or under Lender's control, (d) to make all demands, consents and waivers, or take any other action with respect to, the Collateral, (e) in Lender's discretion, to file any claim or take any other action or institute proceedings, either in its own name or in the name of Borrower or otherwise, which Lender may reasonably deem necessary or appropriate to protect and preserve the right, title and interest of Lender in and to the Collateral, and (f) to otherwise act with respect thereto as though Lender were the outright owner of the Collateral; provided, however, that the power of attorney herein granted shall be exercisable only upon the occurrence and during the continuation of an Event of Default. Borrower agrees to reimburse Lender upon demand for all reasonable costs and expenses, including attorneys' fees and expenses, which Lender may incur while acting as Borrower's attorney in fact hereunder, all of which costs and expenses are included within the Obligations.

10.14 Confidentiality. All information (other than periodic reports filed by Borrower with the Securities and Exchange Commission) disclosed by Borrower to Lender in writing or through inspection pursuant to this Agreement shall be considered confidential. Lender agrees to use the same degree of care to safeguard and prevent disclosure of such confidential information as Lender uses with its own confidential information, but in any event no less than a reasonable degree of care. Lender shall not disclose such information to any third party (other than Lender's or Lender's partner's attorneys and auditors subject to the same confidentiality obligation set forth herein) and shall use such information only for purposes of evaluation of its investment in Borrower and the exercise of Lender's rights and the enforcement of its remedies under this Agreement and the other Operative Agreements. The obligations of confidentiality shall not apply to any information that (a) was known to the public prior to disclosure by Borrower under this Agreement, (b) becomes known to the public through no fault of Lender, (c) is disclosed to Lender by a third party' having a legal right to make such disclosure, or (d) is independently developed by Lender.

IN WITNESS WHEREOF, the parties hereto, by their officers thereunto duly authorized, have executed this Agreement as of the day and year first above written.

SNAPTRACK, INC.

By: Stephen Fainberg
Name: Stephen Fainberg
Title: President

MMC/GATX PARTNERSHIP NO. I

By: Meier Mitchell & Company, as general partner

By: _____
Name: _____
Title: _____

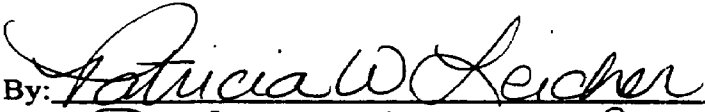
IN WITNESS WHEREOF, the parties hereto, by their officers thereunto duly authorized, have executed this Agreement as of the day and year first above written.

SNAPTRACK, INC.

By: _____
Name: _____
Title: _____

MMC/GATX PARTNERSHIP NO. I

By: Meier Mitchell & Company, as general partner

By: 
Name: PATRICIA W. LEICHER
Title: VICE PRESIDENT

SCHEDULES

- 1 **Funding Certificate**
- 2 **Disclosure Schedule**
- 3 **Conditions Precedent**

EXHIBITS

- A **Form of Secured Promissory Note**
- B **Form of Landlord Consent**
- C **Form of Warrant**
- D **Form of Opinion of Counsel**

SCHEDULE 1

FUNDING CERTIFICATE

The undersigned, _____, being the duly elected and acting _____ of SNAPTRACK, INC., a California corporation ("Borrower"), does hereby certify to MMC/GATX Partnership No. I, in connection with that certain Loan and Security Agreement dated as of December 30, 1997, (the "Loan Agreement"; with other capitalized terms used below having the meanings ascribed thereto in the Loan Agreement) that:

1. The representations and warranties made by Borrower in Article III of the Loan Agreement and in the other Operative Documents are true and correct as of the date hereof.
2. No event or condition has occurred and is continuing that would constitute a Default or an Event of Default under the Loan Agreement or any other Operative Document.
3. Borrower is in compliance with the covenants and requirements contained in Articles IV, VI and VII of the Loan Agreement.
4. All conditions referred to in Article VIII of the Loan Agreement to the making of the Loan to be made on or about the date hereof been satisfied.
5. No material adverse change in the general affairs, management, results of operations, condition (financial or otherwise) or prospects of Borrower, whether or not arising from transactions in the ordinary course of business, has occurred.

Dated: _____, 199__

SNAPTRACK, INC.

By: _____

Name: _____

Title: _____

SCHEDULE 2
DISCLOSURE SCHEDULE

SCHEDULE 3

CONDITIONS PRECEDENT

PART I:

At the time of execution and delivery of this Agreement, there shall also have been duly executed and delivered to Lender:

- (a) The Warrant;
- (b) A Landlord Consent, from the owner of each building in which Collateral is anticipated to be located;
- (c) A favorable opinion of counsel for Borrower, dated as of the closing date, in the form attached hereto as Exhibit D;
- (d) Copies, certified by the Secretary, Assistant Secretary or Chief Financial Officer of Borrower as of the closing date, of Borrower's charter documents and bylaws and of all documents evidencing corporate action taken by Borrower authorizing the execution, delivery and performance of the Operative Documents to which Borrower is a party, in form and substance satisfactory to Lender and its counsel;
- (e) Good standing certificate from Borrower's state of incorporation and the state in which Borrower's principal place of business is located, together with certificates of the applicable governmental authorities that Borrower is in compliance with the franchise tax laws of each such state, each dated as of a recent date;
- (f) Evidence of the insurance coverage required by Section 6.01(d) of this Agreement;
- (g) All necessary consents of shareholders and other third parties with respect to the execution, delivery and performance of this Agreement, the Warrant, the Note and the other Operative Documents;
- (h) Form UCC-1 Financing Statements, duly executed by Borrower, or other documents, and Borrower shall have taken such actions, if any, as Lender shall reasonably determine are necessary or desirable to perfect and protect its security interest in the Collateral in the forms provided by Lender;
- (i) Grants of Security Interest in Intellectual Property in the forms provided by Lender;
- (j) Notices of Security Interest to Depository Banks in the forms provided by Lender; and
- (k) All other documents as Lender shall have reasonably requested.

PART II

On or prior to the Funding Date of each Loan, each of the items set forth in Part I of this Schedule 3 shall have been delivered to Lender and the following conditions shall have been satisfied or waived by Lender:

- (a) Borrower shall have provided to Lender such documents, instruments and agreements as Lender shall reasonably request to evidence the perfection and priority of the security interests granted to Lender pursuant to Article V;

- (b) No Event of Default or Default shall have occurred and be continuing;
- (c) Borrower shall have duly executed and delivered to Lender a Note prepared by Lender with respect to the Loan;
- (d) In Lender's sole discretion, there shall not have occurred any material adverse change in the general affairs, management, results of operations, condition (financial or otherwise) or prospects of Borrower, whether or not arising from transactions in the ordinary course of business, and there shall not have occurred since the date first written on the cover page of this Agreement any material adverse deviation by Borrower from the business plan of Borrower presented to and not disapproved by Lender;
- (e) The representations and warranties contained in this Agreement and the other Operative Documents to which Borrower is a party shall be true and correct in all material respects as if made on such Funding Date;
- (f) Each of the Operative Documents remains in full force and effect;
- (g) The Funding Date of the requested Loan shall not be later than the Commitment Termination Date; and
- (h) The amount of the initial requested Loan shall not be less than \$750,000 and the amount of each subsequent Loan shall not be less than \$200,000.