

01-21-2003

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Form PTO-1594 (Rev. 03/01) OMB No. 0651-0027 (exp. 5/31/2) Tab settings



U.S. DEPARTMENT OF COMMERCE U.S. Patent and Trademark Office

102342432

PK

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

1. Name of conveying party(ies):

Kingway Acquisition, Inc.

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

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

2. Name and address of receiving party(ies)

Name: Fleet Capital Corporation

Internal

Address:

Street Address: One South Wacker Drive, Suite 1400

City: Chicago State: Illinois Zip: 60606

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

Execution Date: September 24, 2002

4. Application number(s) or registration number(s):

A. Trademark Application No.(s)

72120537

B. Trademark Registration No.(s)

See Attached Exhibit A

Additional number(s) attached Yes No

5. Name and address of party to whom correspondence concerning document should be mailed:

Name: John T. McEnroe

Internal Address:

Vedder, Price, Kaufman & Kammholz

Street Address: 222 N. LaSalle St., 24th Floor

City: Chicago State: IL Zip: 60601

6. Total number of applications and registrations involved:

1

7. Total fee (37 CFR 3.41): \$40.00

- Enclosed Authorized to be charged to deposit account (Charge any deficiencies or credit any overpayment to the acct)

8. Deposit account number:

(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.

John T. McEnroe

Name of Person Signing

Signature

9/24/02 Date

Total number of pages including cover sheet, attachments, and document: 11

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

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TRADEMARK REEL: 002652 FRAME: 0396

TRADEMARK AND LICENSE SECURITY AGREEMENT
BETWEEN
KINGWAY ACQUISITION, INC. and
FLEET CAPITAL CORPORATION

SCHEDULE A
TRADEMARKS

<u>Trademark</u>	<u>Serial No.</u>	<u>Filing Date</u>	<u>Registration No.</u>	<u>Date Issued</u>
King-Way	72120537	5/22/61	0728306	3/6/62

TRADEMARK AND LICENSE SECURITY AGREEMENT

This TRADEMARK AND LICENSE SECURITY AGREEMENT (the "Agreement"), dated as of September 20, 2002, is made by Kingway Acquisition, Inc., a Delaware corporation having its principal place of business at Lewisville, Texas ("Grantor"), in favor of Fleet Capital Corporation, a Rhode Island corporation ("FCC"), as agent for the "Lenders" (as hereinafter defined) (FCC, in such capacity, "Agent").

WITNESSETH:

WHEREAS, Grantor (as a "Borrower"), the revolving credit and term loan lender signatories thereto ("Revolving Credit and Term Loan A Lenders"), the term loan B lender ("Term Loan B Lenders" and together with Revolving Credit and Term Loan A Lenders, "Lenders") and FCC, both individually as a Revolving Credit and Term Loan A Lender and as Agent, have entered into that certain Amended and Restated Loan and Security Agreement dated as of September 20, 2002 (as the same may hereafter be amended or otherwise modified from time to time, the "Loan Agreement") pursuant to which the Lenders have, subject to certain conditions precedent, agreed to make loans, advances and other financial accommodations (collectively, the "Loans") to Borrower and certain affiliates of Borrower; and

WHEREAS, Agent and Lenders have required as a condition, among others, to the making of the Loans to Borrower and its affiliates, in order to secure the prompt and complete payment, observance and performance of all of Borrower's and its affiliates' obligations and liabilities hereunder, under the Loan Agreement, and under all of the other instruments, documents and agreements executed and delivered by Borrower or its affiliates to Agent and Lenders in connection with the Loan Agreement (all such obligations and liabilities being hereinafter referred to collectively as the "Obligations"), that Grantor execute and deliver this Agreement to Agent for its benefit and the benefit of Lenders pursuant to the priorities set forth in the Loan Agreement;

NOW, THEREFORE, in consideration of the premises set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor agrees as follows:

1. Defined Terms.

(a) Unless otherwise defined herein, the capitalized terms used herein that are defined in the Loan Agreement shall have the meanings specified in the Loan Agreement.

(b) The words "hereof," "herein" and "hereunder" and words like import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and section and schedule references are to this Agreement unless otherwise specified.

(c) All terms defined in this Agreement in the singular shall have comparable meanings when used in the plural, and vice versa, unless otherwise specified.

2. Security Interest in Trademarks. To secure the complete and timely payment, performance and satisfaction of all of the Obligations, Grantor hereby grants to Agent, for its benefit and the benefit of Lenders, pursuant to the priorities set forth in the Loan Agreement a first priority security interest in, having priority over all other security interests, with power of sale to the extent permitted by applicable law, all of Grantor's now owned or existing and filed and hereafter acquired or arising and filed:

(i) trademarks, registered trademarks and trade mark applications, trade names, service marks, registered service marks and service mark applications including, without limitation, the registered trade marks, trademark applications, registered service marks and service applications listed on Schedule A, and (a) all renewals thereof, (b) all income, royalties, damages and payments now and hereafter due and/or payable with respect thereto, including, without limitation, payments under all licenses entered into in connection therewith and damages and payments for past or future infringements or dilutions thereof, (c) the right to sue for past, present and future infringements and dilutions thereof, and (d) all of Grantor's rights corresponding thereto throughout the world (all of the foregoing registered trademarks, trademark applications, registered service marks and service mark applications, together with the items described in clauses (a)-(d) in this paragraph 2(i), being sometimes hereinafter individually and/or collectively referred to as the "Trademarks");

(ii) the goodwill of Grantor's business connected with and symbolized by the Trademarks; and

(iii) license agreements with any other party in connection with any Trademarks or such other party's trademarks, registered trademarks and trademark applications, trade names, service marks, registered service marks and service mark applications, whether Grantor is a licensor or licensee under any such license agreement, including but not limited to, the license agreements listed on Schedule B, and the right upon the occurrence and during the continuance of an Event of Default to use the foregoing in connection with the enforcement of Agent's or Lenders' rights under the Loan Agreement (all of the foregoing being hereinafter referred to collectively as the "Licenses"). Notwithstanding the foregoing provisions of this Section 2, the Licenses shall not include any license agreement that by its terms prohibits the grant of the security interest contemplated by this Agreement.

3. Restrictions on Future Agreements. Grantor will not, without Agent's prior written consent, enter into any agreement, including, without limitation, any license agreement that is inconsistent with this Agreement, and Grantor further agrees that it will not take any action, and will use its best efforts not to permit any action to be taken by others subject to its control, including licensees, or fail to take any action, that would in any material respect affect the validity or enforcement of the rights transferred to Agent, for its benefit and the ratable benefit of Lenders, under this Agreement or the rights associated with those Trademarks which are necessary or desirable in the operation of Grantor's business.

4. New Trademarks. Grantor represents and warrants that the Trademarks and Licenses listed on Schedules A and B, respectively, include all of the trademarks, trademark registrations, trademark applications, trade names, service marks, service mark registrations, service mark applications and license agreements in connection with trademarks, registered

trademarks, trademark applications, trade names, service marks, registered service marks and service mark applications now owned or held by Grantor. If, prior to the termination of this Agreement, Grantor shall (i) obtain rights to any new trademarks, trademark registrations, trademark applications, trade names, service marks, service mark, registration, service mark applications or license agreements in connection with trademarks, registered trademarks, trademark applications, trade names, service marks, registered service marks or service mark applications or (ii) become entitled to the benefit of any trademark, trademark registration, trademark application, trade name, service mark, service mark registration or service mark application, the provisions of Section 2 shall automatically apply thereto and Grantor shall give to Agent prompt written notice thereof. Grantor hereby authorizes Agent to modify this Agreement by (i) amending Schedules A or B, as the case may be, to include any future trademarks, trademark registrations, trademark applications, trade names, service marks, service mark applications and license agreements in connection with trademarks, registered trademarks, trademark applications, service marks, service mark registrations, service mark applications and trade names that are Trademarks or Licenses under Section 2, or under this Section 4, and (ii) filing, in addition to and not in substitution for, this Agreement, a duplicate original of this Agreement contained on Schedules A or B thereto, as the case may be, such future trade marks, trademark applications, trade names, service marks, service mark applications and license agreements in connection with trademarks, registered trademarks, trademark applications, service marks, registered service marks, service mark applications and trade names that are Trademarks or Licenses under Section 2 or this Section 4.

5. Royalties. Grantor hereby agrees that the use by Agent of the Trademarks and Licenses as authorized hereunder shall be co-extensive with Grantor's rights thereunder and with respect thereto and without any liability for royalties or other related charges from Agent or any Lender to Grantor.

6. Nature and Continuation of Agent's Security Interest. This Agreement is made for collateral security purposes only. This Agreement shall create a continuing security interest in the Trademarks and Licenses and shall remain in full force and effect until the Obligations have been paid in full and the Loan Agreement terminated. At such time, the rights granted to Agent and Lenders hereunder shall terminate, and Agent and Lenders shall deliver such documents as Grantor shall reasonably request to terminate any filings or assignments of record pursuant hereto.

7. Right to Inspect; Further Assignments and Security Interests. Agent shall have the right, upon twenty-four (24) hours' prior written notice to Grantor, at any reasonable time during normal business hours and from time to time, to inspect Grantor's premises and to examine Grantor's books, records and operations relating to the Trademarks, including, without limitation, Grantor's quality control processes; *provided*, that in conducting such inspections and examinations, Agent shall use its best efforts not to disturb unnecessarily the conduct of Grantor's ordinary business operations. From and after the occurrence of an Event of Default, and subject to the terms of the Loan Agreement Grantor agrees that Agent, or a conservator appointed by Agent, shall have the right to establish such reasonable additional product quality controls as Agent or such conservator, in its sole judgment, may deem necessary to assure maintenance of the quality of products sold by Grantor under the Trademarks. Grantor agrees (i) not to sell or assign its respective interests in, or grant any license under, the Trademarks

without the prior written consent of Agent, (ii) to maintain the quality of any and all products in connection with which the Trademarks are used, consistent with the quality of said products as of the date hereof, and (iii) not to change the quality of such products in any material respect without the prior written consent of Agent.

8. Duties of Grantor. Grantor shall have the duty, to the extent desirable in the normal conduct of Grantor's business and consistent with Grantor's current business practices (i) to prosecute diligently any trademark applications or service mark applications that are part of the Trademarks pending as of the date hereof or thereafter until the termination of this Agreement, (ii) to make applications for trademarks and service marks as Grantor deems appropriate, and (iii) to take reasonable steps to preserve and maintain all of Grantor's rights in the trademark applications, service mark applications and trademark and service mark registrations that are part of the Trademarks. Any expenses incurred in connection with the foregoing shall be borne by Grantor. Grantor shall not abandon any material trademark or service mark that is the subject of a registered trademark, service mark or application therefor and that is or, to Grantor's knowledge, shall be necessary or economically desirable in the operation of the Grantor's business. Grantor agrees to retain an experienced trademark attorney reasonably acceptable to Agent for the filing and prosecution of all such applications and other proceedings. Neither Agent nor any Lender shall have any duty with respect to the Trademarks. Without limiting the generality of the foregoing, neither Agent nor any Lender shall be under any obligation to take any steps necessary to preserve rights in the Trademarks and Licenses against any other parties, but may do so at its option during the continuance of an Event of Default, and all reasonable expenses incurred in connection therewith shall be for the sole account of Grantor and added to the Obligations secured hereby.

9. Agent's Right to Sue. From and after the occurrence and during the continuance of an Event of Default, and subject to the terms of the Loan Agreement, Agent shall have the right but shall not be obligated, to bring suit to enforce the Trademarks and the Licenses and, if Agent shall commence any such suit, Grantor shall, at the request of Agent, do any and all lawful acts and execute any and all proper documents required by Agent in aid of such enforcement. Grantor shall, upon demand, promptly reimburse and indemnify Agent for all costs and reasonable expenses incurred by Agent in the exercise of its rights under this Section 9 (including, without limitation, all attorneys' and paralegals' fees). If, for any reason whatsoever, Agent is not reimbursed with respect to the costs and expenses referred to in the preceding sentence, such costs and expenses shall be added to the Obligations secured hereby.

10. Waivers. No course of dealing between Grantor and Agent, and no failure to exercise or delay in exercising on the part of Agent any right, power or privilege hereunder or under the Loan Agreement shall operate as a waiver of any of Agent's rights, powers or privileges. No single or partial exercise of any right, power or privilege hereunder or under the Loan Agreement shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

11. Agent's Exercise of Rights and Remedies upon Default. Notwithstanding anything set forth herein to the contrary, it is hereby expressly agreed that upon the occurrence and during the continuance of an Event of Default, Agent may exercise any of the rights and remedies provided in this Agreement, the Loan Agreement, or any other agreement executed in

connection therewith. Without limiting the generality of the foregoing, Grantor acknowledges and agrees that (i) the Trademarks and Licenses comprise a portion of the Collateral and Agent shall have the right to exercise its rights under the Loan Agreement with respect to the Trademarks and Licenses to the same extent as with respect to all other items of Collateral described therein, and (ii) from and after the occurrence and during the continuance of an Event of Default, Agent or its nominee may use the Trademarks and Licenses to complete the manufacture of, assemble, package, distribute, prepare for sale and sell the Inventory, or otherwise in connection with the conduct of Grantor's business.

12. Severability. The provisions of this Agreement are severable, and if any clause or provision shall be held invalid and unenforceable in whole or in part in any jurisdiction, then such invalidity or unenforceability shall affect only such clause or provision, or part thereof, in such jurisdiction, and shall not in any manner affect such clause or provision in any other jurisdiction, or any other clause or provision of this Agreement in any jurisdiction.

13. Modification. This Agreement cannot be altered, amended or modified in any way, except as specifically provided in Sections 2 and 4 hereof or by a writing signed by the parties hereto.

14. Cumulative Remedies; Power of Attorney. All of Agent's rights and remedies with respect to the Trademarks and the Licenses, whether established hereby, by any other agreements or by law, shall be cumulative and may be exercised singularly or concurrently. Grantor hereby irrevocably appoints Agent as Grantor's attorney-in-fact, with full authority in the place and stead of Grantor and in the name of Grantor or otherwise to carry out the acts described below. Subject to the terms of the Loan Agreement, upon the occurrence and during the continuance of an Event of Default and the giving by Agent of written notice to Grantor of Agent's intention to enforce its rights and claims against Grantor, Grantor hereby authorizes Agent to, in its reasonable discretion (i) endorse Grantor's name on all applications, documents, papers and instruments necessary or desirable for Agent in the use of the Trademarks and the Licenses, (ii) take any other actions with respect to the Trademarks and the Licenses as Agent deems is in its best interest, (iii) grant or issue any exclusive or nonexclusive license under the Trademarks to anyone on commercially reasonable terms, and (iv) assign, pledge, convey or otherwise transfer title in or dispose of the Trademarks to anyone on commercially reasonable terms. Agent shall take no action pursuant to subsection (i), (ii), (iii) or (iv) of this Section 14 without taking like action with respect to the entire goodwill of Grantor's business connected with the use of, and symbolized by, such Trademarks. Grantor hereby ratifies all that such attorney-in-fact shall lawfully do or cause to be done by virtue hereof. This power of attorney is coupled with an interest and shall be irrevocable until this Agreement shall have been terminated pursuant to Section 6. Grantor acknowledges and agrees that this Agreement is not intended to limit or restrict in any way the rights and remedies of Agent under the Loan Agreement, but rather is intended to facilitate the exercise of such rights and remedies. Agent shall have, in addition to all other rights and remedies given it by the terms of this Agreement, all rights and remedies allowed by law and the rights and remedies of a secured party under the Uniform Commercial Code as enacted in any jurisdiction in which the Trademarks may be located or deemed located.

15. Binding Effect; Benefits. This Agreement shall be binding upon Grantor and its successors and assigns, and shall inure to the benefit of Agent, Lenders and its and their nominees, successors and assigns. Grantor's successors and assigns shall include, without limitation, a receiver, trustee or debtor-in-possession of or for Grantor; *provided, however* that Grantor shall not voluntarily assign its obligations hereunder without the prior written consent of Agent.

16. Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws (as distinguished from the conflicts of law provisions) and decisions of the State of Illinois.

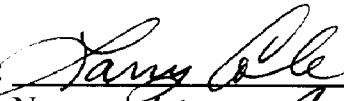
17. Notices. All notices or other communications hereunder shall be given in the manner and to the addresses set forth in the Loan Agreement.

18. Section Headings. The section headings herein are for convenience of reference only, and shall not affect in any way the interpretation of any of the provisions hereof.

19. Execution in Counterparts. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement on the day and year first above written.

KINGWAY ACQUISITION, INC., a
Delaware corporation

By: 
Name: LARRY COLE
Title: SECRETARY

Accepted and agreed to as of this 24th day of
September, 2002.

FLEET CAPITAL CORPORATION, as
Agent

By: _____
Name: _____
Title: _____

15. Binding Effect; Benefits. This Agreement shall be binding upon Grantor and its successors and assigns, and shall inure to the benefit of Agent, Lenders and its and their nominees, successors and assigns. Grantor's successors and assigns shall include, without limitation, a receiver, trustee or debtor-in-possession of or for Grantor; *provided, however* that Grantor shall not voluntarily assign its obligations hereunder without the prior written consent of Agent.

16. Governing Law. This Agreement shall be governed by and construed in accordance with the internal laws (as distinguished from the conflicts of law provisions) and decisions of the State of Illinois.

17. Notices. All notices or other communications hereunder shall be given in the manner and to the addresses set forth in the Loan Agreement.

18. Section Headings. The section headings herein are for convenience of reference only, and shall not affect in any way the interpretation of any of the provisions hereof.

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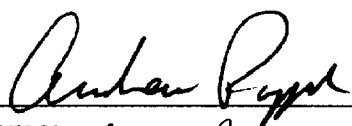
IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement on the day and year first above written.

KINGWAY ACQUISITION, INC., a
Delaware corporation

By: _____
Name: _____
Title: _____

Accepted and agreed to as of this 24th day of
September, 2002.

FLEET CAPITAL CORPORATION, as
Agent

By:  _____
Name: Andrew Popas
Title: Vice President

STATE OF Texas)
) SS
COUNTY OF Denton)

The foregoing Trademark and License Security Agreement was executed and acknowledged before me this 24th day of September, 2002, by Larry Cole personally known to me to be the Secretary of KINGWAY ACQUISITION, INC., a Delaware corporation, on behalf of such corporation.

(SEAL)

Kathy M. De Grey
Notary Public

My commission expires: 04/15/04



KATHY M. DE GREY
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 04-15-2004

SCHEDULE A

TRADEMARKS

<u>Trademark</u>	<u>Serial No.</u>	<u>Filing Date</u>	<u>Registration No.</u>	<u>Registered Date</u>
King-Way	72120537	5/22/61	0728306	3/6/62

SCHEDULE B

LICENSES

NONE

B-1

CHICAGO/#974367.2

RECORDED: 10/02/2002

**TRADEMARK
REEL: 002652 FRAME: 0407**