**LOAN AGREEMENT**

This LOAN AND SECURITY AGREEMENT (the “Agreement”) is entered into as of (Month, Date, Year), by and between Daily Finance (“Creditor”) and (“Borrower”).

**RECITALS**

Borrower wishes to obtain credit from time to time from Creditor, and Creditor desires to extend credit to Borrower. This Agreement sets forth the terms on which Creditor will advance credit to Borrower, and Borrower will repay the amounts owing to Creditor.

**AGREEMENT**

The parties agree as follows:

|  |  |  |
| --- | --- | --- |
|  | **1.** | **DEFINITIONS AND CONSTRUCTION**. |

**1.1** **Definitions**. As used in this Agreement, all capitalized terms shall have the definitions set forth on Exhibit A. Any term used in the Code and not defined herein shall have the meaning given to the term in the Code.

**1.2** **Accounting Terms**. Any accounting term not specifically defined on Exhibit A shall be construed in accordance with GAAP and all calculations shall be made in accordance with GAAP (except for noncompliance with FAS 123R in monthly reporting). The term “financial statements” shall include the accompanying notes and schedules.

|  |  |  |
| --- | --- | --- |
|  | **2.** | **LOAN AND TERMS OF PAYMENT**. |

**2.1** **Credit Extensions**.

**(a)** **Promise to Pay**. Borrower promises to pay to Creditor, in lawful money of the United States of America, the aggregate unpaid principal amount of all Credit Extensions made by Creditor to Borrower, together with interest on the unpaid principal amount of such Credit Extensions at rates in accordance with the terms hereof.

**(b)** **Term Loans**.

**(i)** Subject to and upon the terms and conditions of this Agreement, Creditor agrees to make one (1) or more term loans to Borrower in an aggregate principal amount not to exceed $100,000.00 (each a “Term Loan” and collectively the “Term Loans”). Borrower may request Term Loans at any time from the date hereof through the Availability End Date. The proceeds of the Term Loans shall be used for general working capital purposes.

**(ii)** Interest shall accrue from the date of each Term Loan at the rate specified in Section 2.2(a), and prior to the Availability End Date shall be payable monthly beginning on the first day of the month next following such Term Loan, and continuing on the same day of each month thereafter. Any Term Loans that are outstanding on the Availability End Date shall be payable in six(6)/twelve(12) equal monthly installments of principal, plus all accrued interest, beginning on \_\_\_\_\_\_\_\_\_\_\_(Month, Date, Year) and continuing on the same day of each month thereafter through the Term Loan Maturity Date, at which time all amounts due in connection with the Term Loans and any other amounts due under this Agreement shall be immediately due and payable. Term Loans, once repaid, may not be reborrowed. Borrower may prepay any Term Loan without penalty or premium.

**(iii)** When a Borrower desires to obtain a Term Loan, Borrower shall notify Creditor (which notice shall be irrevocable) by electronic transmission to be received no later than 14 Business Days prior to the date on which the Term Loan is to be made. Such notice shall be substantially in the form of Exhibit B. The notice shall be signed by an Authorized Officer.

**2.2** **Interest Rates, Payments, and Calculations**.

**(a)** **Interest Rate for Term Loans**. Except as set forth in Section 2.2(b), the Term Loans shall bear interest, on the outstanding daily balance thereof, at a fixed annual rate of 9.98%.

**(b)** **Late Fee; Default Rate**. If any payment is not made within 5 calendar days after the date such payment is due, Borrower shall pay Creditor a late fee equal to the lesser of (i) 5% of the amount of such unpaid amount or (ii) the maximum amount permitted to be charged under applicable law. All Obligations shall bear interest, from and after the occurrence and during the continuance of an Event of Default, at a rate equal to 5 percentage points above the interest rate applicable immediately prior to the occurrence of the Event of Default.

**(c)** **Payments**. Creditor shall, at its option, charge such interest, all Creditor Expenses, and all Periodic Payments against any of Borrower’ deposit accounts.

**(d)** **Computation**. All interest chargeable under the Loan Documents shall be computed on the basis of a 360 day year for the actual number of days elapsed.

**2.3** **Crediting Payments**. Prior to the occurrence of an Event of Default, Creditor shall credit a wire transfer of funds, auto debit, check or other item of payment to such deposit account or Obligation as Borrower specifies, except that to the extent a Borrower uses the Term Loans to purchase Collateral, Borrower repayment of the Term Loans shall apply on a “first-in-first-out” basis so that the portion of the Term Loans used to purchase a particular item of Collateral shall be paid in the chronological order the Borrower purchased the Collateral. After the occurrence and during the continuance of an Event of Default, Creditor shall have the right, in its sole discretion, to immediately apply any wire transfer of funds, auto debit, check, or other item of payment Creditor may receive to conditionally reduce Obligations, but such applications of funds shall not be considered a payment on account unless such payment is of immediately available federal funds or unless and until such check or other item of payment is honored when presented for payment. Notwithstanding anything to the contrary contained herein, any wire transfer or payment received by Creditor after 5:00 p.m. Pacific time shall be deemed to have been received by Creditor as of the opening of business on the immediately following Business Day. Whenever any payment to Creditor under the Loan Documents would otherwise be due (except by reason of acceleration) on a date that is not a Business Day, such payment shall instead be due on the next Business Day, and additional fees or interest, as the case may be, shall accrue and be payable for the period of such extension.

**2.4** **Fees**. Borrower shall pay to Creditor the following:

**(a)** **Creditor Expenses**. On the Closing Date, all Creditor Expenses incurred through the Closing Date, and, after the Closing Date, all Creditor Expenses, as and when they become due related to each Term Loan.

|  |  |  |
| --- | --- | --- |
|  | **3.** | **CONDITIONS OF LOANS**. |

**3.1** **Conditions Precedent to Closing**. The agreement of Creditor to enter into this Agreement on the Closing Date is subject to the condition precedent that Creditor shall have received, in form and substance satisfactory to Creditor, each of the following items and completed each of the following requirements:

**(a)** this Agreement;

**(b)** an officer’s certificate of Borrower with respect to incumbency and resolutions authorizing the execution and delivery of this Agreement;

**(c)** if applicable, a financing statement (Form UCC-1);

**(d)** payment of the fees and Creditor Expenses then due specified in Section 2.4, which may he debited from any of Borrower’ accounts with Creditor;

**(e)** loan origination fee of $300;

**(f)** application fee of $50;

**(g)** if applicable, current SOS Reports indicating that except for Permitted Liens, there are no other security interests or Liens of record in the Collateral;

**(h)** current financial statements, including audited statements (or such other level required by the Investment Agreement) for Borrower’s most recently ended fiscal year, together with an unqualified opinion (or an opinion qualified only for going concern so long as such Borrower’s investors provide additional equity as needed), company prepared consolidated and consolidating balance sheets, income statements and statements of cash flows for the most recently ended, and such other updated financial information as Creditor may reasonably request; and

**(i)** such other documents or certificates, and completion of such other matters, as Creditor may reasonably request.

**3.2** **Conditions Precedent to all Credit Extensions**. The obligation of Creditor to make each Credit Extension, including the initial Credit Extension, is contingent upon the Borrower’ compliance with Section 3.1 above, and is further subject to the following conditions:

**(a)** timely receipt by Creditor of the Loan Advance/Paydown Request Form as provided in Section 2.1; and

**(b)** the representations and warranties contained in Section 5 shall be true and correct in all material respects on and as of the date of such Loan Advance/Paydown Request Form and on the effective date of each Credit Extension as though made at and as of each such date, and no Event of Default shall have occurred and be continuing, or would exist after giving effect to such Credit Extension (provided, however, that those representations and warranties expressly referring to another date shall be true, correct and complete in all material respects as of such date). The making of each Credit Extension shall be deemed to be a representation and warranty by Borrower on the date of such Credit Extension as to the accuracy of the facts referred to in this Section 3.2.

|  |  |  |
| --- | --- | --- |
|  | **4.** | **REPRESENTATIONS AND WARRANTIES**. |

Borrower represents and warrants as follows:

**4.1** **Due Organization and Qualification**. Borrower is an entity duly existing under the laws of the state in which it is organized and qualified and licensed to do business in any state in which the conduct of its business or its ownership of property requires that it be so qualified, except where the failure to do so would not reasonably be expected to cause a Material Adverse Effect.

**4.2** **Due Authorization; No Conflict**. The execution, delivery, and performance of the Loan Documents are within Borrower’s powers, have been duly authorized, and are not in conflict with nor constitute a breach of any provision contained in such Borrower’s Certificate of Incorporation, Certificate of Formation, Bylaws or Operating Agreement, nor will they constitute an event of default under any material agreement by which such Borrower is bound. No Borrower is in default under any agreement by which it is bound, except to the extent such default would not reasonably be expected to cause a Material Adverse Effect.

**4.3** **Intellectual Property**. Borrower’s Intellectual Property is set forth on Schedule 5.4 hereto. Borrower is the sole owner of the intellectual property created or purchased by such Borrower, except for licenses granted by such Borrower to its customers in the ordinary course of business. To the best of Borrower’s knowledge, each of the copyrights, trademarks and patents created or purchased by such Borrower is valid and enforceable, and no part of the intellectual property created or purchased by such Borrower has been judged invalid or unenforceable, in whole or in part, and no claim has been made to such Borrower that any part of the intellectual property created or purchased by such Borrower violates the rights of any third party except to the extent such claim would not reasonably be expected to cause a Material Adverse Effect.

**4.4** **Name; Location of Chief Executive Office**. Borrower has not done business under any name other than that specified on the signature page hereof, and its exact legal name is as set forth in the first paragraph of this Agreement. The chief executive offices of Borrower are located at the addresses indicated in Section 10 hereof.

**4.5** **Litigation**. There are no actions or proceedings pending by or against any Borrower or any Subsidiary before any court or administrative agency in which a likely adverse decision would reasonably be expected to have a Material Adverse Effect.

**4.6** **No Material Adverse Change in Financial Statements**. All consolidated and consolidating financial statements related to a Borrower and any Subsidiary that are delivered by such Borrower to Creditor fairly present in all material respects such Borrower’s consolidated and consolidating financial condition as of the date thereof and such Borrower’s consolidated and consolidating results of operations for the period then ended. There has not been a material adverse change in the consolidated or in the consolidating financial condition of any Borrower since the date of the most recent of such financial statements submitted to Creditor.

**4.7** **Solvency, Payment of Debts**. Borrower is able to pay its debts (including trade debts) as they mature; the fair saleable value of Borrower’s assets (including goodwill minus disposition costs) exceeds the fair value of its liabilities; and Borrower is not left with unreasonably small capital after the transactions contemplated by this Agreement.

**4.8** **Compliance with Laws and Regulations**. Borrower is not an “investment company” or a company “controlled” by an “investment company” within the meaning of the Investment Company Act of 1940. Borrower is not engaged principally, or as one of its important activities, in the business of extending credit for the purpose of purchasing or carrying margin stock (within the meaning of Regulations T and U of the Board of Governors of the Federal Reserve System). Borrower has not violated any statutes, laws, ordinances or rules applicable to it, the violation of which would reasonably be expected to have a Material Adverse Effect.

**4.9** **Government Consents**. Borrower has obtained all consents, approvals and authorizations of, made all declarations or filings with, and given all notices to, all governmental authorities that are necessary for the continued operation of such Borrower’s business as currently conducted, except where the failure to do so would not reasonably be expected to cause a Material Adverse Effect.

**4.10** **Inbound Licenses**. Borrower is not a party to, nor is bound by, any material license or other agreement important for the conduct of such Borrower’s business that prohibits or otherwise restricts such Borrower from granting a security interest in such Borrower’s interest in such license or agreement or any other property important for the conduct of such Borrower’s business, other than this Agreement or the other Loan Documents.

**4.11** **Full Disclosure**. No representation, warranty or other statement made by Borrower in any certificate or written statement furnished to Creditor taken together with all such certificates and written statements furnished to Creditor contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained in such certificates or statements not misleading in light of the circumstances in which they were made, it being recognized by Creditor that the projections and forecasts provided by Borrower in good faith and based upon reasonable assumptions are not to be viewed as facts and that actual results during the period or periods covered by any such projections and forecasts may differ from the projected or forecasted results.

|  |  |  |
| --- | --- | --- |
|  | **5.** | **AFFIRMATIVE COVENANTS**. |

Borrower covenants that, until payment in full of all outstanding Obligations, and for so long as Creditor may have any commitment to make a Credit Extension hereunder, Borrower shall do all of the following:

**5.1** **Good Standing and Government Compliance**. Borrower shall maintain its good standing in the respective states of formation, shall maintain qualification and good standing in each other jurisdiction in which the failure to so qualify would reasonably be expected to have a Material Adverse Effect, and shall furnish to Creditor the organizational identification number issued to such Borrower by the authorities of the state in which such Borrower is organized, if applicable. Borrower shall comply with all statutes, laws, ordinances and government rules and regulations to which it is subject, and shall maintain in force all licenses, approvals and agreements, the loss of which or failure to comply with which would reasonably be expected to have a Material Adverse Effect.

**5.2**  **Returns**. Returns and allowances, if any, shall be between Borrower and its customers. Any returns and allowances from customer to Borrower shall have no effect on this loan.

**5.3** **Further Assurances**. At any time and from time to time each Borrower shall execute and deliver such further instruments and take such further action as may reasonably be requested by Creditor to effect the purposes of this Agreement.

|  |  |  |
| --- | --- | --- |
|  | **6.** | **NEGATIVE COVENANTS**. |

Borrower covenants and agrees that, so long as any credit hereunder shall be available and until the outstanding Obligations are paid in full or for so long as Creditor may have any commitment to make any Credit Extensions, such Borrower will not do any of the following without Creditor’s prior written consent, which shall not be unreasonably withheld:

**6.1** **Change in Name, Location, Executive Office, or Executive Management; Change in Business; Change in Fiscal Year; Change in Control**. Change its name or the state of such Borrower’s formation or relocate its chief executive office without 30 days prior written notification to Creditor; replace or suffer the departure of its chief executive officer without delivering written notification to Creditor within 10 Business Days; take action to merge of consolidate, liquidate, wind up, or otherwise cease to conduct business in the ordinary course; change its fiscal year end; have a Change in Control without delivering written notification to Creditor within 10 Business Days.

**6.2** **No Investment Company; Margin Regulation**. Become or be controlled by an “investment company,” within the meaning of the Investment Company Act of 1940, or become principally engaged in, or undertake as one of its important activities, the business of extending credit for the purpose of purchasing or carrying margin stock, or use the proceeds of any Credit Extension for such purpose.

|  |  |  |
| --- | --- | --- |
|  | **7.** | **EVENTS OF DEFAULT**. |

Any one or more of the following events shall constitute an Event of Default by Borrower under this Agreement:

**7.1** **Payment Default**. If a Borrower fails to pay any of the Obligations when due;

**7.2** **Covenant Default**.

**(a)** If a Borrower fails to perform any obligation under Article 5 of this Agreement, or violates any of the covenants contained in Article 6 of this Agreement;

**(b)** If a Borrower fails or neglects to perform or observe any other material term, provision, condition, covenant contained in this Agreement, in any of the Loan Documents, or in any other present or future agreement between a Borrower and Creditor and as to any default under such other term, provision, condition or covenant that can be cured, has failed to cure such default within 10 days after a Borrower receives notice thereof or, any officer of a Borrower becomes aware thereof; provided, however, that if the default cannot by its nature be cured within the 10 day period or cannot after diligent attempts by Borrower be cured within such 10 day period, and such default is likely to be cured within a reasonable time, then Borrower shall have an additional reasonable period (which shall not in any case exceed 30 days) to attempt to cure such default, and within such reasonable time period the failure to have cured such default shall not be deemed an Event of Default but no Credit Extensions will be made;

**7.3** **Material Adverse Change**. If there occurs any circumstance or any circumstances which would reasonably be expected to have a Material Adverse Effect;

**7.4** **Attachment**. If any material portion of a Borrower’s assets is attached, seized, subjected to a writ or distress warrant, or is levied upon, or comes into the possession of any trustee, receiver or person acting in a similar capacity and such attachment, seizure, writ or distress warrant or levy has not been removed, discharged or rescinded within 10 days, or if a Borrower is enjoined, restrained, or in any way prevented by court order from continuing to conduct all or any material part of its business affairs, or if a judgment or other claim becomes a lien or encumbrance upon any material portion of a Borrower’s assets, or if a notice of lien, levy, or assessment is filed of record with respect to any material portion of a Borrower’s assets by the United States Government, or any department, agency, or instrumentality thereof, or by any State, county, municipal, or governmental agency, and the same is not paid within ten days after such Borrower receives notice thereof, provided that none of the foregoing shall constitute an Event of Default where such action or event is stayed or an adequate bond has been posted pending a good faith contest by such Borrower (provided that no Credit Extensions will be made during such cure period);

**7.5** **Insolvency**. If Borrower becomes insolvent, or if an Insolvency Proceeding is commenced by a Borrower, or if an Insolvency Proceeding is commenced against Borrower and is not dismissed or stayed within 30 days (provided that no Credit Extensions will be made prior to the dismissal of such Insolvency Proceeding);

**7.6** **Misrepresentations**. If any material misrepresentation or material misstatement exists now or hereafter in any warranty or representation set forth herein or in any certificate delivered to Creditor by any Responsible Officer pursuant to this Agreement or to induce Creditor to enter into this Agreement or any other Loan Document.

|  |  |  |
| --- | --- | --- |
|  | **8.** | **CREDITOR’S RIGHTS AND REMEDIES**. |

**8.1** **Rights and Remedies**. Upon the occurrence and during the continuance of an Event of Default, Creditor may, at its election, without notice of its election and without demand, do any one or more of the following, all of which are authorized by Borrower:

**(a)** Declare all Obligations, whether evidenced by this Agreement, by any of the other Loan Documents, or otherwise, immediately due and payable (provided that upon the occurrence of an Event of Default described in Section 8.5 (insolvency), all Obligations shall become immediately due and payable without any action by Creditor);

**(b)** Demand that Borrower (i) deposit cash with Creditor in an amount equal to the amount of any Letters of Credit remaining undrawn, as collateral security for the repayment of any future drawings under such Letters of Credit, and (ii) pay in advance all Letter of Credit fees scheduled to be paid or payable over the remaining term of the Letters of Credit, and Borrower shall promptly deposit and pay such amounts;

**(c)** Cease advancing money or extending credit to or for the benefit of Borrower under this Agreement or under any other agreement between a Borrower and Creditor;

**(d)** Settle or adjust disputes and claims directly with account debtors for amounts, upon terms and in whatever order that Creditor reasonably considers advisable; and

**(f)** Set off and apply to the Obligations any and all (i) balances and deposits of any Borrower held by Creditor, and (ii) indebtedness at any time owing to or for the credit or the account of any Borrower held by Creditor;

**8.2** **Accounts Collection**. At any time after the occurrence and during the continuation of an Event of Default, Creditor may notify any Person owing funds to Borrower of Creditor’s security interest in such funds and verify the amount of such Account. Borrower shall collect all amounts owing to any Borrower for Creditor, receive in trust all payments as Creditor’s trustee, and immediately deliver such payments to Creditor in their original form as received from the account debtor, with proper endorsements for deposit.

**8.3** **Remedies Cumulative**. Creditor’s rights and remedies under this Agreement, the Loan Documents, and all other agreements shall be cumulative. Creditor shall have all other rights and remedies not inconsistent herewith as provided under the Code, by law, or in equity. No exercise by Creditor of one right or remedy shall be deemed an election, and no waiver by Creditor of any Event of Default on a Borrower’s part shall be deemed a continuing waiver. No delay by Creditor shall constitute a waiver, election, or acquiescence by it. No waiver by Creditor shall be effective unless made in a written document signed on behalf of Creditor and then shall be effective only in the specific instance and for the specific purpose for which it was given. Borrower expressly agrees that this Section 9.7 may not be waived or modified by Creditor by course of performance, conduct, estoppel or otherwise.

**8.4** **Demand; Protest**. Except as otherwise provided in this Agreement, each Borrower waives demand, protest, notice of protest, notice of default or dishonor, notice of payment and nonpayment and any other notices relating to the Obligations.

|  |  |  |
| --- | --- | --- |
|  | **9.** | **NOTICES**. |

Unless otherwise provided in this Agreement, all notices or demands by any party relating to this Agreement or any other agreement entered into in connection herewith shall be in writing and (except for financial statements and other informational documents which may be sent by first-class mail, postage prepaid) shall be personally delivered or sent by a recognized overnight delivery service, certified mail, postage prepaid, return receipt requested, or by electronic mail to Borrower or to Creditor, as the case may be, at its addresses set forth below:

|  |  |  |
| --- | --- | --- |
|  |  |  |
| If to Borrower: |  | Borrower Address |
|  |  |  |
|  |  | |
| If to Creditor: |  | Daily Finance |
|  |  | 458 E. Commercial Road |
|  |  | San Bernardino, CA 92408 |
|  |  | Attn: |
|  |  | Email: |
|  |  | |

The parties hereto may change the address at which they are to receive notices hereunder, by notice in writing in the foregoing manner given to the other.

|  |  |  |
| --- | --- | --- |
|  | **10.** | **CHOICE OF LAW AND VENUE; JURY TRIAL WAIVER**. |

This Agreement shall be governed by, and construed in accordance with, the internal laws of the State of California, without regard to principles of conflicts of law. Jurisdiction shall lie in the State of California. All disputes, controversies, claims, actions and similar proceedings arising with respect to Borrower’ accounts or any related agreement or transaction shall be brought in the Superior Court of San Bernardino County, California or the United States District Court for the Central District of California, except as provided below with respect to arbitration of such matters. CREDITOR AND BORROWER EACH ACKNOWLEDGE THAT THE RIGHT TO TRIAL BY JURY IS A CONSTITUTIONAL ONE, BUT THAT IT MAY BE WAIVED. EACH OF THEM, AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT, WITH COUNSEL OF THEIR CHOICE, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHT ANY OF THEM MAY HAVE TO A TRIAL BY JURY IN ANY LITIGATION BASED UPON OR ARISING OUT OF THIS AGREEMENT OR ANY RELATED INSTRUMENT OR LOAN DOCUMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT OR ANY COURSE OF CONDUCT, DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN), OR ACTION OF ANY OF THEM. THESE PROVISIONS SHALL NOT BE DEEMED TO HAVE BEEN MODIFIED IN ANY RESPECT OR RELINQUISHED BY CREDITOR OR ANY BORROWER, EXCEPT BY A WRITTEN INSTRUMENT EXECUTED BY EACH OF THEM. If the jury waiver set forth in this Section 10 is not enforceable, then any dispute, controversy, claim, action or similar proceeding arising out of or relating to this Agreement, the Loan Documents or any of the transactions contemplated therein shall be settled by final and binding arbitration held in San Bernardino County, California in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association by one arbitrator appointed in accordance with those rules. The arbitrator shall apply California law to the resolution of any dispute, without reference to rules of conflicts of law or rules of statutory arbitration. Judgment upon any award resulting from arbitration may be entered into and enforced by any state or federal court having jurisdiction thereof. Notwithstanding the foregoing, the parties may apply to any court of competent jurisdiction for preliminary or interim equitable relief, or to compel arbitration in accordance with this Section. The non-prevailing party shall be solely responsible for the costs and expenses of the arbitration, including without limitation, the arbitrator’s fees and expert witness fees, and actual or reasonable attorneys’ fees (as determined by the arbitrator), incurred by the prevailing party.

|  |  |  |
| --- | --- | --- |
|  | **11.** | **GENERAL PROVISIONS**. |

**11.1** **Successors and Assigns**. This Agreement shall bind and inure to the benefit of the respective successors and permitted assigns of each of the parties and shall bind all persons who become bound as a debtor to this Agreement; provided, however, that neither this Agreement nor any rights hereunder may be assigned by any Borrower without Creditor’s prior written consent, which consent may be granted or withheld in Creditor’s sole discretion. Creditor shall have the right without the consent of or notice to Borrower to sell, assign, transfer, negotiate, or grant participation in all or any part of, or any interest in, Creditor’s obligations, rights and benefits hereunder.

**11.2** **Indemnification**. Borrower shall defend, indemnify and hold harmless Creditor and its officers, employees, and agents against: (a) all obligations, demands, claims, and liabilities claimed or asserted by any other party in connection with the transactions contemplated by this Agreement; and (b) all losses or Creditor Expenses in any way suffered, incurred, or paid by Creditor, its officers, employees and agents as a result of or in any way arising out of, following, or consequential to transactions between Creditor and a Borrower whether under this Agreement, or otherwise (including without limitation reasonable attorneys fees and expenses), except for losses caused by Creditor’s gross negligence or willful misconduct.

**11.3** **Time of Essence**. Time is of the essence for the performance of all obligations set forth in this Agreement.

**11.4** **Severability of Provisions**. Each provision of this Agreement shall be severable from every other provision of this Agreement for the purpose of determining the legal enforceability of any specific provision.

**11.5** **Amendments in Writing, Integration**. All amendments to or terminations of this Agreement or the other Loan Documents must be in writing. All prior agreements, understandings, representations, warranties, and negotiations between the parties hereto with respect to the subject matter of this Agreement and the other Loan Documents, if any, are merged into this Agreement and the Loan Documents.

**11.6** **Counterparts**. This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, when taken together, shall constitute but one and the same Agreement. Executed copies of the signature pages of this Agreement sent by facsimile or transmitted electronically in Portable Document Format (“PDF”), or any similar format, shall be treated as originals, fully binding and with full legal force and effect, and the parties waive any rights they may have to object to such treatment.

**11.7** **Survival**. All covenants, representations and warranties made in this Agreement shall continue in full force and effect so long as any Obligations remain outstanding or Creditor has any obligation to make any Credit Extension to a Borrower. The obligations of Borrower to indemnify Creditor with respect to the expenses, damages, losses, costs and liabilities described in Section 11.2 shall survive until all applicable statute of limitations periods with respect to actions that may be brought against Creditor have run.

**11.8** **Confidentiality**. In handling any confidential information, Creditor and Borrower and all employees and agents of each such party shall exercise the same degree of care that such party exercises with respect to its own proprietary information of the same types to maintain the confidentiality of any non-public information thereby received or received pursuant to this Agreement except that disclosure of such information may be made (i) in the case of Creditor, to the subsidiaries or Affiliates of Creditor or Borrower in connection with their present or prospective business relations with Borrower, (ii) in the case of Creditor, to prospective transferees or purchasers of any interest in the Credit Extensions, provided that they have entered into a comparable confidentiality agreement in favor of Borrower and have delivered a copy to Borrower, (iii) as required by law, regulations, rule or order, subpoena, judicial order or similar order, (iv) in the case of Creditor, as may be required in connection with the examination, audit or similar investigation of Creditor and (v) as Creditor may determine in connection with the enforcement of any remedies hereunder. Confidential information hereunder shall not include information that either: (a) is in the public domain or in the knowledge or possession of the receiving party when disclosed to such party, or becomes part of the public domain after disclosure to such receiving party through no fault of such receiving party; or (b) is disclosed to the receiving party by a third party, provided such receiving party does not have actual knowledge that such third party is prohibited from disclosing such information.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first above written.

|  |  |  |
| --- | --- | --- |
|  |  |  |
| BORROWER | | |
|  |  | |
| By: |  |  |
| Title: |  | CEO |
|  | | |
|  | | |
| DAILY FINANCING - CREDITOR | | |
|  |  | |
| By: |  |  |
| Title: |  |  |

**[*Signature Page to Loan and Security Agreement*]**

**EXHIBIT A**

DEFINITIONS

“Accounts” means all presently existing and hereafter arising accounts, contract rights, payment intangibles and all other forms of obligations owing to Borrower arising out of the sale or lease of goods (including, without limitation, the licensing of software and other technology) or the rendering of services by Borrower and any and all credit insurance, guaranties, and other security therefor, as well as all merchandise returned to or reclaimed by Borrower and Borrower’ Books relating to any of the foregoing.

“Affiliate” means, with respect to any Person, any Person that owns or controls directly or indirectly such Person, any Person that controls or is controlled by or is under common control with such Person, and each of such Person’s senior executive officers, directors, and general partners.

“Authorized Officer” means someone designated as such in the corporate resolution provided by each Borrower to Creditor in which this Agreement and the transactions contemplated hereunder arc authorized by such Borrower’s board of directors. If a Borrower provides subsequent corporate resolutions to Creditor after the Closing Date, the individual(s) designated as “Authorized Officer(s)” in the most-recently provided resolution shall be the only “Authorized Officers” for purposes of this Agreement.

“Availability End Date” means June 14, 2021.

“Creditor Expenses” means all reasonable costs or expenses (including reasonable attorneys’ fees and expenses, whether generated in-house or by outside counsel) incurred in connection with the preparation, negotiation, administration, and enforcement of the Loan Documents; reasonable Collateral audit fees; insufficient fees or such related fee assessed by any financial institution for reasons attributable to Borrower; and Creditor’s reasonable attorneys’ fees and expenses (whether generated in-house or by outside counsel) incurred in amending, enforcing or defending the Loan Documents (including fees and expenses of appeal), incurred before, during and after an Insolvency Proceeding, whether or not suit is brought.

“Business Day” means any day that is not a Saturday, Sunday, or other day on which Creditors in the State of California are authorized or required to close.

“Cash” means unrestricted cash and cash equivalents.

“Change in Control” shall mean directly or indirectly, of a sufficient number of shares of all classes of stock then

outstanding of a Borrower ordinarily entitled to vote in the election of directors, empowering such “person” or “group” to elect a majority of the Board of Directors of a Borrower, who did not have such power before such transaction.

“Closing Date” means the date of this Agreement.

“Code” means the California Uniform Commercial Code as amended or supplemented from time to time.

“Copyrights” means any and all copyright rights, copyright applications, copyright registrations and like protections in each work or authorship and derivative work thereof, whether published or unpublished and whether or not the same also constitutes a trade secret, now or hereafter existing, created, acquired or held.

“Credit Extension” means each Term Loan or any other extension of credit by Creditor, to or for the benefit of a Borrower hereunder.

“Equipment” means all present and future machinery, equipment, tenant improvements, furniture, fixtures, vehicles, tools, parts and attachments in which a Borrower has any interest.

“Event of Default” has the meaning assigned in Article 8.

“GAAP” means generally accepted accounting principles, consistently applied, as in effect from time to time in the United States.

“Indebtedness” means (a) all indebtedness for borrowed money or the deferred purchase price of property or services, including without limitation reimbursement and other obligations with respect to surety bonds and letters of credit, (b) all obligations evidenced by notes, bonds, debentures or similar instruments, (c) all capital lease obligations, and (d) all Contingent Obligations, including but not limited to any sublimit contained herein.

“Insolvency Proceeding” means any proceeding commenced by or against any Person or entity under any provision of the United States Bankruptcy Code, as amended, or under any other Bankruptcy or insolvency law, including assignments for the benefit of creditors, formal or informal moratoria, compositions, extension generally with its creditors, or proceedings seeking reorganization, arrangement, or other relief.

“Intellectual Property” means all of a Borrower’s right, title, and interest in and to the following:

(a) Copyrights, Trademarks and Patents;

(b) Any and all trade secrets, and any and all intellectual property rights in computer software and computer software products now or hereafter existing, created, acquired or held;

(c) Any and all design rights which may be available to a Borrower now or hereafter existing, created, acquired or held;

(d) Any and all claims for damages by way of past, present and future infringement of any of the rights included above, with the right, but not the obligation, to sue for and collect such damages for said use or infringement of the intellectual property rights identified above;

(e) All licenses or other rights to use any of the Copyrights, Patents or Trademarks, and all license fees and royalties arising from such use to the extent permitted by such license or rights;

(f) All amendments, renewals and extensions of any of the Copyrights, Trademarks or Patents; and

(g) All proceeds and products of the foregoing, including without limitation all payments under insurance or any indemnity or warranty payable in respect of any of the foregoing.

“Inventory” means all present and future inventory in which a Borrower has any interest.

“Investment” means any beneficial ownership of (including stock, partnership or limited liability company interest or other securities) any Person, or any loan, advance or capital contribution to any Person.

“IRC” means the Internal Revenue Code of 1986, as amended, and the regulations thereunder.

“Letter of Credit” means a commercial or standby letter of credit or similar undertaking issued by Creditor at Borrower’s request.

“Lien” means any mortgage, lien, deed of trust, charge, pledge, security interest or other encumbrance.

“Loan Documents” means, collectively, this Agreement, any note or notes executed by a Borrower, and any other document, instrument or agreement entered into in connection with this Agreement, all as amended or extended from time to time.

“Material Adverse Effect” means a material adverse effect on (i) the operations, business or financial condition of a Borrower and its Subsidiaries taken as a whole, (ii) the ability of a Borrower to repay the Obligations or otherwise perform its obligations under the Loan Documents, or (iii) a Borrower’s interest in, or the value, perfection or priority of Creditor’s security interest in the Collateral.

“Obligations” means all debt, principal, interest, Creditor Expenses and other amounts owed to Creditor by Borrower pursuant to this Agreement or any other agreement, whether absolute or contingent, due or to become due, now existing or hereafter arising, including any interest that accrues after the commencement of an Insolvency Proceeding and including any debt, liability, or obligation owing from a Borrower to others that Creditor may have obtained by assignment or otherwise.

“Borrower” means BORROWER NAME.

“Patents” means all patents, patent applications and like protections including without limitation improvements, divisions, continuations, renewals, reissues, extensions and continuations-in-part of the same.

“Periodic Payments” means all installments or similar recurring payments that a Borrower may now or hereafter become obligated to pay to Creditor pursuant to the terms and provisions of any instrument, or agreement now or hereafter in existence between Borrower and Creditor.

“Permitted Indebtedness” means:

(a) Indebtedness of Borrower in favor of Creditor arising under this Agreement or any other Loan Document;

“Permitted Liens” means the following:

(a) Any Liens existing on the Closing Date and disclosed in the Schedule (excluding Liens to be satisfied with the proceeds of the Credit Extensions) or arising under this Agreement, the other Loan Documents, or any other agreement in favor of Creditor;

(b) Liens for taxes, fees, assessments or other governmental charges or levies, either not delinquent or being contested in good faith by appropriate proceedings and for which the relevant Borrower maintains adequate reserves;

(d) Liens incurred in connection with the extension, renewal or refinancing of the indebtedness secured by Liens of the type described in clauses (a) through (c) above, provided that any extension, renewal or replacement Lien shall be limited to the property encumbered by the existing Lien and the principal amount of the indebtedness being extended, renewed or refinanced does not increase;

(f) Liens arising from judgments, decrees or attachments in circumstances not constituting an Event of Default under Sections 8; and

“Person” means any individual, sole proprietorship, partnership, limited liability company, joint venture, trust, unincorporated organization, association, corporation, institution, public benefit corporation, firm, joint stock company, estate, entity or governmental agency.

“Responsible Officer” means each of the Chief Executive Officer, the Chief Operating Officer, the Chief Financial Officer, Vice President of Finance and the Controller of a Borrower; as well as any other officer or employee identified as an Authorized Officer in the corporate resolution delivered by Borrower to Creditor in connection with this Agreement.

“Schedule” means the schedule of exceptions attached hereto and approved by Creditor, if any.

“SOS Reports” means the official reports from the Secretaries of State of each Collateral State, each state where a Borrower’s chief executive office is located, each state of a Borrower’s formation and other applicable federal, state or local government offices identifying all current security interests filed in the Collateral and Liens of record as of the date of such report.

“Subordinated Debt” means any debt incurred by a Borrower that is subordinated in writing to the debt owing by such Borrower to Creditor on terms reasonably acceptable to Creditor (and identified as being such by the Borrower and Creditor).

“Subsidiary” means any corporation, partnership or limited liability company or joint venture in which (i) any general partnership interest or (ii) more than 50% of the stock, limited liability company interest or joint venture of which by the terms thereof ordinary voting power to elect the Board of Directors, managers or trustees of the entity, at the time as of which any determination is being made, is owned by a Borrower, either directly or through an Affiliate.

“Term Loan” has the meaning assigned in Section 2.1(b).

“Term Loan Maturity Date” means [insert date].

“Trademarks” means any trademark and servicemark rights, whether registered or not, applications to register and registrations of the same and like protections, and the entire goodwill of the business of a Borrower connected with and symbolized by such trademarks.

|  |  |  |
| --- | --- | --- |
|  |  |  |
| **DEBTOR** |  | **BORROWER COMPANY NAME** |
|  |  | |
| **SECURED PARTY:** |  | **DAILY FINANCING** |

**EXHIBIT B**

**LOAN ADVANCE/PAYDOWN REQUEST FORM**

**Amount of Advance Request**:

**Loan Advance Details**

Wire to Account:

Name of Financial Institution:

Account Number: Routing Number:

Account Name:

*OR*

Pay by Check:

Name of Payee:

Address:

**Borrower Declaration**

*I confirm that above details are true and correct and request the loan advance amount per the Loan and Security Agreement dated June 14, 2021.*

***Borrower***

Full Name:

Title of Authorized Officer:

Signature:

Date: