

DEED OF SUBORDINATION

INTRODUCTION

Dated:

Parties:

(1) **RABOBANK NEW ZEALAND LIMITED**
at Level 23, 157 Lambton Quay, Wellington 6011, New Zealand
(the **“Lender”**)

(2)
(the **“Subordinated Lender”**)

(3)
(the **“Borrower”**)

Background

[A] From time to time the Subordinated Lender makes advances to the Borrower, the amounts and the terms of such advances as agreed between the parties (the **“Subordinated Arrangements”**).

[C] The Lender, at the request of the Subordinated Lender and the Borrower, makes or will make financial accommodation available to the Borrower.

[D] It has been agreed that the claims of the Subordinated Lender against the Borrower under the Subordinated Arrangements shall be regulated and/or subordinated in the manner set out herein.

Terms of this deed:

1. INTERPRETATION

1.1 Definitions

In this Deed, unless the context otherwise requires:

“Ancillary Liabilities” in relation to any of the Senior Liabilities or Subordinated Liabilities means:

- (a) any refinancing, novation, refunding, deferral or extension of any of those liabilities;
- (b) any further advance which may be made under any agreement supplemental to the relevant facilities agreement plus all interest, fees and costs in connection therewith;
- (c) any claim for damages or restitution in the event of rescission of any such liabilities or otherwise in connection with the relevant facilities agreement;
- (d) any claim against the Borrower flowing from any recovery by the Borrower of a payment or discharge in respect of those liabilities, on the grounds of preference or otherwise; and
- (e) any amounts (such as post-insolvency interest) which would be included in any of the above but for any discharge, non-provability, unenforceability or non-allowability of the same in any insolvency or other proceedings.

“Business Day” means a week day on which banks are open for general banking business in the city in which the Borrower is located.

“**Liquidation**” includes provisional liquidation, receivership, compromise, arrangement, amalgamation, statutory management, reconstruction, winding up, dissolution, assignment for the benefit of creditors, arrangement or compromise with creditors.

“**Senior Creditors**” means the holders from time to time of the Senior Liabilities.

“**Senior Liabilities**” means any obligation of the Borrower to any person (whether present or future, actual or contingent, secured or unsecured, as principal or surety or otherwise) for the payment or repayment of money other than moneys payable under, pursuant to or arising out of the Subordinated Documents.

“**Senior Documents**” means each agreement or document evidencing or entered into pursuant to the Senior Liabilities.

“**Senior Event of Default**” means any event specified as a default in the Senior Documents.

“**Subordinated Documents**” means the Subordinated Arrangements and any documents entered into pursuant thereto.

“**Subordinated Liabilities**” means all present and future sums, liabilities and obligations whatsoever (actual or contingent) payable, owing, due or incurred by the Borrower to the Subordinated Lender pursuant to the terms of the Subordinated Documents together with all Ancillary Liabilities relating thereto.

1.2 Interpretation

In this Deed, unless the context otherwise requires:

- (a) a reference to this Agreement or any other document or instrument includes any variation, supplement, novation or replacement of any of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) any reference herein to a person shall include a company, partnership or unincorporated association;
- (e) any obligation of the Borrower or the Subordinated Lender herein to do something shall include an obligation to procure the same to be done and any obligation not to do something shall include an obligation not knowingly to permit, suffer or allow the same;
- (f) headings shall be ignored for the purposes of interpretation;
- (g) references herein to a party, shall be construed so as to include their respective successors in title, transferees and assigns;
- (h) references to a “**clause**” or “**Schedule**” shall, subject to any contrary indication, be construed as a reference to a clause hereof or schedule hereto;
- (i) references to a “**security interest**” shall be construed as a reference to a mortgage, charge, pledge, lien (other than a lien arising in the ordinary course of business or by operation of law) or other security interest of any kind whatsoever securing any obligation of any person or any other type of preferential arrangement (including, without limitation, title transfer and retention arrangements) having a similar effect save to the extent that such arrangement arises in the ordinary course of business or by operation of law; and
- (j) references to “**assets**” shall include properties and revenues.

2. RANKING

- 2.1 The Subordinated Lender hereby agrees and the Borrower acknowledges that the Senior Liabilities, whether secured or unsecured, shall rank in priority to the Subordinated Liabilities.
- 2.2 Save as otherwise provided herein the priorities referred to in clause 2.1 will not be affected by any intermediate reduction or increase in, amendment or variation to, or satisfaction of, the Senior Liabilities or any other circumstances.
- 2.3 The provisions of clause 2.1 above shall apply notwithstanding the order in which or dates upon which the Senior Documents, the Subordinated Documents or this Deed are executed or any of them are registered or notice of them is given to any person.
- 2.4 The Subordinated Lender hereby agrees and acknowledges that the Subordinated Liabilities are subordinated to the Senior Liabilities to the extent and in the manner hereinafter set forth to the prior payment in full of the Senior Liabilities.

3. UNDERTAKINGS OF THE BORROWER

The Borrower undertakes that it will not:

- (a) pay, prepay, redeem, purchase or otherwise acquire any of the Subordinated Liabilities;
- (b) create or permit to subsist any security interest over any of its assets for, or any guarantee, indemnity or other assurance against financial loss in respect of, any of the Subordinated Liabilities;
- (c) amend, supplement, novate or release any term of the Subordinated Documents; or
- (d) take or omit any action whereby the subordination contemplated by this Deed may be impaired.

4. UNDERTAKINGS OF THE SUBORDINATED LENDER

- 4.1 The Subordinated Lender undertakes that it will not:
- (a) permit or require the Borrower to pay, prepay, redeem, purchase or otherwise acquire any of the Subordinated Liabilities;
 - (b) take, accept or receive the benefit of any security interest or guarantee, indemnity or other assurance against financial loss in respect of the Subordinated Liabilities; or
 - (c) agree to any amendment, supplement or novation to the Subordinated Documents.
- 4.2 Subject to clause 5, from and after the date hereof and so long as the Senior Liabilities are or may be outstanding, neither the Subordinated Lender nor any person on its behalf or appointed by it will:
- (a) take or receive from the Borrower by cash receipt, set-off or in any other manner whatsoever, the whole or any part of the Subordinated Liabilities nor any security therefor; or
 - (b) discharge, sue for or institute legal proceedings to recover all or any part of the Subordinated Liabilities, nor apply for or vote in favour of any resolution for the Liquidation of the Borrower.

5. NO REPAYMENTS

- 5.1 The Borrower may not repay a Subordinated Liability (partially or fully), and the Subordinated Lender may not receive repayment of a Subordinated Liability (partial or full), including default

interest, without prior written consent from the Lender (which may be manifested in a letter from the Lender or recorded as a special condition in a Letter of Offer).

5.2 If at any time whilst any Senior Liabilities are or may be outstanding:

- (a) the Subordinated Lender receives a payment or distribution in cash or in kind of, or on account of, any of the Subordinated Liabilities;
- (b) the Subordinated Lender receives the proceeds of any enforcement of any security interest conferred by any security documents; or
- (c) the Borrower makes any payment or distribution in cash or in kind on account of the purchase or other acquisition of any of the Subordinated Liabilities,

and any of the payments or receipts referred to above are not permitted by clause 5.1 the Subordinated Lender will hold such moneys on trust for and to the order of the Borrower and will forthwith pay any and all such amounts to the Senior Creditors for application on account of the Senior Liabilities whether due or not due.

6. REALISATION

6.1 If there occurs:

- (a) any distribution, division or application, partial or complete, voluntary or involuntary, by operation of law or otherwise, of all or any part of the assets of the Borrower by reason of the Liquidation or dissolution of the Borrower or its businesses or any sale, receivership or insolvency proceeding or assignment for the benefit of creditors; or
- (b) the Borrower goes into Liquidation,

then and in any such event:

- (c) the Subordinated Liabilities shall be postponed and subordinated to the Senior Liabilities and the Senior Creditors shall be entitled to receive payment in full in money or moneys worth of all the Senior Liabilities before the Subordinated Lender is entitled to receive any payment on account of the Subordinated Liabilities;
- (d) any payment or distribution of any kind or character and all and any rights in respect thereof, whether in cash, securities or other property which is payable or deliverable upon or with respect to the Subordinated Liabilities or any part thereof by the liquidator, manager, trustee, statutory manager or receiver (or the equivalent thereof) of the Borrower or its estate shall forthwith be paid or delivered to the Senior Creditors for application on account of the Senior Liabilities, due or not due; and
- (e) until so paid or delivered, any such payment or distribution of proceeds shall be held by the Subordinated Lender on trust for and to the order of the Senior Creditors.

6.2 The Subordinated Lender will execute or procure the execution of and deliver to the Senior Creditors such powers of attorney, assignments or other instruments as may be requested by the Senior Creditors in order to enable the Senior Creditors to enforce any and all claims upon or with respect to the Subordinated Liabilities or any part thereof and to collect and receive any and all payments or distributions which may be payable or deliverable at any time upon or with respect to the Subordinated Liabilities or any part thereof.

6.3 The liquidator, receiver, manager, administrator or other insolvency representative or trustee of the Borrower or its estate is authorised to apply any assets or moneys received by him or her in accordance with the terms of this Deed or as instructed by the Senior Creditors.

6.4 Without prejudice to the foregoing provisions of this clause or any other provision hereof, nothing in this Deed shall inhibit the Subordinated Lender from claiming or proving in the liquidation of the Borrower for the amount of the Subordinated Liabilities owing to the Subordinated Lender.

- 6.5 If any Subordinated Liabilities are discharged in whole or in part by a set-off, the Subordinated Lender will forthwith pay (and pending such payment shall hold the same on trust for the Senior Creditors for the purpose hereof) an amount equal to the amount of the Subordinated Liabilities discharged by the set-off to the Senior Creditors to be applied on account of the Senior Liabilities whether due or not due.
- 6.6 No such payments, receipts or amounts in respect of set off as described in clauses 5.2 or 6.5 shall, as between the Borrower and its creditors, be deemed to constitute payment by the Borrower to the Subordinated Lender in respect of the Subordinated Liabilities.

7. DEFENCES

- 7.1 The provisions of this Deed shall not be affected, impaired or revoked by any act, omission, transaction, limitation, matter, thing or circumstance whatsoever which but for this provision might operate to affect the priorities of the Senior Liabilities and the Subordinated Liabilities provided for herein including without limitation:
- (a) any time, waiver or indulgence granted to the Borrower or any other person;
 - (b) the taking of any other Security Interest from the Borrower or any other person or the variation, compromise, renewal or release of, or the failure, refusal or neglect to take, perfect or enforce, any rights, remedies or Security Interests from or against the Borrower or any other person;
 - (c) any legal limitation, disability, incapacity or other circumstances relating to the Borrower or any other person; or
 - (d) any amendment, supplement to or novation of any of the Senior Documents or the Subordinated Documents.
- 7.2 The Borrower expressly acknowledges that no failure or delay by the Subordinated Lender in exercising any of its rights in relation to the Subordinated Liabilities as a result of the provisions of this Deed shall operate as a waiver or variation of its rights with respect thereto.

8. AMENDMENTS

The provisions of this Deed may not be amended (otherwise than in accordance with the terms hereof) except by written agreement between the Lender, the Subordinated Lender and the Borrower.

9. NOTICES

All notices, requests, demands, consents, approvals, agreements or other communications to or by a party to this Agreement:

- (a) must be in writing;
- (b) must be signed by an Authorised Officer of the sender;
- (c) will be deemed to be duly given or made:
 - (i) (in the case of delivery in person or by post) when delivered, received or left at the address of the recipient in accordance with clause 9(d); or
 - (ii) (in the case of a facsimile transmission) on receipt by the sender of an error free transmission report at the end of transmission,but if delivery or receipt is on a day which is not a Business Day or is later than 4 pm (local time), it will be taken to have been duly given or made at the commencement of business on the next Business Day; and
- (d) shall be addressed to the relevant party at their address or facsimile number notified by that party to the other party for the purposes of this Deed.

10. BENEFIT OF AGREEMENT

The Subordinated Lender and the Borrower hereby irrevocably acknowledges and agrees that for the purposes of Section 12 of the Contract and Commercial Law Act 2017 this Deed constitutes promises that confer and are intended to confer benefits on the Senior Creditors and may be relied upon by and are given for the benefit of the Senior Creditors and may be enforced by any of the Senior Creditors against the Subordinated Lender and the Borrower as if that Senior Creditor was a party to this Deed.

11. MISCELLANEOUS

- 11.1 This Deed may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which, when executed and delivered, shall constitute an original, but all the counterparts shall together constitute one and the same instrument.
- 11.2 If any provision of this Deed is prohibited or unenforceable in any jurisdiction in relation to any party hereto, such prohibition or unenforceability shall not invalidate the remaining provisions hereof or affect the validity or enforceability of such provision in any other jurisdiction or in relation to any of the other parties hereto.
- 11.3 The priority and subordination provisions of this Deed are cumulative.
- 11.4 This Deed overrides anything in the Subordinated Documents to the contrary.
- 11.5 The parties hereto confirm that this Deed shall not constitute nor create nor is it intended to constitute or create any security interest on the part of the Subordinated Lenders.

12. GOVERNING LAW AND JURISDICTION

This Deed is governed by and shall be construed in accordance with the laws of New Zealand. The Lender, the Subordinated Lender and the Borrower accepts unconditionally the non-exclusive jurisdiction of the courts exercising jurisdiction there.

EXECUTION

THE SUBORDINATED LENDER

Signed by)	
in the presence of:)	
)	
)	
.....)
Signature of witness)	Signature of Subordinated Lender
)	
)	
.....)	
Name of witness (BLOCK LETTERS))	
)	
)	
.....)	
Address of witness)	
)	
)	
.....)	
Occupation of witness)	

