

**EXHIBIT D**

**Post Confirmation Estate Agreement**

## POST CONFIRMATION ESTATE AGREEMENT

This Post Confirmation Estate Agreement (the “Agreement”) is made this [\_\_\_] day of [\_\_\_\_\_], 2005, by and among the debtors and debtors in possession (collectively, the “Debtors”)<sup>1</sup> and James E. Ashton (the “Plan Administrator,” and collectively with the Debtors, the “Parties”), pursuant to the Joint Liquidating Plan of Reorganization of DESA Holdings Corporation and DESA International LLC Pursuant to Chapter 11 of the United States Bankruptcy Code (Docket No. 1462) (the “Plan”).<sup>2</sup>

### **RECITALS:**

A. On June 8, 2002, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (as amended, the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”);

B. In accordance with the Plan, the Post Confirmation Estate is being established for the primary purpose of distributing the assets transferred to it under the Plan (the “Post Confirmation Estate Assets”) to the Holders of Allowed Claims (collectively, the “Beneficiaries”);

C. The Post Confirmation Estate is created pursuant to, and to effectuate, the Plan;

D. The powers, authority, responsibilities and duties of the Plan Administrator shall be governed by this Agreement, the Plan and the order entered by the Bankruptcy Court confirming the Plan (the “Confirmation Order”);

E. Pursuant to the terms and conditions of the Plan, the Confirmation Order and this Agreement, the Plan Administrator shall administer all Post Confirmation Estate Assets;

F. This Agreement is intended to supplement and complement the Plan; provided, however, if any of the terms and/or provisions of this Agreement conflict with the terms and/or provisions of the Plan, then the Plan shall govern;

G. The Post Confirmation Estate is established as a liquidating trust, in accordance with Treasury Regulation Section 301.7701-4(d) with no objective to continue or engage in the conduct of a trade or business except to the extent reasonably necessary to, and consistent with, the liquidating purpose of the Post Confirmation Estate; and

H. The Post Confirmation Estate is intended to qualify as a “grantor trust” for federal income tax purposes with the Beneficiaries treated as the grantors and owners of the trust.

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<sup>1</sup> The Debtors consist of the following two entities: DESA Holdings Corporation and DESA International LLC (f/k/a DESA International, Inc.).

<sup>2</sup> Capitalized terms not defined herein shall have the same meaning ascribed in the Plan.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein and in the Plan, the Debtors and the Plan Administrator agree as follows:

## ARTICLE I

### PLAN ADMINISTRATOR

1.1 Appointment. The Debtors hereby appoint James E. Ashton to serve as the initial Plan Administrator under the Plan, and James E. Ashton hereby accepts such appointment and agrees to serve in such capacity, in each case effective upon the Effective Date of the Plan. In the event that the Plan Administrator resigns, is removed, terminated or unable to serve as the Plan Administrator, then the Plan Administrator shall have the right to select a successor who may be appointed the Plan Administrator and shall serve in such capacity until the Post Confirmation Estate is dissolved in accordance with Article VIII.A.2 of the Plan. In the event the Plan Administrator elects not to exercise his right to select a successor, such successor Plan Administrator shall be appointed by the Bankruptcy Court.

1.2 The Plan. Pursuant to this Agreement, the Plan Administrator is required to and shall abide by the terms of the Plan.

1.3 Generally. The Plan Administrator's powers are exercisable solely in a fiduciary capacity consistent with, and in furtherance of, the Plan and the Confirmation Order and not otherwise. The Plan Administrator shall have the authority to bind the Post Confirmation Estate but shall for all purposes hereunder be acting in the capacity as Plan Administrator and not individually. The Plan Administrator shall be required to take any and all actions provided for and contemplated by the Plan and the Confirmation Order.

1.4 Powers.

(a) In connection with the administration of the Plan and the Post Confirmation Estate, except as otherwise set forth in this Agreement, the Confirmation Order or the Plan, the Plan Administrator shall have all of the rights and powers necessary to effectuate the Plan.

(b) Without limiting, but subject to, the foregoing, the Plan Administrator shall be expressly authorized, but shall not be required, to:

(i) hold legal title to the Post Confirmation Estate Assets;

(ii) protect and enforce the rights to the Post Confirmation Estate Assets vested in the Post Confirmation Estate by any method deemed appropriate including, without limitation, by judicial proceedings or pursuant to any applicable bankruptcy, insolvency, moratorium or similar law and general principles of equity;

(iii) invest and withdraw any moneys held as part of the Post Confirmation Estate Assets in accordance with the terms of Section 1.10 hereof;

(iv) effect the distribution of the Post Confirmation Estate Assets to the Beneficiaries in accordance with the provisions of the Plan;

(v) compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle Claims and Causes of Action in favor of or against the Post Confirmation Estate;

(vi) except as otherwise set forth herein, in the Confirmation Order or the Plan, institute, prosecute, abandon, settle, or compromise any and all claims, rights, and Causes of Action without the consent or approval of any third party and without any further order of the Bankruptcy Court or any other court; provided, however, the Plan Administrator shall not pursue claims or Causes of Action which have been released pursuant to the Plan, including Article X.F thereof, the Confirmation Order and by any previous order of the Bankruptcy Court;

(vii) determine and satisfy any and all liabilities created, incurred or assumed by the Post Confirmation Estate;

(viii) file, if necessary, any and all tax and information returns with respect to the Post Confirmation Estate and pay taxes properly payable by the Post Confirmation Estate, if any;

(ix) pay all expenses and make all other payments relating to the Post Confirmation Estate Assets;

(x) make distributions in satisfaction of any and all Claims as provided for in the Plan;

(xi) retain and pay law firms as counsel to the Post Confirmation Estate to aid in the prosecution of any claims that constitute the Post Confirmation Estate Assets and to perform such other functions as may be appropriate and/or necessary to comply with the terms of the Plan, the Confirmation Order or this Agreement;

(xii) retain and pay a public accounting firm to perform such reviews and/or audits of the financial books and records of the Post Confirmation Estate as may be appropriate;

(xiii) retain and pay such third parties as the Plan Administrator may deem necessary or appropriate to assist the Plan Administrator in carrying out his powers and duties under this Agreement and in accordance with the Plan;

(xiv) engage in any transaction material to the foregoing, including, but not limited to, opening bank accounts in the name of the Post Confirmation Estate and entering into contracts and leases on behalf of the Post Confirmation Estate;

(xv) provide periodic reporting to the Bankruptcy Court and parties in interest, as may be required, of the status of the Claims resolution process, distributions to the Beneficiaries and prosecution of Causes of Action;

(xvi) execute, deliver, file or record such documents, instruments, releases and other agreements, and take such actions as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan; and

(xvii) assume such other powers as may be vested in or assumed by the Post Confirmation Estate pursuant to the Plan or Bankruptcy Court order, or as may be necessary and proper to carry out the provisions of this Agreement, the Plan or the Confirmation Order.

1.5 Authority. Except as otherwise set forth in this Agreement, the Confirmation Order or the Plan, and subject to the retained jurisdiction of the Bankruptcy Court as provided for in the Plan, but without prior or further authorization, the Plan Administrator may control and exercise authority over the Post Confirmation Estate Assets and over the protection, conservation and disposition thereof. No person dealing with the Post Confirmation Estate shall be obligated to inquire into the authority of the Plan Administrator in connection with the protection, conservation or disposition of the Post Confirmation Estate Assets.

1.6 Fiduciary Obligations to Post Confirmation Estate and Beneficiaries. The Plan Administrator's actions as Plan Administrator will be held to the same standard as the trustee of a trust under Delaware law. His fiduciary obligations to the Post Confirmation Estate and its Beneficiaries are the same fiduciary obligations that the trustee of a trust owes to that trust and its beneficiaries under Delaware law.

1.7 Limitation of Plan Administrator's Authority. The Plan Administrator shall have no power or authority except as set forth in this Agreement, the Confirmation Order or in the Plan.

1.8 Limitation of Liability of Post Confirmation Estate, Plan Administrator and Professionals. In no event shall the Plan Administrator, the Plan Administrator's employees, the Post Confirmation Estate's employees or any of the respective present and future affiliates, employees, directors, officers, agents, attorneys, representatives, successors, assigns and professionals of each of the foregoing (collectively, the "Protected Parties") be held personally liable for any Claim asserted against the Protected Parties. Specifically, the Protected Parties shall not be liable for any negligence or any error of judgment made in good faith, or with respect to any action taken or omitted to be taken in good faith or for any breach of fiduciary duty, except to the extent that the action taken or omitted to be taken by the Protected Party is determined by a Final Order to be due to their own respective gross negligence or willful misconduct.

1.9 Reliance by Plan Administrator. Except as otherwise provided in Section 1.8 hereof, the Plan Administrator may rely, and shall be protected in acting upon, any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, or other paper

or document believed by him to be genuine and to have been signed or presented by the proper party or parties.

1.10 Investment and Safekeeping of Post Confirmation Estate Assets. All Post Confirmation Estate Assets shall, until distributed or paid over as herein provided, be held in trust for the benefit of the Beneficiaries. The Plan Administrator shall have no liability for interest or producing income on any moneys received by the Post Confirmation Estate hereunder and held for distribution or payment to the Beneficiaries, except as such interest shall actually be received by the Post Confirmation Estate. Investments of any moneys held by the Post Confirmation Estate shall be administered in view of the manner in which individuals of ordinary prudence, discretion and judgment would act in the management of their own affairs; provided, however, that the right and power of the Plan Administrator to invest the Post Confirmation Estate Assets, the proceeds thereof, or any income earned by the Post Confirmation Estate, shall be limited to the right and power to invest such assets in demand and time deposits, such as short-term certificates of deposit, in banks or other savings institutions, or other temporary liquid investments, such as Treasury bills; and, provided, further, that the scope of any such permissible investments shall be limited to include only those investments, or shall be expanded to include any additional investments, as the case may be, that a liquidating trust, within the meaning of Treasury Regulation Section 301.7701-4(d), may be permitted to hold, pursuant to the Treasury Regulations, or any modification in the IRS guidelines, whether set forth in IRS rulings, other IRS pronouncements or otherwise.

1.11 Compensation of the Plan Administrator.

(a) The Post Confirmation Estate shall (i) pay the Plan Administrator a monthly fee of Five Thousand U.S. Dollars (\$5,000) as compensation for the services rendered by the Plan Administrator pursuant to this Agreement and (ii) reimburse the Plan Administrator for the actual and reasonable out-of-pocket expenses incurred by the Plan Administrator, including, without limitation, necessary travel, lodging, postage, telephone and facsimile charges upon receipt of periodic billings.

(b) The Post Confirmation Estate Assets shall be subject to the claims of the Plan Administrator, and the Plan Administrator shall be entitled to reimburse himself out of the Liquidation Reserve for his actual and reasonable out-of-pocket expenses.

1.12 Exculpation. No Holder of a Claim or any other party-in-interest will have, or otherwise pursue, any Claim or cause of action against the Plan Administrator, the Post Confirmation Estate or the employees or professionals thereof (solely in the performance of their duties thereas), for making payments in accordance with the Plan or for implementing the provisions of the Plan, except for any acts or omissions to act that are the result of willful misconduct or gross negligence.

1.13 Termination. The duties, responsibilities and powers of the Plan Administrator shall terminate when the Post Confirmation Estate dissolves. The Post Confirmation Estate shall dissolve when all Disputed Claims have been resolved, all Distributions have been made pursuant to the Plan and all other obligations under the Plan have been fulfilled.

1.14 No Bond. The Plan Administrator shall serve without bond.

1.15 Confidentiality. The Plan Administrator shall, during the existence of the Post Confirmation Estate, hold strictly confidential and not use for personal gain any material, non-public information of or pertaining to any entity to which any of the Post Confirmation Estate Assets relate or of which he has become aware in his capacity as Plan Administrator.

## ARTICLE II

### ESTABLISHMENT OF THE POST CONFIRMATION ESTATE

2.1 Transfer of Assets to the Post Confirmation Estate. On the Effective Date, and in accordance with and pursuant to the terms of the Plan, the Confirmation Order and this Agreement, the Debtors shall assign and transfer to the Post Confirmation Estate all of their right, title, and interest in and to all of the Post Confirmation Estate Assets, notwithstanding any prohibition of assignability under applicable non-bankruptcy law. The Post Confirmation Estate Assets shall be held by the Post Confirmation Estate in trust for the Beneficiaries, subject to the terms and conditions of the Plan, the Confirmation Order and this Agreement.

2.2 Title to Assets. For all federal income tax purposes, all parties (including, without limitation, the Debtors, the Plan Administrator and the Beneficiaries) shall treat the transfer of the Post Confirmation Estate Assets by the Debtors to the Post Confirmation Estate, as set forth in Section 2.1, as a transfer of such assets by the Debtors to the Beneficiaries and followed by a transfer by such Beneficiaries to the Post Confirmation Estate, and the Beneficiaries shall be treated as the grantors and owners of a grantor trust for federal income tax purposes.

2.3 Assignment and Assumption of Liabilities. In accordance with the provisions of Section 2.1 hereof, the Debtors hereby transfer and assign, and the Post Confirmation Estate hereby assumes and agrees that all Post Confirmation Estate Assets will be transferred to the Post Confirmation Estate for the benefit of the Beneficiaries.

## ARTICLE III

### BENEFICIARIES

3.1 Identification of Beneficiaries. In order to determine the actual names, addresses and tax identification numbers of the Beneficiaries, the Post Confirmation Estate shall be entitled to conclusively rely on the names, addresses and tax identification numbers, if any, set forth in the Debtors' Schedules, filed proofs of claim or ballots cast with respect to the Plan. Each Beneficiary's right to distribution from the Post Confirmation Estate, which is dependent upon such Beneficiary's classification under the Plan, shall be that accorded to such Beneficiary under the Plan. Each distribution by the Post Confirmation Estate to the Beneficiaries shall be made in accordance with the terms set forth in the Plan.

## ARTICLE IV

### PURPOSE, AUTHORITY, LIMITATIONS, AND DISTRIBUTIONS

4.1 Purpose of the Post Confirmation Estate. The Post Confirmation Estate shall be established for the primary purpose of liquidating its assets, in accordance with Treasury Regulation Section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business except to the extent reasonably necessary to, and consistent with, the liquidating purpose of the Post Confirmation Estate. Accordingly, the Post Confirmation Estate shall, in an expeditious but orderly manner, liquidate and convert, if applicable, to Cash the Post Confirmation Estate Assets, make timely distributions and not unduly prolong the duration of the Post Confirmation Estate. The liquidation of the Post Confirmation Estate Assets may be accomplished either through the prosecution, compromise and settlement, abandonment or dismissal of any or all Claims, rights or Causes of Action, or otherwise.

4.2 Resolution of Post Confirmation Estate Assets by the Plan Administrator.

(a) The Plan Administrator shall be empowered to and may take all appropriate action with respect to the prosecution, settlement or other resolution of the Post Confirmation Estate Assets, including, without limitation, claims, Causes of Action and Preference Actions, consistent with the Plan. The Plan Administrator shall deal with all collections and settlements within the normal course of his duties.

(b) Notwithstanding anything contained in this Agreement, the Confirmation Order or the Plan to the contrary, the Plan Administrator may, but is not required to, submit a proposed settlement of Post Confirmation Estate Assets, including, without limitation, claims, Causes of Action and Preference Actions, to the Bankruptcy Court or such other court of competent jurisdiction for its approval.

4.3 Books and Records. The Post Confirmation Estate shall maintain books and records relating to the Post Confirmation Estate Assets, the income of the Post Confirmation Estate and the payment of expenses of, and liabilities of and claims against or assumed by the Post Confirmation Estate in such detail and for such period of time as may be necessary to enable it to make full and proper accounting in respect thereof in accordance with Article VII hereof and to comply with applicable provisions of law. Except as provided in Section 7.1 hereof, nothing in this Agreement requires the Post Confirmation Estate to file any accounting or seek approval of any court with respect to the administration of the Post Confirmation Estate, or as a condition for making any payment or distribution out of the Post Confirmation Estate Assets. Beneficiaries shall have the right, upon thirty (30) days' prior written notice delivered to the Plan Administrator, to inspect such books and records, provided that, if so requested, such Beneficiary shall have entered into a confidentiality agreement satisfactory in form and substance to the Plan Administrator.

4.4 Application of Post Confirmation Estate Assets. The Post Confirmation Estate shall apply all Post Confirmation Estate Assets, and any proceeds therefrom, in accordance with the Plan and the Confirmation Order.



4.5 Distribution. The Post Confirmation Estate shall distribute to the Beneficiaries all net Cash income plus all net Cash proceeds from the liquidation of the Post Confirmation Estate Assets (including as Cash for this purpose, all Cash equivalents) in accordance with the provisions of the Plan, including Articles II, III, IV and V thereof, and the Confirmation Order.

## **ARTICLE V**

### **TREATMENT OF DISPUTED CLAIMS**

#### 5.1 Objections to Claims; Prosecution of Disputed Claims.

(a) From and after the Effective Date, the Plan Administrator shall object (and shall take over, and continue prosecuting, any outstanding objections by the Debtors) to the allowance of Disputed Claims filed with the Bankruptcy Court. All objections shall be litigated to Final Order; provided, however, that the Plan Administrator shall have the authority and sole discretion to file, settle, compromise or withdraw any objections to Claims, without approval of the Bankruptcy Court.

(b) The deadline to object to or investigate and review Claims shall be one hundred eighty (180) days after the Effective Date; provided, however, the Plan Administrator reserves the right to seek further extensions of time within which to object to Claims from the Bankruptcy Court by filing a motion with the Bankruptcy Court with proper notice to parties in interest in accordance with relevant Local Rules of the Bankruptcy Court and Federal Rules of Bankruptcy Procedure, and all parties in interest reserve the right to object to such extensions of time in accordance with relevant Local Rules of the Bankruptcy Court and Federal Rules of Bankruptcy Procedure. To the extent the Debtors, the Plan Administrator or any other party in interest files an objection to a Claim on or before such deadline, such Claim shall be deemed and treated as a Disputed Claim under the Plan. Any objections to Claims and settlement thereof shall be dealt with as the Plan Administrator, in his sole discretion, deems to be appropriate. Further, the Plan Administrator shall have the sole and complete discretion to decide not to review and/or object to proofs of Claim below a certain dollar amount to the extent such review and/or objection would be uneconomical.

(c) Unless otherwise provided by the Plan, no Bankruptcy Court approval shall be required in order for the Plan Administrator to settle and/or compromise any Claim, objection to Claim, Cause of Action, or right to payment of or against the Debtors, their Estates or the Post Confirmation Estate.

5.2 Estimation of Claims. The Plan Administrator may at any time request that the Bankruptcy Court estimate any contingent or Disputed Claim pursuant to section 502(c) of the Bankruptcy Code regardless of whether the Debtors or the Plan Administrator previously have objected to such Claim or whether the Bankruptcy Court has ruled on any such objection, and the Bankruptcy Court will retain jurisdiction to estimate any Claim at any time during litigation concerning any objection to any Claim, including, without limitation, during the pendency of any appeal relating to any such objection. Subject to the provisions of section 502(j) of the Bankruptcy Code, in the event that the Bankruptcy Court estimates any contingent or Disputed

Claim, the amount so estimated shall constitute the maximum allowable amount of such Claim. If the estimated amount constitutes a maximum limitation on the amount of such Claim, the Debtors or the Plan Administrator may pursue supplementary proceedings to object to the allowance of such Claim. All of the aforementioned objection, estimation and resolution procedures are intended to be cumulative and not necessarily exclusive of one another. Claims may be estimated and subsequently compromised, settled, withdrawn or resolved by any mechanism approved by the Bankruptcy Court.

5.3 Payments and Distributions on Disputed Claims. No interest shall be paid on Disputed Claims that later become Allowed Claims or with respect to any Distribution to such Holder. No Distribution shall be made with respect to all or any portion of any Claim, a portion of which or all of which is a Disputed Claim, pending the entire resolution thereof. To the extent any property is distributed to an Entity on account of a Claim that is not an Allowed Claim, such property shall promptly be returned to the Post Confirmation Estate for distribution in accordance with the terms of the Plan.

## ARTICLE VI

### SUCCESSOR PLAN ADMINISTRATOR

6.1 Removal. The Plan Administrator may be removed by the Bankruptcy Court, after notice and a hearing, for cause; provided, however, the Plan Administrator may not be removed until a successor Plan Administrator has been designated pursuant to Section 6.3 of this Agreement.

6.2 Resignation. The Plan Administrator may resign by giving not less than thirty (30) days' prior written notice thereof to counsel to the Debtors; provided, however, the Plan Administrator may not resign until a successor Plan Administrator has been designated pursuant to Section 6.3 of this Agreement.

6.3 Appointment of Successor Plan Administrator. In the event that the Plan Administrator resigns, is removed, terminated or unable to serve as the Plan Administrator, then the Plan Administrator shall have the right to select a successor who may be appointed the Plan Administrator and shall serve in such capacity until the Post Confirmation Estate is dissolved in accordance with Article VIII.A.2 of the Plan. In the event the Plan Administrator elects not to exercise his right to select a successor, such successor Plan Administrator shall be appointed by the Bankruptcy Court. Any successor Plan Administrator appointed hereunder shall be bound by and comply with the terms of the Plan, the Confirmation Order and this Agreement.

6.4 Survival of Rights. In the event of the removal or resignation of the Plan Administrator as outlined herein, the provisions of Sections 1.8, 1.11 and 1.12 above shall remain applicable and survive such removal or resignation.

**ARTICLE VII**  
**REPORTING**

7.1 Financial Reports. To the extent required by applicable law or the Plan, as soon as practicable following the end of each calendar year or such other required period, and as soon as practicable upon termination of the Post Confirmation Estate, the Plan Administrator shall submit to the Bankruptcy Court a written report including financial statements of the Post Confirmation Estate at the end of such calendar year or such other required period and the receipts and disbursements of the Post Confirmation Estate for such period.

7.2 Federal Income Tax.

(a) Grantor Trust Status. Subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary (including the issuance of applicable Treasury Regulations, the receipt by the Post Confirmation Estate of a private letter ruling if the Post Confirmation Estate so requests one, or the receipt of an adverse determination by the IRS upon audit if not contested by the Post Confirmation Estate), the Plan Administrator shall file returns for the Post Confirmation Estate as a grantor trust pursuant to Treasury Regulation Section 1.671-4(a).

(b) Allocations of Post Confirmation Estate Taxable Income. Subject to the provisions of Section 7.2(a) hereof, allocations of Post Confirmation Estate taxable income shall be determined by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (without regard to any restriction on distributions described herein) if, immediately prior to such deemed distribution, the Post Confirmation Estate had distributed all of its other assets (valued for this purpose at their tax book value) to Beneficiaries (treating any Holder of a Disputed Claim, for this purpose, as a current Beneficiary entitled to distributions), taking into account all prior and concurrent distributions from the Post Confirmation Estate (including all distributions held in reserve pending the resolution of Disputed Claims). Similarly, taxable losses of the Post Confirmation Estate will be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating distribution of the remaining Post Confirmation Estate Assets. The tax book value of the Post Confirmation Estate Assets for this purpose shall equal their fair market value on the Effective Date or, if later, the date such assets were acquired by the Post Confirmation Estate, adjusted in either case in accordance with tax accounting principles prescribed by the IRC, the regulations and other applicable administrative and judicial authorities and pronouncements.

7.3 Other. The Plan Administrator shall also file (or cause to be filed) any other statements, returns or disclosures relating to the Post Confirmation Estate that are required by any governmental unit and serve upon the Beneficiaries such forms as required by applicable law.

## **ARTICLE VIII**

### **TERMINATION OF POST CONFIRMATION ESTATE**

8.1 Termination of Post Confirmation Estate. The Post Confirmation Estate will terminate no later than the fifth (5th) anniversary of the Effective Date; provided, however, on or prior to the date six (6) months prior to such termination, the Bankruptcy Court, upon motion by a party in interest, may extend the term of the Post Confirmation Estate for a finite period if it is necessary to the liquidating purpose of the Post Confirmation Estate. Multiple extensions can be obtained so long as Bankruptcy Court approval is obtained at least six (6) months prior to the expiration of each extended term; provided, however, that the Post Confirmation Estate receives a favorable opinion of counsel or ruling from the IRS stating that any further extension would not adversely affect the status of the trust as a grantor trust for federal income tax purposes. The Plan Administrator shall not unduly prolong the duration of the Post Confirmation Estate and shall at all times endeavor to resolve, settle or otherwise dispose of any Claims that constitute Post Confirmation Estate Assets and to effect the distribution of the Post Confirmation Estate Assets to the Beneficiaries in accordance with the terms hereof, the Plan and the Confirmation Order, and terminate the Post Confirmation Estate as soon as practicable consistent with the purposes of this Agreement. Prior to and upon termination of the Post Confirmation Estate, the Post Confirmation Estate Assets will be distributed to the Beneficiaries in accordance with their distribution rights under the Plan, subject to the provisions set forth herein. If any distributions of the Post Confirmation Estate are not duly claimed, such distributions will be disposed of in accordance with the Plan.

## **ARTICLE IX**

### **PRESERVATION AND ASSERTION OF PRIVILEGE**

9.1 Preservation and Assertion of Privilege. In connection with the transfer of the Post Confirmation Estate Assets, any attorney-client privilege, work-product privilege, or other privilege or immunity attaching to any documents or communications (whether written or oral) transferred to the Post Confirmation Estate shall vest in the Post Confirmation Estate and its representatives, including the Plan Administrator. The Debtors, the Post Confirmation Estate and the Plan Administrator are authorized to take all necessary actions to effectuate the transfer of such privileges. For the avoidance of doubt, neither the Plan Administrator nor the Post Confirmation Estate shall be treated as a successor for any purpose to the Debtors or their Estates.

## **ARTICLE X**

### **MISCELLANEOUS PROVISIONS**

10.1 Intention of Parties to Establish Grantor Trust. This Agreement is intended to create a grantor trust for United States federal income tax purposes and, to the extent provided by law, shall be governed and construed in all respects as a grantor trust.

10.2 Payment of Statutory Fees and Compliance with Reporting Obligations. All fees payable subsequent to the Effective Date under 28 U.S.C. § 1930(a)(6) shall be paid by the Post Confirmation Estate until the Chapter 11 Cases are converted, dismissed or closed, whichever occurs first. The Post Confirmation Estate shall also comply with all post-Confirmation bankruptcy reporting requirements, including the reporting of disbursement activity under the Plan, in accordance with applicable law.

10.3 Prevailing Party. If the Post Confirmation Estate is the prevailing party in a dispute regarding the provisions of this Agreement or the enforcement thereof, the Post Confirmation Estate shall be entitled to collect any and all costs, expenses and fees, including attorneys' fees, from the non-prevailing party incurred in connection with such dispute or enforcement action.

10.4 Implied Authority of Plan Administrator. No person dealing with the Post Confirmation Estate shall be obligated to inquire into the authority of the Plan Administrator in connection with the protection, conservation, or disposition of Post Confirmation Estate Assets.

10.5 Confidentiality. The Plan Administrator, his employees and any professional hired by such parties (each a "Confidential Party" and collectively the "Confidential Parties") shall hold strictly confidential and not use for personal gain any material, non-public information of which they have become aware in their capacity as a Confidential Party, of or pertaining to any Entity to which any of the Post Confirmation Estate Assets relates; provided, however, that such information may be disclosed if (a) it is now or in the future becomes generally available to the public other than as a result of a disclosure by the Confidential Parties, (b) was available to the Confidential Parties on a non-confidential basis prior to its disclosure to the Confidential Parties pursuant to this Agreement, (c) becomes available to the Confidential Parties on a non-confidential basis from a source other than their work in connection with the Debtors or the Post Confirmation Estate, provided that the source is not also bound by a confidentiality agreement with the Debtors or the Post Confirmation Estate or (d) such disclosure is required of the Confidential Parties pursuant to legal process including, but not limited to, subpoena or other court order or other applicable laws or regulations. In the event that any Confidential Party is requested to divulge confidential information pursuant to this subparagraph (d), such Confidential Party shall promptly, in advance of making such disclosure, provide reasonable notice of such required disclosure to the Plan Administrator to allow the Plan Administrator sufficient time to object to or prevent such disclosure through judicial or other means and shall cooperate reasonably with the Plan Administrator in making any such objection, including, but not limited to, appearing in any judicial or administrative proceeding in support of the Plan Administrator's objection to such disclosure.

10.6 Laws as to Construction. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to rules governing the conflict of law.

10.7 Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall be finally determined by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid or

unenforceable, shall not be affected thereby, and such provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

10.8 Notices. Any notice or other communication hereunder shall be in writing and shall be deemed to have been sufficiently given, for all purposes, if deposited, postage prepaid, in a post office or letter box addressed to the person for whom such notice is intended at such address as set forth below or such other address as filed with the Bankruptcy Court:

If to the Debtors, the Post Confirmation Estate or the Plan Administrator:

**James E. Ashton**  
**6218 Georgian Court**  
**Dallas, TX 75240**  
**Telephone: (972) 991-4848**  
**Facsimile: (972) 934-3940**

With a copy to:

**Counsel for the Debtors**

**KIRKLAND & ELLIS LLP**  
**James H.M. Sprayregen, P.C.**  
**James W. Kapp III, Esq.**  
**200 East Randolph Drive**  
**Chicago, IL 60601**  
**Telephone: (312) 861-2000**  
**Facsimile: (312) 861-2200**

**-and-**

**PACHULSKI, STANG, ZIEHL,**  
**YOUNG, JONES & WEINTRAUB P.C.**  
**Laura Davis Jones, Esq.**  
**Curtis A. Hehn, Esq.**  
**919 North Market Street, 16<sup>th</sup> Floor**  
**P.O. Box 8705**  
**Wilmington, Delaware 19899-8705**  
**(Courier 19801)**  
**Telephone: (302) 652-4100**  
**Facsimile: (302) 652-4400**

10.9 Headings. The section headings contained in this Agreement are solely for convenience of reference and shall not affect the meaning or interpretation of this Agreement or of any term or provision hereof.

IN WITNESS WHEREOF, the parties hereto have either executed and acknowledged this Agreement or caused it to be executed and acknowledged on their behalf by their duly authorized officers as of the date first above written.

The Debtors and Debtors in Possession

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

Plan Administrator

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