

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SECURITIES AND EXCHANGE §
COMMISSION, §
§
PLAINTIFF, §
§
vs. §
§
BRIAN A. BJORK, THE ESTATE OF JOEL §
DAVID SALINAS, J. DAVID GROUP OF §
COMPANIES, INC., J. DAVID §
FINANCIAL GROUP LP, SELECT ASSET §
MANAGEMENT LLC, SELECT ASSET §
CAPITAL MANAGEMENT LLC, SELECT §
ASSET FUND I, LLC, AND SELECT §
ASSET PRIME INDEX FUND, LLC. §
§
DEFENDANTS. §

CIVIL ACTION NO. 4:11 CV - 02830

**RECEIVER’S UNOPPOSED MOTION TO APPROVE COMPROMISE OF CLAIM
AGAINST KO SUPPLY AND KEVIN MALEY**

TO THE HONORABLE KEITH P. ELLISON, UNITED STATES DISTRICT COURT:

Receiver Steven A. Harr (“Receiver”) moves the Court to approve the Compromise of Claim against KO Supply and Kevin Maley, respectfully stating:

I.

BACKGROUND

1. On August 1, 2011, the Securities and Exchange Commission (“SEC”) filed its Complaint against Defendants. In conjunction therewith, the SEC sought, and by Order Appointing Receiver (the “Order”), the Court appointed, Steven A. Harr as the Receiver for Brian A. Bjork, The Estate of Joel David Salinas, J. David Group of Companies, Inc., J. David Financial Group LP, Select Asset Management LLC, Select Capital Management, LLC, Select Asset Fund I, LLC and Select Asset Prime Index Fund, LLC (collectively the “Receivership Entities”).

2. Mr. Harr was authorized to have complete and exclusive control, possession and custody of all Receivership assets and Receivership records of Defendants. Receivership Assets and Receivership Records were defined in the Order as “assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities), of the [Receivership Entities] and all entities they own or control . . . , and the books and records, client lists, account statements, financial and accounting documents, computers, computer hard drives, computer disks, internet exchange servers telephones, personal digital devices and other informational resources of or in possession of the [Receivership Entities] or issued by [Receivership Entities] and in possession of any agent or employee of the [Receivership Entities].”¹

3. The Receiver has been acting and fulfilling his duties as Receiver since his appointment and has conducted various investigations of the Receivership Entities with the intent to marshal the Receivership assets for the benefit of the Receivership Entities’ investors and creditors. These efforts have included interactions with existing and former employees, reviews of corporate records and discussions with involved third-parties.

II.

INTRODUCTION

4. The Receiver’s duties include responsibilities for the entities associated with the numerous loans made the subject of the SEC’s complaint against the Receivership Entities. One of these loans was made by Select Asset Prime Index Fund, L.L.C. (Fund II), a Receivership Entity, to KO Supply, L.L.C. (“KO Supply”). The Loan is a revolving line of credit in the amount of \$1,000,000.00 evidenced by a Term Note dated January 5, 2010 (the “Note”) made

¹ Order Appointing Receiver, ¶1.

payable to Select Asset Prime Index Fund, L.L.C.² Maley personally guaranteed the Loan.³ The term of the Note was initially one year but was extended to July 5, 2011. Nevertheless, KO Supply defaulted on the Note on July 5, 2011. The Receiver has reached an agreement with KO Supply and Maley regarding satisfaction of the defaulted Note which the Receiver now presents to the Court for approval.

III.

AUTHORITIES

5. In receiverships, federal courts have broad equitable powers enabling them to fashion appropriate ancillary remedies necessary to grant full relief. *SEC v. Blatt*, 583 F.2d 1325 (5th Cir. 1978); *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1103-04 (2d Cir. 1972).

IV.

FACTS

6. **The Satisfaction of the Note** - Fund II loaned KO Supply One Million and No/100 Dollars (\$1,000,000.00) (the “Loan”) under a revolving line of credit as evidenced by the Note. The Note was secured by a Securities Account Control Agreement and a Guaranty (the “Guaranty Agreement”) executed by Maley entered on January 5, 2010.

7. The Note matured on January 5, 2011 leaving unpaid principal and accrued interest and incurring additional default interest. Fund II and KO Supply entered into a Modification and Extension Agreement on March 11, 2011 whereby the Note’s maturity date was extended until July 5, 2011 and Fund II advanced to KO Supply an additional Five Hundred Thousand and No/100 Dollars (\$500,000.00) on the line of credit. The Note as extended matured on July 5, 2011 leaving unpaid principal, accrued interest, including default interest, and penalties.

² See Exhibit A.

³ See Exhibit B.

8. KO Supply and Maley claim that they are entitled to an offset of amounts due on the Note based on investments that Maley made with various J David and Select Asset entities. The Receiver does not agree that the offset is due and has been prepared to file suit for recovery of the full amounts due from KO Supply and Maley.

9. In an effort to compromise their positions and settle this matter without further litigation expenses, Fund II, KO Supply and Maley have reached an agreement on a means to satisfy the amounts due under the defaulted Note and Guaranty Agreement. A copy of the proposed Settlement and Release Agreement (“Release”) will be made available to the Court upon request but is not attached here so as to protect the financial privacy of both the Receiver, KO Supply and Maley.

10. **The Compromise of Claim** – The amount payable by KO Supply and Maley under the Release does not constitute full satisfaction of the Note. The Receiver proposes to make the following compromises in order to settle this matter and avoid the costs of litigation: (1) applying 7% interest on the balance of the note since the default on July 5, 2011 instead of default interest at the highest allowable rate, 18%, as authorized by the Note; and (2) offering an additional credit on the Note equal to 25% of the actual amount to be paid by the Receiver on one of Guarantor Maley’s claims against the Receivership estate, limited to a total of \$60,000. The compromise requires that KO Supply and Maley make a lump sum payment of half of the amount currently due with the other half being paid out over the course of the next 12 months with interest in the amount of 2% per annum. The Receiver believes these compromises are in the best interest of the Receivership estate because they will result in an immediate payment of half of the amount due, will provide for the payment of substantially all of the remainder due and the credits given will be less than the expense of additional attorney’s fees in litigating the Note.

11. Therefore, the Receiver requests that the Court approve the Release as stated in this motion and order that the Receiver is permitted to proceed with the transaction as stated or terms substantially similar thereto.

12. Pursuant to Local Rule LR 7.2, the Receiver advises the Court that the Plaintiff SEC does not oppose this Motion. The Defendant entities are all controlled by the Receiver.

IV.

CONCLUSION

WHEREFORE, the Receiver prays that the Court enter an Order in the form submitted with this Motion, or for substantially the same relief in such form as the Court may find just and proper.

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

Respectfully submitted,

/s/ Steven A. Harr

Steven A. Harr, #09035600
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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF CONFERENCE

On April 16, 2012, I conferred with Tim McCole and he advised that the Securities and Exchange Commission is not opposed to the relief sought in this motion.

/s/ Christopher D. DeMeo

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically with the Clerk via the CM/ECF system on April 18, 2012. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system on the date of filing.

/s/ Steven A. Harr _____
Steven A. Harr

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CIVIL ACTION NO. 4:11 CV - 02830

**ORDER GRANTING RECEIVER’S UNOPPOSED
MOTION TO APPROVE COMPROMISE OF CLAIM
AGAINST KO SUPPLY AND KEVIN MALEY**

On this ____ day of _____ 2012, the Court considered Receiver’s Unopposed Motion to Approve Compromise of Claim against KO Supply and Kevin Maley. The Motion is GRANTED.

Signed this ____ day of _____, 2012.

JUDGE PRESIDING

PROMISSORY NOTE

\$1,000,000.00

Houston, Texas

JANUARY 5, 2010

1. **PROMISE TO PAY.** For Value Received, **K O SUPPLY, L.L.C.** (hereinafter referred to as "Maker" whether one or more) promises to pay to

SELECT ASSET PRIME INDEX FUND, LLC

("Payee"), at 4000 WASHINGTON ST. SUITE 200, HOUSTON, TEXAS 77007 or such other location as the Payee shall designate from time to time, the sum of **ONE MILLION AND NO/100 DOLLARS (\$1,000,000.00 - Principal)** in legal and lawful money of the United States of America, with interest thereon from date hereof until paid at the applicable per annum rate specified below.

Maker and Payee agree that the Principal sum show above is the maximum amount of principal that Maker can borrow under this Note. The Maker may borrow up to the maximum amount of principal more than one time, and contemplates borrowing and repaying principal multiple times, acknowledging that the principal borrowed will not exceed the maximum amount of principal.

2. **INTEREST RATE.** The principal of this Note from time to time outstanding shall bear interest from the date hereof until maturity or earlier acceleration at a per annum rate equal to SEVEN PERCENT (7.00%) per annum. Matured or earlier accelerated unpaid amounts shall bear interest at the rate of the lesser of the Maximum Rate and eighteen percent per annum from date of maturity to date of payment. In no event shall the rate charged hereunder, together with all other amounts constituting interest, exceed the Maximum Rate. The term "Maximum Rate" as used in this Note, means, on any day, the highest non-usurious rate of interest (if any) permitted by whichever of applicable federal or Texas law on such day permits the higher interest rate, stated as a rate per annum. On each day, if any, that applicable Texas law establishes the Maximum Rate the Maximum Rate shall be the "weekly ceiling" number referred to in, and determined under, the Texas Finance Code for that day; provided, however, that to the extent permitted by applicable law, Payee reserves the right to change, from time to time by further notice and disclosure to Maker, the ceiling on which the Maximum Rate is based under the Texas Finance Code, if and to the extent permitted by the Texas Finance Code. The Maximum Rate shall be applied by taking into account all amounts characterized by applicable law as interest on the debt evidenced by this Note, so that the aggregate of all interest does not exceed the maximum nonusurious amount permitted by applicable law (the "Maximum Amount").

3. **PAYMENT SCHEDULE/MATURITY DATE.** This note shall be due and payable as follows: In monthly installments of interest accrued through date of each payment, beginning on **February 5, 2010**, and continuing on the same day of each month thereafter, with the entire amount hereof, principal and accrued unpaid interest then remaining unpaid, if any, due and payable in full

on **January 5, 2011**. Interest shall be calculated on the unpaid principal to the date of each installment paid and the payment made credited first to the discharge of the interest accrued and the balance, if any, to the reduction of the principal.

YOUR PAYMENTS ARE NOT SUFFICIENT TO PAY THIS NOTE PRIOR TO MATURITY. UNLESS SOONER ACCELERATED DUE TO A DEFAULT, THIS NOTE MATURES ON JANUARY 5, 2011 AND YOU WILL HAVE A LARGE BALLOON PAYMENT DUE AT THAT TIME. AT MATURITY, YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN AND UNPAID INTEREST THEN DUE, IF ANY. PAYEE IS UNDER NO OBLIGATION TO REFINANCE THE LOAN AT THAT TIME, IF ANY. YOU WILL, THEREFORE, BE REQUIRED TO MAKE PAYMENT OUT OF OTHER ASSETS YOU MAY OWN, OR YOU WILL HAVE TO FIND A LENDER, WHICH MAY BE PAYEE YOU HAVE THIS LOAN WITH, WILLING TO LEND YOU THE MONEY. IF YOU REFINANCE THIS LOAN AT MATURITY, YOU MAY HAVE TO PAY SOME OR ALL OF THE CLOSING COSTS NORMALLY ASSOCIATED WITH A NEW LOAN EVEN IF YOU OBTAIN REFINANCING FROM THE SAME PAYEE.

If any payment required under this Note is not paid within ten days of the day such payment becomes due and payable, then Maker shall pay to Payee, subject to the provisions of this Note limiting the amount of interest, the payment of a late charge (the "Late Charge") to compensate Payee for the loss of use of funds and for the administrative expenses and costs of handling such delinquent payment equal to a one-time charge of five percent (5.0%) of the amount of such payment that was not timely paid (but such Late Charge if interest under the law together with all interest payable hereon shall not exceed the maximum lawful rate). Payee is not obligated to accept any past due payment that is not accompanied by a Late Charge, but may accept such payment without waiving its rights to collect the Late Charge. In no event shall a Late Charge be payable by reason of the acceleration of the indebtedness evidenced by this Note; therefore, a Late Charge would only be due and payable with respect to payments under this Note which become delinquent prior to the acceleration of the indebtedness evidenced hereby.

4. **CERTAIN PROVISIONS REGARDING PAYMENTS**. Whenever any payment shall be due under this Note on a day that is not a Business Day, the date on which such payment is due shall be extended to the next succeeding Business Day, and such extension of time shall be included in the computation of the amount of interest then payable. "Business Day" means a day other than a Saturday, Sunday or other day on which national banks in Houston, Texas are authorized or required to be closed. All payments made as scheduled on this Note shall be applied, to the extent thereof, to accrued but unpaid interest and to unpaid principal, in such manner and order as Payee may elect in its discretion. All prepayments on this Note shall be applied, to the extent thereof, to accrued but unpaid interest on the amount prepaid and to the remaining principal installments, in such manner and order as Payee may elect in its discretion, including but not limited to application to principal installments in inverse order of maturity. Except to the extent that specific provisions are set forth in this Note or another Loan Document with respect to application of payments, all payments received by the holder hereof shall be applied, to the extent thereof, to the indebtedness secured by the

Security Instrument in such manner and order as Payee may elect in its discretion, any instructions from Maker or anyone else to the contrary notwithstanding. Remittances in payment of any part of the indebtedness other than in the required amount in immediately available U.S. funds shall not, regardless of any receipt or credit issued therefor, constitute payment until the required amount is actually received by the holder hereof in immediately available U.S. funds and shall be made and accepted subject to the condition that any check or draft may be handled for collection in accordance with the practice of the collecting bank or banks. Acceptance by the holder hereof of any payment in an amount less than the amount then due on any indebtedness shall be deemed an acceptance on account only and shall not in any way excuse the existence of a Default.

5. **DEFAULTS.** It shall be a default ("Default") under this Note and each of the other documents and agreements executed in connection with this Note (the "Loan Documents") if (a) any principal, interest or other amount of money due under this Note is not paid in full when due, regardless of how such amount may have become due; (b) there shall occur any default or event of default under any Security Instrument or any other Loan Document; (c) the liquidation, termination, dissolution or (if Maker or any guarantor is a natural person) death or legal incapacity of Maker or any guarantor hereof; (d) the bankruptcy or insolvency of, the assignment for the benefit of creditors by, or the appointment of a receiver for any of the property of any party liable for the payment of this Note, whether as maker, endorser, guarantor, surety or otherwise; (e) default in the payment of any other indebtedness due Payee or default in the performance of any other obligation to Payee by Maker or any other party liable for the payment hereof, whether as endorser, guarantor, surety or otherwise, whether or not related to this Note; or (f) Payee in good faith believes the prospect for prompt payment or performance hereunder or under any Loan Document is impaired. Upon the occurrence of a Default, the holder hereof shall have the rights to declare the unpaid principal balance and accrued but unpaid interest on this Note at once due and payable (and upon such declaration, the same shall be at once due and payable), to foreclose any liens and security interests securing payment hereof and to exercise any of its other rights, powers and remedies under this Note, under any other Loan Document, or at law or in equity. All of the rights, remedies, powers and privileges (together, "Rights") of the holder hereof provided for in this Note and in any other Loan Document are cumulative of each other and of any and all other Rights at law or in equity. The resort to any Right shall not prevent the concurrent or subsequent employment of any other appropriate Right. No single or partial exercise of any Right shall exhaust it, or preclude any other or further exercise thereof, and every Right may be exercised at any time and from time to time. No failure by the holder hereof to exercise, nor delay in exercising any Right, including but not limited to the right to accelerate the maturity of this Note, shall be construed as a waiver of any Default or as a waiver of the Right. Without limiting the generality of the foregoing provisions, the acceptance by the holder hereof from time to time of any payment under this Note which is past due or which is less than the payment in full of all amounts due and payable at the time of such payment, shall not (i) constitute a waiver of or impair or extinguish the right of the holder hereof to accelerate the maturity of this Note or to exercise any other Right at the time or at any subsequent time, or nullify any prior exercise of any such Right, or (ii) constitute a waiver of the requirement of punctual payment and performance, or a novation in any respect. If any holder of this Note retains an attorney in connection with any Default or at maturity or to collect, enforce or defend this Note or any other Loan Document in any

lawsuit or in any probate, reorganization, bankruptcy or other proceeding, or if Maker sues any holder in connection with this Note or any other Loan Document and does not prevail, then Maker agrees to pay to each such holder, in addition to principal and interest, all reasonable costs and expenses incurred by such holder in trying to collect this Note or in any such suit or proceeding, including reasonable attorneys' fees.

6. **CONTROLLING PROVISIONS.** All parties to the Loan Documents intend to comply with applicable usury law. All existing and future agreements regarding the debt evidenced by this Note are hereby limited and controlled by the provisions of this Section. In no event (including but not limited to prepayment, default, demand for payment, or acceleration of maturity) shall the interest taken, reserved, contracted for, charged or received under this Note or under any of the other Loan Documents or otherwise, exceed the maximum nonusurious amount permitted by applicable law (the "Maximum Amount"). If, from any possible construction of any document, interest would otherwise be payable in excess of the Maximum Amount, then ipso facto, such document shall be reformed and the interest payable reduced to the Maximum Amount, without necessity of execution of any amendment or new document. If the holder hereof ever receives interest in an amount which apart from this provision would exceed the Maximum Amount, the excess shall, without penalty, be applied to the unpaid principal of this Note in inverse order of maturity of installments and not to the payment of interest, or be refunded to the payor if the principal is paid in full. The holder hereof does not intend to charge or receive unearned interest on acceleration. All interest paid or agreed to be paid to the holder hereof shall be spread throughout the full term (including any renewal or extension) of the debt so that the amount of interest does not exceed the Maximum Amount.

7. **SECURITY.** Payment hereof is secured by a Securities Account Control Agreement executed by KEVIN P. MALEY and by a Guaranty executed by KEVIN P. MALEY.

8. **GENERAL PROVISIONS/WAIVERS.** If more than one person or entity executes this Note as Maker, all of said parties shall be jointly and severally liable for payment of the indebtedness evidenced hereby. Maker and all sureties, endorsers, guarantors and any other party now or hereafter liable for the payment of this Note in whole or in part, hereby severally (i) waive demand, presentment for payment, notice of dishonor and of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices (except any notices which are specifically required by this Note or any other Loan Document), filing of suit and diligence in collecting this Note or enforcing any of the security herefor; (ii) agree to any substitution, subordination, exchange or release of any such security or the release of any party primarily or secondarily liable hereon; (iii) agree that the holder hereof shall not be required first to institute suit or exhaust its remedies hereon against Maker or others liable or to become liable hereon or to enforce its rights against them or any security herefor; (iv) consent to any extensions or postponements of time of payment of this Note for any period or periods of time and to any partial payments, before or after maturity, and to any other indulgences with respect hereto, without notice thereof to any of them; and (v) submit (and waive all rights to object) to non-exclusive personal jurisdiction in the State of Texas, and venue in the county in which payment is to be made as specified on the first page of this Note, for the enforcement of any and all obligations under the Loan

Documents. This Note may not be amended except in a writing specifically intended for the purpose and executed by the party against whom enforcement of the amendment is sought. The holder of this Note may, from time to time, sell or offer to sell the loan evidenced by this Note, or interests therein, to one or more assignees or participants and is hereby authorized to disseminate any information it has pertaining to the loan evidenced by this Note, including, without limitation, any security for this Note and credit information on the undersigned, any of its principals and any guarantor of this Note, to any such assignee or participant or prospective assignee or prospective participant, and to the extent, if any, specified in any such assignment or participation, such assignee(s) or participant(s) shall have the rights and benefits with respect to this Note and the other Loan Documents as such person(s) would have if such person(s) were Payee hereunder. The terms, provisions, covenants and conditions hereof shall be binding upon Maker and the heirs, devisees, representatives, successors and assigns of Maker. Any previous extension of time, forbearance, failure to pursue some remedy, or acceptance of partial payment by Payee, before or after maturity, does not constitute a waiver by Payee of the existence of any event of default nor of its right to strictly enforce the collection of this Note according to its terms. Time is of the essence in Borrower's performance of all duties and obligations imposed by this Note.

9. **JURISDICTION/VENUE/LEGAL ELECTIONS.** THIS NOTE, AND ITS VALIDITY, ENFORCEMENT AND INTERPRETATION, AND ALL RIGHTS OF THE PARTIES SHALL BE GOVERNED BY TEXAS LAW (WITHOUT REGARD TO ANY CONFLICT OF LAWS PRINCIPLES) AND APPLICABLE UNITED STATES FEDERAL LAW. VENUE FOR ENFORCEMENT OF THIS NOTE AND ALL OBLIGATIONS OF MAKER HEREUNDER IS SET AND AGREED IN STATE DISTRICT COURT IN HARRIS COUNTY, TEXAS FOR ALL PURPOSES. MAKER EXPRESSLY WAIVES ANY RIGHT TO HAVE ANY ACTION BROUGHT IN OR REMOVED TO FEDERAL COURT ON THE BASIS OF DIVERSITY OF CITIZENSHIP OR ANY OTHER REASON. THIS CHOICE OF LAW AND VENUE IS AN EXPRESS AGREEMENT AND IS PART OF THE TERMS NEGOTIATED BY THE PARTIES. PAYEE WOULD NOT ENTER INTO THIS TRANSACTION WITHOUT THIS AGREEMENT.

10. **ASSIGNMENT BY PAYEE.** Payee shall at all time have the right, both before and after this date, with Maker's consent, which consent shall not be unreasonably withheld, delayed or conditioned, to assign all or a portion of this loan. Payee is hereby authorized to disseminate any information it has pertaining to the loan evidenced by this Note, including, without limitation, any security for this Note and credit information on the undersigned, any of its principals and any guarantor of this Note, to any such assignee or participant or prospective assignee or prospective participant, and to the extent, if any, specified in any such assignment or participation, such assignee(s) or participant(s) shall have the rights and benefits with respect to this Note and the other Loan Documents as such person(s) would have if such person(s) were Payee hereunder. The terms, provisions, covenants and conditions hereof shall be binding upon Maker and the heirs, devisees, representatives, successors and assigns of Maker.

11. **FINANCIAL INFORMATION.** Maker and each Guarantor of the loan shall provide to Payee current personal and business financial information and tax returns as requested and as

follows: Borrower to provide unaudited compilations of borrower's profit and loss statements and balance sheets quarterly within 20 days of the end of each calendar quarter, and tax returns or audited financial statements annually within 30 days of filing or publishing. Guarantors agree to provide personal financial statements reflecting current information annually. Such information shall be in such form as Payee shall reasonably require.

12. **DEFINITION OF TERMS.** As used herein, (a) "Maker" and/or "Borrower" means each maker who signs this Note, jointly and severally; (b) "guarantor" means each guarantor who guarantees the payment of all or any portion of this Note; (c) "obligor" means each maker, guarantor, endorser, and surety of all or any portion of this Note; (d) this "Note" refers to this instrument and to the indebtedness evidenced by this instrument; (e) "Security Instrument" means and includes each and every pledge, assignment, security agreement, guaranty, mortgage, deed to secure debt, deed of trust, hypothecation, or other security instrument or arrangement given to secure repayment of all or any portion of this Note or performance under any of the Loan Documents, whether now existing or hereafter arising; (f) "Collateral" means any collateral that secures repayment of this Note; (g) "Loan Documents" include all documents executed and delivered in connection with the loan transaction evidenced by this Note (including this Note, each Security Instrument, any loan commitment letters, any loan agreements and all loan application documents), whether now existing or hereafter arising; and (h) "Payee" and/or Lender mean SELECT ASSET PRIME INDEX FUND, LLC and its successors and assigns. The terms "Note", "Security Instrument", and "Loan Documents" include all amendments, modifications, extensions and renewals thereof. If the terms of any of the Loan Documents conflict with the terms of this Note, the terms of this Note shall control.

13. **SPECIAL PROVISIONS.** This Note is for business purposes. None of the proceeds will be used for family, household or consumer purposes. The parties hereto expressly waive the provisions and requirements of Chapter 346 of the Texas Finance Code, and agree that the terms of this note shall not be governed by the provisions thereof.

The loan is intended to be a "Qualified commercial loan" under the Texas Finance Code. "Qualified commercial loan" means a commercial loan in which one or more persons as part of the same transaction lends, advances, borrows, or receives, or is obligated to lend or advance or entitled to borrow or receive, money or credit with an aggregate value of \$250,000 or more if the commercial loan is not secured by real property and, if the aggregate value of the commercial loan is less than \$500,000, and the loan documents contain a written certification from the borrower that: (1) the borrower has been advised by the lender to seek the advice of an attorney and an accountant in connection with the commercial loan; and 2) the borrower has had the opportunity to seek the advice of an attorney and accountant of the borrower's choice in connection with the commercial loan. As a "Qualified commercial loan" the Lender has the right to receive, and pursuant to other documents you have granted Payee a right to receive, additional rights and interests and to participate in or own a share of the income, revenues, production, or profits. YOU HAVE BEEN ADVISED, AND ARE HEREBY ADVISED TO SEEK THE ADVICE OF AN ATTORNEY AND AN ACCOUNTANT IN CONNECTION WITH THIS COMMERCIAL LOAN. An attorney and/or an accountant may

be able to help you more fully understand the economic impact of the loan. THIS SHOULD BE AN ATTORNEY OR ACCOUNTANT OF YOUR OWN CHOICE.

The following notice is applicable only if the face amount of this Note is in excess of \$50,000.00:
THE WRITTEN LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

IN WITNESS WHEREOF, Maker has duly executed this Note as of the date first above written.

K O SUPPLY, L.L.C.

By: _____

KEVIN P. MALEY, MANAGER/MEMBER

GUARANTY AGREEMENT

THIS GUARANTY AGREEMENT is made this 5th day of JANUARY, 2010 (this "Guaranty"), by the undersigned **KEVIN P. MALEY** (hereinafter referred to as "Guarantor") in favor of **SELECT ASSET PRIME INDEX FUND, LLC** ("Creditor").

FOR VALUE RECEIVED, Guarantor, hereby unconditionally and absolutely guarantees to Creditor the prompt and full payment, when due, of all indebtedness and obligations, fixed or contingent, whether arising by notes, guaranties, discounts, overdrafts, or in any other manner, which **K O SUPPLY, L.L.C.**, or one or more of them (hereinafter called "Debtor") may now or at any time hereafter owe Creditor pursuant, under, related to or in any way arising in connection with that certain Promissory Note of even date herewith in the original principal amount of **\$1,000,000.00**, executed by Debtor and payable to the order of Creditor (the "Note"), and all interest and collection costs specified in any document evidencing, securing or pertaining to any such Note, indebtedness and obligations (said indebtedness and obligations being hereinafter collectively called the "Indebtedness").

1. CONTINUING GUARANTY. This is a continuing Guaranty and shall apply to the Indebtedness and any renewals, extensions, refinancings and modifications thereof.

2. SUIT AGAINST GUARANTORS. Suit may be brought against Guarantor in the event of default by Debtor.

3. OTHER REMEDIES. Creditor shall not be required to pursue any other remedies before invoking the benefits of this Guaranty; specifically, Creditor shall not be required to take any action against Debtor or any other person, to exhaust its remedies against endorsers, collateral and other security, or to resort to any balance of any deposit account or credit on the books of Creditor in favor of Debtor or any other person.

4. OBLIGATIONS NOT IMPAIRED. The obligations of Guarantor under this Guaranty shall not be released or impaired without the express prior written consent of Creditor. Without limiting the generality of the foregoing, the obligations of Guarantor shall not be released or impaired on account of the following events:

(a) the voluntary or involuntary liquidation, sale or other disposition of all or substantially all of the assets of Debtor, or any receivership, insolvency, bankruptcy, reorganization or other similar proceedings affecting Debtor or any of its assets;

(b) the addition of a new guarantor or guarantors;

(c) any impairment, modification, release or limitation of liability of, or stay of lien enforcement proceedings against Debtor, its property, or its estate in bankruptcy or any modification, discharge or extension of the Indebtedness resulting from the operation of any present or future provision of the Federal Bankruptcy Code or any other similar federal or state statute, or from the decision of any court, it being the intention hereof that Guarantor shall remain liable on the Indebtedness notwithstanding any act, omission or thing which might, but for the

provisions hereof, otherwise operate as a legal or equitable discharge of Guarantor other than payment in full of the Indebtedness;

(d) Creditor's failure to use diligence in preserving the liability of any person on the Indebtedness, or in bringing suit to enforce collection of the Indebtedness;

(e) the substitution or withdrawal of collateral or release of security, and the exercise or failure to exercise by Creditor of any right conferred upon it herein or in any collateral agreement;

(f) if Debtor is not liable because the act of creating the Indebtedness is ultra vires or the officers or persons creating the Indebtedness acted in excess of their authority, or for any reason the Indebtedness cannot be enforced against Debtor;

(g) any payment by Debtor to Creditor if such payment is held to constitute a preference under the bankruptcy laws, or if for any other reason Creditor is required to refund such payment to Debtor or pay the amount thereof to any other party;

(h) if Guarantor is or becomes liable for any indebtedness owing by Debtor to Creditor, by endorsement or otherwise, other than under this Guaranty; or

(i) if this Guaranty is ever deemed invalid or unenforceable as to the Guarantor.

5. BENEFIT TO GUARANTOR. Guarantors acknowledge and warrant that they derived or expect to derive financial and other advantage and benefit, directly or indirectly, from the Indebtedness and each and every advance thereof and from each and every renewal, extension, release of collateral or other relinquishment of legal rights made or granted or to be made or granted by Creditor to Debtor in an amount not less than the amount guaranteed hereunder.

6. GUARANTOR'S WARRANTIES AND REPRESENTATIONS. Guarantor hereby represents and warrants to Creditor as follows:

(a) Other than as disclosed in writing to Creditor, there are no material conditions, circumstances, events, agreements, material actions, suits, or proceedings pending or, to the knowledge of Guarantor, threatened in any court or before or by any governmental authority against or affecting Guarantor or, to the actual knowledge of Guarantor, against or affecting Debtor. The consummation of the transactions contemplated hereby will not result in a breach of, or constitute a default in, any mortgage, deed of trust, lease, promissory note, loan agreement, credit agreement, partnership agreement or other agreement to which Guarantor is a party or by which Guarantor may be bound or affected. To the actual knowledge of Guarantor, Guarantor is not in default under any laws, ordinances, statutes, codes, rules, regulations, orders and decrees of any governmental authorities which would impair Guarantor's ability to perform their obligations under this Guaranty.

(b) All of the documents evidencing, governing or securing the Indebtedness (the "Loan Documents") including, without limitation, this Guaranty and any other documents referred to herein to which Guarantor is a party, will, upon execution and delivery,

constitute duly authorized, valid and binding obligations of Guarantor, enforceable in accordance with their respective terms except as limited by applicable debtor relief laws. No basis presently exists for any claims by Guarantor against Creditor under the Loan Documents, and enforcement of the Loan Documents is subject to no defenses or offsets.

(c) The representations and warranties contained in the Loan Documents are made as an inducement to Creditor to enter into the Loan Documents, and Guarantor understands that Creditor is relying on such representations and warranties, and that such representations and warranties shall remain true and correct so long as any part of the Indebtedness remains outstanding and shall survive any (i) bankruptcy or receivership proceedings involving Borrower, Guarantor or the Property, (ii) foreclosure of any mortgage securing the Indebtedness or other lien or security interest instrument securing the Indebtedness, or (iii) conveyance of ownership of the Property in the event of default.

(d) All financial statements, schedules, opinions, certificates, confirmations, statements, applications, affidavits, agreements and other materials submitted by Guarantor to Creditor in connection with the Loan Documents fairly state the matters with which they purport to deal, and neither misstate any material fact nor, whether read separately or in the aggregate, fail to state any material fact necessary to make the statements made not misleading.

7. SUBORDINATION. Guarantor hereby subordinates any and all indebtedness of Debtor now or hereafter owed to any of the Guarantor to the Indebtedness, and agree with Creditor that Guarantor shall not demand or accept any payment of principal or interest from Debtor, shall not claim any offset or other reduction of Guarantor's obligations hereunder because of any such indebtedness and shall not take any action to obtain any of the collateral securing the Indebtedness; provided, however, that, if Creditor so requests, any indebtedness of Debtor to the Guarantor shall be collected, enforced and received by Guarantor as trustee for Creditor and be paid over to Creditor on account of the Indebtedness, but without reducing or affecting in any manner the liability of Guarantor under the other provisions of this Guaranty.

8. DEATH OF GUARANTOR. Upon the death of the Guarantor, the obligation of the deceased shall continue against his estate as to all Indebtedness which shall have been incurred by Debtor prior to the actual receipt by an officer of Creditor of written notice of such death.

9. FINANCIAL STATEMENTS. Each of the Guarantors warrants and represents to Creditor that all financial statements heretofore delivered by Guarantors to Creditor are true and correct, that there are no material adverse changes as of the date hereof and that the execution hereof does not render Guarantors insolvent. Guarantors shall provide Creditor with financial statements of the type and at the times specified in the Loan Documents and in any event within 30 days following a request by Creditor therefor.

10. COMPLIANCE WITH LOAN DOCUMENTS. Guarantors shall comply with, observe and be bound by the provisions of the Loan Documents which pertain to Guarantors.

11. WAIVERS. Guarantors waive diligence on the part of Creditor in the collection of the Indebtedness, protest, notice, notice of intention to accelerate the maturity of any portion of the Indebtedness, notice of any actual acceleration thereof, and all extensions that may be granted to Debtor. Creditor shall be under no obligation to notify Guarantors of its acceptance hereof, nor of any advances made or credit extended on the faith hereof, nor of the failure of Debtor to pay

the Indebtedness as it matures. To the fullest extent allowed by law, Guarantors further expressly waive, release and relinquish any and all rights and remedies now or hereafter accorded by applicable law to Guarantors and/or sureties, including without limitation (i) rights of guarantors and sureties under Chapters 3 and 34 of the Texas Business and Commerce Code; (ii) any defense, right of offset or other claim which Guarantors may have against Borrower or Creditor, or which Borrower may have against Creditor or other holder of the Indebtedness (other than payment in full of the Indebtedness); (iii) any affirmative claim, offset, defense or appraisal right under Texas Property Code Section 51.003; and (iv) any rights of redemption, homestead, dower, exemption, marshalling or other similar rights of any kind or nature.

12. LIMITATION ON INTEREST. To the extent that any law limiting the amount of interest that may be contracted for, charged or received is applicable to the obligations of Guarantors under this Guaranty, no provision of this Guaranty shall require the payment or permit the collection of any sum in excess of the maximum lawful amount applicable to Guarantors' obligations under this Guaranty. If any sum in excess of the maximum lawful amount applicable to Guarantors' obligations under this Guaranty is provided for herein, the provisions of this paragraph shall govern, and Guarantors shall not be obligated to pay any sum in excess of the maximum lawful amount applicable to Guarantors' obligations under this Guaranty. All interest paid or agreed to be paid to Creditor shall, to the extent permitted by applicable law, be amortized, prorated, allocated, and spread throughout the full period until payment in full of the principal of the Indebtedness (including the period of any renewal or extension thereof) so that the interest thereon for such full period shall not exceed the maximum amount permitted by applicable law. The intention of Guarantors and Creditor hereunder is to comply with all laws applicable to this Guaranty and Guarantors' obligations hereunder.

13. MODIFICATION OR CONSENT. No modification, consent or waiver of any provision of this Guaranty, or consent to any departure by any of the Guarantors therefrom, shall be effective unless the same shall be in writing and signed by an officer of Creditor, and then shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on any Guarantors in any case shall, of itself, entitle any Guarantors to any other or further notice or demand in similar or other circumstances. No delay or omission by Creditor in exercising any power or right hereunder shall impair any such right or power or be construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise of any such power preclude other or further exercise thereof or the exercise of any other right or power hereunder. All rights and remedies of Creditor hereunder are cumulative of each other and of every other right or remedy which Creditor may otherwise have at law or in equity or under any other contract or document, and the exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies.

14. INDUCEMENT TO CREDITOR. Guarantors acknowledge that this Guaranty is given to induce Creditor to extend credit to Debtor which would not be extended except in reliance upon this Guaranty.

15. COSTS OF COLLECTION. Guarantors agree to pay all costs of collection, including attorney's fees and expenses, if this Guaranty is placed in the hands of an attorney for collection or is collected through any court.

16. NOTICE OF LITIGATION, CLAIMS AND FINANCIAL CHANGE. Guarantors shall promptly inform Creditor of (a) any litigation against Guarantors or affecting any security for the Indebtedness which, if determined adversely, might have a material adverse effect upon the

financial condition of Guarantors or upon such security or might cause a default under any of the documents evidencing, securing or governing the Indebtedness, (b) any claim or controversy which might become the subject of such litigation, and (c) any material adverse change in the financial condition of any of Guarantors.

17. PARTICIPATIONS/SALE. Guarantors acknowledge and agree that Creditor may from time to time sell or offer to sell all or interests in the Indebtedness and the Loan Documents to one or more participants. Guarantors authorize Creditor to disseminate any information it has pertaining to the Indebtedness, including without limitation, complete and current credit information on Debtor, any of its principals and Guarantors, to any such participant/purchaser or prospective participant/purchaser.

18. SUCCESSORS AND ASSIGNS. This Guaranty is for the benefit of Creditor, its successors and assigns, and, in the event of an assignment by Creditor, its successors or assigns, of the Indebtedness, or any part thereof, the rights and benefits hereunder, to the extent applicable to the Indebtedness so assigned, may be transferred with such Indebtedness.

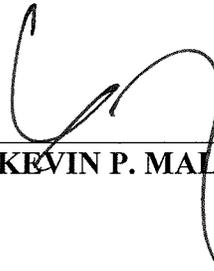
19. COUNTERPARTS. This Guaranty may be executed in a number of identical counterparts, each of which for all purposes is deemed an original; further, the failure of any one or more Guarantors to execute a counterpart hereof shall not affect or impair the validity or enforceability of this Guaranty against the Guarantors executing this Guaranty.

20. HEADINGS. The paragraph headings hereof are inserted for convenience of reference only and shall not alter, define or be used in construing the text of such paragraphs.

21. GOVERNING LAW AND PLACE OF PERFORMANCE. GUARANTORS AGREE THAT THIS AGREEMENT IS GOVERNED BY THE LAWS OF THE STATE OF TEXAS. THIS AGREEMENT IS PERFORMABLE IN HARRIS COUNTY, TEXAS, AND GUARANTORS HEREBY WAIVE THE RIGHT TO BE SUED ELSEWHERE.

(SIGNATURE PAGE ATTACHED)

GUARANTOR:



KEVIN P. MALEY

GUARANTOR'S ADDRESS FOR NOTICE:

