

SECURITIES AND EXCHANGE COMMISSION

FORM 8-K

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FILER

**RxElite, Inc.**

CIK: **1346405** | IRS No.: **620201385** | Fiscal Year End: **1231**  
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UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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**FORM 8-K**

**CURRENT REPORT**  
**Pursuant to Section 13 or 15(d) of the**  
**Securities Exchange Act of 1934**

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Date of Report (Date of earliest event reported): May 30, 2008

**RxElite, Inc.**

(Exact Name of Registrant as Specified in Charter)

Delaware

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(State or other jurisdiction  
of incorporation)

000-50299

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(Commission File Number)

62-0201385

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(IRS Employer  
Identification No.)

1404 North Main, Suite 200  
Meridian, Idaho

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(Address of principal executive offices)

83642

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(Zip Code)

Registrant's telephone number, including area code: (208) 288-5550

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(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
  - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 DFR 240.14a-12)
  - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
  - Pre-commencement communications pursuant to Rule 13e-4 (c) under the Exchange Act (17 CFR 240.13e-4(c))
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**Item 1.01 Entry into a Material Definitive Agreement.**

**Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off Balance Sheet Arrangement of a Registrant**

RxElite, Inc., a Delaware corporation (“RxElite” or the “Company”), has entered into a Loan and Security Agreement dated as of May 30, 2008 (the “Loan Agreement”), with NPIL Pharma Inc. a Delaware company (“N. Pharma” or the “Lender”), pursuant to which the Company obtained a term loan facility from N. Pharma in the initial principal amount of \$3,000,000. The principal amount of the loan may be increased by an additional \$2,000,000 upon request by the Company and upon consent of the Lender, for a total principal amount of \$5,000,000.

The Company entered into the Loan Agreement and related agreements to obtain funds for the purchase by the Company of anesthetic vaporizers.

The loan facility bears interest at the rate of 15% per annum. Further, repayment of the loan is secured by a lien and security interest in favor of N. Pharma in all of the assets of the Company, including its accounts, equipment and inventory. The lien in favor of N. Pharma is subject and subordinate to an existing first priority lien and security interest in favor of Castlerigg Master Investments Ltd. (the “Senior Lender”). On December 31, 2007, the Senior Lender made an investment in the Company in the amount of \$10,500,000, which investment is represented, in part, by a senior secured note (“Senior Note”) which is due and payable on December 31, 2009.

The loan is represented by a Secured Promissory Note in the principal amount of \$3,000,000 dated as of May 30, 2008 (“Secured Note”). Payment of interest is payable each December 31<sup>st</sup> while the loan is outstanding, subject to the rights of the Senior Lender. Payment of the principal amount of the loan and any unpaid interest is due and payable, subject to the rights of the Lender on the earlier of (i) six months after the date of maturity of the Senior Note or (ii) upon demand. The Loan Agreement and Secured Note contain customary events of default.

The Loan Agreement and Secured Note contain affirmative and negative covenants whereby the Company agreed, among other things to:

- deliver periodic financial statements and other information to N. Pharma;
- refrain from further encumbering any of its assets;
- refrain from selling, transferring or leasing any material part of its assets, except in the ordinary course of business;
- refrain from incurring or assuming any indebtedness except as allowed under the terms provided;
- refrain from making any distributions to its stockholders, except under certain limited circumstances; and
- provide N. Pharma, subject to the rights of the Senior Lender, with a 15 day right of first refusal on all future financings undertaken by the Company for so long as the loan is outstanding.

The Company also entered into an Intercreditor and Subordination Agreement dated as of May 30, 2008 (“Intercreditor Agreement”) with N. Pharma and the Senior Lender whereby the parties to such agreement agreed that repayment of interest and principal on the term loan facility and the liens and security interests granted to N. Pharma were subject and subordinate to the rights of the Senior Lender. Under the terms of the Intercreditor Agreement, N. Pharma may not move to collect on the assets of the Company, or obtain payment on the term loan prior to satisfaction in full of all obligations under the Senior Note. The Senior Lender also entered into an Amendment and Waiver Agreement dated as of May 30, 2008 with the Company and N. Pharma whereby it consented to the making of the loan by N. Pharma and certain terms of its original agreements with the Company were amended to account for the N. Pharma loan.

The foregoing summary is not a complete description of the terms of the Loan and Security Agreement, Secured Note, Intercreditor Agreement and Amendment and Waiver, and reference is made to the complete text of such agreements, attached hereto as Exhibit 10.1, 10.2, 10.3 and 10.4, respectively.

#### **Item 8.01 Other Events.**

On December 31, 2007, we entered into a securities purchase agreement with Castlerigg Master Investments Ltd., pursuant to which we sold 5,594,033 shares of our common stock, a 9.50% senior secured redeemable convertible note in the principal amount of \$10,500,000 ("Convertible Note") a Series A warrant to purchase up to 13,985,083 shares of our common stock ("Series A Warrant") and a Series B warrant to purchase up to 4,661,694 shares of our common stock ("Series B Warrant", and together with the Series A Warrant, "Warrants") for aggregate gross proceeds of \$10,500,000 ("Securities Purchase Agreement").

On January 18, 2008, we entered into a letter agreement with the selling stockholder, pursuant to which we amended certain terms of the Convertible Note, the Series A Warrant and the Series B Warrant (the "Warrants").

As of March 31, 2008, under the terms of the Convertible Note, if we failed to record consolidated EBITDA, as defined in the Convertible Note, of at least (i) (\$1,000,000) for the fiscal quarter ending March 31, 2008, the conversion price shall be reset to the lower of (A) the then current conversion price or (B) 85% of the average market price, of our common stock at such time. As defined in the Convertible Note, the "Average Market Price" means, for any given date, the lesser of (i) the arithmetic average of the lowest Weighted Average Price of the Common Stock during the twenty (20) consecutive Trading Days ending on the Trading Day immediately prior to such given date (the "Measuring Period") and (ii) the arithmetic average of the Weighted Average Price of the Common Stock of the three (3) Trading Days with the lowest Weighted Average Price of the Common Stock during the Measuring Period.

As a result of our failure to satisfy the required EBITDA threshold as of March 31, 2008, the conversion price of the Convertible Note has been reduced from the initial conversion price of \$1.1262 per share to \$.2177 per share. Assuming full conversion of the Convertible Note, Castlerigg Master Investments Ltd. would be entitled to approximately 48,231,511 shares of common stock. Under the terms of the Convertible Note and the Warrants, Castlerigg Master Investments Ltd. may not convert the Convertible Note or exercise the Warrants to the extent such conversion or exercise would cause Castlerigg Master Investments Ltd., together with its affiliates, to beneficially own a number of shares of common stock which would exceed 4.99% of our then outstanding shares of common stock following such conversion or exercise, excluding for purposes of such determination shares of common stock issuable upon conversion of the Convertible Note which have not been converted and upon exercise of the Warrants which have not been exercised.

**Item 9.01 Financial Statements And Exhibits**

(d) Exhibits

Exhibit Number	Description
10.1	Loan and Security Agreement dated as of May 30, 2008, between the Company and NPIL Pharma Inc.
10.2	Secured Note dated as of May 30, 2008 in the principal amount of \$3,000,000 in favor of NPIL Pharma Inc.
10.3	Intercreditor and Subordination Agreement dated as of May 30, 2008 by and among the Company, NPIL Pharma Inc. and Castlerigg Master Investments Ltd.
10.4	Amendment and Waiver Agreement dated as of May 30, 2008 by and among the Company, NPIL Pharma Inc. and Castlerigg Master Investments Ltd.

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## SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this Report on Form 8-K to be signed on its behalf by the undersigned hereunto duly authorized.

**RXELITE, INC.**

Dated: June 4, 2008

By: /s/ Jonathan Houssian \_\_\_\_\_

Name: Jonathan Houssian

Title: Chief Executive Officer

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THIS LOAN AND SECURITY AGREEMENT IS SUBJECT TO AN INTERCREDITOR AND SUBORDINATION AGREEMENT, DATED AS OF MAY \_\_\_, 2008, AMONG NPIL PHARMA INC., RXELITE, INC. AND CASTLERIGG MASTER INVESTMENTS LTD.

### LOAN AND SECURITY AGREEMENT

THIS AGREEMENT, made this \_\_\_ day of May, 2008, is by and between NPIL PHARMA INC., a Delaware corporation (the “Lender”) and RXELITE, INC., a Delaware corporation (the “Borrower”).

### RECITALS

Borrower has requested that the Lender make a term loan available to Borrower, and the Lender is willing to make such loan available to Borrower on the terms and conditions set forth in this Agreement.

### SECTION 1. DEFINITIONS

As used herein:

“**Accounts**”, “**Chattel Paper**”, “**Documents**”, “**Equipment**”, “**General Intangibles**”, “**Inventory**” and “**Instruments**” shall have the same respective meanings as are given to those terms in the UCC.

“**Affiliates**” means as to any Person (A) any Person which, directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with such Person, or (B) any Person who is a director or executive officer (i) of such Person, (ii) of any Subsidiary of such Person or (iii) of any Person described in clause (A) above. For purposes of this definition, “control” of a Person shall mean the power, direct or indirect, (i) to vote or direct the voting of more than twenty five percent (25%) of the outstanding shares of voting stock of such Person, or (ii) to direct or cause the direction of the management and policies of such Person whether by contract or otherwise. In no event shall the Lender be deemed to be an Affiliate of the Borrower.

“**Agreement**” means this Loan and Security Agreement, as it may be amended, restated, renewed or extended from time to time.

“**Borrower Distributions**” means (i) any dividend or other distribution, whether in cash, in kind, or otherwise, on account of or with respect to, or (ii) the application of any funds, property or assets to the purchase, redemption or other retirement of, any of Borrower’s equity interests or any warrants, options or other rights with respect to any of Borrower’s equity interests.

“**Business Day**” means any day on which the state banks and national banking associations in New York, New York are open for the conduct of ordinary business.

“**Capitalized Lease**” means a lease that is required to be capitalized for financial reporting purposes in accordance with GAAP.

“**Capitalized Lease Obligation**” means Indebtedness represented by obligations under a Capitalized Lease, and the amount of such Indebtedness shall be the capitalized amount of such obligations determined in accordance with GAAP.

“**Closing**” means the valid execution and delivery of the Note, this Agreement, and the other Loan Documents to the Lender.

“**Collateral**” has the meaning set forth in Section 4.1.

“**Constituent Documents**” means, with respect to any Person, the governing legal documents of such Person, such as Person’s charter, certificate of incorporation, articles of organization, operating agreement, certificate of limited partnership, or Partnership Agreement.

“**Default Rate**” means a rate per annum equal to the Term Rate plus two percent (2%).

“**Event of Default**” has the meaning set forth in Section 8.1.

“**Financial Statements**” means any financial statements submitted to Lender in connection with the Loan.

“**Financing Statements**” means any one or more filings made pursuant to the UCC to perfect the security interests in the Collateral granted to Lender pursuant to Section 4 hereof.

“**Fiscal Year**” means, with respect to the Borrower, the calendar year period of January 1 through December 31.

“**GAAP**” means generally accepted accounting principles as used in the United States applied on a consistent basis as in effect from time to time.

“**Indebtedness**” means, as to any Person, all items of indebtedness whether matured or unmatured, liquidated or unliquidated, direct or contingent, joint or several, including without limitation:

(a) All indebtedness guaranteed, directly or indirectly, in any manner, or endorsed (other than for collection or deposit in the ordinary course of business) or discounted with recourse;

(b) All indebtedness in effect guaranteed, directly or indirectly, through agreements, contingent or otherwise: (1) to purchase such indebtedness; or (2) to purchase, sell or lease (as lessee or lessor) property, products, materials or supplies or to purchase or sell services, primarily for the purpose of enabling the debtor to make payment of such indebtedness or to assure the owner of the indebtedness against loss; or (3) to supply funds to or in any other manner invest in the debtor;

(c) All indebtedness secured by (or for which the holder of such indebtedness has a right, contingent or otherwise, to be secured by) any mortgage, deed of trust, pledge, lien, security interest or other charge or encumbrance upon property owned or acquired subject thereto, whether or not the liabilities secured thereby have been assumed; and



(d) All indebtedness incurred as the lessee of facilities, goods or services under leases that, in accordance with generally accepted accounting principles consistently applied, should be reflected on such Person's balance sheet.

**"Interest Rate"** means the Term Rate.

**"Laws"** means all ordinances, statutes, rules, regulations, order, injunctions, writs or decrees of any government or political subdivision or agency thereof, or any court of similar entity established by any thereof.

**"Loan"** means the term loan in the amount equal to the Loan Commitment made to Borrower by Lender hereunder.

**"Loan Commitment"** means an amount equal to \$3,000,000.00; provided that, so long as no Unmatured Default or Event of Default has occurred and is continuing and subject to Lender's sole discretion, the Loan Commitment may be increased, upon the written request of Borrower, by \$2,000,000.00; provided that the Loan Commitment shall at no time exceed \$5,000,000.00.

**"Loan Documents"** means this Agreement, the Subordination Agreement, the Note and any other document executed or delivered by or on behalf of the Borrower evidencing or securing the Obligations.

**"Loan Termination Date"** means the earlier of (a) six (6) months after the maturity date of the Senior Notes, or (b) immediately after redemption of 100% of the Senior Note pursuant to the terms set forth in the Senior Note.

**"Long Term Debt"** means any Indebtedness which, by its terms, matures more than one (1) year from the date of any calculation thereof, and/or which is renewable or extendable at the option of the obligor to a date more than one (1) year from the date of such calculation.

**"Material Adverse Change"** means a material adverse change in the business or conditions (financial or otherwise) in the result of operations or prospects of the Borrower taken as a whole, or in the value of the Collateral.

**"Material Adverse Effect"** means, when referring to the taking of an action or the omission to take an action, that such action, if taken, or omission, would have a material adverse effect on the business, condition (financial or otherwise) results of operations or prospects of such Person, taken as a whole, or would materially impair the value of the Collateral.

**"Minrad Contract"** means that certain Exclusive Manufacturing and Distribution Agreement, dated as of June 9, 2004, by and between RxElite Holdings Inc. and Minrad International, Inc., as amended to date.

**"Note"** means one or more promissory notes substantially in the form of Exhibit A attached hereto, duly executed and delivered to Lender by Borrower, as the same may be renewed, extended or modified from time to time.

**“Obligations”** means all of the obligations of the Borrower:

(a) To pay the principal of and interest on the Note in accordance with the terms thereof and to satisfy all the Borrower’s other liabilities to the Lender hereunder, whether now existing or hereafter incurred, matured or unmatured, direct or contingent, joint or several, including any extension, modifications, amendments, restatements and renewals thereof and substitutions therefor;

(b) To repay the Lender all amounts advanced by the Lender hereunder on behalf of the Borrower, including without limitation advances for overdrafts, principal or interest payments to prior secured parties, mortgagees, or lienors, or for taxes, levies, insurance, rent, repairs to or maintenance or storage of any of the Collateral; and

(c) To reimburse the Lender, on demand, for all of the Lender’s reasonable out-of-pocket expenses and costs, including the reasonable fees and expenses of its counsel, in connection with the enforcement of this Agreement and the documents required hereunder, including, without limitation, any proceeding brought or threatened to enforce payment of any of the obligations referred to in the foregoing paragraphs (a) and (b), or any suits or claims against Lender whatsoever as a result of Lender’s execution of this Agreement and making of its Loan, all as more specifically set forth in Sections 9.4 and 9.7 hereof; and in addition, to reimburse the Lender for its expenses and reasonable attorneys’ fees in connection with the preparation, administration, amendment, modification or waiver of the Agreement and the other Loan Documents.

**“Permitted Liens”** means:

(a) Liens in favor of Lender;

(b) Liens for taxes, assessments, or similar charges, incurred in the ordinary course of business that are not delinquent;

(c) Pledges or deposits made in the ordinary course of business to secure payment of workmen’s compensation, or to participate in any fund in connection with workmen’s compensation, unemployment insurance, old-age pensions or other social security programs;

(d) Liens of mechanics, materialmen, warehousemen, carriers, or other like liens, securing obligations in the ordinary course of business that are not delinquent;

(e) Good faith pledges or deposits made in the ordinary course of business to secure performance of bids, tenders, contracts (other than for the repayment of borrowed money) or leases, or to secure statutory obligations, or surety, appeal, indemnity, performance or other similar bonds required in the ordinary course of business;

(f) Encumbrances consisting of zoning restrictions, easements or other restrictions on the use of real property, none of which materially impairs the use of such property by the Borrower in the operations of its business, and none of which is violated in any material respect by existing or proposed structures or land use;

(g) Existing liens set forth or described on Schedule 5.6, attached hereto and made a part hereof, and renewals thereof;

(h) Statutory and common law landlord's liens arising under any lease;

(i) The interests of lessees of any property of Borrower;

(j) The following, if the validity or amount thereof is being contested in good faith by appropriate and lawful proceedings, so long as levy and execution thereon have been stayed and continue to be stayed; if Borrower has posted such security as may be required by Laws or as is reasonably satisfactory to Lender:

(i) Claims or liens for taxes, assessments or charges due and payable and subject to interest or penalty;

(ii) Claims, liens and encumbrances upon, and defects of title to, real or personal property, including any attachment of personal or real property or other legal process prior to adjudication of a dispute on the merits;

(iii) Claims or liens of mechanics, materialmen, warehousemen, carriers, or other like liens; and

(iv) Adverse judgments on appeal;

(k) Purchase Money Liens securing Purchase Money Indebtedness incurred in compliance with Section 7.4; and

(l) Liens granted to Castlerigg Master Investments Ltd. (as collateral agent for the holders of the Senior Note) to secure the obligations of Borrower under the Senior Note and the other documents relating thereto.

**“Person”** means any individual, corporation, partnership, association, joint-stock company, estate, trust, unincorporated organization, limited liability company, joint venture, court or government or political subdivision or agency thereof.

**“Purchase Money Indebtedness”** means

(a) Indebtedness created to secure the payment of all or any part of the purchase price of any property,

(b) any Indebtedness incurred at the time of or within 30 days prior to or after the acquisition of any property for the purpose of financing all or any part of the purchase price thereof, and

(c) any renewals, extensions or refinancings thereof, but not any increases in the principal amounts thereof outstanding at the time of any such renewal, extension or refinancing.

**“Purchase Money Lien”** means any lien securing Purchase Money Indebtedness, but only if such lien shall at all times be confined solely to the property the purchase price of which was financed through the incurrence of the Purchase Money Indebtedness secured by such lien.

**“Records”** means correspondence, memoranda, tapes, books, discs, paper, magnetic storage and other documents or information of any type, whether expressed in ordinary or machine language.

**“Senior Note”** means that certain senior secured promissory note, dated December 31, 2007, issued by the Borrower to Castlerigg Master Investments Ltd. in the principal amount of \$10,500,000, as amended, restated or otherwise modified, including, without limitation, any replacement notes.

**“Subordination Agreement”** means that certain Subordination Agreement of even date herewith, by and among the Borrower, the Lender and Castlerigg Master Investments Ltd., as amended, restated or otherwise modified.

**“Subsidiary”** of a Person means any Person of which more than 50% of the outstanding voting securities or other equity interests in such Person shall, at the time of determination, be owned directly or indirectly through one or more Persons, and **“Subsidiaries”** means more than one of such Persons.

**“Term Rate”** means a fixed rate of interest equal to 15% per annum.

**“Vaporizers”** means those certain anesthetic vaporizers purchased after the date hereof and owned by Borrower with the proceeds of the Loan hereunder.

**“UCC”** means the Uniform Commercial Code as in effect on the date hereof in the State of Delaware, as it may be amended from time to time; provided that if by reason of mandatory provisions of law, the perfection or the effect of perfection or non-perfection of a security interest in any Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than Delaware, **“UCC”** means the Uniform Commercial Code as in effect in such other jurisdiction for purposes of the provisions hereof relating to such perfection or effect of perfection or non-perfection.

**“Unmatured Default”** means an event which but for the lapse of time or the giving of notice, or both, would constitute an Event of Default

## SECTION 2. THE LOAN.

Concurrently with the execution of this Agreement, Lender shall make the Loan available to Borrower under the following terms:

2.1 Loan. Upon the Closing Date, the Lender shall make available to Borrower a term loan with a principal amount of \$3,000,000 to be paid at Closing. Amounts re-paid hereunder shall not be permitted to be re-borrowed.

2.2 Use of Proceeds. The Loan shall be used only for the purchase of the Vaporizers.

2.3 Term Note. The obligations of Borrower under the Loan shall be evidenced by one or more Notes in the form attached hereto as Exhibit A.

2.4 Interest Rates and Payments.

(a) Interest shall be charged and paid on the Loan from the date of the initial advance until the Loan is paid at the Term Rate.

(b) Interest shall be computed on the basis of a 360-day year counting the actual number of days elapsed, and shall be due and payable, subject to the Subordination Agreement, upon the earlier of (i) each December 31 occurring after the date hereof, or (ii), upon demand by the Lender.

(c) Notwithstanding the foregoing, upon the occurrence of an Event of Default and during the continuation thereof, interest may be charged at the Default Rate if the Lender so elects, regardless of whether the Lender has elected to exercise any other remedies under Section 8 hereof, including, without limitation, acceleration of the maturity of the outstanding principal of the Note. All such interest shall be paid at the time of and as a condition precedent to the curing of any such default to the extent any right to cure is given.

(d) From time to time, the Lender shall send the Borrower statements of all amounts due hereunder which statements, absent manifest error, shall be considered correct and conclusively binding on the Borrower unless the Borrower notifies the Lender to the contrary within one hundred eighty (180) days of its receipt of any statement to which it objects. All sums payable to the Lender hereunder shall be paid in immediately available funds prior to 12:00 noon eastern standard time on the date when such sums are due and payable. Any amounts received by the Lender after 12:00 noon eastern standard time on any Business Day shall be deemed to have been received on the next Business Day.

(e) Subject to Section 2.6, the entire principal balance of the Loan, together with all interest accrued thereon and all other amounts owing which constitute the Obligations, shall be due and payable in full on the earlier of (1) the Loan Termination Date, or (2) demand by the Lender.

(f) All agreements herein made are expressly limited so that in no event whatsoever shall the interest and loan charges agreed to be paid to the Lender for the use of the money advanced or to be advanced pursuant to this Agreement exceed the maximum amounts collectible under applicable laws in effect from time to time. If for any reason whatsoever the interest or loan charges paid or contracted to be paid in respect of the Loan shall exceed the maximum amounts collectible under applicable laws in effect from time to time, then, ipso facto, the obligation to pay such interest and/or loan charges shall be reduced to the maximum amounts collectible under applicable laws in effect from time to time, and any amounts collected by the Lender that exceeds such maximum amounts shall be applied to the reduction of the principal balance of the Loan and/or refunded to Borrower so that at no time shall the interest or loan charges paid or payable in respect of the Loan exceed the maximum amounts permitted from time to time by applicable law. This provision shall control every other provision herein and in any and all other agreements and instruments now existing or hereafter arising between Borrower and the Lender with respect to the Loan.

2.5 Prepayment. Subject to the Subordination Agreement, the Borrower may, upon two (2) Business Day's prior written notice to the Lender, prepay the Loan in whole or in part.

2.6 Subordination. Notwithstanding anything to the contrary herein, payment of the Obligations shall, to the extent set forth in the Subordination Agreement, be subordinate and junior in right of payment to the prior payment in full of all obligations under the Senior Note, the provisions of which Subordination Agreement are incorporated herein by reference and made a part hereof.

### **SECTION 3. CONDITIONS PRECEDENT**

The obligation of the Lender to fund the Loan is subject to the following conditions precedent:

3.1 Conditions to Initial Advance. The Borrower shall have delivered to the Lender prior to the initial disbursement of the Loan the following:

- (a) This Agreement;
- (b) The Note;
- (c) UCC-1 Financing Statement to be filed at the office of the Delaware Secretary of State and such other offices as Lender may require;
- (d) Copies of the resolutions of the Board of Directors of the Borrower, certified by the Borrower's secretary as of the date of Closing, authorizing the execution, delivery and performance of this Agreement and, as applicable, the Loan Documents and each other document to be delivered pursuant hereto;
- (e) A copy, certified as of the most recent date practicable, by the Delaware Secretary of State of Borrower's certificate of incorporation together with a certificate dated the date of the Closing of Borrower's secretary to the effect that such documents have not been amended since the date of the Secretary of State's certification;
- (f) A copy of Borrower's Bylaws certified by Borrower's secretary as of the date of the Closing;
- (g) A certificate dated as of the date of the Closing of the secretary of the Borrower as to the incumbency and signatures of its officers executing the Loan Documents;
- (h) A Certificate, as of the most recent date practicable, of the Delaware Secretary of State as to the existence and good standing of Borrower;
- (i) The Subordination Agreement, in form and substance satisfactory to Lender, executed by Borrower, Lender and Castlerigg Master Investments Ltd.

(j) A certificate, dated the date of the Closing, signed by the president, vice president, chief financial officer, or corporate controller of the Borrower to the effect that:

- (i) The representations and warranties set forth within Section 5 are true as of the date of the Closing;
- (ii) No Event of Default or Unmatured Default has occurred as of such date; and
- (iii) All of the Loan Documents are in full force and effect.

3.2 Legal Matters. At the time of the Closing and thereafter, all legal matters incidental to the Loan shall be satisfactory to Lender and its counsel.

#### **SECTION 4. COLLATERAL SECURITY**

4.1 Composition of the Collateral. The property in which a security interest is granted pursuant to the provisions of Sections 4.2 and 4.3 shall constitute the “Collateral”. The Collateral, together with all of the Borrower’s other property of any kind, both real and personal, held by, assigned to, mortgaged to or conveyed in favor of the Lender, shall stand as one general, continuing collateral security for all Obligations and may be retained by the Lender until all Obligations have been satisfied in full.

4.2 Rights in Property Held by the Lender. As security for the prompt satisfaction of all Obligations, the Borrower hereby grants the Lender a lien on and a security interest in, all amounts that may be owing from time to time by the Lender to the Borrower in any capacity, including, but without limitation, any balance or share belonging to the Borrower of any deposit or other account with the Lender, which lien and security interest shall be independent of any right of set-off which the Lender may have.

4.3 Rights in Property of the Borrower. As further security for the prompt satisfaction of all Obligations, the Borrower hereby grants the Lender a lien upon and security interest in all of the following, wherever located, whether now owned or hereafter acquired, together with all substitutions, replacements, improvements, accessions or appurtenances thereto, and proceeds (including, without limitation, insurance proceeds) thereof:

- (a) Accounts;
- (b) Chattel Paper;
- (c) Documents;
- (d) Equipment;
- (e) General Intangibles;
- (f) Instruments;
- (g) Inventory; and
- (h) All Records pertaining thereto or to any other Collateral; and
- (i) any other personal property, whether tangible or intangible, now owned or hereafter acquired by Borrower.

4.4 Priority of Liens. The foregoing liens shall be first priority liens except for (a) liens with respect to the Senior Note, and (b) any Permitted Liens on assets which have priority or would have priority by the operation of Laws.

4.5 Financing Statements.

(a) The Borrower will pay or reimburse the Lender for all costs and taxes of filing or recording the same in such public offices as the Lender may designate, and reimburse the Lender for performing subsequent verification searches following Closing in each applicable jurisdiction.

(b) The Borrower hereby authorizes the Lender to file any Financing Statement and to perform all other acts that the Lender deems appropriate to perfect and continue the Lender's security interest in, and to protect and preserve, the Collateral.

## **SECTION 5. REPRESENTATIONS AND WARRANTIES**

To induce the Lender to enter into this Agreement, the Borrower represents and warrants to Lender as follows:

5.1 Due Organization and Qualification. Except as set forth on Schedule 5.1 hereto, the Borrower is a corporation duly organized, validly existing and in good standing under the Laws of the State of Delaware; the Borrower has no Subsidiaries; the Borrower has the lawful power to own its properties and to engage in the business it conducts, and is duly qualified and in good standing in the jurisdictions wherein the nature of the business transacted by it or property owned by it makes such qualification necessary;

5.2 No Conflicting Agreement. The Borrower is not in default with respect to any existing Indebtedness, and the making and performance of the Loan Documents will not (immediately, or with the passage of time or the giving of notice, or both):

(a) Violate any provisions of the Constituent Documents of the Borrower, any provisions of any other documents related to the existing Indebtedness of Borrower (other than violations that have been waived in writing), or violate any Laws, or result in a default under any material contract, agreement, or instrument to which the Borrower is a party or by which the Borrower or any of its property is bound; or

(b) Result in the creation or imposition of any security interest in, or lien or encumbrance upon, any of the assets of the Borrower except in favor of the Lender;

5.3 Capacity. The Borrower has the power and authority to enter into and perform the Loan Documents and to incur the Obligations herein and therein provided for, and have taken all action necessary to authorize the execution, delivery, and performance of the Loan Documents;

5.4 Binding Obligations. The Loan Documents are valid, binding, and enforceable in accordance with their respective terms subject to the general principles of equity (regardless of whether such question is considered in a proceeding in equity or at law) and to applicable bankruptcy, insolvency, moratorium, fraudulent or preferential conveyance and other similar laws affecting generally the enforcement of creditors' rights;



5.5 Litigation. Except as set forth on Schedule 5.5 hereto, there is no pending or, to Borrower's knowledge, threatened order, notice, claim, litigation, proceeding or investigation against or affecting the Borrower that could reasonably be expected to result in a Material Adverse Effect;

5.6 Title. Except as set forth on Schedule 5.6 hereto, the Borrower has good and marketable title to all of its assets, subject to no security interest, encumbrance or lien, or the claims of any other Person except for Permitted Liens and other liens securing Indebtedness, in the aggregate, of less than \$10,000;

5.7 Financial Statements. The Financial Statements, including any schedules and notes pertaining thereto, have been prepared in accordance with GAAP consistently applied, and fully and fairly present (subject, in the case of interim Financial Statements to normal, year-end adjustments and the absence of notes) the financial condition of the Borrower at the dates thereof and the results of operations for the periods covered thereby, and there has been no Material Adverse Change from December 31, 2007 to the date hereof;

5.8 Licenses; Compliance with Laws. Except to the extent that the failure to comply would not result in a Material Adverse Effect, the Borrower, has complied with all applicable Laws with respect to: (1) any licenses, restrictions, specifications, or other requirement pertaining to services that the Borrower performs; (2) the conduct of its business; (3) the use, maintenance, and operation of the real and personal properties owned or leased by it; and (4) health, safety, worker's compensation, and equal employment opportunity;

5.9 Consents; Governmental Approvals. Each consent, approval or authorization of, or filing, registration or qualification with, any Person required to be obtained or effected by the Borrower in connection with the execution and delivery of the Loan Documents or the undertaking or performance of any obligation thereunder has been duly obtained or effected; further, no authorization, consent, approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution, delivery or performance by the Borrower of any Loan Documents to which it is or will be a party, except for approvals which have been obtained and are in full force and effect;

5.10 Survival. All of the representations and warranties set forth in Section 5 shall be true and correct when made and shall survive until all Obligations are satisfied in full.

## **SECTION 6. AFFIRMATIVE COVENANTS**

The Borrower hereby covenants as follows:

6.1 Use of Proceeds. The Borrower will use the proceeds of the Loan only for the purposes permitted in Section 2.2, and will furnish the Lender such evidence as it may reasonably require with respect to such use.

6.2 Financial Statements and Reports. The Borrower will furnish the Lender:

(a) As soon as available and in any event within 90 days after the end of each Fiscal Year of Borrower: (i) statements of cash flows of the Borrower for such Fiscal Year; (ii) income statements of the Borrower for such Fiscal Year; and (iii) balance sheets of the Borrower as of the end of such Fiscal Year - all in reasonable detail, setting forth the corresponding figures as at the end of and for the previous year, including supporting schedules, and audited by independent public accountants of recognized standing, selected by Borrower and reasonably satisfactory to Lender, and prepared in accordance with GAAP;

(b) As soon as available and in any event within 45 days after the close of each of the first three fiscal quarters of each Fiscal Year of the Borrower: (i) statements of cash flows of the Borrower for such year-to-date period; (ii) income statements of the Borrower for such quarterly period; and (iii) balance sheets of the Borrower as of the end of such quarterly period - all in reasonable detail, subject to year-end audit adjustments and certified by the president or principal financial officer of the Borrower to have been prepared in accordance with GAAP consistently applied, except for any inconsistencies explained in such certificate;

(c) As soon as available and in any event within 30 days after the close of each month in each Fiscal Year of Borrower: (i) statements of cash flows of the Borrower for such year-to-date period; (ii) income statements of the Borrower for such monthly period; and (iii) balance sheets of the Borrower as of the end of such monthly period - all in reasonable detail, subject to year-end audit adjustments and certified by the president or principal financial officer of the Borrower to have been prepared in accordance with GAAP consistently applied, except for any inconsistencies explained in such certificate;

(d) Contemporaneously with the delivery of the financial statements referred to in paragraphs (a), (b) and (c) above, a certificate of the president or chief financial officer of the Borrower stating that: (i) such officer has individually reviewed the provisions of this Agreement; (ii) a review of the activities of the Borrower during such reporting period has been made by such officer or under such officer's supervision, with a view to determining whether the Borrower has fulfilled its obligations under this Agreement; and (iii) to the best of such officers' knowledge after a reasonable investigation, the Borrower has observed and performed each undertaking contained in this Agreement and is not in default in the observance or performance of any of the provisions hereof or, if the Borrower shall be so in default, specifying all such defaults and events of which such officer may have knowledge;

(e) Immediately upon receipt of the same by Borrower, copies of all management letters and any other reports which are submitted to the Borrower by its independent accountants in connection with any annual or interim audit of the Records of the Borrower by such accountants;

(f) On or before April 30 of each year, a proforma budget (including both projected maintenance Capital Expenditures and other Capital Expenditures) for such Fiscal Year, in form reasonably satisfactory to the Lender; and

(g) From time to time such additional information regarding the financial condition or business of the Borrower as the Lender may reasonably request.

6.3 Taxes; Copies of Returns. The Borrower will pay, prior to delinquency, all taxes, assessments and charges or levies imposed upon it or on any of its property or which it is required to withhold or pay over, except where contested in good faith by appropriate proceedings with adequate security therefor having been set aside in a manner satisfactory to Lender. The Borrower will pay or cause to be paid, all such taxes, assessments, charges or levies forthwith whenever foreclosure on any lien that attaches (or security therefor) appears imminent. Within ten (10) days of Lender's request therefor, the Borrower will furnish the Lender with copies of federal income tax returns filed.

6.4 Records and Inspection. The Borrower will, upon the request by the Lender, make available during regular business hours any of its business Records for inspection by duly authorized representatives of the Lender, and will furnish the Lender any information regarding their business affairs and financial condition within a reasonable time after written request therefor.

6.5 Maintenance of Existence; Compliance with Laws; Licenses. The Borrower will take all necessary steps to renew, keep in full force and effect, and preserve their corporate existence, good standing, and franchises, and will comply in all respects with all present and future Laws applicable to them except to the extent that a failure to do so would not have or cause to occur a Material Adverse Effect.

6.6 Ordinary Course; Pledge of Notes. The Borrower will keep accurate and complete Records of its Accounts, consistent with sound business practices. The Borrower will collect its Accounts only in the ordinary course of business.

6.7 Notice of Default. The Borrower will notify Lender immediately if it becomes aware of the occurrence of any Event of Default or of any fact, condition or event that only with the giving of notice or passage of time or both, could reasonably be expected to become an Event of Default, or of the failure of the Borrower to observe any of its undertakings hereunder.

6.8 Notice of Name Change or State of Incorporation. The Borrower will notify Lender, with a copy to Castlerigg Master Investments Ltd., thirty (30) days in advance of any change in (i) the name of the Borrower, or (ii) any change in the state of incorporation of Borrower. Prior to establishing any new place of business, if requested by Lender, Borrower will deliver to Lender a landlord's agreement in form and substance satisfactory to Lender.

6.9 Exclusivity. In further consideration for the execution of this Agreement by Lender and as an inducement for the Lender to make the Loan available to Borrower, during the period of time that the Loan is outstanding, Borrower agrees that Borrower shall notify the Lender of any Proposed Equity Offering (as defined below), at the time such proposal is made but in no event less than fifteen (15) days prior to the closing of such Proposed Equity Offering. Subject to the right of first refusal granted to Castlerigg Master Investments, Ltd. pursuant to Section 4(o)(iii) of that certain Securities Purchase Agreement, dated as of December 31, 2007 (the "Securities Purchase Agreement"), the Lender shall have the right to purchase up to 100% of the shares not purchased by Castlerigg Master Investments, Ltd. on the same terms and conditions as offered in the Proposed Equity Offering. If the Lender does not respond within 15 business days of being notified of such a Proposed Equity Offering, or declines to purchase all or a portion of such securities, then that portion which is not purchased by Lender may be offered to other parties on terms no less favorable to the Borrower for a period of 120 calendar days.

In addition, subject to the provisions contained in Section 4(o)(ii) of the Securities Purchase Agreement and the provisions contained in that certain Registration Rights Agreement dated as of December 31, 2007 by and between the Borrower and Castlerigg Master Investments, Ltd., the Borrower will grant the Lender any rights of first refusal or registration rights granted to subsequent purchasers of the Borrower's equity securities to the extent that such subsequent rights are superior, in good faith judgment of the Lender, to those granted in connection with this Agreement.

Proposed Equity Offering shall mean an offering by the Borrower of (a) shares of common stock or preferred stock (whether now authorized or hereafter authorized and issued in any context), (b) shares of common stock issued or issuable upon conversion of any preferred stock, or (c) shares of common stock issued or issuable upon exercise or conversion, as applicable, of stock options, warrants or other convertible securities of the Borrower, to any party. Notwithstanding the foregoing, a Proposed Equity Offering shall not include securities issued: (a) pursuant to any compensatory stock or option plan duly adopted for such purpose by the members of the board of directors of the Borrower, (b) upon the exercise or exchange of or conversion of any securities exercisable or exchangeable for or convertible into shares of common stock of the Borrower issued and outstanding on the date of this Agreement, (c) pursuant to strategic acquisitions or (d) to secure equipment financing.

6.10 Covenant to Negotiate in Good Faith. In further consideration for the execution of this Agreement by Lender and as an inducement for the Lender to make the Loan available to Borrower, Borrower agrees to negotiate with Lender, in good faith, additional terms with respect to Lender's investment in the Borrower, subject to the rights of the holder of the Senior Note.

## SECTION 7. NEGATIVE COVENANTS

Borrower hereby covenants and agrees as follows:

7.1 Merger or Reorganization. Borrower will not enter into any merger, consolidation, reorganization or recapitalization except as permitted under the Senior Note as in effect on the date hereof.

7.2 Sale of Assets. Except as otherwise permitted under the Senior Note, Borrower will not sell, transfer, lease or otherwise dispose of all or any material part of its assets; provided, however, that Borrower may in the ordinary course of business (i) replace damaged, obsolete or worn Equipment with Equipment of similar value and use, or (ii) dispose of assets representing no more than 5% of its consolidated total assets.

7.3 Encumbrances. The Borrower will not: (1) mortgage, pledge, grant or permit to exist a security interest in or lien upon any of its assets of any kind, now owned or hereafter acquired, except for Permitted Liens, or (2) except for any restrictions set forth in the Senior Notes, covenant or agree with any Person other than the Lender not to mortgage, pledge, or grant a security-interest in or a lien upon its assets; provided that Borrower may make such covenant or agreement with respect to assets securing Purchase Money Indebtedness or Capitalized Lease Obligations incurred in accordance with Section 7.4 of this Agreement.

7.4 Debts and Other Obligations. The Borrower will not incur, create, assume, or permit to exist any Indebtedness except: (1) the Loan, (2) Indebtedness evidenced by the Senior Note, (3) trade Indebtedness incurred in the ordinary course of business; (4) Indebtedness secured by Permitted Liens; and (5) Capitalized Lease Obligations and/or Purchase Money Indebtedness to the extent permitted under the Senior Notes. Except for the Senior Notes, Borrower will not prepay, in whole or in part, any existing Indebtedness of the Borrower if at the time such payment is due or is otherwise made, or after giving effect to such payment, an event constituting an Unmatured Default or Event of Default has occurred and is continuing.

7.5 Borrower Distributions. The Borrower will not make any Borrower Distributions without the prior express written consent of the Lender, other than (i) as otherwise required under the Senior Note, and (ii) the redemption of up to 350,000 shares of common stock held by former holders of the Series A Preferred Stock of RxElite Holdings Inc. that is due within fifty (50) days of December 31, 2008 at a redemption price of \$4.00 per share, until payment in full of all Obligations of the Borrower outstanding pursuant to the Loan Documents.

## **SECTION 8. DEFAULT**

8.1 Events of Default. The occurrence of any one or more of the following events shall constitute an “Event of Default” hereunder:

(a) The Borrower shall fail to pay within one (1) Business Day of the date when due any installment of principal or interest payable hereunder, or shall fail to pay within two (2) Business Days of written notice any fee payable hereunder.

(b) The Borrower shall fail to observe or perform any obligation or covenant to be observed or performed by it, jointly or severally, under any of the Loan Documents; provided, however, if such failure is not related to the breach of any negative covenant in Section 7 of this Agreement, Borrower shall have fifteen (15) days after such Person’s knowledge of such breach to cure or cause to be cured such failure.

(c) The Borrower shall fail to pay any Indebtedness for borrowed money (whether direct or indirect, including guarantees of borrowed money due from Subsidiaries) due any Person other than Lender and such failure shall continue beyond any applicable grace period and shall equal or exceed, either individually or in the aggregate, \$100,000.00 in amount.

(d) A Material Adverse Effect shall result from any breach of or event of default arising under any agreement binding the Borrower, as determined by Lender in its reasonable discretion.

(e) Any financial statement, representation, warranty or certificate made or furnished by Borrower in connection with this Agreement or the Loan, or as inducement to the Lender to enter into this Agreement, or in any separate statement or document to be delivered hereunder to the Lender, shall be materially false, incorrect, or incomplete when made, in light of the circumstances under which it was made.

(f) The Borrower shall admit its inability to pay debts as they mature, or shall make an assignment for the benefit of its or any of its creditors.

(g) Proceedings in bankruptcy, or for reorganization of Borrower or for the readjustment of any of its debts, under the United States Bankruptcy Code, as amended, or any part thereof, or under any other Laws, whether state or federal, for the relief of debtors, now or hereafter existing, shall be commenced by the Borrower or shall be commenced against the Borrower and not dismissed within thirty (30) days of such an involuntary filing.

(h) A receiver or trustee shall be appointed for the Borrower or for any substantial part of its assets, or any proceedings shall be instituted for the dissolution or the full or partial liquidation of the Borrower.

(i) The Borrower shall discontinue its business or materially change the nature of its business.

(j) A judgment creditor of the Borrower shall obtain possession of any Collateral or other assets by any means, including, but without limitation, levy, distraint, replevin or self-help.

(k) Any proceeding shall be instituted against the Borrower, which is likely (taking into account the probability of an adverse determination and the exhausting of all appeals) to have a Material Adverse Effect, as determined by Lender in its reasonable discretion.

(l) The Borrower shall default beyond any applicable grace period in any other Indebtedness (excluding the Obligations) owed to the Lender, or any of them, or under any other agreements for credit or borrowed money it may have with Lender, jointly or severally, directly or indirectly, whether matured or unmatured.

(m) RxElite Holdings Inc. or any other party to the Minrad Contract defaults thereunder or the Minrad Contract is terminated.

8.2 Acceleration. Upon the occurrence of any of such Events of Default, the Lender may, at its option, immediately terminate the obligation to make any further advances and/or declare the principal and interest accrued on the Note and all other Obligations to be immediately due and payable, whereupon, subject to the terms of the Subordination Agreement, the same shall become forthwith due and payable, without presentment, demand, protest, or any notice of any kind except as set forth above; provided, that in the case of the Events of Default specified in clause (f), (g) or (h) above with respect to Borrower, without any notice to Borrower or any act by the Lender, the Note and all other Obligations shall, subject to the terms of the Subordination Agreement, become immediately due and payable without presentment, demand, protest or other notice of any kind, all of which are waived by the Borrower. In addition, and regardless of whether the Note has been accelerated, the Lender may upon the occurrence of any Event of Default elect to charge interest at the Default Rate set forth in the Note.

8.3 **Remedies.** After any acceleration, as provided for in Section 8.2, the Lender, subject to the terms of the Subordination Agreement, shall have, in addition to the rights and remedies given it by the Loan Documents, all those allowed by all applicable Laws, including, but without limitation, the UCC as enacted in any jurisdiction in which any Collateral may be located. Without limiting the generality of the foregoing, the Lender may, subject to the terms of the Subordination Agreement, immediately, without demand of performance and without other notice (except as specifically required by the Loan Documents) or demand whatsoever to the Borrower, all of which are hereby expressly waived, and without advertisement, sell at public or private sale, in any manner and at any location authorized by Laws, or otherwise realize upon, the whole, or, from time to time, any part of the Collateral, or any interest which the Borrower may have therein. After deducting from the proceeds of sale or other disposition of the Collateral all expenses (including all reasonable expenses for legal services), the Lender shall apply such proceeds toward the satisfaction of the Obligations. Any remainder of the proceeds after satisfaction in full of the Obligations shall be distributed as required by applicable Laws. Notice of any sale or other disposition shall be given to the Borrower at least ten (10) days before the time of any intended public sale or of the time after which any intended private sale or other disposition of the Collateral is to be made, which the Borrower hereby agrees shall be reasonable notice of such sale or other disposition. The Borrower agrees to assemble, or to cause to be assembled, at its own expense, the Collateral at such place or places as the Lender shall designate. At any such sale or other disposition, the Lender may, to the extent permissible under applicable Laws, purchase the whole or any part of the Collateral, free from any right of redemption on the part of the Borrower, which right is hereby expressly waived and released.

Without limiting the generality of any of the rights and remedies conferred upon the Lender under this Section 8.3, the Lender may, to the full extent permitted by applicable Laws and subject to the terms of the Subordination Agreement:

- (a) Enter upon the premises of the Borrower, exclude therefrom the Borrower, any Subsidiary or any officer or employee thereof, and take immediate possession of the Collateral, either personally or by means of a receiver appointed by a court of competent jurisdiction, using all necessary and lawful self-help to do so;
- (b) At the Lender's option, use, operate, manage and control the Collateral in any lawful manner;
- (c) Collect and receive all receivables, rents, income, revenue, earnings, issues and profits therefrom; and
- (d) Maintain, repair, renovate, alter or remove the Collateral as the Lender may determine in its discretion.

## **SECTION 9. MISCELLANEOUS**

9.1 **Construction.** The provisions of this Agreement shall be in addition to those of any guaranty, pledge or security agreement, note or other evidence of liability held by the Lender, all of which shall be construed as complementary to each other; provided, in the event of any inconsistency, the provisions of this Agreement shall control. Nothing herein contained shall prevent the Lender from enforcing any or all other notes, guaranties, pledge or security agreements in accordance with their respective terms.

9.2 Further Assurance. From time to time, the Borrower will execute and deliver to the Lender such additional documents and will provide such additional information as the Lender may reasonably require to carry out the terms of this Agreement and be informed of the Borrower's operations, business and condition

9.3 Enforcement and Waiver by the Lender. The Lender shall have the right at all times to enforce the provisions of the Loan Documents in strict accordance with the terms thereof, notwithstanding any conduct or custom on the part of the Lender in refraining from so doing at any time or times. The failure of the Lender at any time or times to enforce their rights under such provisions, strictly in accordance with the same, shall not be construed as having created a custom in any way or manner contrary to specific provisions of the Loan Documents or as having in any way or manner modified or waived the same. All rights and remedies of the Lender is cumulative and concurrent and the exercise of one right or remedy shall not be deemed a waiver or release of any other right or remedy.

9.4 Expenses of the Lender. The Borrower will, on demand, reimburse the Lender for all out-of-pocket expenses, including the reasonable fees and expenses of legal counsel for the Lender, incurred by the Lender in connection with the preparation, administration, amendment, modification, or enforcement of the Loan Documents and the collection or attempted collection of the Note.

9.5 Notices. Any notices or consents required or permitted by this Agreement shall be in writing and shall be deemed delivered when delivered in person, or when sent by certified mail, postage prepaid, return receipt requested, by overnight courier service, or by facsimile to the address and/or telecopy number as follows, unless such address or number is changed by written notice hereunder.

(a) If to the Borrower: RxElite, Inc.  
1404 North Main Street, Suite 200  
Meridian, Idaho 83642  
Attn: Jonathan Houssian  
Telecopy: (208) 288-1191

with a copy (which shall not constitute notice) to: Haynes and Boone, LLP  
153 East 53<sup>rd</sup> Street, Suite 4900  
New York, New York 10022  
Attn: Harvey J. Kesner, Esq.  
Telecopy: (212) 918-8989



(b) If to the Lender: NPIL Pharma Inc.  
379 Thornall Street, 1<sup>st</sup> Floor  
Alfieri Building  
Edison, New Jersey 08837  
Attn: R. Ananthanarayanan, President  
Telecopy: 732-388-4013  
Telephone: 732-549-9451

with a copy (which shall not constitute notice) to: Ashurst LLP  
Broadwalk House  
5 Appold Street  
London EC2A 2HA UK  
Attention: Andrew Edge  
Telecopy: +44 (0)20 7638 1112

with a copy (which shall not constitute notice) to: Waller Lansden Dortch & Davis LLP  
511 Union Street, Suite 2700  
Nashville, Tennessee 37219  
Attention: Robert L. Harris  
Jessica Green Gichner  
Telecopy: (615) 244-6804

9.6 Waiver and Release. To the maximum extent permitted by applicable Laws, the Borrower:

(a) Waives: (1) protest of all commercial paper at any time held by the Lender on which the Borrower is in any way liable; and (2) notice and opportunity to be heard, after acceleration in the manner provided in Section 8.2, before exercise by the Lender of the remedies of self-help, set-off, or of other summary procedures permitted by any applicable Laws or by any agreement with the Borrower, and, except where required hereby or by any applicable Laws, notice of any other action taken by the Lender; and

(b) Releases the Lender, and its officers, directors, attorneys, employees, and agents from all claims for loss or damage caused by any act or omission on the part of any of them except for gross negligence, recklessness or willful misconduct.

9.7 Indemnification. Borrower hereby indemnifies and holds the Lender, and its officers, directors, employees and agents free and harmless from and against any and all actions, causes of action, suits, losses, liabilities and damages, and expenses in connection therewith, including, without limitation, reasonable counsel fees and disbursements, incurred by the Lender as a result of, or arising out of, or relating to the execution, delivery, performance or enforcement of the Loan Documents or any instrument contemplated therein, except for the Lender's gross negligence or willful misconduct. If and to the extent that the foregoing undertaking may be unenforceable for any reason, Borrower hereby agrees to make the maximum contribution to the payment and satisfaction of such liabilities and costs permitted under applicable Laws.

9.8 Applicable Laws. The Laws of the State of Delaware, other than its conflicts of laws rules, shall govern the construction and interpretation of this Agreement and the validity and enforceability of this Agreement, and of its provisions and the transactions pursuant to this Agreement.

9.9 Binding Effect, Assignment and Entire Agreement. This Agreement shall inure to the benefit of, and shall be binding upon, the respective successors and permitted assigns of the parties hereto. The Borrower has no right to assign any of its rights or obligations hereunder without the prior written consent of the Lender. This Agreement and the documents executed and delivered pursuant hereto constitute the entire agreement between the parties, and supersede all prior agreements and understandings among the parties hereto. This Agreement may be amended only by a writing signed on behalf of each party.

9.10 Severability. If any provision of this Agreement shall be held invalid under any applicable Laws, such invalidity shall not affect any other provision of this Agreement that can be given effect without the invalid provision, and, to this end, the provisions hereof are severable.

9.11 Counterparts. This Agreement may be executed by the parties independently in any number of counterparts, all of which together shall constitute but one and the same instrument which is valid and effective as if all parties had executed the same counterpart.

9.12 Venue. It is agreed that venue for any action arising in connection with this Agreement or the Obligations secured hereby shall lie exclusively with courts sitting in the State of Delaware, unless the Lender otherwise agrees in writing.

9.13 Right of Setoff. Borrower acknowledges that Lender shall retain its common law right of setoff with respect to any of the Obligations.

**(Remainder of Page Intentionally Left Blank)**

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

BORROWER:

RXELITE, INC.

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

---

LENDER:  
NPIL PHARMA INC.

BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

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THIS SECURED PROMISSORY NOTE IS SUBJECT TO AN INTERCREDITOR AND SUBORDINATION AGREEMENT, DATED AS OF MAY \_\_\_, 2008, AMONG NPIL PHARMA INC., RXELITE, INC. AND CASTLERIGG MASTER INVESTMENTS LTD.

### SECURED PROMISSORY NOTE

\$3,000,000.00

\_\_\_\_\_, 2008

FOR VALUE RECEIVED, **RXELITE, INC.** a Delaware corporation ("**Maker**"), promises to pay to the order of **NPIL PHARMA INC.** ("**Payee**"), the sum of Three Million and No/100 Dollars (\$3,000,000.00) together with interest thereon at the rate set forth in that certain Loan and Security Agreement of even date herewith by and between Maker and Payee (the "**Loan Agreement**"). This Note shall be due and payable in accordance with the terms of the Loan Agreement. Upon the earlier of (a) Demand by the Payee, or (b) the Loan Termination Date, all principal, interest and expenses then outstanding shall be finally due and payable.

Any payment not made within ten (10) days following its due date shall be subject to assessment of a late charge equal to the Default Rate (as defined in the Loan Agreement). All amounts due under this Note are payable at par in lawful money of the United States of America, at the principal place of business of Payee in Edison, New Jersey, or at such other address as the Payee or other holder hereof (herein "**Holder**") may direct.

The occurrence of an Event of Default under the Loan Agreement shall constitute an Event of Default under this Note. Subject to the terms and provisions of the Subordination Agreement (as defined in the Loan Agreement) the occurrence and during the continuation of an Event of Default, Holder may, at its option and without notice, declare all principal and interest provided for under this Note, and any other obligations of Maker to Holder, to be presently due and payable, and Holder may enforce any remedies available to Holder under any documents securing or evidencing debts of Maker to Holder. Holder may waive any default or Event of Default before or after it occurs and may restore this Note in full effect without impairing the right to declare it due for a subsequent default, this right being a continuing one. Upon the occurrence and during the continuation of an Event of Default, the remaining unpaid principal balance of the indebtedness evidenced hereby and all expenses due Holder shall bear interest at the Default Rate (as defined in the Loan Agreement).

All amounts received for payment of this Note shall be first applied to any expenses due Holder under this Note or under any other documents evidencing or securing obligations of Maker to Holder, then to accrued interest, and finally to the reduction of principal. Subject to the terms and provisions of the Subordination Agreement, prepayment of principal or accrued interest may be made, in whole or in part, at any time without penalty. Any prepayment(s) shall reduce the final payment(s) and shall not reduce or defer installments next due.

This Note may be freely transferred by Holder, upon three days prior written notice to Maker.

Maker and all sureties, guarantors, endorsers and other parties to this instrument hereby consent to any and all renewals, waivers, modifications, or extensions of time (of any duration) that may be granted by Holder with respect to this Note and severally waive demand, presentment, protest, notice of dishonor, and all other notices that might otherwise be required by law. All parties hereto waive the defense of impairment of collateral and all other defenses of suretyship.

Maker's performance under this Note is secured by various property, including, but not limited to, the personal property described in the Loan Agreement.

Maker and all sureties, guarantors, endorsers and other parties hereto agree to pay reasonable attorneys' fees and all court and other costs that Holder may incur in the course of efforts to collect the debt evidenced hereby or to protect Holder's interest in any collateral securing the same.

The validity and construction of this Note shall be determined according to the laws of Delaware applicable to contracts executed and performed within that state. If any provision of this Note should for any reason be invalid or unenforceable, the remaining provisions hereof shall remain in full effect.

The provisions of this Note may be amended or waived only by instrument in writing signed by the Holder and Maker and attached to this Note.

**Maker and Lender hereby knowingly and voluntarily waive any right to a trial by jury with regard to any action, proceedings, claims or counterclaims, whether in contract or in tort, at law or in equity, of any type or nature whatsoever arising under or concerning this note or the credit relationship evidenced thereby.**

MAKER REPRESENTS AND WARRANTS THAT THE PROCEEDS OF THIS NOTE ARE FOR BUSINESS AND COMMERCIAL PURPOSES AND NOT PRIMARILY FOR FAMILY, CONSUMER, HOUSEHOLD OR SIMILAR PURPOSES.

Words used herein indicating gender or number shall be read as context may require.

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**RXELITE, INC., Maker**

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

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

Taxpayer I.D. No.:

[Signature page to Note]

**INTERCREDITOR AND SUBORDINATION AGREEMENT**

THIS INTERCREDITOR AND SUBORDINATION AGREEMENT, dated as of May 30, 2008 (this "Agreement") by and among NPIL Pharma Inc., a Delaware corporation (together with any successor or assigns thereof or any subsequent holder of the Subordinated Obligations referred to below, the "Subordinated Lender"), RXELITE, INC., a Delaware corporation (the "Company"), each subsidiary of the Company listed on the signature pages hereto (each a "Guarantor" and collectively, the "Guarantors"; together with the Company and their respective successors and assigns (including any trustee or debtor-in-possession for or of any such Person), being collectively, the "Obligors" and each an "Obligor"), and CASTLERIGG MASTER INVESTMENTS LTD., a British Virgin Islands company, in its capacity as collateral agent (in such capacity, together with any successors or assigns, the "Senior Agent") for the Senior Creditors under the Senior Transaction Documents (as such terms are defined below).

The parties hereto hereby agree as follows:

1. Definitions. Unless otherwise defined herein, terms defined in the Senior Notes or the Securities Purchase Agreement (each as defined below) and used herein shall have the meanings given to them in the Senior Notes and the Securities Purchase Agreement. The words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and section references are to this Agreement unless otherwise specified. The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms. In addition, the following terms shall have the following meanings:

"Bankruptcy Code": United States Bankruptcy Code (11 U.S.C. § 101 *et seq.*), as amended from time to time.

"Collateral": collectively, any and all property from time to time subject to security interests or liens to secure payment or performance of the Senior Obligations or the Subordinated Obligations.

"Company": has the meaning set forth in the preamble to this Agreement.

"Insolvency Event": (a) any Obligor or any of its Subsidiaries commencing any case, proceeding or other action (i) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization, conservatorship or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding-up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (ii) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, or any Obligor or any of its Subsidiaries making a general assignment for the benefit of its creditors; or (b) there being commenced against any Obligor or any of its Subsidiaries any case, proceeding or other action of a nature referred to in clause (a) above; or (c) there being commenced against any Obligor or any of its Subsidiaries any case, proceeding or other action seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets; or (d) any Obligor or any of its Subsidiaries taking any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in clause (a), (b) or (c) above; or (e) any Obligor or any of its Subsidiaries is generally not paying, or being unable to pay, or admitting in writing its inability to pay, its debts as they become due.



“Insolvency Proceeding” : any case, proceeding or other action of the type described in the definition of Insolvency Event.

“Obligor” and “Obligors”: have the respective meanings set forth in the preamble to this Agreement.

“Postpetition Interest”: any interest or entitlement to fees or expenses that accrues after the commencement of any Insolvency Proceeding, whether or not such interest or fees are allowed or allowable as a claim in such proceeding.

“Securities Purchase Agreement”: that certain Securities Purchase Agreement, dated as of December 31, 2007 by and among the Company and the Buyers, as the same may be amended, restated, replaced, modified or supplemented from time to time, including, without limitation, amendments, modifications, supplements, restatements and/or replacements thereof giving effect to increases, renewals, extensions, refundings, deferrals, restructurings, replacements or refinancings of, or additions to, the arrangements provided in any such Securities Purchase Agreement (whether provided by the original Senior Creditor, successors to the Senior Creditors or any other buyers). Reference herein to the Securities Purchase Agreement shall be deemed to mean and include any and all documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Securities Purchase Agreement.

“Senior Agent” has the meaning set forth in the preamble to this Agreement.

“Senior Creditor” any "Buyer" (as such term is defined in the Securities Purchase Agreement) or any other holder of the Senior Notes, the Senior Agent, and/or any other provider of any other financial accommodations under the Senior Transaction Documents, in each case, together with any successors or assigns thereof, and “Senior Creditors” shall mean all such institutions collectively; provided, that references herein to Senior Creditors shall mean and include any replacement agents, holders of the Senior Notes or other providers of other financial accommodations in connection with any refinancing or reconstitution of the Senior Obligations.

“Senior Default”: any default or event of default which would result in the Senior Obligations becoming, or permit the holders of any of the Senior Obligations to declare the Senior Obligations (or any of them) to be, due and payable prior to their stated maturity date or require the Obligor or any Subsidiary thereof to repurchase such Senior Obligations prior to their stated maturity date, or any event or condition which with the giving of notice or passage of time would become any such default or event of default.

“Senior Notes”: means the "Notes" as such term is defined in the Securities Purchase Agreement and any other note from time to time made by the Company in favor of the Senior Creditors evidencing the Senior Obligations, in each case, as the same may be amended, restated or otherwise modified in accordance with the terms hereof (together with any extensions, reissuances, increases or renewals thereto or thereof). Reference herein to Senior Notes shall be deemed to mean and include any promissory notes or similar documents executed and/or delivered in connection with any refinancings or reconstitutions of the Senior Transaction Documents.

“Senior Obligations”: all obligations (including, without limitation, the due performance and observance by each Obligor of all of its other obligations from time to time existing in respect of any of the Transaction Documents) and liabilities of whatever kind or nature owing by any of the Obligors and/or their Subsidiaries to the Senior Agent or any of the other Senior Creditors under or pursuant to this Agreement and any of the Senior Transaction Documents (including, without limitation, in respect of interest accruing at any default rate and any Postpetition Interest), whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, whether arising under, out of, or in connection with, the Securities Purchase Agreement, the Senior Notes, this Agreement, the other Senior Transaction Documents or any other document made, delivered or given by any Obligor, in each case whether on account of principal, interest, reimbursement obligations, fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to the Senior Agent and Senior Creditors that are required to be paid by the Obligors pursuant to the terms of the Securities Purchase Agreement, this Agreement or any other Senior Transaction Document, and all professionals fees in connection with the administration of any Insolvency Proceeding involving any Obligor, whether or not allowed or allowable as a claim in any such proceeding).

“Senior Security Documents”: all documents and instruments (including, any guarantees made in favor of the Senior Agent), now existing or hereafter arising, which create or purport to create a security interest in property to secure payment or performance of the Senior Obligations, in each case, as amended, restated or otherwise modified from time to time, together with any similar agreements executed in connection with any refinancing of the Senior Obligations. Reference herein to Senior Security Documents shall be deemed to mean and include any and all such documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Senior Transaction Documents.

“Senior Termination Date”: the date on which all Senior Transaction Documents and all obligations of the Senior Agent and the other Senior Creditors to make any financial accommodations under any and all Senior Transaction Documents are irrevocably terminated and all of the Senior Obligations are paid in full in cash.

“Senior Transaction Documents”: the Securities Purchase Agreement, the Senior Notes, the Senior Security Documents and all other instruments, documents and agreements that from time to time evidence the Senior Obligations and/or are executed and/or delivered by the Obligors or any of their Subsidiaries in connection therewith, in each case, as the same may be amended, modified or supplemented from time to time, including, without limitation, amendments, modifications, supplements and restatements thereof giving effect to increases, renewals, extensions, refundings, deferrals, restructurings, replacements or refinancings of, or additions to, the arrangements provided in such Senior Transaction Documents (whether provided by the original Senior Creditors, successors to the Senior Creditors or other lenders). Reference herein to Senior Transaction Documents shall be deemed to mean and include any and all documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Senior Transaction Documents.

“Subordinated Credit Agreement”: that certain Loan and Security Agreement dated as of May 30, 2008 by and between the Company and the Subordinated Lender, as the same may be amended, restated, replaced, modified or supplemented from time to time in accordance with the terms hereof. Reference herein to the Subordinated Credit Agreement shall be deemed to mean and include any and all documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Subordinated Credit Agreement.

“Subordinated Guaranty”: any guaranty, keep well agreement, hypothecation or pledge agreement or other agreement to guaranty, pledge assets or otherwise ensure payment of the Subordinated Obligations issued or made by and/or binding upon any of the Obligors or any of their properties and “Subordinated Guaranties” means all such agreements, collectively. References herein to the Subordinated Guaranties shall be deemed to mean and include any and all other guaranties or similar documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Subordinated Loan Documents.

“Subordinated Lender”: has the meaning set forth in the preamble to this Agreement.

“Subordinated Loan”: the loans made by the Subordinated Lender to the Company from time to time pursuant to the Subordinated Loan Documents.

“Subordinated Loan Documents”: collectively, the Subordinated Credit Agreement, the Subordinated Note, the Subordinated Security Documents, the Subordinated Guaranties and any other documents or instruments executed or binding upon the Obligors or their properties that from time to time evidence the Subordinated Obligations or secure or support payment or performance thereof, in each case, as amended, restated or otherwise modified in accordance with the terms hereof. References herein to the Subordinated Loan Documents shall be deemed to mean and include any and all documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Subordinated Loan Documents.

“Subordinated Note”: that certain Secured Promissory Note dated May 30, 2008 executed by the Company in favor of the Subordinated Lender in the original principal amount of \$3,000,000, and any other promissory note from time to time made by any Obligor in favor of the Subordinated Lender evidencing the Subordinated Obligations, in each case, as the same may be amended, restated or otherwise modified in accordance with the terms hereof. Reference herein to Subordinated Note shall be deemed to mean and include any and all similar documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Subordinated Note.

“Subordinated Obligations”: all obligations and liabilities of whatever kind or nature owing by any of the Obligors and/or their Subsidiaries to the Subordinated Lender under or pursuant to any of the Subordinated Loan Documents (including, without limitation, interest accruing at the then applicable rate provided in the Subordinated Credit Agreement after the maturity of the Subordinated Loans and interest accruing at the then applicable rate provided in the Subordinated Note after the filing of any petition in bankruptcy, or the commencement of any Insolvency Proceeding relating to any Obligor or any Subsidiary thereof, whether or not a claim for Postpetition Interest is allowed in such proceeding), whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with, the Subordinated Note, this Agreement, or any other Subordinated Loan Document, in each case whether on account of principal, interest, reimbursement obligations, fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to the Subordinated Lender that are required to be paid by any Obligor pursuant to the terms of the Subordinated Note, this Agreement or any other Subordinated Loan Document).

“Subordinated Security Documents”: collectively, (a) the Subordinated Credit Agreement and (b) any other documents executed by any Obligor or any Subsidiary thereof with the prior written consent of the Senior Agent that from time to time secure payment or performance of the Subordinated Obligations, in each case, as the same may be amended, restated or otherwise modified in accordance with the terms hereof. References herein to the Subordinated Security Documents shall be deemed to mean and include any and all such similar documentation executed and/or delivered in connection with any refinancings or reconstitutions of the Subordinated Loan Documents.

## 2. Subordination.

(a) Except as otherwise expressly permitted pursuant to Section 3(a) hereof, each Obligor and the Subordinated Lender hereby agrees, for itself and each future holder of the Subordinated Obligations, that (i) other than with respect to the accrual and capitalization of interest on the Subordinated Obligations, and (y) the funding by the Subordinated Lender of any Loans permitted pursuant to the terms of the Subordinated Credit Agreements as in effect in the date hereof, no Obligor shall request or accept and the Subordinated Lender shall not make or extend, any additional loans, advances, letters of credit, bankers acceptance or any other extension of credit to or for the benefit of any Obligor at any time from and after the date of this Agreement, and (ii) all Subordinated Obligations are expressly “subordinate and junior in right of payment” (as that phrase is defined in Section 2(b) hereof) to all Senior Obligations. This Agreement shall be deemed to constitute a “subordination agreement” under and within the meaning of Section 510 of the Bankruptcy Code.

(b) “Subordinate and Junior in Right of Payment” means that (i) no part of the Subordinated Obligations shall have any claim to the assets of any Obligor or any of its Subsidiaries (including, without limitation, assets purchased with the proceeds of the Subordinated Loan) on a parity with or prior to the claim of the Senior Obligations regardless of how any such claim arises, whether by grant, statute, operation of law, subrogation or otherwise, and (ii) unless and until the Senior Termination Date shall have occurred, without the express prior written consent of the Senior Agent: (A) no Subordinated Lender will take, demand or receive from any Obligor or any Subsidiary of any Obligor, and no Obligor shall or shall permit any of its Subsidiaries to, make, give or permit, directly or indirectly, by set-off, redemption, purchase or in any other manner, any payment of (of whatever kind or nature, whether in cash, property, securities or otherwise) or give any security for (except such security as granted under the Subordinated Credit Agreement as of the date hereof) the whole or any part of the Subordinated Obligations, including, without limitation, any letter of credit or similar credit support facility to support payment of the Subordinated Obligations; (B) no Subordinated Lender will accelerate for any reason the scheduled maturities of any amount owing under the Subordinated Obligations; it being agreed however that the Subordinated Lender may accelerate the Subordinate Obligations if and to the extent the Senior Creditors shall have accelerated the Senior Obligations; or (C) exercise any rights with respect to the Collateral securing the Subordinated Obligations or any other assets or properties of any Obligor, commence or prosecute any enforcement of any rights or remedies under the Subordinated Loan Documents, including the rights of set-off or recoupment, or exercise any rights or remedies of a secured creditor under the Uniform Commercial Code of any applicable jurisdiction or the Bankruptcy Code.

(c) The expressions “prior payment in full,” “payment in full,” “paid in full” and any other similar terms or phrases when used in this Agreement with respect to the Senior Obligations shall mean the termination of all commitments of the Senior Creditors to extend credit to the Obligors thereunder and the payment in full, in immediately available funds, of all of the Senior Obligations.

3. Permitted Payments.

(a)The Subordinated Lender shall not accept from Obligor any payments of principal, interest, fees on the Subordinated Obligations or any other amount owed by any Obligor to the Subordinated Lender, but may accrue and capitalize interest, fees and expenses on the Subordinated Obligations in accordance with the provisions of the Subordinated Credit Agreement as in effect on the date hereof, provided that upon the payment in full of all the Senior Obligations, the Obligor may make regularly scheduled interest payments in cash to the Subordinated Lender. Other than as expressly set forth immediately above in this Section 3(a), no payments, proceeds or distributions shall be made by any Obligor or any Subsidiary thereof or accepted by the Subordinated Lender on the Subordinated Obligations until after the date that is 181 days after the Senior Termination Date, and any payment, proceeds or distributions made by an Obligor or received (including by set-off, recoupment, as the proceeds of any Collateral or any other manner) by the Subordinated Lender other than as expressly permitted above shall be deemed the property of the Senior Agent and the other Senior Creditors, shall be segregated by the Subordinated Lender and be deemed to have been received by and held by the Subordinated Lender in trust for the Senior Agent and the other Senior Creditors, and shall be turned over by the Subordinated Lender as soon as practical to the Senior Agent in the identical form received (with any necessary endorsements) for distribution to the Senior Creditors in accordance with the Senior Transaction Documents.

(b)No Senior Default shall be deemed to have been waived for purposes of this Section 3 unless and until the Obligor and the Subordinated Lender shall have received a written notice of the waiver of such Senior Default from the Senior Agent.

(c)If the Subordinated Lender receives payment pursuant to clause (a) of this Section 3, such payment shall be deemed to constitute a representation by the Obligor to the Senior Agent and the other Senior Creditors that each of the conditions set forth in subclause 3(a) are satisfied and that such payment is otherwise permitted by such clause (a) and the Senior Transaction Documents.

(d)The provisions of Section 3(a) shall not be applicable to the extent that the provisions of Section 4 are applicable.

4. Additional Provisions Concerning Subordination. The Subordinated Lender and the Obligor further hereby agree that upon the occurrence of any Insolvency Event:

(i) all Senior Obligations shall be paid in full before any payment or distribution of whatever kind or nature is made by or with the assets of any of the Obligor with respect to the Subordinated Obligations; and

(ii) any payment or distribution of assets of any Obligor, whether in cash, property or securities, to which the Subordinated Lender would be entitled except for the provisions hereof, shall be paid or delivered by the Obligor, or any receiver, trustee in bankruptcy, liquidating trustee, disbursing agent or other Person making such payment or distribution, directly to the Senior Agent, for its benefit and the benefit of the Senior Creditors, to the extent necessary to pay in full all Senior Obligations, before any payment or distribution of any kind or nature shall be made to the Subordinated Lender.

5. Rights in Collateral.

(a) Notwithstanding anything to the contrary contained in the Securities Purchase Agreement, any Senior Security Document, any other Senior Transaction Document or the Subordinated Credit Agreement, any Subordinated Security Document or other Subordinated Loan Document and irrespective of:

- (i) the time, order or method of attachment or perfection of the security interests created by any Senior Security Document or any Subordinated Security Document,
- (ii) the time or order of filing or recording of financing statements or other documents filed or recorded to perfect security interests in any Collateral,
- (iii) anything contained in any filing or agreement to which the Senior Agent, any Senior Creditor or the Subordinated Lender now or hereafter may be a party;
- (iv) the avoidance, subordination, invalidity or lapse of any Liens granted by any of the Obligors or any of their Subsidiaries in favor of the Senior Agent or any of the Senior Creditors pursuant to the Senior Transaction Documents; or
- (v) the rules for determining perfection or priority under the Uniform Commercial Code or any other law governing the relative priorities of secured creditors,

any security interest in any Collateral pursuant to any Senior Security Documents has and shall have priority over any security interest in such Collateral pursuant to any Subordinated Security Document. Upon the request of the Senior Agent and at the Company's expense, the Subordinated Lender agrees to file amendments to each of its UCC financing statements and any other publicly filed instruments to expressly acknowledge that the liens evidenced thereby are junior and subordinate to those securing the Senior Obligations, such amendments to be in form and substance reasonably satisfactory to the Senior Agent.

(b) The Subordinated Lender acknowledges and agrees that the Senior Obligations may be increased or reduced and that the terms of the Senior Transaction Documents may be modified, extended or amended from time to time, and that the aggregate amount of the Senior Obligations may be replaced or refinanced, in each event, without the consent of or notice to the Subordinated Lender and without affecting the provisions hereof.

(c) So long as the Senior Termination Date shall not have occurred, whether or not any Insolvency Event has occurred,

- (i) the Subordinated Lender will not (A) exercise or seek to exercise any rights or exercise any remedies with respect to any Collateral or (B) institute any action or proceeding with respect to such rights or remedies, including without limitation, any action of foreclosure or (C) contest, protest or, except as set forth in Section 12(g) hereof, object to any foreclosure proceeding or action brought by the Senior Agent or any of the Senior Creditors or any other exercise by the Senior Agent or any of the Senior Creditors of any rights and remedies under any Senior Transaction Documents; or
- (ii) the Senior Agent and the other Senior Creditors shall each have the exclusive right to enforce rights and exercise remedies with respect to the Senior Obligations and neither the Senior Agent nor the other Senior Creditors shall be required to marshal any Collateral.

(d) In exercising rights and remedies with respect to the Collateral, the Senior Agent and the other Senior Creditors may enforce the provisions of the Senior Security Documents and exercise remedies thereunder and under any other Senior Transaction Documents, all in such order and in such manner as they may determine in the exercise of their sole discretion. Such exercise and enforcement shall include, without limitation, the rights to sell or otherwise dispose of Collateral, to incur expenses in connection with such sale or disposition and to exercise all the rights and remedies of a secured lender under the Uniform Commercial Code of any applicable jurisdiction.

(e) From and after the Senior Termination Date, the Subordinated Lender shall have the right to enforce the provisions of the Subordinated Security Documents and exercise remedies thereunder.

(f) Any money, property or securities realized upon the sale, disposition or other realization by the Senior Agent and/or the other Senior Creditors upon all or any part of the Collateral, shall be applied by the Senior Agent and the other Senior Creditors to the Senior Obligations in such order as the Senior Agent and the other Senior Creditors deem appropriate in their sole discretion (subject to any limitations thereon in the Senior Transaction Documents).

(g) Whether or not any Insolvency Proceeding has been commenced by or against any Obligor, any Collateral or proceeds thereof received in connection with any exercise of any rights and remedies with respect to the Collateral shall (at such time as such Collateral or proceeds has been monetized) be applied: (i) first, to the payment of costs and expenses of the Senior Agent in connection with such exercise of rights and remedies, (ii) second, to the payment or collateralization of the Senior Obligations in accordance with the Senior Transaction Documents, (iii) third, to the payment of costs and expenses of the Subordinated Lender in connection with such exercise of rights and remedies (to the extent Subordinated Lender's exercise of rights and remedies is permitted under this Agreement), and (iv) fourth, to the payment of the Subordinated Obligations in accordance with the Subordinated Loan Documents.

(h) The Senior Agent's rights with respect to the Collateral include the right to release any or all of the Collateral from the Lien of any Senior Security Document or Subordinated Security Document in connection with the sale of such Collateral, notwithstanding that the net proceeds of any such sale may not be used to permanently prepay any Senior Obligations or Subordinated Obligations. In the event Senior Agent releases any of its Liens on all or any part of the Collateral as permitted under this Section 5(h), Senior Agent agrees to use commercially reasonable efforts to notify Subordinated Lender in writing at least 5 days in advance thereof with such notice describing in reasonable details the portion of the Collateral to be released. If the Senior Agent shall determine, in connection with any sale of Collateral, that the release of the Lien of any Subordinated Security Document on such Collateral in connection with such sale is necessary or advisable, the Subordinated Lender shall execute such release documents and instruments and shall take such further actions as the Senior Agent shall reasonably request. The Subordinated Lender hereby irrevocably constitutes and appoints the Senior Agent and any officer of the Senior Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Subordinated Lender and in the name of the Subordinated Lender or in the Senior Agent's own names, from time to time in the Senior Agent's discretion, for the purpose of carrying out the terms of this Agreement if and to the extent the Subordinated Lender fails to take any such action promptly after the Senior Agent's demand therefor, to take any and all appropriate action and to execute any and all documents and instruments that may be necessary or desirable to accomplish the purposes of this Agreement, including, without limitation, executing and/or filing any financing statements, endorsements, assignments or other instruments of transfer or release. The Subordinated Lender hereby ratifies all that said attorneys shall lawfully do or cause to be done pursuant to the power of attorney granted in this paragraph. Notwithstanding the foregoing, in the event the Senior Agent releases its Liens on behalf of itself and the other Senior Creditors on the Collateral in connection with the payment in full of the Senior Obligations, Subordinated Lender shall not be obligated to release its liens (nor be deemed to release its Liens hereunder) or any Collateral remaining after giving effect to payment in full of the Senior Obligations.

6. Consent of the Subordinated Lender.

(a) The Subordinated Lender hereby consents and agrees that, without the necessity of any reservation of rights against the Subordinated Lender, and without notice to or further assent by the Subordinated Lender:

(i) any demand for payment of any Senior Obligations made by the Senior Agent or any other Senior Creditor may be rescinded in whole or in part by the Senior Agent or such Senior Creditor, and any Senior Obligation may be continued, and the Senior Obligations, or the liability of the Obligor or any other party upon or for any part thereof, or any collateral security or guarantee therefor or right of offset with respect thereto, or any obligation or liability of Obligor or any other party under any of the Senior Transaction Documents, may, from time to time, in whole or in part, be renewed, extended, modified, accelerated, compromised, waived, surrendered, or released by the Senior Agent or the other Senior Creditors; and

(ii) any of the Senior Transaction Documents may be amended, modified, supplemented or terminated, in whole or in part, as the Senior Agent and/or the other Senior Creditors may deem advisable from time to time, and any collateral security at any time held by the Senior Agent for the payment of any of the Senior Obligations may be sold, exchanged, waived, surrendered or released,

in each case all without notice to or further assent by the Subordinated Lender, which will remain bound under this Agreement, and all without impairing, abridging, releasing or affecting the subordination provided for herein.

(b) The Subordinated Lender hereby waives any and all notice of the creation, renewal, extension or accrual of any of the Senior Obligations, notice of or proof of reliance by the Senior Agent or the other Senior Creditors upon this Agreement, notice of any adverse change in the financial condition of any Obligor or of any other fact that might increase the Subordinated Lender's risk hereunder, notice of presentment for payment, demand, protest, and notice thereof as to any instrument among the Senior Transaction Documents, notice of any Event of Default under the Senior Transaction Documents, and all other notices and demands to which the Subordinated Lender might otherwise be entitled. The Senior Obligations, and any of them, shall be deemed conclusively to have been created, contracted or incurred in reliance upon this Agreement, and all dealings among the Obligor (or any of them), the Senior Agent and the other Senior Creditors shall be deemed to have been consummated in reliance upon this Agreement. The Subordinated Lender acknowledges and agrees that the Senior Agent and the Senior Creditors have relied upon the subordination provided for herein in consenting to the transactions contemplated under the Subordinate Loan Documents. The Subordinated Lender waives notice of or proof of reliance on this Agreement and protest, demand for payment and notice of default.

(c) The Subordinated Lender hereby waives any right that the Subordinated Lender may have whether such right arises under the Uniform Commercial Code of any applicable jurisdiction or other applicable law, to receive notice of the Senior Agent's or other Senior Creditors' intended disposition of any Collateral or the Senior Agent's or other Senior Creditors' proposed retention of any Collateral in satisfaction of the Senior Obligations (or any portion thereof). The Subordinated Lender further agrees that in the event any Obligor or any its Subsidiaries consents or fails to object to a proposed retention of any Collateral by the Senior Agent or the other Senior Creditors in satisfaction of the Senior Obligations (or a portion thereof), the Subordinated Lender hereby consents to such proposed retention regardless of whether the Subordinated Lender is provided with notice of such proposed retention.



7. Negative Covenants of the Subordinated Lender. Until such time as the Senior Termination Date shall have occurred, the Subordinated Lender shall not, without the prior written consent of the Senior Agent:

(a) sell, assign, or otherwise transfer, in whole or in part, the Subordinated Obligations or any interest therein to any other Person (a "Transferee") or create, incur or suffer to exist any security interest, lien, charge or other encumbrance whatsoever upon the Subordinated Obligations in favor of any Transferee unless (i) such assignment or transfer is to a Transferee which is a fund or account managed by or under common management with the Subordinated Lender and the Transferee of which shall be bound by all terms and provisions hereof (and any transfer to any such Transferee in violation of this provision shall be deemed void and of no force or effect) or (ii) such assignment or transfer is to any other Transferee and (A) such action is made expressly subject to this Agreement and (B) such Transferee expressly acknowledges to the Senior Agent, by a writing in form and substance satisfactory to the Senior Agent, the subordination provided for herein and agrees to be bound by all of the terms hereof;

(b) permit any of the Subordinated Loan Documents to be amended, modified or otherwise supplemented;

(c) commence, or join with any creditors other than the Senior Agent and the other Senior Creditors, collectively, in commencing any Insolvency Proceeding or seeking to have a trustee, receiver, liquidator or similar official appointed for any Obligor, or take or attempt to take any action to take possession, foreclose upon, liquidate or otherwise proceed against any Collateral, exercise any right, remedy or power with respect to, or otherwise take any action to enforce their interest in or realize upon the Collateral;

(d) assert, collect, take any action or institute any proceeding to collect, or enforce all or any part of the Subordinated Obligations or any claims in respect thereof, except as specifically provided for herein;

(e) take or cause to be taken any action, the purpose or effect of which is to make any Lien in respect of any Subordinated Obligations *pari passu* with or senior to the Liens under the Senior Transaction Documents;

(f) except as permitted pursuant to Section 12(g) of this Agreement, oppose, object to, interfere with, hinder or delay, in any manner, whether by judicial proceedings (including, without limitation, any Insolvency Proceeding) or otherwise, any foreclosure, sale, lease, exchange, transfer or other disposition of the Collateral by the Senior Agent or the other Senior Creditors or the taking or enforcing of any other action, rights or proceeding by the Senior Agent or the other Senior Creditors in respect of the Collateral or the Senior Obligations; or

(g) initiate or prosecute or join with any other Person to initiate or prosecute any claim, action, objection or other proceeding (w) challenging the enforceability of the Senior Agent's or any Senior Creditor's claim in any Insolvency Proceeding, (x) challenging the enforceability of any liens or security interests in assets securing the Senior Obligations, (y) asserting any claims which Obligors may hold with respect to the Senior Agent or any other Senior Creditor, or (z) except as permitted pursuant to Section 12(g) of this Agreement, objecting to any sale or other disposition of Obligors' assets consented to by the Senior Agent and/or the other Senior Creditors in any Insolvency Proceeding.

8. Senior Obligations Unconditional. All rights and interests of the Senior Agent and the other Senior Creditors hereunder, and all agreements and obligations of the Subordinated Lender and Obligors hereunder, shall remain in full force and effect irrespective of:

(a) any lack of validity or enforceability of any Senior Security Documents or any other Senior Transaction Documents;

(b) any change in the time, manner or place of payment of, or in any other term of, all or any of the Senior Obligations, or any amendment or waiver or other modification, whether by course of conduct or otherwise, of the terms of the Securities Purchase Agreement, the Senior Notes, or any other Senior Security Document;

(c) any exchange, release or non-perfection of any security interest in any Collateral, or any release, amendment, waiver or other modification, whether in writing or by course of conduct or otherwise, of all or any of the Senior Obligations or any guarantee thereof; or

(d) any other circumstances which otherwise might constitute a defense available to, or a discharge of, Obligor in respect of the Senior Obligations, or of either the Subordinated Lender or any Obligor in respect of this Agreement.

9. Representations and Warranties. The Subordinated Lender represents and warrants to the Senior Agent and the other Senior Creditors that on the date hereof:

(a) (i) the Subordinated Loan Documents, including the Subordinated Credit Agreement and the Subordinated Note, have been issued to it for good and valuable consideration, (ii) the Subordinated Obligations are owned by the Subordinated Lender free and clear of any security interests, liens, charges or encumbrances whatsoever arising from, through or under the Subordinated Lender, (iii) the Subordinated Obligations are payable solely and exclusively to the Subordinated Lender and to no other Person and are payable without deduction for any defense, offset or counterclaim, and (iv) the Subordinated Note and the Subordinated Credit Agreement constitute the only evidence of the Subordinated Obligations;

(b) the Subordinated Lender has the corporate power and authority and the legal right to execute and deliver and to perform its obligations under this Agreement and has taken all necessary corporate action to authorize its execution, delivery and performance of this Agreement;

(c) this Agreement constitutes a legal, valid and binding obligation of the Subordinated Lender enforceable against the Subordinated Lender in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, fraudulent conveyance, moratorium or other similar laws affecting creditors' rights generally or by general principles of equity (whether determined in a case in equity or at law);

(d) the execution, delivery and performance of this Agreement will not violate any provision of any law, rule, regulation, writ, order, judgment or decree binding upon the Subordinated Lender or any term of any indenture, loan agreement, security agreement or other material contract (including, without limitation, this Agreement or the Transaction Documents) to which the Subordinated Lender is a party or by which it is bound and will not result in the creation or imposition of any Lien on any of the properties or revenues of the Subordinated Lender pursuant to any requirement of law affecting or any contractual obligation of the Subordinated Lender, except the interests of the Senior Agent under this Agreement; and

(e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or governmental authority and no consent of any other Person (including, without limitation, any stockholder or creditor of the Subordinated Lender), is required in connection with the execution, delivery, performance, validity or enforceability of this Agreement.

10. No Representation by the Senior Agent or the other Senior Creditors. (a) Except as set forth in clause (b) below, none of the Senior Agent or any other Senior Creditor has made or otherwise makes to the Subordinated Lender, any representations or warranties, express, or implied, nor do the Senior Agent or any Senior Creditor assume any liability to the Subordinated Lender with respect to: (i) the financial or other condition of Obligors or any other obligor under any instruments of guarantee with respect to the Senior Obligations, (ii) the enforceability, validity, value or collectibility of the Senior Obligations or the Subordinated Obligations, any collateral therefor, or any guarantee or security which may have been granted in connection with any of the Senior Obligations or the Subordinated Obligations or (iii) Obligors' title or right to transfer any collateral or security.

(b) Senior Agent represents and warrants that, to its knowledge, no Event of Default (i) is currently outstanding under the Senior Transaction Documents and (ii) has occurred under the Senior Transaction Documents that has not, on or prior to the date hereof, been waived by the Senior Lenders.

11. Waiver of Claims. To the maximum extent permitted by law, the Subordinated Lender waives any claim it might have against the Senior Agent or any other Senior Creditor with respect to, or arising out of, any action or failure to act or any error of judgment, negligence, or mistake or oversight whatsoever on the part of the Senior Agent or any other Senior Creditor, or their respective directors, officers, employees or agents with respect to any exercise of rights or remedies under the Senior Transaction Documents or any transaction relating to the Collateral. Neither of the Senior Agent, any other Senior Creditor nor any of their respective directors, officers, employees or agents shall be liable for failure to demand, collect or realize upon any of the Collateral or for any delay in doing so or shall be under any obligation to sell or otherwise dispose of any Collateral upon the request of any Obligor or the Subordinated Lender or any other Person or to take any other action whatsoever with regard to the Collateral or any part thereof.

12. Provisions Applicable After Bankruptcy. No Turnover.

(a) The provisions of this Agreement shall continue in full force and effect notwithstanding the occurrence of any Insolvency Event. All references in this Agreement to the Obligors shall be deemed to include such Obligor as a debtor-in-possession and any receiver or trustee for such Obligor in any Insolvency Proceeding.

(b) The Subordinated Lender agrees not to support or vote in favor of any plan of reorganization (and shall be deemed to have voted to reject any plan of reorganization) unless such plan (i) pays off, in cash in full, all Senior Obligations, (ii) is accepted by the class of Senior Creditors voting thereon and is supported by the Senior Agent or (iii) incorporates this Agreement by reference and continues the rights and priorities set forth herein with respect to the Senior Obligations and the Subordinated Obligations and the Collateral in a manner which is not adverse to the Senior Agent and the other Senior Creditors subsequent to the date of any such plan of reorganization.

(c) Until the Senior Termination Date shall have occurred, the Subordinated Lender hereby agrees that it shall not file any pleadings or motions, take any position at any hearing or proceeding of any nature, or otherwise take any action whatsoever, in each case, in respect of any of the Collateral, including, without limitation, with respect to the determination of any Liens or claims held by the Senior Agent and the other Senior Creditors (including the validity and enforceability thereof) or the value of any claims of such parties under Section 506(a) of the Bankruptcy Code or otherwise; provided that the Subordinated Lender may file a proof of claim in any Insolvency Proceeding subject to the limitations of this Agreement with respect thereto.

(d) If any Obligor or any Subsidiary thereof becomes the subject of an Insolvency Proceeding, and if the Senior Agent or any of the other Senior Creditors desire to consent to the use of cash collateral under the Bankruptcy Code or to provide financing to any Obligor under the Bankruptcy Code (“DIP Financing”), then the Subordinated Lender agrees that it (w) will be deemed to have consented to, will raise no objection to, nor support any other Person objecting to, the use of such cash collateral or to such DIP Financing, (x) will not request or accept adequate protection or any other relief in connection with the use of such cash collateral or such DIP Financing; provided that if all of the Senior Creditors shall have been provided adequate protection, then the Subordinated Lender may also request and accept adequate protection to the extent such protections do not entitle the Subordinated Lender priority to any assets or payments senior to, or *pari passu* with, the Senior Obligations or otherwise contravening the terms of this Agreement, (y) will subordinate (and will be deemed hereunder to have subordinated) the Liens under the Subordinated Loan Documents (1) to such DIP Financing on the same terms as such Liens are subordinated to the Liens relating to the Senior Transaction Documents (and such subordination will not alter in any manner the terms of this Agreement) and (2) to any adequate protections provided to the Senior Agent and the other Senior Creditors, and (z) agrees that notice received five days prior to the entry of an order approving such usage of cash collateral or approving such financing shall be adequate notice.

(e) The Subordinated Lender agrees that it will not (x) seek relief from the automatic stay or from any other stay in any Insolvency Proceeding or take any action in derogation thereof, in each case in respect of any Collateral without the consent of the Senior Agent or (y) seek or offer to provide financing to any Obligor under any DIP Financing unless consented to by the Senior Agent.

(f) The Subordinated Lender agrees that it shall not object, contest or support any other Person objecting to or contesting (i) any request by the Senior Agent or the other Senior Creditors for adequate protection or (ii) any objection by the Senior Agent or the other Senior Creditors to any motion, relief, action or proceeding based on a claim of a lack of adequate protection or (iii) the payment of interest, fees, expenses or other amounts to the Senior Agent or the other Senior Creditors under Section 506(b) or 506(c) of the Bankruptcy Code or otherwise.

(g) Except as set forth in the following proviso, the Subordinated Lender shall not oppose any sale or disposition of any assets of any Obligor that is supported by the Senior Agent and, to the extent not objected to in accordance with the following proviso, the Subordinated Lender shall be deemed to have consented to any such sale or disposition pursuant to Section 363 of the Bankruptcy Code and to have its Lien released in such asset; provided that notwithstanding the foregoing, the Subordinated Lender shall retain such rights to object to any such sale or disposition as any unsecured creditor would possess.

(h) Nothing contained herein shall prohibit or in any way limit any of the Senior Agent or the other Senior Creditors from objecting in any Insolvency Proceeding or otherwise to any action taken by the Subordinated Lender, including the seeking by the Subordinated Lender or adequate protection or the asserting the Subordinated Lender of its rights and remedies under the Subordinated Loan Documents or otherwise.

(i) In the event that Subordinated Lender shall not have filed a claim permitted hereunder in any Insolvency Proceeding with respect to any Obligor at least 60 days prior to the expiration of the time to file such claims, then Senior Agent, on behalf of Subordinated Lender, shall be authorized to file a claim with respect to the Subordinated Debt.

(j) Notwithstanding anything herein to the contrary, in the event that any part of a claim of the Subordinated Lender is deemed to be unsecured, the Subordinated Lender shall retain such rights as any unsecured creditor would possess.

13. Invalidated Payments. To the extent that the Senior Agent or any other Senior Creditor receives payments on, or proceeds of Collateral for, the Senior Obligations which are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to any Obligor or any Subsidiary thereof, a trustee, receiver or any other party under any bankruptcy law, state or federal law, common law, or equitable cause, then to the extent of such payment or proceeds received, the Senior Obligations, or part thereof, intended to be satisfied shall be revived and continue in full force and effect as if such payments or proceeds had not been received by the Senior Agent or such other Senior Creditor.

14. Further Assurances. The Subordinated Lender and Obligors may, and at any time from time to time upon the written request of the Senior Agent shall, in each case, at their own expense, promptly and duly execute and deliver such further instruments and documents and take such further actions as the Senior Agent may reasonably request for the purposes of obtaining or preserving the full benefits of this Agreement and of the rights and powers herein granted.

15. Turnover. Whether or not any Insolvency Proceeding has been commenced by or against any Obligor, any Collateral or proceeds thereof received by the Subordinated Lender (a) in connection with the exercise of any rights and remedies with respect to the Collateral or otherwise, or (b) as a result of the Subordinated Lender's collusion with any Obligor in violating the rights of the Senior Agent or any other Senior Creditor (within the meaning of Section 9-332 of the Uniform Commercial Code of any applicable jurisdiction), shall be segregated and held in trust and forthwith paid over to the Senior Agent in the same form as received, with any necessary endorsements or as a court of competent jurisdiction may otherwise direct. The Senior Agent is hereby authorized to make any such endorsements as agent for the Subordinated Lender. This authorization is coupled with an interest and is irrevocable until the Senior Termination Date.

16. Provisions Define Relative Rights. This Agreement is intended solely for the purpose of defining the relative rights of the Senior Agent and the other Senior Creditors, collectively, on the one hand, and the Subordinated Lender, on the other hand, and no other Person shall have any right, benefit or other interest under this Agreement.

17. Legend. The Subordinated Lender and each Obligor will cause each of the Subordinated Note and each Subordinated Loan Document to bear upon its face a legend referring to this Agreement and indicating that such documents are subordinated as provided herein.

18. Specific Performance. The Senior Agent is hereby authorized to demand specific performance of this Agreement at any time when the Subordinated Lender shall have failed to comply with any of the provisions of this Agreement applicable to the Subordinated Lender whether or not the Obligors shall have complied with any of the provisions hereof applicable to the Obligors, and the Subordinated Lender hereby irrevocably waives any defense based on the adequacy of a remedy at law which might be asserted as a bar to such remedy of specific performance.

19. Powers Coupled With An Interest. All powers, authorizations and agencies contained in this Agreement are coupled with an interest and are irrevocable until the Senior Termination Date shall have occurred.



20. Notices; Appointment as Agent. All notices, requests and demands to or upon the Senior Agent, the other Senior Creditors, the Obligors or the Subordinated Lender to be effective shall be in writing (or by telex, fax or similar electronic transfer confirmed in writing) and shall be deemed to have been duly given or made (a) when delivered by hand or (b) if given by mail, when deposited in the mails by certified mail, return receipt requested, or (c) if by telex, fax or similar electronic transfer, when sent and receipt has been confirmed, addressed as follows:

If to the Senior Agent or to any other Senior Creditor:

c/o Sandell Asset Management  
40 West 57th St  
26th Floor  
New York, NY 10019  
Telephone: 212-603-5700  
Facsimile: 212-603-5710  
Attention: Cem Hacioglu/Matthew Pliskin

If to any Obligor:

RxElite, Inc.  
1404 North Main  
Suite 200  
Meridian, Idaho 83642  
Telephone: 208-288-5550  
Facsimile: 208-288-1191  
Attention: Jonathan Houssian

With a copy to:

Haynes and Boone, LLP  
153 East 53<sup>rd</sup> Street, Suite 4900  
New York, NY 10022  
Telephone: 212-659-7300  
Facsimile: 212-918-8989  
Attention: Harvey J. Kesner, Esq

If to the Subordinated Lender:

NPIL Pharma Inc.  
379 Thornall Street, 1st Floor  
Alfeiri Building  
Edison, NJ 08837  
Attention: R Ananthanarayanan, President  
Telephone: 732-549-9451  
Telecopier: 732 388 4013

with copies to:

Waller Lansden Dortch & Davis  
511 Union Street, Suite 2700  
Nashville, TN 37212  
Attention: Robert L. Harris, Esq.: Jessica Green Gichner  
Telephone: 615-850-8467, 615-850-8675  
Telecopier: 615-244-6804

The Senior Agent, the Obligors and the Subordinated Lender may change their respective addresses and transmission numbers for notices by notice in the manner provided in this Section.



Each Senior Creditor hereby appoints the Senior Agent, as its agent and representative hereunder to take such actions, receive and give all notices and grant all acquittance in accordance with the terms of this Agreement.

21. Counterparts. This Agreement may be executed by one or more of the parties on any number of separate counterparts, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. A set of the counterparts of this Agreement signed by all the parties shall be lodged with the Senior Agent. Execution and delivery may be effected by the transmission of facsimile signatures pages. The parties shall thereafter exchange original signature pages.

22. Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

23. Integration. This Agreement represents the agreement of the Senior Agent and the Subordinated Lender with respect to the subject matter hereof and there are no promises or representations by the Senior Agent or by the Subordinated Lender relative to the subject matter hereof not reflected herein.

24. Amendments in Writing; No Waiver; Cumulative Remedies.

(a) None of the terms or provisions of this Agreement may be waived, amended, supplemented or otherwise modified except by a written instrument executed by the Senior Agent and the Subordinated Lender; provided that if any such amendment or supplement hereto modifies the obligations of any of the Obligor hereunder or under the Senior Transaction Documents or the Subordinated Loan Documents in any material adverse respect, the consent of such Obligor being so impacted shall also be required, otherwise the consent of the Obligor is not required.

(b) No failure to exercise, nor any delay in exercising, on the part of the Senior Agent or any other Senior Creditor, of any right, power or privilege hereunder shall operate as a waiver thereof. No single or partial exercise of any right, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

(c) The rights and remedies herein provided are cumulative, may be exercised singly or concurrently and are not exclusive of any other rights or remedies provided by law.

25. Section Headings. The section headings used in this Agreement are for convenience of reference only and are not to affect the construction hereof or be taken into consideration in the interpretation hereof.

26. Successors and Assigns. This Agreement shall be binding upon the successors, heirs, administrators, executors and assigns of each of the Obligor and the Subordinated Lender and shall inure to the benefit of each of the Senior Agent, the other Senior Creditors and their respective successors and assigns.

27. GOVERNING LAW: CONSENT TO JURISDICTION AND VENUE. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN ANY OF THE SENIOR TRANSACTION DOCUMENTS, IN ALL RESPECTS, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS AGREEMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE, AND ANY APPLICABLE LAWS OF THE UNITED STATES OF AMERICA. EACH OF OBLIGORS, SUBORDINATED LENDER, SENIOR CREDITORS AND SENIOR AGENT HEREBY CONSENTS AND AGREES THAT THE STATE OR FEDERAL COURTS LOCATED IN THE SOUTHERN DISTRICT OF NEW YORK OR NEW YORK, NEW YORK SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIMS OR DISPUTES AMONG OBLIGORS, SUBORDINATED LENDER, SENIOR CREDITORS AND SENIOR AGENT (OR ANY OF THEM) PERTAINING TO THIS AGREEMENT OR TO ANY MATTER ARISING OUT OF OR RELATING TO THIS AGREEMENT, PROVIDED, THAT THE PARTIES HERETO ACKNOWLEDGE THAT ANY APPEALS FROM THOSE COURTS MAY HAVE TO BE HEARD BY A COURT LOCATED OUTSIDE OF SUCH LOCATIONS AND, PROVIDED, FURTHER THAT NOTHING IN THIS AGREEMENT SHALL BE DEEMED OR OPERATE TO PRECLUDE THE SENIOR AGENT FROM BRINGING SUIT OR TAKING OTHER LEGAL ACTION IN ANY OTHER JURISDICTION TO REALIZE ON THE COLLATERAL OR ANY OTHER SECURITY FOR THE SENIOR OBLIGATIONS, OR TO ENFORCE A JUDGMENT OR OTHER COURT ORDER IN FAVOR OF THE SENIOR AGENT. THE OBLIGORS AND SUBORDINATED LENDER EACH EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR SUIT COMMENCED IN ANY SUCH COURT, AND THE OBLIGORS AND SUBORDINATED LENDER EACH HEREBY WAIVES ANY OBJECTION WHICH IT MAY HAVE BASED UPON LACK OF PERSONAL JURISDICTION, IMPROPER VENUE OR FORUM NON CONVENIENS. OBLIGORS AND SUBORDINATED LENDER EACH HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS, COMPLAINTS AND OTHER PROCESS ISSUED IN ANY SUCH ACTION OR SUIT AND AGREES THAT SERVICE OF SUCH SUMMONS, COMPLAINTS AND OTHER PROCESS MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO IT AT THE ADDRESS SET FORTH IN THE CREDIT AGREEMENT OR BENEATH ITS SIGNATURE LINE BELOW, AS THE CASE MAY BE, AND THAT SERVICE SO MADE SHALL BE DEEMED COMPLETED UPON THE EARLIER OF SUCH OBLIGOR'S OR SUBORDINATED LENDER'S ACTUAL RECEIPT THEREOF OR THREE (3) DAYS AFTER DEPOSIT IN THE U.S. MAILS, PROPER POSTAGE PREPAID.

28. MUTUAL WAIVER OF JURY TRIAL. THE PARTIES HERETO WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, SUIT, OR PROCEEDING BROUGHT TO RESOLVE ANY DISPUTE, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE, BETWEEN THE PARTIES ARISING OUT OF, CONNECTED WITH, RELATED TO, OR INCIDENTAL TO THE RELATIONSHIP ESTABLISHED BETWEEN THEM IN CONNECTION WITH, THIS AGREEMENT OR ANY OF THE SENIOR TRANSACTION DOCUMENTS OR THE TRANSACTIONS RELATED THERETO.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered as of the day and year first above written.

SUBORDINATED LENDER:

NPIL PHARMA INC.

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

Title:

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SENIOR AGENT:

CASTLERIGG MASTER INVESTMENTS LTD.,  
AS THE SENIOR AGENT

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

Title:

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OBLIGORS:

RXELITE, INC.

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

Title:

RXELITE HOLDINGS INC.

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

Name:

Title:

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OBLIGORS' ACKNOWLEDGEMENT AND CONSENT

Each of the undersigned hereby consents to the foregoing Intercreditor and Subordination Agreement dated as of May 30, 2008 (the "Intercreditor Agreement") to which this Acknowledgement and Consent (this "Acknowledgement") is attached. By executing this Acknowledgement, each of the undersigned hereby acknowledges the provisions of the Intercreditor Agreement as they relate to the relative rights of the Senior Agent, the other Senior Creditors and the Subordinated Lender as between such creditors (collectively, the "Creditors"). The undersigned each further agrees that, except as expressly otherwise provided in the Intercreditor Agreement, the terms of the Intercreditor Agreement shall not give the undersigned any, nor modify any, substantive rights vis-à-vis any Creditor, or any obligations or liabilities owing to such parties, under any instrument, document, agreement or arrangement. If any Creditor shall enforce its rights or remedies in violation of the terms of the Intercreditor Agreement, each Obligor agrees that it shall not use such violation as a defense to any future enforcement by any Creditor under the Intercreditor Agreement, or the enforcement by any such Creditor of any other instrument, document or agreement under which such Obligor is bound or assert such violation as a counterclaim or basis for set-off or recoupment against any such Creditor. and agrees to abide thereby and to keep, observe and perform the several matters and things therein intended to be kept, observed and performed by it, and specifically agrees not to make any payments contrary to the terms of said Agreement.

A breach of any of the terms and conditions of this consent by any Obligor or any Subsidiary thereof shall constitute an "Event of Default" under the Senior Transaction Documents.

RXELITE, INC.

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

Title:

RXELITE HOLDINGS INC.

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

Name:

Title:

## EXECUTION COPY

**AMENDMENT AND WAIVER**

This AMENDMENT AND WAIVER (this "Amendment"), dated as of May 30, 2008, is made by and between RxElite, Inc., a Delaware corporation (the "Company"), and Castlerigg Master Investments Ltd., a British Virgin Islands company (the "Holder" or "Castlerigg"). The Company and the Holder are, collectively, the "Parties." Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in that certain Senior Secured Convertible Note, issued by the Company to the Holder on December 31, 2007 in the principal amount of \$10,500,000, as may have been previously amended (the "Note"), pursuant to that certain Securities Purchase Agreement dated as of December 31, 2007 by and between the Company and the Holder (the "Securities Purchase Agreement").

**RECITALS**

WHEREAS, Section 14(b) of the Note provides that the Company shall not, and the Company shall not permit any of its Subsidiaries to, directly or indirectly, incur or guarantee, assume or suffer to exist any Indebtedness, other than (i) the Indebtedness evidenced by the Note and the Other Notes and (ii) other Permitted Indebtedness;

WHEREAS, Section 14(c) of the Note provides that the Company shall not, and the Company shall not permit any of its Subsidiaries to, directly or indirectly, allow or suffer to exist any Liens other than Permitted Liens and Permitted Vaporizer Liens;

WHEREAS, the Company desires to enter into a Loan and Security Agreement with NPIL Pharma Inc., a Delaware corporation ("NPIL"), in the form attached hereto as Exhibit A (the "Loan and Security Agreement"), pursuant to which NPIL shall lend the Company \$5,000,000 (the "NPIL Loan") in exchange for a promissory note and a junior lien in substantially all of the Company's assets (the "NPIL Lien");

WHEREAS, the NPIL Loan is not Permitted Indebtedness and the NPIL Lien is not a Permitted Lien; and

WHEREAS, at the request of the Company, the Holder has agreed to consent to the NPIL Loan and the granting of the NPIL Lien, and treat them as Permitted Indebtedness and a Permitted Lien, respectively, subject to the terms and conditions set forth in the subordination agreement, in the form attached hereto as Exhibit B (the "Subordination Agreement"), by and among NPIL, the Company and Castlerigg in its capacity as collateral agent for the Holder.

NOW, THEREFORE, in consideration of the promises and covenants made herein, and for such other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Amendment to the Note.

(a) Section (4) of the Note is hereby amended by (i) deleting the word "or" appearing at the end of clause (xviii) thereof, (ii) redesignating clause (xix) as new clause (xx) and (iii) adding new clause (xix) to read as follows:

“(xix) any default or event of default shall have occurred under the Loan and Security Agreement; or”

(b) The definition of “Permitted Indebtedness” set forth in Section (28)(dd) of the Note is hereby amended by (i) deleting the word “and” appearing therein immediately before clause (v) thereof and (ii) adding the following new clause (vi) to read as follows:

“and (vi) Indebtedness incurred under that certain Loan and Security Agreement, dated as of May 30, 2008 (the “**Loan and Security Agreement**”), by and between the Company and NPIL Pharma Inc., a Delaware corporation (the “**Subordinated Lender**”), to the extent that such Indebtedness and the Liens that secure such Indebtedness are subject to the terms of the Subordination Agreement, dated as of May 30, 2008 (the “**Subordination Agreement**”), by and among the Subordinated Lender, the Company and Castlerigg Master Investments Ltd., in its capacity as collateral agent for the Holder.”

(c) The definition of “Permitted Vaporizer Liens” set forth in Section (28)(ff) of the Note is hereby amended and restated in its entirety to read as follows:

“**Permitted Vaporizer Liens**” means Liens incurred by the Company pursuant to the Loan and Security Agreement (as in effect on the date hereof), securing Indebtedness permitted under clause (vi) of the definition of Permitted Indebtedness, to the extent that such Liens are subject to the terms of the Subordination Agreement.”

## 2. Waiver and Consent.

(a) Subject to Section 3 hereof, the Holder consents to, and waives any Event of Default that would otherwise arise under Section (4)(x) of the Note as a result of the Company’s failure to comply with Sections (14)(b) and (c) of the Note due to the Company entering into the Loan and Security Agreement and granting a Lien on and in the Company’s assets under the Loan and Security Agreement.

(b) The waiver in this Section 2 shall be effective only in this specific instance and for the specific purpose set forth herein and does not allow for any other or further departure from the terms and conditions of the Securities Purchase Agreement, the Note or any other Transaction Document (as defined in the Securities Purchase Agreement), which terms and conditions shall continue in full force and effect.

## 3. Miscellaneous Provisions.

(a) No Further Agreements/Waivers. The Company hereby (i) acknowledges, that except as set forth herein and as may have been previously amended, the Note shall remain unmodified and in full force and effect and is hereby ratified and confirmed in all respects except that on and after the date hereof all references in the Note to the “Notes”, the “Note”, the “Senior Secured Convertible Note”, “thereto”, “thereof”, “thereunder” or words of like import referring to the Note shall mean the Note as amended by this Amendment, and (ii) confirms and agrees that to the extent that any Transaction Document purports to assign or pledge to Castlerigg, individually and in its capacity as collateral agent for the Buyers party to the Securities Purchase Agreement, or to grant to Castlerigg, individually and in its capacity as collateral agent for the Buyers party to the Securities Purchase Agreement, a security interest in or Lien on, any Collateral (as defined in the Security Agreement dated as of December 31, 2007 by and among the Company and the subsidiaries of the Company signatories thereto in favor of Castlerigg individually and as collateral agent for the Buyers party to the Securities Purchase Agreement (the “Security Agreement”)) as security for the Company’s obligations under the Securities Purchase Agreement, the Note and the Transaction Documents, as the case may be, of the Company or any Guarantor (as defined in the Security Agreement) from time to time existing in respect of the Note (as amended hereby) and the other Transaction Documents, such pledge, assignment and/or grant of the security interest or Lien is hereby ratified and confirmed in all respects. This Amendment may only be modified or amended by a written agreement executed by Parties. Each Party hereby acknowledges and agrees that this Amendment constitutes a “Transaction Document” under the Note.





(b) Fees and Expenses. The Company shall pay or cause to be paid all legal fees and expenses of counsel for the Holder incurred in connection with the execution and delivery of this Amendment.

(c) Counterparts. This Amendment may be executed in one or more counterparts, each of which shall be deemed an original but all of which when taken together shall constitute one and the same instrument. Facsimiles or portable document files transmitted by e-mail containing original signatures shall be deemed for all purposes to be originally signed copies of the documents which are the subject of such facsimiles or files.

(d) Binding on Successors. This Amendment shall be binding upon and shall inure to the benefit of the successors and permitted assigns of the Parties.

(e) Entire Agreement. The Note, as may have been previously amended, and as reflective of the terms hereof, contains the entire understanding between the Parties and supersede any prior written or oral agreements between them respecting the subject matter contained herein. There are no representations, agreements, arrangements or understandings, oral or written, between the Parties relating to the subject matter hereof that are not fully expressed herein.

[Signature Page Follows]

**[SIGNATURE PAGE TO AMENDMENT]**

IN WITNESS WHEREOF, the Parties have caused this Amendment to be duly executed by their respective authorized officers as of the date first above written.

RXELITE, INC.

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

Name: Jonathan Houssian

Title: President and Chief Executive Officer

CASTLERIGG MASTER INVESTMENTS LTD.

By: Sandell Asset Management Corp.

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

Name:

Title:

ACCEPTED BY:

RXELITE HOLDINGS INC.

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

Name:

Title: