



ITEM: 5.A.(8)

Department of
Community Investment

Memorandum

December 10, 2015

TO: South Bend Redevelopment Commission
FROM: Brock Zeeb, Economic Resources Director
SUBJECT: IRF subordination

In 2014 staff brought forward a development agreement with Nello Corporation creating 524 jobs and 50 million in new commercial investment. Nello's contractors have experienced delays in building construction that has created a need for Nello Corporation to ramp up more rapidly upon completion of their building.

The proposed ownership interest subordination is a partnership between the City of South Bend Redevelopment Commission and the Industrial Revolving Fund (IRF). The IRF is an economic development tool designed to assist and promote growth in local manufacturing.

The IRF will take a 1st position ahead of the Commission's purchase security interest to secure a working capital loan of \$\$ 1,400,000 for Nello. It will require the IRF to provide any material updates to the Commission.

Staff requests approval of the IRF subordination agreement.



SECURITY AGREEMENT

THIS SECURITY AGREEMENT (this "Agreement") executed and delivered this day of _____, 2015, by **SOUTH BEND REDEVELOPMENT COMMISSION** ("Grantor"), whose address is 1400 S. County-City Building, 227 W. Jefferson Blvd., South Bend, Indiana 46601, to and in favor of **THE INDUSTRIAL REVOLVING FUND OF SOUTH BEND, INDIANA, 1ST SOURCE BANK, SOUTH BEND, INDIANA, TRUSTEE**, ("Lender").

RECITALS

On _____, 2015, Nello Inc., an Indiana corporation ("Borrower") executed a Promissory Note (the "Note") and Loan Agreement (the "Loan Agreement") in favor of Lender, pursuant to which Lender agreed to lend to Borrower the aggregate stated amount of One Million Four Hundred Thousand Dollars (\$1,400,000.00) ("Loan");

Lender has agreed to make said Loan, evidenced by the Note and Loan Agreement, for the purpose of facilitating equipment and inventory relocation to South Bend, Indiana ("The City") as well as to hire and train new staff and cover inventory purchases from local vendors with which Borrower has no previous history.

Borrower has represented to Lender that completion of the Project (as defined herein) will result in retention of current jobs and creation of additional jobs in The City, as well as a substantial capital investment by Borrower in Borrower's assets located in The City;

Borrower has requested certain economic development assistance from The City, which assistance consists of The City agreeing to acquire certain equipment and subsequently lease said equipment to Borrower for use by Borrower at a manufacturing facility located in The City of a type and size necessary to consolidate therein Borrower's present manufacturing operations and to increase its manufacturing resources (the "Project"), as all more fully set for in an Economic Development Memorandum of Understanding between the South Bend Redevelopment Commission and Borrower dated June 20, 2014 ("MOU"), and the related Equipment Lease Agreement executed July 21, 2014 (the "Equipment Lease");

As part of the agreement in the MOU and Equipment Lease, Borrower and the City have agreed that upon the satisfaction of certain requirements the Borrower may purchase the equipment from the City for One Dollar (\$1.00);

Grantor understands that Lender is willing to grant the Loan to Borrower only upon certain conditions, one of which is that Grantor grant to Lender a security interest in that equipment purchased for the benefit of Borrower as set forth above.

NOW, THEREFORE, the parties hereto, each in consideration of the other's promises, agreements, representations, warranties and covenants hereinafter contained, agree that the

Recitals above set forth in this Security Agreement are a part of this Security Agreement for all purposes and agree as follows:

1.0 Grant of Security Interest by Grantor. Grantor grants to Lender a continuing security interest in:

1.1 All of Grantor's right, title and interest in that certain equipment purchased, and to be purchased, for the benefit of Borrower in accordance with the MOU and the related Equipment Lease Agreement, which includes, but is not limited to, the following equipment designated as Year 1 Equipment under the MOU: (i) BSCO, Inc. Steel Pole Welding Operation; (ii) ALLTRA HG30-11S Precision Gantry Shape Cutting Machine; (iii) CC-10-120-PWR Power Medium Turning Roll and CC-10-120-IDL Idler Unit with Hand Wheel; and (iv) Two "Fabri-K" Series DNC Hydraulic Press Brakes in Tandem, Model FK 1250-30/26's Serial #A1889 & A1890 as stated in Proposal #91714GB1AC1-2.

1.2 All of Grantor's right, title and interest in additional equipment that is purchased pursuant to the Equipment Lease Agreement and the MOU.

All of the above property in which a continuing security interest has been granted to Lender by Grantor is collectively referred to as the "Collateral".

2.0 Indebtedness Secured by Agreement.

2.1 Indebtedness. The continuing security interest granted to Lender by Grantor in this Agreement is to secure only the payment of Borrower's original repayment obligation under the Note (as stated above) (the "Indebtedness").

3.0 Representations and Warranties.

3.1 Agreement Binding and Enforceable. This Agreement is a legal, valid and binding obligation of Grantor, enforceable in accordance with its terms.

3.2 Collateral Ownership. Grantor is the sole owner of all existing Collateral.

3.3 Collateral Free of Lien. Other than the security interest herein granted, all existing Collateral and Collateral hereafter arising or acquired is and shall be free and clear of any security interests, liens, encumbrances, claims or rights of others, and Grantor does and shall warrant and defend the Collateral against any person, firm or entity claiming an interest in the Collateral adverse to the interest of Lender.

3.4 Location and Use of Collateral. All of the Collateral is and will be kept at the location of Borrower and in accordance with the terms of the MOU and the Equipment Lease, and neither Grantor nor Borrower will remove any part of the Collateral therefrom without the prior express written consent of Lender, and the Collateral will only be used for the Project and in accordance with the terms of the MOU and the Equipment Lease.

4.0 Agreement of Grantor. Grantor covenants and agrees with Lender from and after the date of this Agreement, and until all of the Indebtedness is fully paid and satisfied and this Agreement is terminated in accordance with paragraph 8.9.

4.1 Perfection of Security Interests. Grantor authorizes Lender to file or record such financing statements or other documents in any public office deemed necessary by Lender to perfect or continue the perfection of Lender's security interests in the Collateral.

5.0 Rights and Remedies of Lender. In the Event of Default by the Borrower under the Note or Loan Agreement, Lender shall have all the rights and remedies permitted under the Uniform Commercial Code of Indiana and in effect in each jurisdiction in which Collateral is located, permitted under other laws and authorized under this Agreement, and without limitation of other rights and remedies, the following:

5.1 Accelerate Indebtedness. Lender may, without notice or demand, at Lender's option and notwithstanding any time or credit allowed by an instrument evidencing an Indebtedness, accelerate and declare the entire unpaid balance of any and all Indebtedness immediately due and payable.

5.2 Take Possession of Collateral. Lender may take possession of the Collateral and, for that purpose, Lender may enter in or on to any premises on which the Collateral or any part of it may be situated and remove the Collateral.

5.3 Require Collateral to be Made Available. Lender may require Borrower and Grantor to make the Collateral available to Lender at a place to be designated by Lender that is reasonably convenient to Lender, Borrower and Grantor.

5.4 Preservation of Collateral. Lender may, but in no way is obligated to, take steps to preserve rights in the Collateral against any third party.

5.5 Use of Collateral while in Lender's Possession. When in possession of the Collateral, Lender may use it for any purpose or in any manner or cause it to lose its identity without an obligation to account for such use, except when used for a purpose not connected with performing Borrower's obligations with respect to it, preservation or disposal of the Collateral unless otherwise authorized by law. Lender may use, without charge, any and all equipment, machinery or appliances necessary to unload and remove any Collateral from storage facilities in the event that the removal of the Collateral is necessary for purposes of repossession by Lender to realize on Lender's security interest. The standard of care imposed upon Lender as to the use of the Collateral in its possession is that of a prudent person without any special skill or knowledge.

5.6 Sale of Collateral. Unless the Collateral is perishable, threatens to decline speedily in value or of a type customarily sold on a recognized market, Lender shall give Grantor and Borrower at least ten (10) days prior written notice of the time and place of

any public sale or of the time after which any private sale or other intended disposition is to be made. Lender may sell any of the Collateral, at public or private sales, or a combination, for cash or on credit as a unit or in lots. The order of sale of times in lots shall be as Lender shall determine. Lender may become purchaser at any sale.

5.7 Expenses Incurred in Connection with a Sale of Collateral. Expenses of retaking, holding, preparing for sale, selling or the like shall include Lender's costs, expenses and reasonable attorneys' fees which are secured under this Agreement and all such expenses shall be first paid out of the proceeds of any disposition of Collateral.

6.0 General.

6.1 Waivers by Grantor. With respect to both the Indebtedness and the Collateral, Grantor assents to any and all extensions, renewals or postponements of the time of payment or any other indulgence, to any substitutions, exchanges, or releases of Collateral, to the additions or releases of any party or person primarily or secondarily liable, to the acceptance of partial payments and the settlement, compromising or adjusting of any of them, all in such manner and at such time or times as Lender may deem advisable, provided, however, that Grantor does not consent or agree to any increase in Borrower's original repayment obligation under the Note (as stated above).

6.2 No Duty of Lender to Act on Collateral. Lender shall have no duty:

6.2.0 To take possession of any of the Collateral or to take any action for the care, preservation, protection or insurance of any of the Collateral;

6.2.1 To collect, foreclose on or otherwise realize on the Collateral; or

6.2.2 To collect, foreclose on or otherwise realize on the Collateral in any particular manner, in any particular sequence or at all.

6.3 Notices. Any demand upon or notice to Grantor that Lender may elect to give shall be effective if personally delivered; sent by ordinary mail, certified or registered mail; transmitted by telegraph, wireless or radio company and/or sent by overnight courier addressed to Grantor at the address identified at the beginning of this Agreement or, if Grantor has notified Lender in writing of a change of address noted in its records, to Grantor's last address so notified. Demands or notices addressed to Grantor's address at which Lender customarily communicates with Grantor shall also be effective. Notices and demands of Lender to Grantor shall be effective upon their personal delivery, mailing, transmission, or delivery to an overnight courier, as the case may be, whether or not actually received by Grantor.

6.4 Form of Words. When applicable, use of the singular form of any word shall also mean or apply to the plural, and the masculine form shall mean and apply to the feminine or the neuter.

6.5 Severability of Agreement. If and to the extent that applicable law confers any rights or imposes any duties inconsistent with or in addition to any of the provisions of this Agreement, the affected provisions shall be amended to conform to such law, and if any provision of this Agreement shall be invalidated, all other provisions shall remain in full force and effect.

6.6 Successors and Assigns. All rights of Lender shall inure to the benefit of its successors and assigns, and obligations of Grantor shall bind the Grantor's successors and assigns.

6.7 Governing Law. This Agreement and all rights and obligations under it, including matters of construction, value and performance, shall be governed by the Uniform Commercial Code, as amended from time to time, in effect in the state of Indiana and by other applicable laws of the state of Indiana.

EXECUTED AND DELIVERED by Grantor and Lender as of the date first written above.

"GRANTOR":

South Bend Redevelopment Commission

By: _____

Printed: _____

Title: _____

"LENDER":

The Industrial Revolving Fund of South Bend,
Indiana, 1st Source Bank, South Bend,
Indiana, Trustee

By: _____

Patrick M. McMahon, Chairman

CONSENT OF BORROWER

By executing below, Borrower hereby consents to and accepts the terms of the above Security Agreement.

BORROWER:

Nello Inc.

By: _____
Daniel Ianello, President

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SUBORDINATION AGREEMENT

THIS SUBORDINATION AGREEMENT (“Agreement”) is made and entered into this ____ day of _____, 2015 by and between **SOUTH BEND REDEVELOPMENT COMMISSION** (“Commission”), **INDUSTRIAL REVOLVING FUND OF SOUTH BEND, INDIANA 1ST SOURCE BANK, SOUTH BEND INDIANA, TRUSTEE** (“IRF”), and **NELLO INC.** (“Borrower”).

RECITALS

1. IRF has agreed to loan to Borrower the sum of One Million Four Hundred Thousand Dollars (\$1,400,000.00) pursuant to the terms of a certain Loan Agreement and Promissory Note dated _____, 2015, as amended from time to time (“the IRF Note”). The Note is secured by the following:

All of Borrower’s right, title and interest in and to, and all contract rights under, that certain Equipment Lease Agreement by and between South Bend Redevelopment Commission and Borrower dated July 21, 2014 (“Equipment Lease”), including all equipment Borrower is now leasing and may subsequently purchase according to the Equipment Lease and the Economic Development Memorandum of Understanding (“MOU”), which includes, but is not limited to, the following equipment designated as Year 1 Equipment under the MOU: (i) BSCO, Inc. Steel Pole Welding Operation; (ii) ALLTRA HG30-11S Precision Gantry Shape Cutting Machine; (iii) CC-10-120-PWR Power Medium Turning Roll and CC-10-120-IDL Idler Unit with Hand Wheel; and (iv) Two “Fabri-K” Series DNC Hydraulic Press Brakes in Tandem, Model FK 1250-30/26’s Serial #A1889 & A1890 as stated in Proposal #91714GB1AC1-2.

All of Borrower’s right, title and interest in additional equipment that is leased and/or purchased pursuant to the Equipment Lease Agreement and MOU.

The proceeds and products of the foregoing in whatever form the same may be, including, but not limited to, proceeds from insurance policies (including, without limitation, proceeds of credit insurance policies).

All of the above property in which a continuing security interest has been granted to IRF by Borrower is collectively referred to as the “MOU/Equipment Collateral”.

2. Prior to execution of the IRF Note, the Commission had entered into agreements with the Borrower whereby Commission agreed to purchase certain equipment and subsequently lease said equipment to Borrower, all as more particularly set forth in the MOU and the related Equipment Lease Agreement.

3. The Equipment Lease provides that to the extent the Equipment Lease is considered a secured transaction under the Indiana Uniform Commercial Code, Borrower granted to Commission a purchase money security interest in the MOU/Equipment Collateral.

4. In order to induce IRF to make the above-referenced loan to Borrower, Commission has agreed to subordinate its security interest in the MOU/Equipment Collateral to the IRF's security interest in the MOU/Equipment Collateral, solely, and to no other interest.

NOW, THEREFORE, for valuable consideration, the parties agree as follows:

1. **Recitals.** The Recitals above set forth are a part of this Agreement for all purposes.

2. **Commission's Agreement.** Commission agrees that IRF will hold a first position security interest in the MOU/Equipment Lease Collateral at all times that the Borrower's original repayment obligation under the IRF Note remains outstanding, including the period of time that the City of South Bend owns the MOU/Equipment Collateral and is leasing the same to Borrower, which interest shall be superior to any right, title, interest, claim or lien which the Commission may now or in the future have in that same MOU/Equipment Collateral, and its proceeds, if any.

3. **Lien Priorities.** Notwithstanding the date, manner, or order of perfection of the security interests with respect to the MOU/Equipment Collateral granted by Borrower to Commission and IRF, and notwithstanding any provisions of the Uniform Commercial Code as enacted by the State of Indiana, or any applicable law or any prior agreement between the parties hereto, or whether any of the parties hereto holds possession of the MOU/Equipment Collateral; as between Commission and IRF, IRF shall hold a first and prior security interest in the MOU/Equipment Collateral during the time that the Borrower's original repayment obligation under the IRF Note remains outstanding.

Commission and IRF agree that, as between themselves, the priorities of Commission and IRF established by this Agreement shall be effective, and distribution shall be made in accordance with this Agreement.

In the event of a foreclosure sale or any other sale of the Borrower's assets, including the MOU/Equipment Collateral, by Borrower with prior written consent of Commission and IRF, all net proceeds realized from the sale of the MOU/Equipment Collateral shall be paid first to the IRF for application to the IRF Note, with any residual proceeds thereafter paid to Commission.

Nothing in this Agreement will be construed as the Commission's consent or agreement to the subordination of its purchase money security interest in the MOU/Equipment Collateral to any interest at any time other than the IRF's interest as stated in this Agreement.

4. **Waiver, Modification or Cancellation.** Any waiver, alteration or modification of any of the provisions of this Agreement, or cancellation or replacement of this Agreement, shall not be valid unless such is in writing and signed by all of the parties hereto.

5. **Benefit and Burden.** This Agreement shall inure to the benefit of, and bind the parties hereto and their respective legal representatives, successors and assigns.

6. **Application.** This Agreement shall constitute a continuing agreement of subordination, and IRF may continue to grant modification or extensions to the IRF Note without affecting this Agreement, provided, however, that (a) IRF must give Commission prompt written notice of any such modification or extension, and (b) that the subordination of the Commission's security interest under this Agreement will immediately cease in the event that Borrower's original indebtedness under the IRF Note (as stated above) increases.

Further, Commission agrees that IRF may enter into such agreement with Borrower as IRF may deem proper extending the time of payment or renewing or otherwise altering the terms of the Note of Borrower to IRF or affecting any security underlying the Note, or may exchange, sell, or surrender or otherwise deal with any such security, without, in any way, impairing or affecting this Agreement, provided, however, that IRF must give Commission prompt written notice of the same.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above mentioned.

"IRF":

The Industrial Revolving Fund of
1st Source Bank, South Bend
Indiana, Trustee

By: _____
Patrick M. McMahon, Chairman

"COMMISSION":

South Bend Redevelopment Commission

By: _____
Printed: _____
Title: _____

ATTEST:

By: _____
Printed: _____
Title: _____

AGREED AS TO FORM AND CONTENT:

Nello Inc.

By: _____
Daniel Ianello, President

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