SAMPLE
CALIFORNIA THIRD-PARTY LEGAL OPINION
FOR BUSINESS TRANSACTIONS

OPINIONS COMMITTEE
OF
THE BUSINESS LAW SECTION
OF
THE STATE BAR OF CALIFORNIA

REVISED
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PREFACE TO THE 2014 REVISION

Since the publication of the original Sample California Third-Party Legal Opinion for Business Transactions in May 2010, the Opinions Committee of the Business Law Section of the State Bar of California (the “Committee”) has approved for publication a Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions (the “Venture Opinion”). The Venture Opinion is based upon this Sample California Third-Party Legal Opinion for Business Transactions (the “Transactional Opinion”) but includes opinions not included in the Transactional Opinion, such as opinions on Delaware corporations and stock issuances.

In the course of preparing the Venture Opinion, the Committee decided to make several revisions to the text of the Transactional Opinion. As both opinions are “samples,” the Committee made revisions when it believed the formulation in the Venture Opinion was better or clearer; however, in several instances (such as the formulation of the authorization opinions) differences in language continue in part to illustrate that opinions may be worded in many acceptable ways. In most cases, such as changes to the consents and approvals opinion or the no breach or default opinion (paragraphs 8 and 9) or the non-exclusive list of laws upon which no opinion is expressed unless addressed specifically (which list is illustrative of the kinds of laws referred to in Section E of the opinion), the Committee adopted language from the Venture Opinion that it believed was clearer but did not change the intended meaning of the opinions.

Three changes that clarify the Transactional Opinion deserve mention. They are:

1. The exception to the no breach or default opinion addressing Material Agreements has been expanded to exclude from the scope of the opinion not only financial covenants and similar provisions, but also provisions that are tied to “material adverse changes” or similar concepts. This provision tracks the language in the Venture Opinion and excludes matters not typically within the professional competence of lawyers.

2. The limitations on the enforceability of indemnity clauses in agreements have been restated (a matter of particular importance in many transactions of the type exemplified by the Venture Opinion).

3. The covered law qualification at the beginning of Section E has been revised to add an express reference to the fact that the opinion is limited to laws that in the opinion giver’s experience are typically applicable to transactions of the type exemplified by documents addressed. While the Committee believes this is implicit even if not stated, it has adopted the more express statement included in the Venture Opinion.

Other changes to the Transactional Opinion do not change its text but rather update the footnotes to address matters that received different treatment or emphasis in the Venture Opinion. These include:

1. Clarifying the discussion of “performance” oriented opinions. Perhaps reflecting the greater variety and significance of future obligations in the venture context, the
Venture Opinion treats future performance in a more nuanced manner. This revision reflects the substance of that treatment in the notes to the power and authority opinion, the authorization opinion, and the consents and approvals and no conflicts opinions. Since the Committee believes the use of the term does not change the meaning of the first two opinions and since it believes that in many financing contexts opinion givers will conclude they can address “performance” even when theoretically it may be more difficult to do so (as with the consents and approvals and no conflicts opinions), the Committee has not revised the text of the Transactional Opinion to delete express references to “performance” in places where the word does not appear in the Venture Opinion, but has revised the accompanying notes.

2. Adding a brief discussion of the *Fortress* case and why some lawyers favor a more extensive statement of assumptions.

3. Noting the reluctance of some opinion givers to address arbitration provisions, though the Transactional Opinion (like the Venture Opinion) continues to reflect the view that in commercial transactions of the type in which opinions are generally given opinion givers can usually address arbitration provisions.

The Committee hopes that, as practice continues to evolve, this Transaction Opinion, as well as the Venture Opinion and other materials published by the Committee, whether alone or in conjunction with other committees of the Business Law Section, will continue to be updated so as to continue to address the needs of the practicing bar.

This revision was undertaken by the Chair of the 2010 Drafting Committee for the Transactional Opinion, Timothy G. Hoxie (also Co-Chair of the Opinions Committee at the time of this revision), with the assistance of present Co-Chair Richard N. Frasch and incoming Co-Chair and present Vice Chair James F. Fotenos. This revision was approved by the Steering Committee of the Opinions Committee, as well as the Executive Committee of the Business Law Section.

August 2014
PREFACE TO THE ORIGINAL MAY 2010 SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS

The following sample third-party legal opinion (the “Opinion”) has been prepared by the Opinions Committee (the “Committee”) of the Business Law Section (the “Business Law Section”) of the State Bar of California. The Committee has prepared the Opinion as an illustration of what an opinion following the precepts of the opinion reports of the Business Law Section might look like. There is not a single form of legal opinion that can be viewed as the “sole” or even for most cases the “best” or “preferred” form that lawyers should use. Consequently, the Opinion is intended as a sample and should not be construed as a prescriptive model.

The Committee chose as a transactional model an unsecured lending transaction involving a California corporation as the borrower, a California limited liability company as the guarantor, and transaction documentation governed by California law. While any number of transactional models could have been chosen, the Committee settled on a basic loan transaction largely because lending is an area of practice where third-party opinions are still commonly requested and delivered. The Committee believes that the chosen transaction allows it to illustrate certain opinions commonly given in a business transaction involving California corporations and limited liability companies. With the addition of appropriate assumptions and qualifications (and the deletion of others, such as those pertaining to usury if the transaction does not involve an opinion on the enforceability of the loan documents or their compliance with law), the Opinion can be used as a basis to prepare opinions in other contexts. For a sample opinion letter for a personal property secured loan transaction, see Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Legal Opinions in Personal Property Secured Transactions (2005), Appendix B.

The Opinion should be interpreted in accordance with the customary practice of lawyers giving opinions under (and advising those who receive opinions given under) California law as articulated in the various opinion reports of the Business Law Section and other professional associations, such as the American Bar Association’s Section of Business Law and the TriBar Opinion Committee. Certain of these reports are listed in footnotes 1 and 4 of the Opinion. Practitioners may note that the Opinion itself does not specifically refer to customary practice; however, whether or not such a reference is made, any opinion, including an opinion in the form of this sample Opinion, should be interpreted in light of customary practice. Practitioners are encouraged to consult Appendix 7 of the State Bar of California Business Law Section’s Report On Third Party Remedies Opinions (2007), which provides an extensive discussion of customary opinion practice. Similar discussions can be found in the publications of other bar organizations, including the TriBar Opinion Committee.

The Committee expresses its appreciation to the following individuals who composed the Drafting Committee primarily responsible for the preparation of this sample Opinion: Timothy G. Hoxie (chairman of Drafting Committee), James F. Fotenos, Matthew R. Gemello, Jerome A. Grossman, David M. Jargiello, F. Daniel Leventhal, Susan Cooper Philpot, Steven E. Sherman and Peter S. Szurley.

May 2010
Ladies and Gentlemen:

We have acted as counsel to [Name of Borrower], a California corporation (the “Borrower”), and [Name of Guarantor], a California limited liability company (the “Guarantor”) in connection with the [Name of Agreement] (the “Loan Agreement”), dated as of __________, between the Borrower and [Name of Lender], a National Banking Association (the “Lender”). This opinion is delivered to you pursuant to Section __ of the Loan Agreement. The Borrower and the Guarantor are sometimes referred to in this letter individually as a “Loan Party” and collectively as the “Loan Parties.” Each capitalized term that is defined in the Loan Agreement and that is used but not defined in this letter has the meaning given to it in the Loan Agreement.

A. DOCUMENTS EXAMINED

We have examined the following documents:

(i) the Loan Agreement;

(ii) the Promissory Note;

(iii) the Guaranty;

(iv) the Articles of Incorporation of the Borrower, certified by the California Secretary of State as of ______ and certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this opinion;

(v) the Bylaws of the Borrower, certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this opinion;

(vi) records certified to us by an officer of the Borrower as constituting all records of proceedings and actions of the board of directors [and the shareholders] of the Borrower relating to the Loan;
(vii) a Certificate of Status—Domestic Corporation with respect to the Borrower, issued by the California Secretary of State on ______;

(viii) the Articles of Organization of the Guarantor, certified by the California Secretary of State as of ______ and certified to us by an [officer] of the Guarantor as being complete and in full force and effect as of the date of this opinion;

(ix) the Operating Agreement of the Guarantor dated as of ______, and certified to us by [an officer] of Guarantor as being in full force and effect as of the date of this opinion;

(x) records certified to us by [an officer] of the Guarantor as constituting all records of proceedings and actions of the [manager(s) and members] of the Guarantor relating to the Loan;

(xi) a Certificate of Status – Domestic Limited Liability Company with respect to the Guarantor, issued by the California Secretary of State on ______;

(xii) a certificate of the [Chief Financial Officer, General Counsel or other appropriate officer] of the Borrower identifying certain agreements and instruments to which the Borrower is a party or by which the Borrower’s properties or assets are bound (the “Certificate Relating to Agreements”);

(xiii) a copy of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being a true and correct copy of the original (“Material Agreements”);

(xiv) a certificate of the [Chief Financial Officer, General Counsel or other appropriate officer] of the Guarantor identifying certain agreements and instruments to which the Guarantor is a party or by which the Guarantor’s properties or assets are bound (the “Guarantor’s Certificate Relating to Agreements”);

(xv) a copy of each of the agreements and instruments identified in the Guarantor’s Certificate Relating to Agreements, certified to us as being a true and correct copy of the original (“Guarantor Material Agreements”); and

(xvi) a certificate of each of [the Chief Financial Officer, General Counsel or other appropriate officer] of the Borrower and the Guarantor as to certain factual matters relevant to this opinion.

Each of the documents identified in items (i) through (iii) above is sometimes referred to herein as a “Loan Document.”
We have also examined such other documents and made such further legal and factual examination and investigation as we deem necessary for purposes of rendering the following opinions.

B. CERTAIN ASSUMPTIONS

We have assumed, for purposes of the opinions expressed below, that:

(a) the Lender is (i) a subsidiary of a bank holding company (as such terms are defined in Section 1287 of the California Financial Code) or is a bank organized under the laws of the United States or any State thereof, (ii) a foreign (other nation) bank described in Section 1768 of the California Financial Code meeting the criteria for exemption set forth therein, (iii) licensed under the California Finance Lenders Law (Cal. Fin. Code § 22000 et seq.), or (iv) a lending institution otherwise belonging to an exempt class of persons and, as a result thereof, that the Lender is exempt from the restrictions of Section 1 of Article XV of the Constitution of the State of California relating to rates of interest upon the loan of money;

(b) the Loan will be made by the Lender for its own account or for the account of another person that qualifies for an exemption from the interest rate limitations of California law; and

(c) there is no agreement by the Lender to sell participations or any other interest in the Loan to be made under the Loan Agreement to any person other than a person that qualifies for an exemption from the interest rate limitations of California law.

C. OPINIONS

Based on the foregoing, and subject to the qualifications set forth in Section E ("Certain Qualifications") below, we are of the opinion that:

1. The Borrower is a corporation validly existing and in good standing under the laws of the State of California.

2. The Borrower has the corporate power to enter into and perform its obligations under each of the Loan Documents to which it is a party.

3. The Borrower has taken all corporate action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party, and the Borrower has duly executed and delivered the Loan Documents to which it is a party.

4. The Guarantor is a limited liability company existing and in good standing under the laws of the State of California.

5. The Guarantor has the limited liability company power to enter into and perform its obligations under the Guaranty.
6. The Guarantor has taken all limited liability company action necessary to authorize the execution and delivery of, and the performance of its obligations under, the Guaranty, and the Guarantor has duly executed and delivered the Guaranty.

7. Each of the Loan Documents to which the Borrower or Guarantor is a party is a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.

8. All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law (as defined in Section E (“Certain Qualifications”) below) required to execute and deliver, and perform their obligations under, the Loan Documents have been obtained or made.

9. The execution and delivery by Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not:

   (a) violate the Articles of Incorporation or the Bylaws of the Borrower or the Articles of Organization or the Operating Agreement of the Guarantor;

   (b) result in a breach of or constitute a default under any Material Agreement or Guarantor Material Agreement or result in the creation of a security interest in, or lien upon, any of the Borrower’s or the Guarantor’s properties or assets under any Material Agreement or Guarantor Material Agreement, but excluding (i) financial covenants and similar provisions therein requiring financial calculations or determinations to ascertain compliance or (ii) provisions relating to the occurrence of a “material adverse event” or “material adverse change” or words or concepts to similar effect;

   (c) violate any judgment, order or decree of any court or arbitrator [identified on Schedule __ to the Loan Agreement] [or] [applicable to either of them and known to us]; or

   (d) violate any Covered Law (defined in Section E (“Certain Qualifications”) below) to which either the Borrower or the Guarantor is subject.

D. CONFIRMATIONS

We are not representing the Borrower or the Guarantor in any action or proceeding that is pending, or overtly threatened in writing by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Loan Documents or the performance by the Borrower or the Guarantor of their respective obligations thereunder.

E. CERTAIN QUALIFICATIONS

Our opinions are limited to the federal law of the United States and the law of the State of California but in each case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Loan Documents. We express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood
to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein,] we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices act, foreign asset or trading control, or investment company laws and regulations. The law covered by this opinion letter is referred to herein as the “Covered Law.”

Our opinions are subject to the following additional qualifications:

(1) Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.

(2) Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Borrower or the Guarantor in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.

(3) We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (i) broadly or vaguely stated rights, (ii) the benefits of statutory, regulatory or constitutional rights, (iii) unknown future defenses, and (iv) rights to one or more types of damages.

(4) [The enforcement of Section __ of [the Loan Agreement], relating to the payment of attorneys’ fees and costs, is subject to the limitations of Section 1717 of the California Civil Code.]

(5) [We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to fix the venue of proceedings relating to the Loan.]

(6) [We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to waive the parties’ rights to a jury trial.]

(7) [We advise you of California statutory provisions and case law to the effect that a guarantor may be discharged, in whole or in part, if the beneficiary of the guaranty alters the obligation of the principal, fails to inform the guarantor of material information pertinent to the principal or any collateral, elects remedies that may impair either the subrogation or reimbursement rights of the guarantor against the principal or the value of any collateral, fails to accord the guarantor the protections afforded a debtor under Division 9 of the California Uniform Commercial Code or otherwise takes any action that prejudices the guarantor, unless, in any such case, the guarantor has effectively waived such rights or the consequences of such action or has consented to such action. While California Civil Code Section 2856 and case law provide that
express waivers of a guarantor's right to be discharged, such as those contained in the Guaranty, are generally enforceable under California law, we express no opinion regarding the effectiveness of the waivers in the Guaranty.

(8) [We advise you that a court may refuse to enforce [Section __ of the Loan Agreement], which provides [for judicial review of arbitration awards/other reason]. We express no opinion regarding the effect of the inclusion of that provision in [the Loan Agreement] upon the enforceability of the parties’ agreement to submit disputes to arbitration.] [or] [We express no opinion regarding the enforceability of [Section _____ of the Loan Agreement], which purports to submit disputes to arbitration.]

(9) We express no opinion regarding the enforceability of [set out any provision of the Loan Documents determined to provide for a penalty, liquidated damages, acceleration of future amounts due (other than principal) without appropriate discount to present value, late charges, prepayment charges, or increased interest rates upon default that is determined to be unenforceable for a reason other than one included within qualification (1).]

(10) We express no opinion as to the enforceability of any indemnification or contribution provisions in the Loan Documents (or other provisions having an effect similar to any of these types of provisions) to the extent that the enforceability of such provisions is limited by public policy or statutory provisions, or to the extent that such indemnification or similar provisions purport to indemnify a party against, or release a party from liability for, its own fraudulent or illegal actions or [gross] negligence.

This letter may be relied upon solely by the Lender for use in connection with the transactions contemplated by the Loan Agreement. No other party may rely upon this letter or the opinions expressed herein without our prior written consent.

Very truly yours,

ABLE & BAKER LLP