SAMPLE
CALIFORNIA THIRD-PARTY LEGAL OPINION
FOR BUSINESS TRANSACTIONS

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

REVISED
AUGUST 2014

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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
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
[Name of Lender], a National Banking Association

[Address of Lender]  

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In deference to long-standing custom, we refer to this letter as an “opinion” even though, in addition to legal opinions, it contains factual confirmations. We have suggested that any factual confirmation be presented in a separate section (here, Section “D”). This approach is already common in securities transactions, where “negative assurance” statements have traditionally been provided. See Task Force on Sec. Law Opinions, Comm. on Fed. Regulation of Sec., ABA Section of Bus. Law, Special Report: Negative Assurance in Securities Offerings (2008 Revision), 64 Bus. Law. 395 (2009) (hereinafter “Negative Assurance Report”).

As noted in the preface to this sample opinion, the sample does not specifically state that it is to be interpreted in accordance with the customary practice of lawyers giving opinions under California law; however, regardless of whether or not such a statement is included the opinion, the opinion should be interpreted in light of such customary practice. If the opinion preparers nonetheless want to include a reference to customary practice, one increasingly accepted method of doing so would be to refer to the Principles cited above. This could be done by including, either at the beginning or the end of the opinion, a statement such as: “This opinion letter shall be interpreted in accordance with the Legal Opinion Principles published by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law, 53 Bus. Law 831 (1998).”

2 By its nature, a third-party legal opinion speaks only as of the date it is issued. As such, it does not cover changes in law or fact that occur following the date of its issuance. See Principles, supra note 1, at 833.

3 The opinion will usually be issued in favor of an institution, rather than an individual, and will be addressed to the institution, and not to a specified individual at that institution. We have chosen to use an unsecured
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”).4 This opinion is delivered to you pursuant to Section __ of the Loan Agreement.5 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.

4 This sample opinion assumes that the Borrower is a California corporation, and that the Guarantor is a California limited liability company. Opinions for limited partnerships (while not illustrated in the sample opinion) are discussed in a report prepared by the Partnerships and LLC Committee. See Partnerships and Limited Liability Companies Comm. of the Bus. Law Section of the State Bar of Cal., Report on Legal Opinions Concerning California Partnerships (February 1998.) This report is also available at http://www.calbar.org/buslaw under the “Opinions Resources” tab.

5 It is common to state the context in which the opinion is rendered. Here, as is often the case, delivery of the opinion is a condition to the closing of the transaction and reference is made to the provision in the Loan Agreement requiring its delivery.
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

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6 The order in which the elements of a legal opinion are set forth varies from firm to firm. The order adopted in this sample follows basically that set out in the 2007 Business Transactions Report:

(1) introductory matters, such as the date, the identity of the opinion recipient, the role of the opinion giver giving the opinion, and the purpose for which the opinion is given; (2) a general or specific recitation of the documents and other factual and legal matters reviewed by the opinion giver, including in some instances a statement of reliance on various factual assumptions; (3) the legal conclusions expressed in the opinion, and any qualifications to the legal conclusions; (4) matters peculiar to the particular opinion, such as matters relative to opinions of local counsel in other jurisdictions and specific limitations on the use of the opinion; and (5) the signature of the opinion giver.

This form departs from this framework in one significant respect: it separates factual confirmations – whether or not traditionally expressed with the legal conclusions – from the legal conclusions by placing them in a separate Section D headed “Confirmations” immediately following the legal conclusions. See infra note 29.

7 Practice varies as to whether the opinion lists documents that the opinion preparers have reviewed for purposes of the opinion. See 2007 Business Transactions Report, supra note 1, at 24-32, for an extended discussion regarding the description of an opinion giver’s factual examination.

This sample opinion assumes that the Loan Agreement, Promissory Note and Guaranty state that they are governed by California law. For sample opinions specifically addressing the validity of a governing law clause in loan documents that select as the governing law the law of a state other than California, see the suggested language in note 23 below. Note that an enforceability opinion is understood as a matter of customary practice to cover – unless explicitly excluded – the enforceability of the choice of law clause. See 2007 Remedies Report, app. 10, at B-2. In commercial transactions involving not less than $250,000, a choice of California law is generally enforceable in California. See Cal. Civ. Code § 1646.5 (West 2011). For transactions involving less than $250,000, the transaction must have a sufficient relationship to California to support that choice of law under the traditional analysis in Restatement (Second) of Conflict of Laws § 187 (1971), applied in Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 462 (1992). In the assumed transaction upon which this sample opinion is based, if the loan is for $250,000 or more, section 1646.5 will support the choice of California law; if the loan were for less than $250,000, the opinion preparers would analyze the relationship of the transaction to California. Here, the organization of the Borrower and the Guarantor in California should be sufficient to support application of California law. See 2007 Remedies Report, supra note 1, app. 10, at B-1, citing Application Group, Inc. v. Hunter Group Inc., 61 Cal. App. 4th 881, 899 (1998).
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;\(^8\)

(vii) a Certificate of Status—Domestic Corporation with respect to the Borrower, issued by the California Secretary of State on ______;\(^9\)

(viii) the Articles of Organization of the Guarantor, certified by the California Secretary of State as of ______ and certified to us by an [officer]\(^10\) 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]\(^11\) of the Guarantor relating to the Loan;

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\(^8\) See 2007 Business Transactions Report, supra note 1, at 45-46, for a description of customary diligence with respect to the “duly authorized” opinion. While some opinion preparers may review the corporate minute books, others may rely upon a secretary’s certificate as to the adoption of the relevant resolutions. Id. (citing Cal. Corp. Code § 314 (West 2014) as to the legal effect of a copy of a resolution certified by a person purporting to be the secretary or an assistant secretary of the adopting corporation).

\(^9\) See 2007 Business Transactions Report, supra note 1, at 26-28, for a description of the certificates of public officials customarily relied upon. As the 2007 Business Transactions Report concludes, at least in routine cases, customary practice requires neither that every certificate be dated the date of the opinion nor that the opinion state that it is based solely on the certificates listed, without telephonic or other update. Id.

Some lawyers obtain a good standing letter from the Franchise Tax Board certifying good standing with that agency and thereby confirm that no suspension for nonpayment of taxes is imminent. The Committee believes that, absent some particular concern about tax delinquencies, customary practice does not require that a Franchise Tax Board letter be obtained in order to opine on the good standing of a California corporation. The Secretary of State’s good standing certificate would reflect whether or not as a result of a tax delinquency the corporation’s charter had been suspended or forfeited. See 2007 Business Transactions Report, supra note 1, at 42.

\(^10\) The certificate could come from a member, manager or officer depending upon the management structure of the LLC. See generally California LLC Report, supra note 1, at 2 (noting different permitted management structures of LLCs).

\(^11\) Who will need to take action on behalf of the LLC will be a function of its Articles of Organization and Operating Agreement. The California LLC Report states that the opinion giver is entitled to assume, without so stating, the legal capacity of natural persons who are members, managers and officers, as well as the fact that any entity member, manager or officer that is not a natural person has taken whatever internal entity proceedings (i.e.,
(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”);12

(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.13

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.14

12 Loan documents sometimes include a schedule of the Borrower’s material agreements; in that case, the opinion preparers commonly forego the receipt of a Certificate Relating to Agreements, and refer instead to the agreements and instruments identified on the relevant schedule. If the Borrower is an SEC reporting company, the opinion may instead refer to the material contracts filed as exhibits to the Borrower’s most recent annual report on Form 10-K, together with any subsequent reports on Forms 10-Q or 8-K.

13 This certificate addresses factual matters relevant to the Borrower and the Guarantor if not known to the opinion preparers. These can include matters such as the absence of dissolution proceedings and the absence (or identification) of pending litigation. Some opinion preparers omit this certificate and instead rely on the general statement about the making of “further legal and factual examination” to cover any such matters.

14 Some opinion preparers include a statement to the effect that they have not conducted a search of the docket of any court or other tribunal. According to the 1998 TriBar Report, no such disclaimer is necessary (and no such search is required in connection with a “no litigation” confirmation). 1998 TriBar Report, supra note 1, at
B. CERTAIN ASSUMPTIONS

We have assumed, for purposes of the opinions expressed below, that:15

15 The 1998 TriBar Report takes the view that express assumptions should be kept to a minimum. For example, the following assumptions, relating to facts that “are common to transactions generally and are customarily assumed as a matter of course,” are understood to be applicable whether or not stated:

• Legal capacity of individuals.
• That copies of documents furnished to the opinion givers conform to the originals.
• That the original documents furnished to the opinion givers are authentic.
• That the signatures on executed documents are genuine.
• That the agreement being opined upon is binding on the other parties to it.

Similarly, it is not necessary to separately state as an assumption that those who have approved an agreement have satisfied their fiduciary obligations and have disclosed any interest in the transaction 1998 TriBar Report, supra note 1, at 629, or that contracts covered by the “no breach” opinion that by their terms are governed by the laws of another jurisdiction whose law is not being covered in the opinion are being interpreted in accordance with their plain meaning. 1998 TriBar Report, supra note 1, at 660. All of these assumptions may be relied on and left unstated so long as they are not known to be false or reliance on them in the particular circumstance is unreasonable. 1998 TriBar Report, supra note 1, at 610.

The 2011 decision in Fortress Credit Corp. v. Dechert, LLP, 89 A.D. 3d 615, N.Y. App. Div. (2011), may lead some opinion givers to state expressly some or all of the assumptions of general applicability. This stems from the fact that the court in that case noted, as one of the bases for dismissing the action, that the opinion letter in question included an assumption regarding the genuineness of all signatures and the authenticity of the documents reviewed. Although the result in the case no doubt was correct, we believe that, in the absence of facts suggesting that the opinion preparers knew that the documents were not genuine, the case should ultimately have been decided the same way whether or not an express assumption had been included in the opinion letter. However, for many of the same reasons that some opinion givers are inclined to include an express reference to customary practice in their opinion letters whether through reference to the Principles or otherwise, (see, e.g., supra note 1), some opinion givers state some or all of the general assumptions. We believe that, whether or not assumptions of general application are stated, an opinion letter should be read as if they were stated – and the opinion preparers should not be responsible for affirmatively investigating their accuracy. We note that a “laundry list” approach to assumptions (and to qualifications/exceptions) – that is, utilizing a standard list of assumptions, qualifications or exceptions that may include assumptions, qualifications or exceptions that do not apply to the actual terms of the agreement(s) being considered – can impair the value of an opinion letter as a communications tool. See TriBar Opinion Comm., The Remedies Opinion -- Deciding When to Include Exceptions and Assumptions, 59 Bus. Law. 1483, 1486 (2004) [hereinafter “TriBar Remedies Opinion Report”].

In addition to assumptions of general application, opinion givers sometimes include express assumptions about matters that are not generally applicable to all opinions but are necessary for the particular opinions being given. Inclusion of these assumptions is required if they are to be relied on, and their inclusion shifts to the recipient the burden of confirming the matters assumed or taking the risk that they are not accurate. See 1998 TriBar Report, supra note 1, at 616.

(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.  

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16 The listed assumptions are frequently made by a California opinion preparer with respect to loans made by an institutional lender. Some opinion preparers omit (b) and/or (c) on the ground that the matters they address may be reasonable to assume without expressly stating them. For examples of other assumptions or qualifications relevant to a personal property secured loan, see the UCC Report, supra note 3, app. B. The 2007 Business Transactions Report also addresses other assumptions or qualifications that may be appropriate in given situations. See 2007 Business Transactions Report supra note 1, at 33-34.

Depending on the facts of a particular transaction, it may be possible to rely on an exemption from the California usury laws based on the nature of the transaction or borrower under the California Corporations Code, rather than the exempt status of the lender. See Cal. Corp. Code §§ 25116-25118 (West 2006). For example, section 25118 exempts a transaction involving one or more evidences of indebtedness aggregating at least $300,000 under certain circumstances. Id. If an exemption from usury laws is based on one of these statutory transaction exemptions, the opinion preparers would replace the assumptions in paragraphs (a)-(c) of the text of the sample opinion with assumptions supporting the basis for the chosen exemption.

If no exemption from the California usury laws is available, the opinion should at a minimum state that no opinion is expressed with respect to compliance with usury laws or the effect of non-compliance on the Loan Parties, since absent any such reservation, an opinion that a loan is enforceable includes an opinion that it is not usurious. That exception should ordinarily be included even if the stated interest rate does not exceed the usury ceiling because of the possibility that charges or other consideration together with the stated interest may exceed the usury ceiling. However, were the opinion preparers to conclude that, in their professional judgment, the loan is usurious, the opinion preparers should consider whether giving any enforceability opinion at all is appropriate. See, e.g., 2007 Business Transactions Report, supra note 1, at 20.

17 See generally 2007 Business Transactions Report, supra note 1, at 40 (reporting that practice has moved toward giving the “validly existing” opinion and away from the “duly incorporated” opinion). While one might debate whether a “due incorporation” opinion should require the opinion preparer to review the corporate law
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.\textsuperscript{18}

\textsuperscript{18} This sample opinion omits two common references in the “corporate power” opinion: the references after the words “corporate power” to “and authority,” and the reference to the power of the Borrower to “own and operate its assets.” The 2007 Business Transactions Report notes, with respect to these references:

Historically, the corporate power opinion included a reference to “authority” in addition to “power.” Because of concerns that a reference to “authority” could lead to a more expansive interpretation of the “corporate power” opinion, current practice appears to be moving away from including “authority.” However, the “corporate power” opinion is generally understood to have the same meaning whether or not “authority” is included and, to the extent that the word “authority” is included, it is generally understood to be limited to “corporate authority” even without the modifier “corporate” immediately preceding the word “authority.” In addition, the corporate power opinion has historically included an express opinion that the subject corporation has the corporate power to own and operate its assets. Current practice seems to be evolving away from this form of opinion in favor of limiting the “corporate power” opinion to the Company’s power to carry on its business as it is currently conducted.

2007 Business Transactions Report, supra note 1, at 44 (footnotes omitted).

Note that, if the corporate power opinion is written to extend beyond entering into and performing an agreement to the “power to carry on its business as it is currently conducted,” the opinion should be based on (in addition to review of the Borrower’s articles of incorporation, which are reviewed to confirm the absence of any limitations on corporate powers) an officer’s certificate or disclosure document describing that business. \textit{Id.}

Lastly, the opinion on corporate power to “perform” covers both the obligations in the Loan Documents that the Company is required to meet at closing and the obligations that the Company is required to perform

\begin{itemize}
\item [in effect at the time of incorporation and determine compliance with it, customary practice in California permits a “duly incorporated” opinion to be given based solely upon a certified copy of a California corporation’s articles of incorporation; the California Corporations Code provides that the articles, certified by the Secretary of State, are “conclusive” evidence of the corporation’s formation. Cal. Corp. Code § 209 (West 2014). As a result, the “due incorporation” opinion adds little of practical value to the “validly existing” opinion. A “duly organized” opinion, by contrast, encompasses not only incorporation, but also appointment of the initial board of directors, the adoption of the corporation’s bylaws, the election of officers, and the original authorization and issuance of shares, all in the context of the laws in existence at the time of incorporation. 2007 Business Transactions Report, supra note 1, at 41. Thus, conducting the necessary due diligence with respect to any corporation other than one that was recently formed can be onerous. The 2007 Business Transactions Report concludes that it “would be appropriate for an opinion giver to decline to give” such an opinion with respect to a given entity unless the opinion giver incorporated the entity—and notes that, even then, opinion givers more commonly give the much more limited “due incorporation” opinion. \textit{Id.}
\item [The “valid existence” opinion means that the corporation has not dissolved or ceased to exist and that no dissolution proceedings have been initiated. \textit{Id.} (also discussing the basis for giving this opinion). The “good standing” opinion means that the corporation’s charter has not been suspended or forfeited. See \textit{Id.}, at 42.
\item [This sample opinion omits the opinion that the Borrower is qualified to do business and is in good standing in any other jurisdiction. If given, this opinion is customarily based solely on a certificate from the foreign jurisdiction(s) in question, \textit{id.}, and would take the form of “The Borrower has qualified to do business and is in good standing in the state[s] of _____” [insert specific jurisdictions covered]. As such, the opinion adds little if anything to the information conveyed by the certificates themselves. The 2007 Business Transactions Report also notes that “[i]t is generally accepted that an opinion giver should not be asked for an opinion that the [entity being opined upon] is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on [it].” \textit{Id.}, at 43. See also Guidelines, supra note 1, at 879.
\end{itemize}
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.19

4. The Guarantor is a limited liability company existing and in good standing under the laws of the State of California.20

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19 See generally 2007 Business Transactions Report, supra note 1, at 45-48. This formulation of the due authorization and due execution and delivery opinion is not intended to have any meaning different than the formulation in the 2007 Business Transactions Report (i.e., “[t]he Agreement has been duly authorized by all necessary corporate actions on the part of the Company and has been duly executed and delivered by the Company”). The opinion means that the execution, delivery and performance of the relevant agreements have been authorized, and they have been executed by duly authorized officers or agents. In this context, whether or not it uses the word “perform”, the opinion is understood to mean as a matter of customary practice that the Company has taken all corporate action required to authorize its officers to bind the Company contractually to perform its obligations under the Loan Documents; the opinion is understood not to provide assurance that the Company has taken corporate action required to perform after the closing obligations in the Loan Documents when that action can only be appropriately taken at a future date. See Venture Opinion supra note 1 at n.48. The opinion is also understood not to cover authorizations required under laws other than the applicable corporation law. Id.

“Giving an opinion that a document has been ‘duly delivered’ generally means that the opinion giver is present at the delivery of the signed agreement or otherwise satisfied as to the implementation of procedures for actual delivery.” 2007 Business Transactions Report, supra note 1 at n.46. The opinion should omit the words “and delivered” if the opinion giver is not able to satisfy the requirements discussed in the 2007 Business Transactions Report with respect to the “duly delivered” opinion.

Closings today often are effected by an electronic exchange of signature pages. When the opinion preparers do not witness the physical execution of the signature pages, they are permitted, as a matter of customary practice, to assume, without so stating, that all signatures are genuine. See Venture Opinion, supra note 1 at n.49. In addition, customary practice permits the opinion preparers to assume, without so stating, that an electronic exchange of signature pages, coupled with express or implied authorization to attach them to the relevant documents, is an appropriate procedure to constitute actual delivery. Some opinion preparers are not comfortable relying on customary practice, however, and instead obtain an officer’s certificate regarding execution and delivery of the relevant documents and describe their reliance in the opinion letter as follows:

In rendering the opinion set forth in Section C, paragraph 3, concerning the Borrower’s execution and delivery of the Loan Documents, we have not necessarily observed their execution by the Borrower but have relied exclusively upon representations regarding the Borrower’s execution and delivery of the Loan Documents made to us in a certificate and our review of copies, facsimiles or .pdf files of executed signature pages delivered to us by representatives of the Borrower or its agents.

The Committee believes that either approach is acceptable.

20 See California LLC Report, supra note 1, at 2-5; TriBar Opinion Comm., Third-Party Closing Opinions: Limited Liability Companies, 61 Bus. Law. 679, 683-87 (2006) [hereinafter “TriBar LLC Report”]. This sample opinion does not track the language in the California LLC Report exactly. That report includes the words “duly formed” prior to the words “limited liability company.” California LLC Report, supra note 1, at 2. Rather, like the “due incorporation” opinion (see supra note 18), this opinion omits the phrase “duly formed” for the same reason that the valid existence opinion for the Borrower omits the words “duly incorporated.” See Cal. Corp. Code §
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.  

17702.01(e) (West 2014) (“[T]he filing of the articles of organization by the Secretary of State is conclusive proof that the organizer satisfied all conditions to the formation of a limited liability company.”).

Note that this opinion omits the word “validly” before “existing.” The California LLC Report states that the word “validly” is used in the corporate context to distinguish “de jure” from “de facto” corporations: the corporate opinion means that the corporation is a “de jure” corporation. See 2007 Business Transactions Report, supra note 1, at 41, California LLC Report, supra note 1, at 4. The California LLC Report states that since there is no judicial basis for such a distinction in the case of LLCs the term “validly” adds nothing to the opinion. See California LLC Report, supra note 1 at 4.

The California LLC Report further states that giving an “existence” opinion for a California LLC as is done here requires confirmation that the articles of organization have been filed, that the members have entered into an operating agreement, that no certificate of cancellation has been filed, and that the LLC has not merged or been converted into any other entity. California LLC Report, supra note 1, at 4. The California LLC Report notes that the California LLC statute does not use the phrase “duly organized,” and so the report states that there would be no difference between a “duly formed” and a “duly organized” opinion for a California LLC. See Id. at 3.

21 See California LLC Report, supra note 1, at 5-9; TriBar LLC Report, supra note 20, at 687-89. The California LLC Report notes that the wording “power and authority” is commonly requested and given in California opinion practice. California LLC Report, supra note 1, at 9. Although the words “and authority” – for the same reasons as stated supra note 18 with respect to the corporate authority opinion – are omitted from the sample opinion, addition of the words “and authority,” if requested, will not change the meaning of the opinion. As in the numbered opinion 3 above, the sample opinion here omits the “power to conduct business” opinion. The California LLC Report, supra note 1, at 5-9, contains an extensive discussion of the “power to conduct business” opinion with respect to a California LLC, which opinion if requested can be given by adding the words “and to carry on its business as it is currently conducted.” Note that if the opinion is expanded to include the power to conduct business (as opposed to simply the power to enter an agreement) the opinion preparers will establish that the business is of a type that can be conducted by a LLC. See Id. at 9-10. This sample opinion omits from the “power to conduct business” opinion reference to ownership of “property” or “assets” for the same reasons those references were omitted for corporations. See supra note 18.

22 See California LLC Report, supra note 1, at 9-10; TriBar LLC Report, supra note 20, at 689-90. As is the case in numbered opinion 3 with respect to a corporation, the opinion should omit the words “and delivered” if the opinion preparers are not able to satisfy the requirements discussed in the California LLC Report, supra note 1, at 13, with respect to the “duly delivered” opinion. See supra note 19 for a discussion of “performance” in the context of this opinion.

23 The 2007 Remedies Report, supra note 1, addresses the meaning and scope of this opinion. The 2007 Remedies Report sets forth the customary understanding of the meaning of the remedies opinion, which is that “(i) a contract has been formed, (ii) a remedy will be available in the event of a breach of the undertakings in the contract (or the undertakings will otherwise be given effect), and (iii) remedies in the contract will be given effect, unless, in the case of (ii) or (iii), expressly or implicitly excluded.” 2007 Remedies Report, supra note 1, at 3. Of course, in establishing whether or not a contract has been formed, the opinion preparers will need to confirm or assume the necessary predicates of that opinion, many of which are, by customary practice, assumed without so stating (as in
the case of capacity of individuals) or covered, as they are in this sample opinion, in other opinions that typically accompany a remedies opinion, such as (in the case of parties who are entities) the opinions addressing power and authority and due authorization.

The 2007 Remedies Report goes on to note:

[T]his report … concludes that the long-standing supposed continental divide over the meaning and scope of the remedies opinion - the “New York view” that it covers “each and every” provision of a contract versus the “California view” that it covers only the “essential provisions” - should no longer be of concern in opinion practice. Instead, the focus should be on customary practice. Customary practice comprises customary diligence (particularly the legal diligence customarily undertaken in giving a remedies opinion), customary competence, and customary usage (the customarily understood meaning of terms used in third-party legal opinions).

2007 Remedies Report, supra note 1, at 1.

Rendering a legal opinion in general – and giving an enforceability opinion in particular - requires that the opinion preparers conduct factual and legal diligence. A good discussion of customary factual diligence cited by the 2007 Remedies Report can be found in Article II of the 1998 TriBar Report. 1998 TriBar Report, supra note 1, at 608-19. Customary legal diligence, addressed in Appendix 8 of the 2007 Remedies Report, begins with a review by competent opinion preparers of the entire relevant contract or contracts. 2007 Remedies Report, supra note 1, app. 8. If a question about the enforceability of a particular provision of a relevant contract is identified, the preparers must determine whether the opinion covers the issue. If it does, they must determine whether the issue can be resolved. If the issue cannot be resolved, they should include an appropriate exception in the opinion. See 2007 Remedies Report, supra note 1, app. 8, at 7-8.

While the Committee notes that some opinion givers are of the view that no remedies opinion should be given when the documents in question select as their governing law the law of a state other than California, the Committee believes that practice “now greatly favors permitting the primary opinion giver to render an opinion to the effect that, if the law of the State of California were held to apply to the agreement, notwithstanding the choice of law of another jurisdiction, the agreement would be enforceable.” 2007 Remedies Report, supra note 1, app. 10, at B-1 (endnote 1). See also 2007 Remedies Report, supra note 1, app. 4, at 12 (also supporting the use of this so-called “as if” approach). If such an opinion is given, (assuming, for illustrative purposes, that the Loan Documents are governed by New York law), the lead-in to the enforceability opinion would be modified to read substantially as follows: “If a court were to apply the law of California to the interpretation and enforcement of the Loan Documents, rather than the law of New York as provided therein, the Loan Documents would be …” In addition, while not required, in such an event many lawyers modify the statement about the law covered by this opinion (which appears at the beginning of Section E (“Certain Qualifications”) of this sample opinion) by adding to it the following:

We note that the [Loan Documents] provide that they are to be governed by New York law. We express no opinion herein on New York law or the enforceability of the [Loan Documents] under New York law.

The “as if” remedies opinion does not cover the enforceability of the choice of law clause since it assumes that the choice of law clause is not enforced. See Tribar Remedies Opinion Report, supra note 15, at 1497 n.70 (“[The “as if” remedies] opinion has the same meaning as any other remedies opinion except that it does not address the enforceability of the chosen law provision.”). While some opinion givers take an exception to the coverage of an “as if” remedies opinion if the remedies opinion is not intended to address the enforceability under California law of the chosen law provisions of the Loan Documents, this is not required. If an express exception is desired, it may be done in a variety of ways, including by adding to the statement above a statement that no opinion is expressed on “the enforceability under California law of the choice of New York law in the Loan Documents.”

If there are sufficient contacts or bases to support the parties’ selection of the chosen law, and the Lender requests a specific opinion on the choice-of-law provision, a form for such an opinion follows:

In a proceeding in a court of the State of California for the enforcement of the Loan Agreement, and based on [describe contacts or bases for choosing law of
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.24

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:25

See 2007 Business Transactions Report, supra note 1, at 88-91; 2007 Remedies Report, supra note 1, app. 10, at B-1 - B-6. This opinion could be given as a supplement to the "as if" remedies opinion. This opinion could also be given as a stand-alone opinion, without any remedies opinion, if the Lender does not request an “as if” remedies opinion. See 2007 Business Transactions Report, supra note 1, at 90-91.

24 According to the 2007 Business Transactions Report:

This opinion is intended to give the opinion recipient comfort that the [Borrower] has obtained all necessary consents, approvals and orders and has made all filings and obtained all registrations and qualifications required on its part or for it to consummate the transaction. To a considerable extent this opinion overlaps the “no violation” opinion as it relates to applicable laws and the remedies opinion, if given.

2007 Business Transactions Report, supra note 1, at 61 (footnotes omitted). Note that, as drafted, this opinion covers “performance” of future obligations and, therefore, requires the opinion preparers to consider whether the future obligations under the Loan Documents are sufficiently clear that they can identify all of the consents and approvals required to perform these obligations. In most loan transactions future obligations will be sufficiently clear but they may not be in other contexts. See Venture Opinion, supra note 1 at n.63 (suggested form of opinion excluding “performance”).

Note that the 2014 revision to this sample opinion adds an express reference to the “Covered Law,” which is the law covered by the opinion and described in Section E. In so doing, the Committee has followed more closely the format in the Venture Opinion but does not believe that the reference changes the scope or meaning of this opinion.

25 See generally 2007 Business Transactions Report, supra note 1, at 48-64, for an explanation of the opinions set forth in this list. Some opinion givers prefer to avoid reference to “performance” here and in the consents and approvals opinion in paragraph 8 out of concern that the term could be construed to cover a broad range of future acts that may become necessary to comply with an agreement (e.g., making required governmental filings, such as SEC reports were they required for a particular transaction, that may well themselves require future corporate approvals); these opinion givers often refer instead to “consummation of the transaction” or, in a case such as the loan transaction considered in this sample opinion, “incurrence of the obligations under the Loan and application of the proceeds as contemplated by the Loan Documents.” When an opinion giver agrees to give an opinion on “performance” of all of the Company’s obligations under the Loan Documents, the opinion covers not only performance of those obligations at and before the closing but also obligations to be performed after the closing. See Donald W. Glazer, Scott FitzGibbon and Steven O. Weise, Glazer & FitzGibbon on Legal Opinions, §§ 13.2.3-16.3.7, at 548-552 and 602-07 (ed. 2008) (hereinafter “Glazer & FitzGibbon”); 1998 Tribar Report, supra note 1 at 657-658; 2007 Business Transactions Report, supra note 1 at 48-56 (discussing diligence required to address performance). As...
(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;26

(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]27; or

(d) violate any Covered Law (defined in Section E (“Certain Qualifications”) below) to which either the Borrower or the Guarantor is subject.28


26 It is preferable to give this opinion based on an agreed list of reviewed documents (as here), rather to make reference to a vague or insufficiently defined universe (as in “all agreements known to us”). The latter formulation is less certain and more susceptible to later disputes.

This opinion has been understood, if given without qualification of the type included here, to cover financial covenants contained in any covered agreements. However, in the 2007 revision of the 2007 Business Transactions Report, the Corporations Committee concluded that evaluating compliance with such covenants is beyond the professional competence of lawyers. Accordingly, opinion preparers often will (i) include an express assumption to the effect that the financial covenants will not be violated, (ii) include an express qualification disclaiming any opinion regarding the financial covenants, or (iii) rely on an officer’s certificate to the effect that the financial covenants will not be breached by the [Borrower’s] entry into the [Loan Documents]. See 2007 Business Transactions Report, supra note 1, at 51-52 n.161. The 2007 Business Transaction Report also included a formulation of this opinion that included the reference to clauses relating to “material adverse change” or similar concepts; as with financial covenants, opinion preparers are generally not in a position to determine the materiality of a change or event. Given these considerations, the Committee suggests the exclusion noted at the end of clause (b) in the text; use of this formulation ensures that the opinion will not cover matters that typically are outside the professional competence of lawyers.

27 The Committee believes that the trend in practice is toward the first formulation of this opinion, though the latter formulation is not uncommon and, with the statement (appearing in Section E (“Certain Qualifications”) of this sample opinion) as to what constitutes “knowledge” for purposes of this opinion, is also appropriate.

28 The “no violation” opinion should be understood to mean that neither the execution nor delivery by the Borrower or the Guarantor of the Loan Documents nor their performance of the Loan Documents will result in a fine, penalty or other similar sanction against the Borrower or the Guarantor under the Covered Law. See 2007 Business Transactions Report, supra note 1, at 55. The opinion does not cover the enforceability of the Loan Documents. Rather, that is a matter covered by the remedies opinion.

By customary usage, this opinion is limited to the law of the jurisdiction(s) expressly covered by the opinion, and excludes both local laws and certain regulatory laws. See generally 2007 Business Transactions
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.29

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29 In opinions rendered in many transactional contexts, including financing transactions, the opinion giver has traditionally been asked for a statement (based on the opinion giver’s knowledge) as to the absence of litigation against the Borrower, except as otherwise disclosed. This statement often is limited to litigation that adversely affects the transaction or that could have a material adverse effect on the Borrower. Despite the fact that this statement is actually a confirmation of a factual matter, it is often requested to be included with the legal opinions. This statement has traditionally been formulated as follows:

To our knowledge, except as listed on Schedule __ [to the Loan Agreement] [to this opinion], there is no action or proceeding pending or threatened in writing against either the Borrower or the Guarantor that may adversely affect the transactions contemplated by the Loan Documents or that may have a material adverse effect on the Borrower or the Guarantor.

The statement in the body of the sample opinion is not this “traditional” formulation. Rather, the text in the body of the sample opinion limits the confirmation to matters being handled by the opinion giver (echoing, in this regard, the long-accepted scope limitation on audit letter responses). It does not cover “investigations” because of the difficulty in determining whether they are ongoing or, if they ever were ongoing, have concluded. See, e.g., D. Glazer and A. Field, No-Litigation Opinions Can Be Risky Business, 14 Business Law Today 6 (2005) [hereinafter “No-Litigation Opinions”]. It is also limited to matters that relate to the transaction at hand, rather than being a more general “status” statement about the Borrower or the Guarantor.

These limitations allow the opinion preparers to avoid the need to rely, at least as heavily, on the traditional, and less satisfactory, “knowledge” and “materiality” limitations. It also avoids the fundamental problem with the traditional formulation, which is that it is a factual confirmation that is dependent (almost exclusively) on information supplied to the opinion preparers by the Borrower (and, in our example, the Guarantor). If the recipient wishes a factual confirmation that is broader than that suggested in the text, it is recommended that, rather than give this confirmation in its traditional form, the opinion recipient rely on an appropriate factual representation from the Borrower and the Guarantor. The 2007 Business Transactions Report and the 1998 TriBar Report reach a similar conclusion. See 2007 Business Transactions Report, supra note 1, at 64; 1998 TriBar Report, supra note 1, at 663-65.

The 2007 Business Transactions Report describes the meaning of the litigation confirmation and customary diligence. 2007 Business Transactions Report, supra note 1, at 62-64. See also infra note 33 and the related text for a discussion of the “knowledge” qualification. Note that the “knowledge” qualification, while helpful, may still require that opinion preparers, when faced with a circumstance that creates some doubt as to the accuracy of the confirmation, conduct additional inquiry before giving the confirmation. See generally No-Litigation Opinions, supra. Further, while the “traditional” formulation in this footnote states that the confirmation does not extend to litigation other than litigation that “may adversely affect the transactions contemplated by the Loan Agreement or that
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.”

30 By customary usage, the statement “[w]e express no opinion herein as to the application or effect of the law of any other jurisdiction” is understood even if not stated. 2007 Business Transactions Report, supra note 1, at 86-91; 1998 TriBar Report, supra note 1, at 631.

31 See 2007 Business Transactions Report, supra note 1, at 24-31, 56. While the 2014 revision to this sample opinion conforms this language more closely to that in the Venture Opinion by adding in the first sentence the phrase “...our opinions are limited to the...” laws that in our experience are typically applicable to transactions of the type exemplified by the Loan Documents” the change is not intended to change the meaning of the qualification. As noted in the 2010 version of this sample opinion, the sentence listing laws excluded from the scope of the opinion may be omitted without changing the scope of the opinion in transactions where the referenced laws would not
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.32

(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.33

(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.34

(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.]35

(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.]36

32 See 2007 Remedies Report, supra note 1, app. 10, at 3-9 (discussing the bankruptcy and equitable principles exceptions).

33 See generally 2007 Business Transactions Report, supra note 1, at 15-17, 32-34 (with respect to confirmations of fact and limitations on the basis of knowledge, respectively). Note that, if reference is not made to “knowledge” in numbered opinion 9(c) above, this definition of “knowledge” could be deleted from this opinion.

34 See 2007 Remedies Report, supra note 1, app. 10, at B-9 – B-11 (endnote 6 discusses waivers of the types addressed in clauses (i) – (iv) of the sample language). Note that this, and any of qualifications (3), (4), (5), (6), (7), (8) or (9), should be included in the opinion only if contractual provision(s) of the type addressed by the qualification are actually included in the Loan Documents.


36 See 2007 Remedies Report, supra note 1, app. 10, at B-13 – B-14 (endnote 13 discusses forum selection clauses and consents to jurisdiction).
(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.]\(^{37}\)

(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.\(^{38}\)

(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.]\(^{39}\)

\(^{37}\) See 2007 Remedies Report, supra note 1, app. 10, at B-15 – B-16 (endnote 15 discusses jury trial waivers).

\(^{38}\) See 2007 Remedies Report, supra note 1, app. 10, at B-18 – B-20 (endnote 18 discusses waivers of defenses available to guarantors).

\(^{39}\) See 2007 Remedies Report, supra note 1, app. 10, at B-22 – B-24 (endnote 20 discusses arbitration provisions). The enforceability of “judicial review” provisions is unsettled. Federal courts applying the Federal Arbitration Act, 9 USC § 1 et seq., (the “Arbitration Act”) will not enforce them, see Hall Street Assocs. LLC v. Mattel, Inc., 552 U.S. 576 (2008), but California courts may well, see Cable Connections, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 44 Cal. 4th 1334 (2008).

Since the publication of the original sample opinion in 2010, the Committee has noted a tendency of some opinion givers to exclude arbitration clauses from the coverage of their remedies opinion. Many recent judicial decisions have considered challenges to the enforceability of arbitration clauses. Both federal and California case law make clear that public policy strongly favors enforcement of arbitration agreements. In the past, California courts often held that particular arbitration clauses were unenforceable because they were unconscionable. See, e.g., Armendariz v. Foundation Health Psychcare Servs. Inc., 24 Cal. 4th 83, 87 (2000), Discover Bank v. Superior Court, (2005). The Arbitration Act generally provides that an agreement to arbitrate is enforceable, except on grounds that may exist for the revocation of any contract, such as unconscionability or fraud. In AT&T Mobility LLC v. Concepcion, (2011), the US Supreme Court concluded that the Arbitration Act preempted state law where the unconscionability was based on the terms of an arbitration clause itself and, therefore, held that the Arbitration Act preempted the holding in Discover Bank. Subsequently, the Supreme Court held that where the pro-arbitration policy of the Arbitration Act conflicts with the enforcement of another federal law (such as the antitrust law) under the terms of a particular arbitration agreement, the policies of the other law must give way so long as the other law does not otherwise provide. See, e.g., Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013). Applying Concepcion, California courts have upheld arbitration clauses and have not allowed class arbitrations in the absence of an agreement permitting class arbitration. See Truly Nolen of America v. Superior Court, 208 Cal. App. 4th 487 (2012); see also Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109 (2013), cert. denied, 134 S. Ct. 2724 (2014) (under the
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).]  

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.

Arbitration Act, courts applying state unconscionability principles cannot mandate procedural rules that are inconsistent with fundamental attributes of arbitration; however a court applying an unconscionability analysis may consider the value of benefits provided to employees by state statutes in determining whether a particular arbitral scheme provides an accessible, affordable process for resolving wage disputes. See also Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014) (class action waivers in arbitration clauses in labor contracts are enforceable under the Arbitration Act; however, the Arbitration Act does not preempt state law that provides for unenforceability of waiver of the rights of aggrieved persons to bring court actions as designated actors for the State). As a result of the US Supreme Court decisions, the Committee believes that as a general rule opinion givers need not include an exception for the enforceability of arbitration clauses in agreements among commercial parties in loan financings. Nevertheless, many opinion givers remain uncomfortable giving opinions on the enforceability of arbitration clauses, because they believe that: (1) the law is not completely settled, (2) they do not closely follow developments in the law in this area, or (3) although arbitration clauses may be generally enforceable, they are unsure whether certain provisions of the arbitration clause are enforceable such that unenforceability of the particular provision might render the entire arbitration clause unenforceable because the unenforceable provision “permeates” the entire arbitration provision. In the case of such uncertainty, opinion givers may consider including the latter broader qualification (and may find that in many cases opinion recipients are willing to accept it).

See 2007 Remedies Report, supra note 1, app. 10, at B-7 – B-9 (endnote 3 discusses penalty provisions). The enforceability of these provisions generally turns on their reasonableness. Opinion preparers “should not be expected to determine whether a given economic remedy is reasonable, and ...as a matter of customary practice a remedies opinion is understood as not extending to the reasonableness of such remedies.” Id.

2007 Remedies Report, supra note 1, app. 10, at B-26 – B-31 (endnotes 23 and 25 discuss indemnities). This provision tracks its counterpart in the Venture Opinion. It is not intended to change the meaning of the exception previously included in the exceptions in clause (3) above but makes the exception clearer. See Venture Opinion, supra note 1 at n.88. Note that the sample language does not take an exception for negligence; opinion givers should confirm that the provision is sufficiently clear that it covers negligent acts of the indemnified party in which case the brackets around “gross” should be removed. See 2007 Remedies Report, supra note 1, app. 10, at B-26-B-28.

This sample takes the traditional approach to reliance: namely, only those to whom the opinion is addressed may rely on it. It does not limit the ability of the recipient to provide copies, however, to others. If a limitation on distribution of copies is intended, it should be added, using language such as the following:

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40 See 2007 Remedies Report, supra note 1, app. 10, at B-7 – B-9 (endnote 3 discusses penalty provisions). The enforceability of these provisions generally turns on their reasonableness. Opinion preparers “should not be expected to determine whether a given economic remedy is reasonable, and ...as a matter of customary practice a remedies opinion is understood as not extending to the reasonableness of such remedies.” Id.

41 2007 Remedies Report, supra note 1, app. 10, at B-26 – B-31 (endnotes 23 and 25 discuss indemnities). This provision tracks its counterpart in the Venture Opinion. It is not intended to change the meaning of the exception previously included in the exceptions in clause (3) above but makes the exception clearer. See Venture Opinion, supra note 1 at n.88. Note that the sample language does not take an exception for negligence; opinion givers should confirm that the provision is sufficiently clear that it covers negligent acts of the indemnified party in which case the brackets around “gross” should be removed. See 2007 Remedies Report, supra note 1, app. 10, at B-26-B-28.

42 This sample takes the traditional approach to reliance: namely, only those to whom the opinion is addressed may rely on it. It does not limit the ability of the recipient to provide copies, however, to others. If a limitation on distribution of copies is intended, it should be added, using language such as the following:
Very truly yours,

Copies of this letter may not be furnished to any other party, nor may any portion of this letter be quoted, circulated or referred to in any other document, without our prior written consent.


Opinion recipients may request that specified third parties (such as assignees) be allowed to rely on the opinion. As a general rule, careful attention should be given to whether parties other than the addressee should be allowed to rely on the opinion and/or any confirmation. See, e.g., R. Ryan, The Role of Lead Counsel in Syndicated Lending Transactions, 64 Bus. Law. 783, 790-91 (2009) (discussing reliance by assignees); Negative Assurance Report, supra note 1, at 405 n.57 (discussing restricting access to negative assurance confirmations). The preferred practice is to address the opinion to any persons (if known) who are allowed to rely on it, or, if not known, to clearly define the universe of such persons. An example of language allowing reliance by permitted assignees under the Loan Documents follows:

At your request, we consent to reliance on this letter by any future assignee of your interest in the loans under the Loan Agreement pursuant to an assignment that is made and consented to in accordance with the provisions of Section [___] of the Loan Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time. In no event may an assignee rely on this letter to any extent greater than could the original addressee.

Exceptions may also be requested when the opinion giver seeks to prohibit the sharing of copies as stated above. An example of language allowing additional parties to see the letter (but not to rely on it), follows:

Notwithstanding the foregoing, a named addressee hereof may furnish a copy of this letter: (a) to any applicable rating agency involved with, or institution providing credit enhancement, liquidity support or reinsurance in connection with, the transactions contemplated by the Loan Documents (the “Transactions”); (b) to the independent auditors and lawyers advising such addressee in connection with the Transactions; (c) to any governmental authority having regulatory authority over such addressee; (d) to the permitted assigns, participants and successors (both actual and prospective) of such addressee under the Loan Documents; or (e) pursuant to court order or legal process of any court or governmental agency or as otherwise required by applicable law; provided that none of the foregoing may rely on this letter (unless specifically authorized to do so herein) or further circulate, quote or otherwise refer to this letter (except with our prior written consent or as otherwise required pursuant to any court order or legal process of any court or governmental agency or pursuant to applicable law).