# After the Loan is Closed—Attorneys' Opinions in Connection with Loan Assumptions, Modifications and Defeasances

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## Opinion Letters
## For
## Loan Modifications and Defeasances

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## I. Loan Modifications

**A. Introduction.** After a real estate loan is closed, the borrower and the lender may agree, for a variety of reasons, to modify the terms of the loan. Particularly in a down market, the borrower may need to modify the loan, for example, in order to obtain relief from amortization requirements or to extend the term of the loan because of difficulty in obtaining refinancing from other lenders. Although minor modifications to relatively small mortgage loans may not involve a requirement for the borrower's counsel to issue an opinion letter as to the modification documents, it is common for such an opinion letter to be required in material modifications in larger transactions. In those situations, the borrower's counsel needs to consider the appropriate scope of such opinions as compared to the opinions for the original loan closing and, correspondingly, the assumptions and qualifications that apply to those opinions.

**B. Core Opinions Required**. Typically, the core opinions required by a lender in a loan modification will cover the same general areas as those covered in an opinion letter issued in connection with the original loan closing, except that the opinions address the documents that modify the original loan documents. Accordingly, substantially the same due diligence will be required for the loan modification opinion letter as for the opinion letter in the original closing, such as confirmation of the organizational status of the borrower, review of authorizing resolutions, etc. The following are the typical opinions required:

1. Organizational Status of the Borrower.

   *The Borrower is a validly existing [corporation][limited liability company] in good standing under the laws of the State.*

2. Power and Authority of the Borrower.

   *The Borrower has the [corporate power][limited liability company] and authority to execute, deliver and perform the terms and provisions of each Modification Document to which it is a party and has taken all necessary[ corporate][limited liability company] action to authorize the execution, delivery and performance thereof.*

3. Execution and Delivery.

   *The Borrower has duly executed and delivered the Modification Documents to which it is a party.*

4. Enforceability.

   *The Modification Documents to which the Borrower is a party are valid and binding obligations of the Borrower, enforceable against the Borrower in accordance with their terms. [Alternative: The Modification Documents to which the Borrower is a party and the Original Loan Documents to which the Borrower is a party, as modified by the Modification Documents, are valid and binding obligations of the Borrower, enforceable against the Borrower in accordance with their terms.]*

5. Noncontravention.

   *Neither the execution, delivery and performance by the Borrower of any of the Modification Documents to which it is a party, nor the compliance by the Borrower with the terms and provisions thereof, (a) violates any present law, statute or regulation of the State that, in each instance, is applicable to the Borrower or (b) violates any provision of the articles of incorporation or bylaws of the Borrower.*

**C. Meaning of the Enforceability Opinion as to Loan Modification Documents.** What does an opinion that the modification documents are enforceable against the borrower, as distinguished from an enforceability opinion on the original loan documents, really mean? Opinion givers and opinion recipients may not be in total agreement on this.

1. Contractually Binding. Both opinion givers and opinion recipients probably would agree that an opinion that the modification documents are "valid and binding" against the borrower means that the borrower is contractually bound by the modification documents to which it is a party. This would include those provisions of the modification documents that do not specifically purport to modify the original loan documents, such as the typical "boiler plate" found in most loan modification documents.

2. Effective to Modify Original Loan Documents. Opinion recipients, and most opinion givers, also believe that an opinion that the loan modification documents are "valid, binding and enforceable" means that the modification documents are effective to modify the original loan documents in the manner stated in the modification documents. Some opinion givers may argue such an interpretation requires more than a simple enforceability opinion, just as many opinion givers do not consider an enforceability opinion on a mortgage, without more, to mean that the mortgage is effective to grant a lien on the real estate or to create a security interest in the personal property. However, clearly opinion recipients would argue that an opinion that the loan modification documents are effective to modify the original loan documents goes to the very heart of the loan modification transaction and is the primary reason for requesting the enforceability opinion to begin with. For opinion givers to assume otherwise, even if they may take intellectual satisfaction in the rightness of their argument, may expose them to substantial risk that a court would side with the opinion recipient's interpretation.

3. Enforceability of Original Loan Documents. Almost all opinion givers probably would argue, and most opinion recipients would probably agree, that an enforceability opinion as to loan modification documents does not mean that that the original loan documents themselves, or the original loan documents as modified by the loan modification documents, are valid, binding and enforceable, unless the opinion specifically states as much. However, this does not necessarily mean that the opinion giver can ignore the original loan documents and issue an enforceability opinion on the modification documents without reviewing, at least on a cursory basis, the original loan documents. If a modification document, for example, purports to amend Section 5(c) of the loan agreement in a certain way, the opinion giver at least should review Section 5(c) and all other provisions in the original loan documents that are purportedly modified to confirm that the language of the loan modification agreements makes sense in the context of the overall transaction.

**D. Additional Assumptions and Qualifications for the Enforceability Opinion on Loan Modification Documents.**

1. Customary Assumptions and Qualifications. All of the customary assumptions, exclusions and qualifications that would apply to an enforceability opinion issued in connection with the original loan documents generally should be included in an opinion letter addressing the enforceability of loan modification documents. However, some of those qualifications may be unnecessary, depending on the scope of the opinion requested. For example, many opinion givers routinely include in their opinion letters, in addition to the customary bankruptcy and equitable principles qualifications, a qualification that certain other provisions of the loan documents may be unenforceable, usually with the statement that the loan documents contain adequate remedial provisions for the ultimate practical realization of the principal benefits intended to be afforded by the documents. This sort of "catch all" qualification may not be appropriate if the enforceability opinion relates only to the modification documents (as opposed to the original loan documents *as modified by* the modification documents) and if the modification documents merely purport to modify certain provisions of the original loan documents and do not purport to grant any remedies separate and apart from the original loan documents.

2. Assumption as to Enforceability of Original Loan Documents. Perhaps the most common assumption that is added to an opinion letter on the enforceability of loan modification documents is to the effect that the original loan documents are themselves valid, binding and enforceable. Although it may be argued that an enforceability opinion on loan modification documents can stand alone without specifically addressing the underlying loan documents, most lawyers would question whether loan modification documents can be effective to modify other documents, and enforceable in accordance with their terms, if the original loan documents themselves are not in effect or are not valid and binding against the borrower and the other parties. Inasmuch as "enforceability" of the original loan documents really subsumes several other concepts, the assumption may be addressed to cover the following issues:

    (a) The parties to the original loan documents, at the time the original loan documents were executed and on the effective date of the loan modification documents, (i) were and are either natural persons or validly existing entities in good standing and (ii) had and have the legal capacity and power and authority to enter into and perform the original loan documents.

(b) The original loan documents were duly authorized by all necessary action on the part of the parties thereto.

(c) The original loan documents were duly executed and delivered by the parties thereto.

(d) The original loan documents are valid and binding obligations of the parties thereto enforceable in accordance with their terms.

(e) The original loan documents are in full force and effect.

If the law firm representing the borrower in connection with the loan modification transaction represented the borrower and rendered an enforceability opinion in the original loan transaction, the lender may object to the foregoing assumptions, and borrower's counsel may decide to forgo them. However, before eliminating these assumptions, consideration should be given to, among other things, whether (i) the same lawyers are involved in both the original closing and the loan modification, (ii) there is any question concerning the due diligence that was undertaken in the original closing and (iii) any laws may have changed since the original opinion letter was issued. If the enforceability opinion to be issued in connection with the loan modification relates only to the modification documents and not the original loan documents, as modified, and if the statute of limitations has run with respect to the earlier opinion letter, eliminating these assumptions may also result in an implicit ratification of the earlier opinion letter.

3. Assumption as to No Amendments. It is also appropriate for borrower's counsel to assume that the original loan documents have not been modified previously (unless otherwise identified in the opinion letter). Borrower's counsel may also assume that the parties have not waived any provisions of the original loan documents expressly or by course of conduct, although this may not be a necessary assumption if the enforceability opinion is limited to the loan modification documents (or the assumption may be limited to nonwaiver of those provisions in the original loan documents being modified).

4. Exclusion of Opinion as to Original Loan Documents. If the enforceability opinion being issued in connection with the loan modification is limited to the modification documents, as opposed to the loan documents as modified by the modification documents, the opinion letter should specifically state that no opinion is given as to the enforceability of the original loan documents. This exclusion applies

even if an assumption was made that the original loan documents are enforceable and in effect, which assumption merely permits the opinion giver to opine as to the enforceability of the loan modification documents but does not address the scope of the opinions in the opinion letter. It is typical, for example, for loan modification documents to state that the borrower ratifies and reaffirms all of the terms and conditions of the original loan documents. Arguably, an enforceability opinion on the loan modification documents implicitly includes the enforceability of the original loan documents that are ratified and reaffirmed. Even if the borrower's counsel issued an enforceability opinion in connection with the original closing, the foregoing exclusion can still be stated but with reference to the original opinion letter regarding enforceability of the original loan documents, thereby avoiding a restatement of the original opinion letter as to which the statute of limitations may have already run.

**E. Sample Opinion Letter on Loan Modification Documents Only.** Attached as Appendix A is a sample opinion letter relating to, among other things, the enforceability of the loan modification documents rather than the original loan documents.

**F. Enforceability Opinion on Original Loan Documents as Modified.** Lender's counsel often requests borrower's counsel to opine not only that the loan modification documents are enforceable, but also that the original loan documents, as modified by the modification documents, are valid, binding and enforceable. This may prompt an exchange of views between borrower's counsel and lender's counsel on the reasonableness of such a request.

1. Why this Opinion Should Not Be Given. There are several arguments that borrower's counsel may consider in objecting to such a request:

   (a) First and perhaps most important, the cost of the due diligence for such opinion may not be justified, especially if the loan amount is relatively small or the modification is relatively minor. This is especially true if borrower's counsel did not issue the original opinion letter. In order to give the opinion, borrower's counsel will presumably need to review the original loan documents carefully, not just the loan modification documents, and ascertain, for example, whether any questionable provisions of the original loan documents need to be addressed in the opinion letter qualifications. Moreover, arguably borrower's counsel needs to reconfirm all of the due diligence regarding the power and authority of the borrower to enter into the original loan documents.

(b) The lender already has an opinion letter on the enforceability of the original loan documents and should be willing to rely on that opinion letter rather requesting a new one.

(c) From a risk management standpoint, borrower's counsel may also consider, though not necessarily communicate this to lender's counsel, that every opinion letter issued by the law firm involves some potential for a mistake to have been made that would result in liability for the law firm. Even if borrower's counsel is not aware of any defect in the prior opinion letter, why run the risk of repeating a mistake by restating the opinions from a prior transaction?

2. Why this Opinion is Appropriate. Lender's counsel can make several arguments as well in support of its position:

(a) The lender should have reasonable assurances that, once the original loan documents are modified, all of the documents governing the relationship between the parties still function properly and can be relied upon as enforceable, not just the most recent modification documents. If there is some question whether the original loan documents, as modified, are fully enforceable (subject, of course, to the customary qualifications), the lender needs to know that.

(b) The cost of opining as to the original loan documents, as modified, should not be significantly greater than opining only as to the loan modification documents, particularly if borrower's counsel represented the borrower in the original loan closing. Even if borrower's counsel is new to the transaction, he or she will need to review the original loan documents to some extent anyway in order to give the opinion on the modification documents.

(c) The golden rule.

**G. Opinions as to Liens.**

1. Title Insurance. To the extent that a lender seeks assurances as to the continuing validity, perfection and priority of the mortgage lien granted in connection with the original loan, an endorsement to the original lender's title insurance policy, reflecting the loan modification documents as appropriate and updating the effective date of the original policy, should more than suffice to provide such assurances in lieu of an opinion of borrower's counsel on those issues.

2. Additional Collateral. To the extent that the loan modification involves additional collateral, it may be appropriate to request an opinion as to the validity of the lien on the additional collateral, at least if such an opinion was given in connection with the original loan closing.

3. Effect on Priority. Lender's counsel occasionally may request an opinion that modifying the original loan documents does not affect the priority of the mortgage or deed of trust. This is an opinion that should be avoided. First, as noted above, an endorsement to the title insurance policy reflecting a modification to the mortgage or deed of trust and updating the effective date provides better assurance to the lender than an opinion of counsel. Even if there is no modification to the mortgage or deed of trust resulting from the loan modification (in which case the title company has no recordable document to reference in an endorsement), an opinion that the modification does not affect the priority of the mortgage or deed of trust is not advisable. The general rule at common law is that intervening lienors are not subject to modifications of prior liens if the effect of those modifications materially prejudices the intervening lienors. *See* Restatement (3d) Property (Mortgages) § 7.3. Determining whether a modification would be materially prejudicial to possible intervening lienors requires borrower's counsel to make a judgment call that generally would not be appropriate in an opinion letter.

4. UCC Security Interest. Unless the borrower in the loan modification is different from the borrower in the original loan likely be flied in connection with the loan modification) or additional personal property collateral is being pledged, there should be no need to opine as to the continuing validity and perfection of a UCC security interest granted by the original loan documents, as no new financing statement or amendment to a financing statement is required to be filed if certain of the loan terms are being modified. On the other hand, if the loan is also being assumed by a new borrower in connection with the modification, a new financing statement or an amendment to the original financing statement would probably be filed, and an opinion as to the continuing perfection of the UCC security interest may be appropriate.

**H. Restated Loan Documents.** If the loan modification involves not just amending the original loan documents but also restating them in their entirety, it is generally appropriate for the lender to request borrower's counsel to provide a comprehensive opinion letter on the amended and restated documents comparable to the opinion letter required for the original loan closing.

(d) Assumption as to Original Loan Documents. If each of the restated loan documents properly state that they restate and supersede in their entirety the corresponding original loan documents, it should not be necessary to *assume* the validity and enforceability of the original loan documents, although borrower's counsel may want to specifically *exclude* the original loan documents from the opinions.

(e) Parties Executing Restated Documents. Note that, in order for the original loan documents to be effectively amended and restated, it may be necessary for all parties, including the lender and the trustee under any deed of trust, to execute the restated documents.

**I. Sample Opinion Letter on Original Loan Documents as Modified.** Attached as Appendix B to this outline is a sample opinion letter relating to, among other things, the enforceability of the original loan documents as modified, a loan assumption and the continuing UCC security interest.

## II. Defeasances

**A. Introduction.** As more and more commercial real estate loans are securitized, defeasances have become a common means to "pay off" or refinance such loans. Although a mortgage loan placed in a securitzation program typically cannot be paid off for an extended period of time after it is originated, the loan documents usually will permit, following the expiration of any initial "lockout" period, the loan to be defeased in the manner described below. The defeasance permits the bonds issued by the REMIC that holds the mortgage loan to remain outstanding rather than having to be partially redeemed every time a loan is paid off. As a condition to permitting a defeasance, however, the lender typically requires an opinion from borrower's counsel regarding the defeasance documents.

**B. Defeasance Process.** In a defeasance, the loan is not paid off and principal and interest continue to be payable in accordance with the terms of the note evidencing the loan. However, the borrower purchases U.S. Treasury securities in an amount that will generate sufficient payments to cover the debt service on the loan and with a maturity that matches the maturity of the loan or at least the date by which prepayment of the loan is finally permitted. The U.S. Treasury securities are then pledged to the REMIC to secure the loan. The borrower also assigns the note to a bankruptcy remote, special purpose entity, frequently referred to as the "successor borrower," formed solely for the purpose of assuming the obligation to pay the note in accordance with its terms. Upon completion of the foregoing, the REMIC will release the lien of the mortgage or deed of trust securing the loan from the property so that it may be sold or refinanced.

**C. Defeasance Documents.** In a defeasance transaction, the following documents are typically used:

(i) an Account Agreement among the borrower, a securities intermediary, the REMIC and the servicer, pursuant to which an account is established with the securities intermediary to hold the U.S. Treasury securities;

(ii) a Pledge Agreement among the borrower, the REMIC and the securities intermediary, pursuant to which the borrower pledges the U.S. Treasury securities to the REMIC as security for the loan; and

(iii) an Assignment, Assumption and Release Agreement among the borrower, the successor borrower, the REMIC, the servicer and the securities intermediary, pursuant to which the borrower assigns its loan obligations and its interest in the pledged securities and the defeasance documents to the successor borrower, the successor borrower assumes (on a nonrecourse basis) the borrower's loan obligations and its obligations under the defeasance documents, and the borrower is released (subject to certain exceptions) from liability under the loan documents arising after the date of the assignment.

**D. Defeasance Opinions.** Opinions required from borrower's counsel in defeasance transactions tend to cover the same areas as an opinion for the original loan transaction, except that the opinions address the defeasance documents rather than the underlying loan documents. Thus, borrower's counsel will be expected to opine as to the borrower's organizational status, power and authority to enter into the defeasance documents, due authorization, execution and delivery of the defeasance documents, enforceability of the defeasance documents against the borrower and noncontravention with the borrower's organizational documents, etc.

1. Enforceability Opinions. Although the opinions required of borrower's counsel in a defeasance are not particularly challenging, the defeasance documents often are governed by the law of a state (such as New York) other than the state in which the property is located. In such cases, borrower's counsel may not be in a position to give the enforceability opinion if he or she does not practice in that state. However, if the borrower has retained a professional defeasance consultant, often the consultant's counsel will be able to provide the enforceability opinion so that borrower's counsel can limit its opinion to the other areas described above.

2. UCC Security Interest. In some cases, the lender may require an opinion to the effect that (i) the pledge by the borrower of the U.S. Treasury securities is effective to create a valid security interest under the UCC, (ii) such security interest is perfected and (iii) such security interest is a first priority security interest. Usually this opinion is given by counsel to the lender or successor borrower, but occasionally it is requested of borrower's counsel. Such an opinion requires an understanding of Article

8 and Article 9 of the UCC and of U.S. Treasury regulations that many real estate attorneys do not typically develop in a normal real estate finance practice. Care therefore should be taken before undertaking such an opinion, and UCC experts in the law firm representing the borrower should be consulted.

3. Addressees. Typically, an opinion with respect to defeasance documents is addressed to the REMIC, the servicer and applicable rating agencies.

4. Mortgage Recording Tax. In states such as New York with high mortgage recording tax, the defeasance may be structured somewhat differently to avoid the tax, and this may prompt the lender to request an opinion that the mortgage recording tax is not due.

   (a) In a typical refinancing in such states, the original mortgage and promissory note are assigned to the new lender and are then amended and restated to conform to the new loan terms. No mortgage recording tax is paid on the amended and restated mortgage. In a defeasance, however, the note is normally assigned to the successor borrower, the original mortgage is released, and a new note and mortgage are used for the refinanced loan. Unfortunately, this generally causes mortgage recording tax to be due on the new mortgage.

   (b) To avoid mortgage recording tax in a defeasance, a new note is signed by the borrower just before the defeasance, with the same payment terms as the original note. The new note is delivered to the new lender and the U.S. Treasury securities are pledged to secure the new note. The new lender then transfers the new note and the pledged securities to the REMIC, and the REMIC transfers to the new lender the original note and the original mortgage. The successor borrower assumes the new note, and the original borrower is released from liability under the new note. The original borrower and new lender then amend and restate the original note and the original mortgage.

   (c) If the lender requests an opinion that such a structure does in fact avoid the payment of mortgage recording tax, borrower's counsel obviously will need to consult the specific state law governing such taxes. New York's Department of Taxation and Finance issued an advisory opinion (No. TSB-A-00(1)(R)) on the subject on February 25, 2000.

**E. Sample Opinion Letter for Defeasance Transaction.** Attached to this outline as Appendix C is a sample opinion letter for a defeasance transaction, including an

enforceability opinion as to the defeasance documents and a UCC opinion as to the pledge of the U.S. Treasury securities.

**Appendices**

A—Sample Form of Opinion Letter for Loan Modification Documents
B—Sample Form of Opinion Letter for Original Loan Documents, as modified
C—Sample Form of Opinion Letter for Defeasance

**Appendix A**

**[LETTERHEAD OF BORROWER'S COUNSEL]**

[Date]

Institutional Lender, N.A.
[Address]

**ABC Borrower, LLC**

Ladies and Gentlemen:

We have acted as special counsel to ABC Borrower, LLC, a _____ limited liability company (the "Borrower"), and ABC Guarantor, Inc., a _____ corporation (the "Guarantor"; the Borrower and the Guarlantor are collectively referred to as the "Borrower Parties" and individually as a "Borrower Party"), in connection with the transactions contemplated by the First Amendment to Loan Agreement dated as of _____ (the "Amendment Agreement") between the Borrower and Institutional Lender, N.A. (the "Lender"). This opinion letter is furnished to you at the request of the Borrower Parties in order to satisfy conditions to the closing of the transactions contemplated by the Amendment Agreement. Unless otherwise defined herein, terms used herein have the meanings provided in the Amendment Agreement.

In connection with this opinion letter, we have examined the following documents, each of which is dated as of the date of the Amendment Agreement unless otherwise indicated:

(a) the Amendment Agreement;

(b) the First Amendment to Promissory Note between the Borrower and the Lender;

(c) the First Amendment to Deed of Trust, Security Agreement, Assignment of Rents and Leases and Fixture Filing among the Borrower, John A. Smith, as trustee, and the Lender; and

(d) the First Amendment to Nonrecourse Carveout Guaranty between the Guarantor and the Lender.

The documents referred to in clauses (a) through (d) above are referred to collectively as the "Subject Documents" and individually as a "Subject Document."

In addition we have examined and relied upon the following:

(i) a certificate from the Guarantor, as sole member of the Borrower, certifying as to true and correct copies of the articles of organization and operating agreement of the Borrower (the "Borrower Organizational Documents");

(ii) a certificate from the corporate secretary of the Guarantor, certifying as to (A) true and correct copies of the articles of incorporation and bylaws of the Guarantor (collectively with the Borrower Organizational Documents, the "Organizational Documents"), (B) board of directors resolutions of the Guarantor authorizing the execution and delivery of the Subject Documents by the Guarantor, individually and as sole member of the Borrower, as applicable, and (C) the incumbency and specimen signatures of the person(s) executing the Subject Documents on behalf of the Guarantor

(iii) a certificate issued by the _____ Secretary of State (the "SOS") attesting that the certificate of organization of the Borrower was issued by the SOS and is in effect (the "Borrower Certificate of Fact");

(iv) a certificate issued by the SOS attesting to the continued existence and good standing of the Guarantor in the State of _____ (collectively with the Borrower Certificate of Fact, the "Good Standing Certificates" and, individually, a "Good Standing Certificate"); and

(v) originals, or copies identified to our satisfaction as being true copies, of such other records, documents and other instruments as we have deemed necessary for the purposes of this opinion letter.

For all purposes of the opinions expressed herein, we have assumed, without independent investigation, that:

(a) Factual Matters. With regard to factual matters, to the extent that we have reviewed and relied upon (a) certificates of the Borrower Parties or authorized representatives thereof, (b) representations of the Borrower Parties set forth in the Subject Documents and (c) certificates and assurances from public officials, all of such certificates, representations and assurances are accurate;

(b) Authentic and Conforming Documents. All documents submitted to us as originals are authentic, complete and accurate, and all documents submitted to us as copies conform to authentic original documents;

(c) Signatures. The signatures of individuals signing the Subject Documents are genuine;

(d) Subject Documents Authorized and Binding on Certain Parties. Except with respect to the Borrower Parties, all of the Subject Documents and the documents required or permitted to be delivered thereunder have been duly authorized by all necessary action on the part of the parties thereto. Except with respect to the Borrower Parties, all of the Subject Documents have been duly executed and delivered by the parties thereto and, except with respect to the Borrower Parties, are legal, valid and binding obligations enforceable against such parties in accordance with their terms;

(e) Accurate Description of Parties' Understanding. The Subject Documents accurately describe and contain the mutual understanding of the parties, and there are no oral or written statements or agreements that modify, amend or vary, or purport to modify, amend or vary, any of the terms thereof; and

(f) Original Loan Documents. The Original Loan Documents (as defined in the Amendment Agreement) are valid and binding obligations enforceable against the parties thereto in accordance with their terms.

Based on and subject to the foregoing and the other limitations, assumptions, qualifications and exclusions set forth in this opinion letter, we are of the opinion that:

1. Organizational Status. The Borrower is validly existing as a limited liability company under the laws of the State of _____ and, based solely upon its Good Standing Certificate, its certificate of organization is in effect as of the date set forth in such Good Standing Certificate. The Guarantor is a validly existing corporation under the laws of the State of _____, and, based solely upon its Good Standing Certificate, is in good standing under the laws of the State of _____ as of the date set forth in such Good Standing Certificate.

2. Power and Authority. Each of the Borrower Parties has the limited liability company or corporate power and authority to execute, deliver and perform the terms and provisions of each Subject Document to which it is a party and has taken all necessary limited liability company or corporate action to authorize the execution, delivery and performance thereof.

3. Execution, Validity and Enforceability. Each of the Borrower Parties has duly executed and delivered each of the Subject Documents to which it is party, and each such Subject Document constitutes its valid, binding and enforceable obligation.

4. Noncontravention. Neither the execution, delivery and performance by any Borrower Party of any of the Subject Documents to which it is a party, nor the compliance by any Borrower Party with the terms and provisions thereof, (a) violates any present law, statute or regulation of the State of _____ that, in each instance, is applicable to such Borrower Party or (b) violates any provision of the Organizational Documents.

We call your attention to the following matters as to which we express no opinion:

(a) Jurisdiction; Venue, etc. Any agreement of a Borrower Party in a Subject Document to submit to the jurisdiction of a specified federal or state court**,** to waive any objection to the laying of the venue, to waive the defense of forum non conveniens in any action or proceeding referred to therein, to waive trial by jury, to effect service of process in any particular manner or to establish evidentiary standards, and any agreement of a Borrower Party regarding the choice of law governing a Subject Document;

(b) Local Ordinances. The ordinances, statutes, administrative decisions, orders, rules and regulations of any municipality, county, special district or other political subdivision of any state;

(c) Title and Security Interests. (i) Title to, or the rights of any of the Borrower Parties or any other person in, any collateral for the Loan or the other obligations under any of the Original Loan Documents or the Subject Documents or (ii) the creation, validity, perfection, enforceability or priority of any lien or security interest purported to be granted under any of the Subject Documents or any of the Original Loan Documents in or in respect of any of such collateral.

The opinions set forth above are subject to the following qualifications and limitations:

(a) Applicable Law. Our opinions are limited to the federal law of the United States, the laws of the State of _____, as applicable, and we do not express any opinion concerning any other law.

(b) Bankruptcy. Our opinions are subject to the effect of any applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting creditors' rights generally.

(c) Equitable Principles. Our opinions are subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing. In applying such principles, a court, among other things, might limit the availability of specific equitable remedies (such as injunctive relief, the remedy of specific performance and appointment of a receiver), might not allow a creditor to accelerate maturity of debt or exercise other remedies upon the occurrence of a default deemed immaterial or for non-credit reasons or might decline to order a debtor to perform covenants in a Subject Document. Further, a court may refuse to enforce a covenant if and to the extent that it deems such covenant to be violative of applicable public policy, including, for example, provisions requiring indemnification of the Lender against liability for its own wrongful or negligent acts.

(d) Incorporated Documents. The foregoing opinions do not relate to (and we have not reviewed) any document or instrument other than the Subject

Documents, and we express no opinion as to such other document or instrument (including, without limitation, the Original Loan Documents or any other document or instrument referenced or incorporated in any of the Subject Documents) or as to the interplay between the Subject Documents and any such other document or instrument.

The foregoing opinions are being furnished to the Lender for the purpose referred to in the first paragraph of this opinion letter, and this opinion letter is not to be furnished to any other person or entity. The opinions set forth herein are made as of the date hereof, and we assume no obligation to supplement this opinion letter if any applicable laws change after the date hereof or if we become aware after the date hereof of any facts that might change the opinions expressed herein. The headings or titles to paragraphs or sections of this opinion letter are for convenience of reference only and are not to be construed to have any effect or meaning with respect to such paragraphs or sections.

Very truly yours,

**Appendix B**

**[LETTERHEAD OF BORROWER'S COUNSEL]**

[Date]

Institutional Lender, N.A.
[address]

**ABC Borrower, Inc.**

Ladies and Gentlemen:

We have acted as special counsel to ABC Borrower, LLC., a _____ corporation (the "Assuming Borrower"), and ABC Guarantor, Inc., a _____ corporation (the "Guarantor"; the Assuming Borrower and the Guarantor are collectively referred to as the "Borrower Parties" and individually as a "Borrower Party"), in connection with the transactions contemplated by the Loan Assumption Agreement and Modification of Note, Deed of Trust and Other Loan Documents dated as of _____ (the "Assumption Agreement") among the Assuming Borrower, Original Borrower, L.P., a Delaware limited partnership (the "Original Borrower"), and Institutional Lender, N.A. (the "Lender"). This opinion letter is furnished to you at the request of the Borrower Parties in order to satisfy conditions to the closing of the transactions contemplated by the Assumption Agreement. Unless otherwise defined herein, terms used herein have the meanings provided in the Assumption Agreement. In addition, as used herein, the term "UCC" means the Uniform Commercial Code as in effect on the date hereof in the State of _____.

In connection with this opinion letter, we have examined the following documents, each of which is dated as of the date of the Assumption Agreement unless otherwise indicated:

(e) the Assumption Agreement;

(f) the Unsecured Indemnity Agreement (the "Indemnity") by the Assuming Borrower and the Guarantor in favor of the Lender;

(g) the Guaranty Agreement (the "Guaranty") by the Guarantor in favor of the Lender;

(h) the Subordination of Management Agreement (the "Subordination of Management Agreement") among the Assuming Borrower, the Operating Lessee, ABC Management Company, and the Lender;

(i) the Promissory Note dated _____ (the "Note") made by the Original Borrower and payable to the Lender in the principal amount of $_____;

(j) the Deed of Trust, Security Agreement and Fixture Filing dated as of _____ (the "Deed of Trust") among the Original Borrower, John A. Smith, as trustee, and the Lender;

(k) the Assignment of Leases and Rents dated as of _____, between the Original Borrower and the Lender; and

(l) the Assignment of Contracts and Agreements dated as of _____, between the Original Borrower and the Lender.

The documents referred to in clauses (a) through (d) above are referred to collectively as the "Assumption Documents" and individually as an "Assumption Document," and the documents referred to in clauses (e) through (h) above are referred to collectively as the "Original Loan Documents" and individually as an "Original Loan Document." The Assumption Documents and the Original Loan Documents are referred to collectively as the "Subject Documents" and individually as a "Subject Document."

In addition we have examined and relied upon the following:

(i) a certificate from the corporate secretary of each of the Borrower Parties, certifying as to (A) true and correct copies of the articles of incorporation and bylaws of such Borrower Party (the "Organizational Documents"), (B) board of directors resolutions of such Borrower Parties authorizing the Assumption Documents and the transactions contemplated thereunder and (C) the incumbency of the person(s) authorized to execute the Assumption Documents on behalf of such Borrower Party;

(ii) with respect to each of the Borrower Parties, a certificate issued by the _____ Secretary of State (the "SOS") attesting to the continued existence and good standing of such Borrower Party in the State of _____ (collectively, the "Good Standing Certificates" and individually, a "Good Standing Certificate");

(iii) a UCC Financing Statement (Form UCC-1) to be filed in the UCC Division of the SOS (the "Central Filing Office") naming the Assuming Borrower as debtor and the Lender as secured party (the "Central Financing Statement");

(iv) a UCC Financing Statement (Form UCC-1) to be filed with the Register of Deeds of _____ County, _____ (the "Local Recording Office"), naming the Assuming Borrower as debtor and the Lender as secured party (the "Local Financing Statement"; collectively with the Central Financing Statement, the "Financing Statements"); and

(v) originals, or copies identified to our satisfaction as being true copies, of such other records, documents and other instruments as we have deemed necessary for the purposes of this opinion letter.

**Assumptions Underlying Our Opinions**

For all purposes of the opinions expressed herein, we have assumed, without independent investigation, that:

(m) Factual Matters. With regard to factual matters, to the extent that we have reviewed and relied upon (i) certificates of the Borrower Parties or authorized representatives thereof, (ii) representations of the Borrower Parties set forth in the Assumption Documents and (iii) certificates and assurances from public officials, all of such certificates, representations and assurances are accurate.

(n) Authentic and Conforming Documents. All documents submitted to us as originals are authentic, complete and accurate, and all documents submitted to us as copies conform to authentic original documents.

(o) Signatures. The signatures of individuals signing the Assumption Documents are genuine.

(p) Assumption Documents Authorized and Binding on Certain Parties. Except with respect to the Borrower Parties, all of the Assumption Documents and the documents required or permitted to be delivered thereunder have been duly authorized by all necessary action on the part of the parties thereto. Except with respect to the Borrower Parties, all of the Assumption Documents have been duly executed and delivered by the parties thereto and, except with respect to the Borrower Parties, are legal, valid and binding obligations enforceable against such parties in accordance with their terms.

(q) Original Loan Documents Authorized and Binding on Original Loan Parties. All parties to the Original Loan Documents (the "Original Loan Parties") are either natural persons or validly existing entities in good standing under the laws of the respective states in which they are organized and had the legal capacity and full power and authority to execute, deliver and perform the Original Loan Documents. All of the Original Documents (i) were duly authorized by all necessary action on the part of the Original Loan Parties, (ii) were duly executed and delivered by the Original Loan Parties, (iii) are legal, valid and binding obligations enforceable against the Original Loan

Parties in accordance with their terms and (iv) are in full force and effect as of the effective date of the Assumption Agreement.

(r) Modifications and Waiver of Original Loan Documents. None of the Original Loan Documents have been modified or amended in any respect, and no provisions thereof have been waived by the parties' course of conduct or otherwise

(s) Consents for Certain Parties. All necessary consents, authorizations, approvals, permits or certificates (governmental and otherwise) which are required as a condition to the execution and delivery of the Assumption Documents by the parties thereto (other than the Borrower Parties) and to the consummation by such parties of the transactions contemplated thereby have been obtained.

(t) Accurate Description of Parties' Understanding. The Subject Documents accurately describe and contain the mutual understanding of the parties thereto, and there are no oral or written statements or agreements that modify, amend or vary, or purport to modify, amend or vary, any of the terms thereof.

(u) Security Interest. With respect to the collateral described in the Financing Statements in which a security interest may be created under Article 9 of the UCC (the "Article 9 Collateral"), (i) the Original Loan Documents created a valid security interest under the UCC in the Article 9 Collateral in favor of the Lender to secure the Loan, as defined in the Deed of Trust (the "Security Interest"), and the Security Interest remains in effect, (ii) the Original Borrower is and has been at all times a limited partnership formed under the laws of the State of Delaware, (iii) the Security Interest in the Article 9 Collateral that can be perfected by filing a financing statement with the Secretary of State of Delaware has been and, until transfer of such Article 9 Collateral to the Assuming Borrower, remained perfected pursuant to the law of the State of Delaware, (iv) the Security Interest in the Article 9 Collateral that can be perfected by filing a fixture filing in the Local Recording Office has been and, until transfer of such Article 9 Collateral to the Assuming Borrower, remained perfected pursuant to the laws of the State of _____ and (v) title to the Article 9 Collateral has been transferred by the Original Borrower to the Assuming Borrower.

## Our Opinions

Based on and subject to the foregoing and the other limitations, assumptions, qualifications and exclusions set forth in this opinion letter, we are of the opinion that:

5. Organizational Status. Each of the Borrower Parties is a validly existing corporation under the laws of the State of _____, and, based solely upon its Good Standing Certificate, is in good standing under the laws of the State of _____.

6. Power and Authority. Each of the Borrower Parties has the corporate power and authority (i) to execute, deliver and perform the terms and provisions of each

Assumption Document to which it is a party and has taken all necessary corporate action to authorize the execution, delivery and performance thereof and (ii) to perform it obligations under the Original Loan Documents as assumed and modified pursuant to the Assumption Agreement.

7. Execution, Validity and Enforceability. Each of the Borrower Parties has duly executed and delivered each of the Assumption Documents to which it is party, and each such Assumption Document constitutes its valid, binding and enforceable obligation. Each of the Original Loan Documents, as assumed and modified pursuant to the Assumption Agreement, constitutes the valid, binding and enforceable obligation of the Assuming Borrower.

8. Governmental Approvals. No consent, approval or authorization of, or filing with, any governmental authority of the State of _____ that, in each case, is applicable to any of the Borrower Parties, is required for (a) the due execution, delivery and performance by any Borrower Party of any of the Assumption Documents to which it is a party, including the assumption of the Original Loan Documents by the Assuming Borrower pursuant to the Assumption Agreement, or (b) the validity, binding effect or enforceability of any Assumption Document to which any Borrower Party is a party, except (i) in each case as have previously been made or obtained, (ii) filings and recordings which are necessary to perfect liens and security interests in the collateral described in the Subject Documents and (iii) consents, approvals, authorizations or filings as may be required to be obtained or made by the Lender as a result of its involvement in the transactions contemplated by the Subject Documents.

9. Noncontravention. Neither the execution, delivery and performance by any Borrower Party of any of the Assumption Documents to which it is a party, including the assumption of the Original Loan Documents by the Assuming Borrower pursuant to the Assumption Agreement, nor the compliance by any Borrower Party with the terms and provisions thereof, (a) violates any present law, statute or regulation of the State of _____ that, in each instance, is applicable to such Borrower Party or (b) violates any provision of the Organizational Documents.

10. Financing Statements. (a) The Central Financing Statement is in proper form for filing in the Central Filing Office. The Local Financing Statement is in proper form for filing in the Local Recording Office and to be effective as a fixture filing with respect to that portion of the Article 9 Collateral that constitutes "fixtures" as defined in Section 9-102 the UCC ("Fixtures").

(b) Assuming that the Central Financing Statement has been duly submitted for filing in the Central Filing Office with the appropriate filing fee tendered, or duly accepted for filing by the Central Filing Office, the Security Interest in those items of the Article 9 Collateral in which title has been transferred to the Assuming Borrower, and in which a security interest may be perfected under Article 9 of the UCC by the filing of a financing statement in the Central Filing Office, will continue to be perfected under the UCC.

(c) Assuming that the Local Financing Statement has been duly submitted for filing in the Local Recording Office with the appropriate filing fee tendered, or duly accepted for filing by the Local Recording Office, the Security Interest in those Fixtures in which title has been transferred to the Assuming Borrower will continue to be perfected under the UCC.

11. Assumption Agreement. The Assumption Agreement is in proper form for recording in the Local Recording Office.

**Exclusions**

We call your attention to the following matters as to which we express no opinion:

(a) Certain Laws. (i) Federal and state securities laws or regulations, banking laws and regulations, pension and employee benefit laws and regulations, environmental laws and regulations, tax laws and regulations, health and occupational safety laws and regulations, building code, zoning, subdivision and other laws and regulations governing the development, use and occupancy of real property, (ii) the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and other federal and state antitrust and unfair competition laws and regulations, (iii) the Assignment of Claims Act of 1940, as amended, (iv) the Investment Company Act of 1940, as amended, and (iv) the effect of any of the foregoing on any of the opinions expressed.

(b) Jurisdiction; Venue, etc. Any agreement of a party in a Subject Document to submit to the jurisdiction of a specified federal or state court**,** to waive any objection to the laying of the venue, to waive the defense of forum non conveniens in any action or proceeding referred to therein, to waive trial by jury, to effect service of process in any particular manner or to establish evidentiary standards, and any agreement of a party regarding the choice of law governing a Subject Document.

(c) Trust Relationship. The creation of any trust relationship by any party on behalf of the Lender.

(d) Local Ordinances. The ordinances, statutes, administrative decisions, orders, rules and regulations of any municipality, county, special district or other political subdivision of any state.

(e) Certain Agreements of Borrower Parties. Any agreement of a party in a Subject Document providing for:

(i) specific performance of any party's obligations;

(ii) establishment of a contractual rate of interest payable after judgment;

(iii) rights of set off and rights of subrogation;

(iv) the granting of any power of attorney;

(v) survival of liabilities and obligations of any party under any of the Subject Documents arising after the effective date of termination of any of the Subject Documents; or

(vi) obligations to make an agreement in the future.

(f) Remedies. Any provision in any Subject Document to the effect that rights or remedies are not exclusive, that every right or remedy is cumulative and may be exercised in addition to any other right or remedy, that the election of some particular remedy does not preclude recourse to one or more others or that failure to exercise or delay in exercising rights or remedies will not operate as a waiver of any such right or remedy.

(g) Sale of Collateral. Any provision in any Subject Document relating to the sale or other disposition of Article 9 Collateral except in compliance with the UCC (including any purchase thereof by the Lender).

(h) Custody of Collateral. Any provisions in any Subject Document providing for the care of collateral in the possession of the Lender to the extent inconsistent with Section 9-207 of the UCC.

(i) Waivers. Any purported waiver, release, variation, disclaimer, consent or other agreement to similar effect (collectively, a "Waiver") by any Borrower Party under any Subject Document to the extent limited by Sections 1-302 or 9-602 of the UCC or other provisions of applicable law (including judicial decisions), except to the extent that such Waiver is effective under and is not prohibited by or void or invalid under Section 9-602 of the UCC or other provisions of applicable law (including judicial decisions).

(j) Original Loan Documents. As to the Original Loan Documents, (i) the accuracy, validity or enforceability as against the Assuming Borrower of the representations and warranties made by the Original Borrower in the Original Loan Documents, (ii) the validity, binding effect and enforceability against the Assuming Borrower of any covenants of the Original Borrower in the Original Loan Documents that relate to a type of entity different from that of the Assuming Borrower or that relate to the period of time before the Assuming Borrower assumed the Original Borrower's obligations under the Original Loan Documents and (iii) the compliance or noncompliance by the Original Borrower with the covenants, terms and conditions of the Original Loan Documents.

(k) Judicial Foreclosure. The enforceability of any provision of the Deed of Trust providing for judicial foreclosure in lieu of foreclosure by the trustees' power of sale.

(l) Security Interest in Certain Types of Collateral. The creation of any security interest purported to be granted in or in respect of the following: (a) any real property, equipment used in farming operations, farm products, crops, timber to be cut, as-extracted collateral, "know how", copyrights, patents, trademarks, service marks, licenses, trade secrets, trade names and other intellectual property or rights therein; (b) policies of insurance, receivables due from any government or agency thereof, inventory which is subject to any negotiable documents of title (such as negotiable bills of lading or warehouse receipts), consumer goods, beneficial interests in a trust, letters of credit or accounts resulting from the sale of any of the foregoing; or (c) any other property or assets, the creation of a security interest in which is excluded from the coverage of Article 9 of the UCC, including such property or assets the creation, perfection or priority of a security in which are subject to (i) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title for the perfection or recordation of a security interest therein or which specifies a place of filing different from that specified in the UCC for filing to perfect or record such security interest, (ii) a certificate of title statute or (iii) the laws of any jurisdiction other than the State of _____ or the United States).

(m) Enforceability of Lien on Certain Types of Article 9 Collateral. The enforceability of any lien on or security interest in any Article 9 Collateral:

(i) consisting of goods of a consignor who has delivered such goods to the debtor under a true consignment (as distinguished from a consignment intended as security);

(ii) as against a "buyer in the ordinary course of business" (within the meaning of Article 9 of the UCC) of the Article 9 Collateral; and

(iii) consisting of inventory of the debtor in the event of any failure by the debtor to have fully complied with the Fair Labor Standards Act of 1932, as amended, including Sections 206 and 207 thereof.

(n) Title and Security Interests. (i) Title to, or the rights of any of the Borrower Parties or any other person in, any collateral for the Loan or the other obligations under any of the Subject Documents, (ii) the creation, validity or priority of any lien or security interest purported to be granted under any of the Subject Documents in or in respect of any of such collateral and (iii) except as expressly set forth herein, the perfection or enforceability of any such lien or security interest.

## Qualifications and Limitations

The opinions set forth above are subject to the following qualifications and limitations:

(o) Applicable Law. Our opinions are limited to the federal law of the United States and the laws of the State of _____, as applicable, and we do not express any opinion concerning any other law.

(p) Bankruptcy. Our opinions are subject to the effect of any applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting creditors' rights generally.

(q) Equitable Principles. Our opinions are subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing. In applying such principles, a court, among other things, might limit the availability of specific equitable remedies (such as injunctive relief, the remedy of specific performance and appointment of a receiver), might not allow a creditor to accelerate maturity of debt or exercise other remedies upon the occurrence of a default deemed immaterial or for non-credit reasons or might decline to order a debtor to perform covenants in a Subject Document. Further, a court may refuse to enforce a covenant if and to the extent that it deems such covenant to be violative of applicable public policy, including, for example, provisions requiring indemnification of the Lender against liability for its own wrongful or negligent acts.

(r) Unenforceability of Certain Provisions. Certain of the provisions contained in the Subject Documents may be unenforceable or ineffective, in whole or in part. Such provisions include, for example, those which: waive or do not require notice in connection with the exercise of remedies; authorize a standard for decision other than commercial reasonableness; authorize the taking of possession of the Property (as defined in the Assumption Agreement) without judicial process or otherwise authorize self-help or authorize the Lender to act on behalf of, or exercise the rights of, any party; characterize any assignment of rents, leases and/or other documents, rights and interests as "absolute" rather than a collateral assignment for security purposes; purport to validate otherwise invalid provisions of other documents incorporated or referred to in any Subject Document; characterize certain actions or provisions as null or void; purport to alter the priority of any lien or security interest; or subrogate the Lender or any other party to the rights of others. However, the inclusion of such provisions does not render any Subject Document invalid as a whole, and each of the Subject Documents contains, in our opinion, adequate remedial provisions for the ultimate practical realization of the principal benefits purported to be afforded by such Subject Document, subject to the other qualifications, limitations and exceptions contained in this opinion letter. We note that the unenforceability of such provisions may result in delays in enforcement of the rights and remedies of the Lender under the Subject Documents, and we express no opinion as to the economic consequences, if any, of such delays.

(s) Governmental Approvals and Noncontravention. With respect to our opinions expressed in paragraph 4 and in clause (a) of paragraph 5, such opinions are limited to our review of only those laws and regulations that, in our experience, are normally applicable to transactions of the type contemplated by the Subject Documents and to business entities generally.

(t) Material Changes to Terms. Provisions in the Subject Documents which provide that any obligations of a party thereunder will not be affected by the action or failure to act on the part of the Lender or by an amendment or waiver of the provisions contained in the other Subject Documents might not be enforceable under circumstances in which such action, failure to act, amendment or waiver so materially changes the essential terms of the obligations that, in effect, a new contract has arisen between the Lender and the other parties thereto.

(u) Incorporated Documents. The foregoing opinions do not relate to (and we have not reviewed) any document or instrument other than the Subject Documents, and we express no opinion as to such other document or instrument (including, without limitation, the any document or instrument referenced or incorporated in any of the Subject Documents) or as to the interplay between the Subject Documents and any such other document or instrument.

(v) Security Interest in Proceeds. The continuation and perfection of the Lender's security interest in the proceeds of the Article 9 Collateral are limited to the extent set forth in Section 9-315 of the UCC.

(w) Actions to Continue Effectiveness. We express no opinion as to any actions that may be required to be taken periodically under the UCC or any other applicable law for the effectiveness of the Financing Statements, or the validity or perfection of any security interest, to be maintained.

(x) Rights in After-Acquired Article 9 Collateral. A security interest in any Article 9 Collateral that constitutes after-acquired collateral does not attach until the debtor has rights in such after-acquired collateral.

(y) Property Acquired after Commencement of Bankruptcy Case. In the case of property which becomes part of the Article 9 Collateral after the date hereof, Section 552 of the Bankruptcy Reform Act of 1978, as amended (the "Bankruptcy Code") limits the extent to which property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.

(z) After-acquired Property as Voidable Preference. In the case of property which becomes part of the Article 9 Collateral after the date hereof, Section 547 of the Bankruptcy Code provides that a transfer is not made until the debtor has rights in the property transferred, so a security interest in after-acquired property which is security for other than a contemporaneous advance may be treated as a voidable preference under the conditions (and subject to the exceptions) provided by Section 547 of the Bankruptcy Code.

(aa) Rights of Third Parties in Certain Article 9 Collateral. The rights of the Lender with respect to Article 9 Collateral consisting of accounts, instruments, licenses, leases, contracts or other agreements will be subject to the claims, rights and defenses of the other parties thereto against the debtor.

(bb) Licenses or Permits as Article 9 Collateral. In the case of any Article 9 Collateral consisting of licenses or permits issued by governmental authorities or other persons or entities, the debtor may not have sufficient rights therein for the security interest of the Lender to attach and, even if the debtor has sufficient rights for the security interest of the Lender to attach, the exercise of remedies may be limited by the terms of the license or permit or require the consent of the governmental authority issuing such license or permit.

(cc) Article 9 Collateral Evidenced by Instruments. We note that, if any of the Article 9 Collateral is evidenced by instruments or tangible chattel paper or any other property in which a security interest may be perfected by taking possession (in each case as defined, and as provided for, in the UCC), the local law of the jurisdiction where such property is located will govern the priority of a possessory security interest in such property and the effect of perfection or non-perfection of a non-possessory security interest in such property.

(dd) Other UCC Limitations. Such opinions may also be limited by Sections 9-320, 9-323, 9-335 and 9-336 of the UCC

**Miscellaneous**

The foregoing opinions are being furnished to the Lender for the purpose referred to in the first paragraph of this opinion letter, and this opinion letter is not to be furnished to or relied upon by any other person or entity other than successor holders of the Note without our prior written consent. The opinions set forth herein are made as of the date hereof, and we assume no obligation to supplement this opinion letter if any applicable laws change after the date hereof or if we become aware after the date hereof of any facts that might change the opinions expressed herein. The headings or titles to paragraphs or sections of this opinion letter are for convenience of reference only and are not to be construed to have any effect or meaning with respect to such paragraphs or sections.

Very truly yours,

**Appendix C**

**[LETTERHEAD OF BORROWER'S COUNSEL]**

[Date]

[REMIC]
[Address]

[Rating Agency]
[Address]

[Servicer]
[Address

**ABC Partnership, L.P.**

Ladies and Gentlemen:

We have acted as special counsel to ABC Partnership, L.P., a Delaware limited partnership (the "Pledgor"), in connection with the defeasance of a $_____ loan made by ABC Lender (the "Original Lender") to the Pledgor pursuant to the Loan Agreement dated as of _____ (the "Loan Agreement") between the Pledgor and the Original Lender (the "Defeasance"). This opinion letter is furnished to you pursuant to Section ___ of the Loan Agreement.

**Documents Reviewed**

In connection with this opinion letter, we have examined the following documents, each of which is dated as of the date of hereof unless otherwise indicated:

(ee) the Defeasance Pledge and Security Agreement (the "Pledge Agreement") among the Pledgor, ABC Bank, as Trustee under the Pooling and Servicing Agreement dated _____ for _____, Commercial Mortgage pass-Through Certificates, Series ____ (the "Pledgee"), and XYZ Bank (the "Intermediary");

(ff) the Defeasance Account Agreement (the "Account Agreement") among the Pledgor, the Intermediary, the Pledgee and Loan Servicing Company (the "Servicer"); and

(gg) the Defeasance Assignment, Assumption and Release Agreement among the Pledgor, Successor Borrower, LLC, the Pledgee, the Servicer and the Intermediary.

The documents referred to in clauses (a) through (c) above are referred to collectively as the "Defeasance Documents".

In addition, we have examined and relied upon the following:

(i) a certificate from the general partner of the Pledgor certifying as to true and correct copies of the certificate of limited partnership, limited partnership agreement and consent of the partners of the Pledgor (the "Organizational Documents") and resolutions of the partners of the Pledgor authorizing the transactions contemplated by the Defeasance Documents;

(ii) a certificate issued by the Secretary of State of Delaware, attesting to the continued existence and good standing of the Pledgor in such state (the "Pledgor's Good Standing Certificate");

(iii) a Certificate of the Pledgor, a copy of which is attached as Annex A hereto (the "Pledgor's Certificate"), together with the agreements and instruments referred to therein (collectively, the "Reviewed Agreements"); and

(iv) originals, or copies identified to our satisfaction as being true copies, of such other records, documents and other instruments as we have deemed necessary for the purposes of this opinion letter.

## Defined Terms

Unless otherwise defined herein, terms used herein have the meanings provided for in the Pledge Agreement. In addition, the following terms have the respective meanings set forth below when used in this opinion letter:

"Bankruptcy Code" means the Bankruptcy Reform Act of 1978, as amended.

"Entitlement Holder" means a person identified in the records of the Intermediary as having a Security Entitlement.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"Federal Security" means securities issued by the United States Treasury, maintained in the TRADES book-entry system and constituting "book-entry securities" as defined in 31 C.F.R. Part 357.2.

"Federal Security Entitlement" means a "security entitlement" as defined in Section 357.2 of the Treasury Regulations with respect to a Federal Security.

"New York UCC" means the Uniform Commercial Code as in effect on the date hereof in the State of New York.

"Security Entitlements" means the Federal Security Entitlements and the UCC Security Entitlements with respect to the Securities.

"Securities Intermediary" means a "securities intermediary" within the meaning of Section 357.2 of the Treasury Regulations and Section 8-102(a)(14) of the New York UCC.

"Treasury Regulations" means the regulations of the United States Department of the Treasury governing the transfer and pledge of marketable book-entry securities as set forth in 31 C.F.R. Part 357, as amended.

"UCC Security Entitlement" means a "security entitlement" as defined in Section 8-102(a)(17) of the New York UCC with respect to a Financial Asset.

**Assumptions Underlying Our Opinions**

For all purposes of the opinions expressed herein, we have assumed, without independent investigation, the following.

(hh) Factual Matters. To the extent that we have reviewed and relied upon (i) certificates of the Pledgor or any of the Pledgor's Partners, (ii) representations of the Pledgor set forth in the Defeasance Documents and (iii) certificates and assurances from public officials, all of such certificates, representations and assurances are accurate with regard to factual matters.

(ii) Contrary Knowledge of Addressee. No addressee of this opinion letter has any actual knowledge that any of our factual assumptions is inaccurate.

(jj) Signatures. The signatures of individuals signing the Defeasance Documents are genuine and authorized.

(kk) Authentic and Conforming Documents. All documents submitted to us as originals are authentic, complete and accurate, and all documents submitted to us as copies conform to authentic original documents.

(ll) Capacity of Certain Parties. All parties to the Defeasance Documents (other than the Pledgor and parties executing on behalf of the Pledgor) have the capacity and full power and authority to execute, deliver and perform the Defeasance Documents and the documents required or permitted to be delivered and performed thereunder.

(mm) Defeasance Documents Binding on Certain Parties. Except with respect to the Pledgor, all of the Defeasance Documents and the documents required or permitted to be delivered thereunder have been duly authorized by all necessary corporate or other action on the part of the parties thereto, have been duly executed and delivered by such parties and are legal, valid and binding obligations enforceable against such parties in accordance with their terms.

(nn) Consents for Certain Parties. All necessary consents, authorizations, approvals, permits or certificates (governmental and otherwise) which are required as a condition to the execution and delivery of the Defeasance Documents by the parties thereto (other than the Pledgor and parties executing on behalf of the Pledgor) and to the consummation by such parties of the transactions contemplated thereby have been obtained.

(oo) Accurate Description of Parties' Understanding. The Defeasance Documents accurately describe and contain the mutual understanding of the parties, and there are no oral or written statements or agreements that modify, amend or vary, or purport to modify, amend or vary, any of the terms thereof.

(pp) Reviewed Agreements. With respect to our opinion in paragraph 4(c), if the law governing any Reviewed Agreement is not the law of the State of New York, such law would have the same effect as the law of the State of New York.

(qq) Investment Accounts. The Pledged Collateral Account is a "securities account" as defined in Section 8-501(a) of the New York UCC, and all property from time to time credited to the Pledged Collateral Account are Financial Assets.

(rr) Rights of Pledgor in Securities. At the time of crediting by the Intermediary of the Securities to the Pledged Collateral Account and delivery to the Intermediary of the cash, if any, the Securities exist and the Pledgor has rights therein and in the cash, subject to no other lien, claim or encumbrance.

(ss) Value. The Pledgor has received "value" (as defined in Section 1-201(44) of the New York UCC) in exchange for granting a security interest in the Pledged Collateral.

(tt) Intermediary. The Intermediary (i) is a Securities Intermediary, (ii) maintains Federal Security Entitlements and UCC Security Entitlements with respect to and in the full amount of the Securities, (iii) maintains the Pledged Collateral Account as a "securities account" as defined in the New York UCC for the benefit of the Pledgee, (iv) will treat all property held in the Pledged Collateral Account as Financial Assets, (v) has not identified and will not identify in its records any person as an Entitlement Holder with respect to the Pledged Collateral Account (or any security or entitlement therein) other than the person specified as Entitlement Holder with respect thereto in the Pledge Agreement, (vi) has not agreed to comply with entitlement orders of any person with respect to the Pledged Collateral Account (or any security or entitlement therein), except

the person authorized in the Pledge Agreement to give entitlement orders with respect thereto, and (vii) otherwise is in compliance with its other obligations under the Defeasance Documents.

(uu) Securities. The Securities have been credited to the Pledged Collateral Account by the Intermediary, and the book entries made by the Intermediary with respect to the Securities are complete and accurate in all respects.

(vv) No Notice of Adverse Claim. The Pledgee will acquire its security interest in the Pledged Collateral without notice or knowledge of any "adverse claim" (as defined in the New York UCC), or other adverse liens or encumbrances (including, without limitation, liens arising under federal, state or local tax laws or Title IV of ERISA).

**Our Opinions**

Based on and subject to the foregoing and the exclusions, qualifications, limitations and other assumptions set forth in this opinion letter, we are of the opinion that:

12. Organizational Status. The Pledgor is a validly existing limited partnership under the laws of the State of Delaware and, based solely upon the Pledgor's Good Standing Certificate, is in good standing under such laws as of the date set forth in the Pledgor's Good Standing Certificate.

13. Power and Authority. The Pledgor has the limited partnership power and authority to execute, deliver and perform the terms and provisions of the Defeasance Documents and has taken all necessary limited partnership action to authorize the execution, delivery and performance thereof.

14. Execution, Validity and Enforceability. The Pledgor has duly executed and delivered the Defeasance Documents, and the Defeasance Documents constitute its valid, binding and enforceable obligation.

15. Noncontravention. Neither the execution, delivery and performance by the Pledgor of the Defeasance Documents, nor the compliance by the Pledgor with the terms and provisions thereof: (a) violates any present law, statute or regulation that, in each case, is applicable to the Pledgor; (b) violates any provision of the Organizational Documents of the Pledgor; or (c) results in any breach of any of the terms of, or constitutes a default under, any Reviewed Agreement.

16. Security Interest in Pledged Collateral. The Pledge Agreement is effective to create under the New York UCC a valid security interest in favor of the Pledgee, to secure the Secured Obligations, in all right, title and interest of the Pledgor in the Pledged Collateral to the extent that such a security interest may be created in the Pledged Collateral under Article 9 of the New York UCC.

17. Priority of Security Interest. Upon (i) due execution and delivery of the Defeasance Documents, (ii) indication by the Intermediary in its records of the crediting of the Securities to the Pledged Collateral Account in accordance with the Defeasance Documents and (iii) delivery by the Pledgor to the Intermediary of the initial cash deposit, for deposit to the Pledged Collateral Account, the Pledgee will have, as security for the Secured Obligations, a valid and duly perfected first priority security interest in the Federal Security Entitlements of Pledgor and in the UCC Security Entitlements of Pledgor, with respect to the Securities and proceeds thereof which constitute Financial Assets in the Pledged Collateral Account. For purposes of this opinion, "first priority security interest" means that no security interest of any other creditor under Article 8 or Article 9 of the New York UCC which has not been perfected by control (within the meaning of the New York UCC) would be equal or prior to the security interest of the Pledgee therein..

**Matters Excluded from Our Opinions**

We express no opinion with respect to the following matters.

(a) Indemnification. Any agreement of the Pledgor in the Defeasance Documents relating to indemnification, contribution or exculpation from costs, expenses or other liabilities that is contrary to public policy or applicable law.

(b) Jurisdiction, Venue, etc. Any agreement of the Pledgor in the Defeasance Documents to submit to the jurisdiction of any specific federal or state court**,** to waive any objection to the laying of the venue, to waive the defense of forum non conveniens in any action or proceeding referred to therein, to waive trial by jury, to effect service of process in any particular manner or to establish evidentiary standards, and any agreement of the Pledgor regarding the choice of law governing the Defeasance Documents (except as otherwise provide herein).

(c) Trust Relationship. The creation of any trust relationship by the Pledgor on behalf of any other party.

(d) Certain Laws. Federal securities laws or regulations, state securities and Blue Sky laws or regulations, federal and state banking laws and regulations, pension and employee benefit laws and regulations, federal and state environmental laws and regulations, federal and state tax laws and regulations, federal and state health and occupational safety laws and regulations, building code, zoning, subdivision and other laws and regulations governing the development, use and occupancy of real property, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and other federal and state antitrust and unfair competition laws and regulations, the Assignment of Claims Act of 1940, and the effect of any of the foregoing on any of the opinions expressed.

(e) Local Ordinances. The ordinances, statutes, administrative decisions, orders, rules and regulations of any municipality, county, special district or other political subdivision of a state.

(f) Certain Agreements of Pledgor. Any agreement of the Pledgor in the Defeasance Documents providing for:

(i) specific performance of the Pledgor's obligations;

(ii) establishment of a contractual rate of interest payable after judgment;

(iii) rights of set off;

(iv) the granting of any power of attorney;

(v) survival of liabilities and obligations of any party under any of the Defeasance Documents arising after payment in full of the Note; or

(vi) obligations to make an agreement in the future.

(g) Remedies. Any provision in any Defeasance Document to the effect that rights or remedies are not exclusive, that every right or remedy is cumulative and may be exercised in addition to any other right or remedy, that the election of some particular remedy does not preclude recourse to one or more others or that failure to exercise or delay in exercising rights or remedies will not operate as a waiver of any such right or remedy.

(h) UCC Choice of Law. Any provision in any Defeasance Document with respect to governing law to the extent that such provision purports to affect the choice of law governing perfection and non-perfection of the security interests.

(i) Sale of Collateral. Any provision in any Defeasance Document relating to the sale or other disposition of collateral except in compliance with the New York UCC (including any purchase thereof by the Pledgee).

(j) Custody of Collateral. Any provision in any Defeasance Document providing for the care of collateral in the possession of the Pledgee to the extent inconsistent with Section 9-207 of the New York UCC.

(k) Waivers. Any purported waiver, release, variation, disclaimer, consent or other agreement to similar effect (collectively, a "Waiver") by the Pledgor under any Defeasance Document to the extent limited by Sections 1-102(3) or 9-602 of the New York UCC or other provisions of applicable law (including judicial decisions), except to the extent that such Waiver is effective under and is not prohibited by or void or invalid under Section 9-602 of the New York UCC or other provisions of applicable law (including judicial decisions).

(l) Title. Any person's ownership rights in or title to any property or assets forming any part of the Pledged Collateral.

(m) Other Security Interest Limitation. The creation, validity, perfection, priority or enforceability of any security interest purported to be granted in or in respect any property or assets, the creation or perfection of a security interest in which is excluded from the coverage of Article 8 or Article 9 of the New York UCC, or the creation, validity, perfection, priority or enforceability of any security interest other than as expressly provided in our opinions.

**Qualifications and Limitations Applicable to Our Opinions**

The opinions set forth above are subject to the following qualifications and limitations.

(n) Applicable Law. Our opinions are limited to the federal law of the United States, the Delaware Revised Uniform Limited Partnership Act and the laws of the State of New York, and we do not express any opinion concerning any other law.

(o) Bankruptcy. Our opinions are subject to the effect of any applicable bankruptcy, insolvency (including, without limitation, laws relating to preferences, fraudulent transfers and equitable subordination), reorganization, moratorium and other similar laws affecting creditors' rights generally.

(p) Equitable Principles. Our opinions are subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing. In applying such principles, a court, among other things, might limit the availability of specific equitable remedies (such as injunctive relief and the remedy of specific performance), might not allow a creditor to accelerate maturity of debt or exercise other remedies upon the occurrence of a default deemed immaterial or for non-credit reasons or might decline to order a debtor to perform covenants in a Defeasance Document. Further, a court may refuse to enforce a covenant if and to the extent that it deems such covenant to be violative of applicable public policy, including, for example, provisions requiring indemnification of a party against liability for its own wrongful or negligent acts.

(q) Unenforceability of Certain Provisions. Certain of the provisions contained in the Defeasance Documents may be unenforceable or ineffective, in whole or in part, but the inclusion of such provisions does not render any Defeasance Document invalid as a whole, and each of the Defeasance Documents contains, in our opinion, adequate remedial provisions for the ultimate practical realization of the principal benefits purported to be afforded by such Defeasance Document, subject to the other qualifications contained in this opinion letter. We note, however, that the unenforceability of such provisions may result in delays in enforcement of the rights and remedies of the Pledgee under the Defeasance Documents, and we express no opinion as to the economic consequences, if any, of such delays.

(r) Choice of New York Law and Forum. To the extent that any of our opinions relate to the enforceability of the choice of New York law and choice of New York forum provisions of any Defeasance Document, our opinions are rendered in

reliance upon N.Y. Gen. Oblig. Law §§ 5-1401 and 5-1402 (McKinney 2001) and N.Y. CPLR 327(b) (McKinney 2001) and are subject to the qualification that such enforceability may be limited by public policy considerations of any jurisdiction, other than the courts of the State of New York, in which enforcement of such provisions, or of a judgment upon an agreement containing such provisions, is sought.

(s) Noncontravention and Governmental Aprovals. With respect to the opinion expressed in paragraphs 4(a), our opinion is limited to our review of only those laws and regulations that, in our experience, are normally applicable to transactions of the type contemplated by the Defeasance Documents and to business entities generally.

(t) Material Changes to Terms. Provisions in the Defeasance Documents which provide that any obligations of the Pledgor thereunder will not be affected by the action or failure to act on the part of any other party or by an amendment or waiver of the provisions contained in the other Defeasance Documents might not be enforceable under circumstances in which such action, failure to act, amendment or waiver so materially changes the essential terms of the obligations that, in effect, a new contract has arisen between the Pledgor and the other parties.

(u) Incorporated Documents. This opinion does not relate to (and we have not reviewed) any documents or instruments other than the Defeasance Documents and the Reviewed Agreements, and we express no opinion as to such other documents or instruments (including, without limitation, any documents or instruments referenced or incorporated in any of the Defeasance Documents or the Reviewed Agreements) or as to the interplay between the Defeasance Documents or the Reviewed Agreements and any such other documents and instruments.

(v) Reviewed Agreements. With respect to our opinion in paragraph 4(c), we express no opinion as to any violation of a Reviewed Agreement not readily ascertainable from the face of the Reviewed Agreement or arising from any cross-default provision insofar as it relates to a default under an agreement that is not a Reviewed Agreement or arising under a covenant of a financial or numerical nature or requiring computation.

(w) Security Interest in Proceeds. The continuation and perfection of the Pledgee's security interest in the proceeds of the Pledged Collateral, other than proceeds which constitute Financial Assets in the Pledged Collateral Account, are limited to the extent set forth in Section 9-315 of the New York UCC.

(x) Actions to Continue Effectiveness. We express no opinion as to any actions that may be required to be taken periodically under the New York UCC or any other applicable law for the effectiveness of any financing statements, or the validity or perfection of any security interest, to be maintained.

(y) After-Acquired Property. A security interest in any Pledged Collateral that constitutes after-acquired collateral does not attach until the Pledgor has rights in such after-acquired collateral.

(z) Property Acquired after Commencement of Bankruptcy Case. In the case of property which becomes part of the Pledged Collateral after the date hereof, Section 552 of the Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.

(aa) After-acquired Property as Voidable Preference. In the case of property which becomes part of the Pledged Collateral after the date hereof, Section 547 of the Bankruptcy Code provides that a transfer is not made until the debtor has rights in the property transferred, so a security interest in after-acquired property which is security for other than a contemporaneous advance may be treated as a voidable preference under the conditions (and subject to the exceptions) provided by Section 547 of the Bankruptcy Code.

(bb) Rights of Third Parties in Certain Collateral. The rights of the Pledgee with respect to Pledged Collateral consisting of accounts, instruments, licenses, leases, contracts or other agreements will be subject to the claims, rights and defenses of the other parties thereto against the Pledgor.

(cc) Priority. We express no opinion with respect to the priority of the security interest of Pledgee in the Pledged Collateral against any of the following: (i) a lien accorded priority by law in favor of the United States of America or any state, or any agency or instrumentality of either of them (including, without limitation, liens arising under federal, state or local tax law); (ii) a lien accorded priority under ERISA; (iii) claims accorded priority by law pursuant to Section 3713 of Title 31 of the United States Code; (iv) a secured party (as defined in Section 9-102(a)(72) of the New York UCC) who has or obtains control of the Pledged Collateral; (v) any interest of the Intermediary; (vi) a security interest in favor of the United States or in favor of any other person that is marked on the books and records of the Federal Reserve Bank where the Intermediary maintains Federal Security Entitlements, or of any other person with whom Intermediary maintains an account, with respect to the Securities; (g) liens which may be granted under Section 363, 364(d), 510(c), 552 or 1129(b) of the Bankruptcy Code; or (h) liens arising solely by operation of law.

(dd) Clearing Corporation Rules. We express no opinion as the effect of any clearing corporation rules adopted by the Intermediary.

(ee) Collateral Evidenced by Instruments. We note that, if any of the Pledged Collateral is evidenced by instruments or tangible chattel paper or any other property in which a security interest may be perfected by taking possession (in each case as defined, and as provided for, in the New York UCC), the local law of the jurisdiction where such property is located will govern the perfection and priority of a possessory

security interest in such property and the effect of perfection or non-perfection of a non-possessory security interest in such property.

(ff) Federal Book-Entry Regulations. Our opinion as to Federal Security Entitlements is based solely on the Federal Book-Entry Regulations as published in the Code of Federal Regulations, without regard to any interpretations, operating circulars or other communications from the Department of the Treasury, the Board of Governors of the Federal Reserve System or any Federal Reserve Bank, and we call to your attention that, pursuant to the Federal Book-Entry Regulations, the Secretary of the Treasury may waive provisions of the Federal Book-Entry Regulations, and we express no opinion on the effect of any such waiver on the opinion expressed herein.

(gg) Other UCC Limitations. Such opinions may also be limited by Subpart 3 and Subpart 4 of Part 3 of Article 9 of the New York UCC and Part 5 of Article 8 of the New York UCC.

**Miscellaneous**

The foregoing opinions are being furnished only to the parties to whom this opinion letter is addressed and only for the purpose referred to in the first paragraph of this opinion letter, and this opinion letter is not to be furnished to any other person or entity or used or relied upon for any other purpose without our prior written consent. The opinions set forth herein are made as of the date hereof, and we assume no obligation to supplement this opinion letter if any applicable laws change after the date hereof or if we become aware after the date

hereof of any facts that might change the opinions expressed herein. Headings in this opinion letter are intended for convenience of reference only and shall not affect its interpretation.

Very truly yours,

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