

**AMERICAN BAR ASSOCIATION, SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
SPRING SYMPOSIA, WASHINGTON, D.C.
SPONSORED BY THE LEGAL OPINIONS IN REAL ESTATE TRANSACTIONS COMMITTEE**

Thursday, April 28, 2011 from 1:30 p.m. - 3:00 p.m.

THE ANNOTATED REAL ESTATE FINANCE OPINION: GAMBOL, GUIDE, GOAL, OR GIFT?

**A discussion of the Annotated Real Estate Finance Opinion, a collaborative endeavor of the
ABA RPTE Legal Opinions in Real Estate Transactions Committee,
the ACREL Attorneys' Opinions Committee, and the ACMA Opinions Committee**

- **Update of the 1998 Inclusive Real Estate Secured Transaction Opinion**
- **The Role of Customary Practice**
- **Benefits of an Illustrative Opinion**
- **Negatives of an Illustrative Opinion**
- **The Angels are in the Footnotes**
- **Is Inside-Out Better?**

**Program Chair and Speaker: Edward J. Levin,
Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC, Baltimore, Maryland,
elevin@gfrlaw.com**

Speakers:

William B. Dunn, Clark Hill P.L.C., Detroit, Michigan, WDunn@ClarkHill.com

**Kenneth M. Jacobson, Katten Muchin Rosenman LLP, Chicago, Illinois
kenneth.jacobson@kattenlaw.com**

**Robert J. Krapf, Richards, Layton & Finger, P.A., Wilmington, Delaware,
krapf@RLF.com**

**David L. Miller, Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia,
david.miller@pillsburylaw.com**

**Lydia C. Stefanowicz, Edwards Angell Palmer & Dodge LLP, Madison, New Jersey,
LStefanowicz@eapdlaw.com**

**Robert A. Thompson, Sheppard Mullin Richter & Hampton LLP,
San Francisco, California, RThompson@sheppardmullin.com**

Discussion Topics

1. Background, Part 1, ¶ I.
 - Inclusive Real Estate Secured Transaction Opinion served as the starting point;
 - Activities of Joint Working Group
 - Addition of members of Joint Working Group
 - Inclusion of members of the three Committees in two large conference calls
2. Format of Report, Part 1, ¶ V.
 - Present format matches that of the Inclusive Opinion
 - Strength of the Report is in the footnotes
 - Benefits of an illustrative opinion
 - Negatives of an illustrative opinion
 - Consideration of using an Inside-Out approach
 - Length of Opinion Letter
3. Scope, Part 1, ¶¶ I & VI.
 - The paradigm for the illustrative form of opinion is a mortgage loan origination
 - Each of the paradigm borrower and guarantor is a limited liability company
 - Focus of the opinion is on the general counsel to Borrower
 - Focus of opinion is not on local counsel
 - The opinion includes reference to a Guarantor
 - The opinion does not discuss personal property issues (¶4.6(i))
4. Integration with Customary Practice, Part 1, ¶ III.
5. Exclusion of Federal Law and Specified Other Law ¶¶ 1.3 and 4.6

6. Assumptions ¶ 2.1
 - Reordering – moved ahead of opinions in the form
 - Relationship to other qualifications (in Part IV)
7. Enforceability Opinion ¶ 3.5
 - Usury opinion is deemed implicit; consider: should we give a usury opinion at all?; should it be explicit?
 - If not giving a usury opinion, make sure to exclude it
 - Issues relating to choice of law
8. Qualifications ¶ Part IV
9. Generic Enforceability Qualification ¶ 4.3
 - Discussion regarding renaming it “general qualification”
 - Comfort and necessary qualifications to it
 - Which qualifications may be eliminated with the use of the Generic Enforceability Qualification?
 - Reason why “practical realization” is disfavored
10. Foreclosure/Assignment of Rents ¶ 4.3 – what assurances are given?
11. No Litigation Confirmation ¶ 5.1
12. Who may rely on the Opinion Letter? ¶ 6.1.
13. Governing Law of the Opinion Letter ¶ 6.2

ANNOTATED REAL ESTATE FINANCE OPINION

A REPORT¹

By: William B. Dunn, Detroit, Michigan
Kenneth P. Ezell, Jr., Nashville, Tennessee
Kenneth M. Jacobson, Chicago, Illinois
Robert J. Krapf, Wilmington, Delaware
Edward J. Levin, Baltimore, Maryland
David L. Miller, Washington, D.C.
Lydia C. Stefanowicz, Madison, New Jersey
Robert A. Thompson, San Francisco, California²

¹ This Report does not render legal, tax or accounting advice. This Report has not been approved by the governing body or membership of any of the bar organizations whose members were involved in its preparation. Accordingly, the views expressed are solely those of the authors. It is important to note, however, that this work is a collaborative effort reflecting a consensus of the authors as a group, and does not necessarily reflect the views of individual authors, or their respective firms, organizations or associations, or of the Committees (as defined below), as to this Report as a whole or the treatment in this Report of any particular point. The authors reserve the right to assert contrary or other positions with regard to the matters discussed in this Report.

² The authors are circulating this working draft for wider review including review by the following committees (the “Committees”): (1) the American Bar Association, Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions (the “RPTE Committee”), Edward J. Levin, Baltimore, Maryland, Chair; (2) the American College of Real Estate Lawyers, Attorneys’ Opinions Committee (the “ACREL Committee”), Kenneth P. Ezell, Jr., Nashville, Tennessee, Chair; and (3) the American College of Mortgage Attorneys, Opinions Committee (the “ACMA Committee”), Lydia C. Stefanowicz, Madison, New Jersey, Chair. The authors wish to thank the many members of each of the Committees who have provided thoughtful comments on prior drafts of this Report.

Annotated Real Estate Finance Opinion

I. INTRODUCTION

This Report updates and expands the Inclusive Real Estate Secured Transaction Opinion, including its accompanying report (collectively, the “**Inclusive Opinion**”).¹ The Inclusive Opinion and this Report address “**Opinion Letters**,” meaning, in this context, legal advice or evaluations, rendered in writing, by a lawyer or law firm (“**Opinion Giver**”), to a third party who is not a client of the Opinion Giver with respect to the subject matter of the advice (“**Opinion Recipient**”), in real estate secured transactions in the United States.² Like the Inclusive Opinion, this Report includes an example of an Opinion Letter with introductory comments and explanatory footnotes.

The Inclusive Opinion was issued in 1998 jointly by the RPTE Committee and the ACREL Committee (as defined in note 2). The Inclusive Opinion drew on only two reports (collectively, the “**Accord Opinion Reports**”): (i) the American Bar Association Third-Party Legal Opinion Report, including the Legal Opinion Accord, published in 1991,³ and (ii) the report published in 1994 by a joint effort of the RPTE Committee and the ACREL Committee⁴ which adapted the Accord for loans secured by real estate. The Accord Opinion Reports stated that Opinion Letters issued pursuant to those Reports would incorporate the Accord Opinion Reports by reference; all of the definitions and provisions of the Accord Opinion Reports were deemed to be part of any Opinion Letter that so referenced to those Reports. Therefore, the parties would have to look outside the text of such an “Accord” Opinion Letter, to the Accord Opinion Reports, in order to understand such an “Accord” Opinion Letter. In contrast, the Inclusive Opinion provided an example of an Opinion Letter that included within its four corners all of the principal Opinion Letter concepts in the Accord Opinion Reports. The Inclusive Opinion referred to this as “one-stop shopping” because there was no need to look (or shop) outside the Inclusive Opinion to see the principal concepts it took from those two Reports (but, as noted below, the Inclusive Opinion did not purport to address every Opinion Letter concept).

¹ Inclusive Real Estate Secured Transaction Opinion and related report (1998).
<http://www.abanet.org/rppt/cmtes/rp/i5/inclusive-art.html>.

² The ABA/ACREL Accord Adaptation Report (as defined below) in 1994 used the term “real estate secured transaction” or “**REST**” to refer to a transaction involving a lien on real estate, to distinguish its subject matter from other transactions that might involve real estate but were not directly secured by such a mortgage, deed of trust or similar instrument. Like the 1994 report, this current report is intended to address only real estate secured transactions in the United States.

³ The “**Accord**” is part of the *Third-Party Legal Opinion Report, including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991) (reprinted in 29 REAL PROP. PROB. & TR. J. 487 (1994)) (the “**ABA Business Law Accord Report**”).

⁴ *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions of the Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers*, 29 REAL PROP. PROB. & TR. J. 569 (1994) (the “**ABA/ACREL Accord Adaptation Report**”).

The Inclusive Opinion was intended to be an educational tool, providing a more accessible way to understand the two Accord Opinion Reports. It was “inclusive” in the sense of including the principal concepts of those two Reports. By design, the “inclusiveness” of the Inclusive Opinion was limited; it did not go beyond the two Accord Opinion Reports. It was never intended to be inclusive in the sense of reflecting other reports or approaches to Opinion Letter practice or every aspect of customary practice.

In this updated Report, we now go beyond the Inclusive Opinion to reflect many developments in Opinion Letter practice since issuance of the Inclusive Opinion. Like the Inclusive Opinion, this Report is intended, among other things, primarily to be an educational tool as well as a framework for more general consideration of Opinion Letter issues.

II. PROFESSIONAL RESPONSIBILITY

This Report does not include an in depth discussion of professional responsibility considerations that apply to Opinion Letter practice. These considerations include the need to obtain client consent to deliver an Opinion Letter, the protection of client confidences, and the identification, appreciation and resolution of conflicts of interest.

Ethics rules of each jurisdiction must be considered in opinion practice. Model Rule 2.3(a) of the American Bar Association Model Rules of Professional Conduct (2002, and in effect on the date of this Report) allows a lawyer to provide an evaluation of a matter affecting a client for the use of another person if the lawyer “reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client.” This Rule is the ethical basis of third party opinion practice. It is not uniform as adopted among the states, however. Rules in several jurisdictions require consent of the client, “after consultation,” to any evaluation by a lawyer of a matter for someone other than the client.⁵ Model Rule 1.2(a) also permits a lawyer to take such action “as is impliedly authorized to carry out the representation,” premised on the lawyer’s having consulted with the client about the means by which the client’s interest is to be pursued, as required by Model Rule 1.4.

Note however that Model Rule 2.3(b) requires the lawyer to obtain the client’s informed consent if the lawyer knows or reasonably should know that providing the opinion would materially and adversely affect the client’s interests. This could occur for example if the opinion negotiations would reveal to the Lender that a material remedy is not available in the Transaction Documents as drafted. In that case, the Opinion Giver would need to have the client’s consent to reveal that fact. Such consent may exist by implication under Model Rule 2.3(a), but whether it could may depend on the understanding between the lawyer and the client concerning the transaction.

⁵ See, Dunn and Levin, *Ethical Conduct and Liability to Third Persons in Legal Opinion Practice*, published at American College of Real Estate Lawyers, *The ACREL Papers* 385 (ALI-ABA Fall 2002) <http://www.acrel.org/Documents/Seminars/2002%20Dunn%20-%20Ethical%20conduct%20to%20third%20persons.pdf>.

Conflicts of interest among clients involved in a given transaction may give rise to a requirement under Model Rule 1.7 that the Opinion Giver obtain informed consent of each client involved in the transaction. For example, while the below Annotated Opinion Letter contemplates that the Opinion Giver represents both a borrower and a guarantor, this Report does not address, but notes with caution, the possibility that the interests of a borrower and guarantor may not be perfectly aligned in every instance or the possibility of conflicts of interest that may arise in that context.

III. CUSTOMARY PRACTICE

Among the developments in Opinion Letter practice is the recognition of the importance of custom and practice, or as it often is referred to in this context, customary practice. The Accord Opinion Reports were designed to be a type of agreed protocol; that is, in large part, the meaning of the Opinion Letters and the diligence required to provide such Opinion Letters were set out in written form in the Accord Opinion Reports.

Customary practice takes a different approach; that is, the meaning of the words used in an Opinion Letter, and the diligence required to provide such an Opinion Letter, are determined by the customary practice of lawyers who give and receive such Opinion Letters. The Real Estate Opinion Guidelines⁶ provide valuable guidance regarding customary real estate opinion letter practice.

Criticisms of certain aspects of the “customary practice” approach include its potential lack of precision (that is, can the Opinion Giver and Opinion Recipient reach a comprehensive understanding of the meanings of words and the diligence required to support them?) and the related concern that there are certain differences in customary practice across the country. It may not be possible to eliminate the lack of precision that concerns some, and it may not be possible to completely eliminate regional differences in customary practice. Nevertheless, published reports of bar associations and other professional groups provide some guidance as to the meaning of customary practice. The Customary Practice Statement,⁷ which was approved by a large number of bar associations and other professional groups, including several national associations of real

⁶ Committee on Legal Opinions of the Section of Real Property, Probate and Trust Law (now the RPTE Committee), American Bar Association, and Attorneys’ Opinions Committee, American College of Real Estate Lawyers, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003) (the “**Real Estate Opinion Guidelines**”).

⁷ Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (2008) (the “**Customary Practice Statement**”). For a discussion of certain aspects of customary practice from the standpoint of a business lawyer, see Committee on Legal Opinions of the Section of Business Law, American Bar Association, *Legal Opinion Principles* 53 BUS. LAW. 831 (1998) (the “**Business Opinion Principles**”). The Working Group on Legal Opinions and the Committee on Legal Opinions of the American Bar Association Business Law Section have begun a project that will work with other bar associations and professional groups to identify the extent of consensus as to various statements in the Business Opinion Principles and other aspects of customary practice. Some of the authors of this Report have agreed to participate in that project.

estate lawyers, provides a brief summary of the context of customary practice in which Opinion Letters are prepared and interpreted.⁸

IV. REASONABLE BALANCE

What a given party may argue is customary or “market” is not always reasonable or appropriate for inclusion in an Opinion Letter in every context. For example, even though the accompanying Annotated Opinion Letter includes an Enforceability Opinion, such an opinion may not always be appropriate. The Real Estate Opinion Guidelines note:

The benefit of an opinion to the recipient should warrant the time and expense required to prepare it. [footnote omitted] In particular, opinions from borrower’s counsel in intrastate transactions (or a multistate transaction for which the Lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the Lender normally should not be necessary and may not be cost justified.⁹

V. LENGTH

One approach has supported streamlined Opinion Letters. For example, the Illustrative Opinion Letter that accompanied the Accord was extremely short because it incorporated the Accord by reference. Using a short Opinion Letter with a reference to a published report results in the ability to quickly check any variations between a given Opinion Letter and the published report. This approach in the Accord never received broad acceptance, perhaps because, as noted in the Inclusive Opinion, behind the short-form of an “Accord” Opinion Letter lay the Accord Opinion Reports with a complex set of code-like interpretive rules that were, to say the least, challenging to master. To understand an “Accord” Opinion Letter, one would need to be conversant with the Accord Opinion Reports for assumptions, exceptions, exclusions, limitations, qualifications, definitions, principles and other matters.

More recently, the Customary Practice Statement notes that customary Opinion Letter practice provides content to abbreviated Opinion Letter language, thus allowing shorter forms of Opinion Letter. The Customary Practice Statement, however, does not require short Opinion Letters. The questions remain: How short is too short? And, how much precision in language is necessary to convey the meanings of the words used in an Opinion Letter?

Our observation is that real estate finance lawyers tend to use lengthier Opinion Letters than many of their counterparts in other business transactions. This may result in

⁸ Many principles of professional responsibility and ethical rules beyond the few mentioned in the text above are relevant to Opinion Letter practice.

⁹ Real Estate Opinion Guidelines at pages 244-245.

part from the nature of the type of transaction, but also may result in part from viewing matters through a different lens from other business lawyers.

Conversely, while supporting the use of somewhat longer Opinion Letters, we recognize the opposite danger: that a lengthy Opinion Letter might give false comfort that it is completely comprehensive; indeed, as noted in the Customary Practice Statement, while an Opinion Letter might on the surface seem to be comprehensive, an Opinion Letter cannot express all of the gloss that customary practice will add to understanding an Opinion Letter.

VI. ANNOTATED OPINION LETTER FORM

The next part of this Report is an example of an Opinion Letter that addresses many issues that arise in Opinion Letter practice in real estate secured transactions. The example includes annotations discussing many, but, by no means, all, of the issues that arise in Opinion Letter practice. We believe that the inclusion of an example of an Opinion Letter provides a useful vehicle to help identify and consider a great many substantive issues in their normal context instead of at a more abstract level.

The inclusion of specific Opinion Letter language in this Report, however, calls for some important explanation and qualification. The purpose of including such language is not to prescribe, endorse or in any way to take a position as to what an appropriate Opinion Letter request might be or how any given issue should be expressed in an Opinion Letter. The inclusion of specific language is intended merely to put in a concrete context the consideration and discussion of issues that arise in typical Opinion Letter requests.

As noted above, in preparing the accompanying Annotated Opinion Letter, the authors began with the language of the ABA/ACREL Inclusive Opinion, which, in turn, was based on the Opinion Letter in the ABA Business Law Accord Report, as modified by the ABA/ACREL Accord Adaptation Report. The Accord itself has been effectively abandoned by its original author and sponsor, the ABA Business Law Section. As a result, many lawyers consider the Accord and the Inclusive Opinion to be outdated or otherwise not to reflect contemporary Opinion Letter practice. The reasons we have chosen, nonetheless, to use this approach of updating the Inclusive Opinion to prepare this exemplar are that (i) the Inclusive Opinion is the only example of an Opinion Letter that has been widely read and commented on by a national real estate legal audience, (ii) it in general raises many of the same issues and requests commonly found in local opinion practice and (iii) it offers a structure and grammar which is commonly used in existing opinion practice.

This does not mean that we in any way recommend or endorse the referenced language as a model form. To the contrary, it is recognized that the form of Opinion Letter requested or offered by lawyers and law firms is a function and product of a variety of circumstances, including regional and local customary practice, which may vary among states, regions, firms, lawyers, clients and transactions, and over time. Stated differently, while several state bar associations and professional groups have successfully

pursued the development of model forms of Opinion Letters generally accepted by lawyers in their respective jurisdictions, a generally agreed upon standard form of legal opinion for interstate transactions has not been achieved, and perhaps predictably and appropriately so. Customary practice in an interstate setting should be viewed as at best an emerging consensus as to how opinion parties respond to certain concepts and issues, not, in the foreseeable future, as an effort to create comprehensive, nationally uniform Opinion Letter language or scope.

The Annotated Opinion Letter provided with this Report uses as its paradigm a commercial loan secured by a mortgage, deed of trust or similar instrument encumbering real property—a real estate secured transaction. Even apart from regional differences noted above, the accompanying Annotated Opinion Letter will not be appropriate to every situation. For example, the Annotated Opinion Letter is written as if given by the lead counsel in a real estate secured transaction, and it was not designed for local counsel opinions where additional assumptions and limitations will be appropriate. Local counsel opinions are a project for another day. Similarly, the Annotated Opinion Letter does not speak to Opinion Letters that might be provided or considered in connection with transactions, such as loan modifications or loan assumptions, that might occur after origination of the loan.

The accompanying Annotated Opinion Letter includes many assumptions, exclusions and other qualifications that we believe would be implied by customary practice even if not expressly stated. By including in the Annotated Opinion Letter such customarily implied assumptions, exclusions and other qualifications, we intend to facilitate the consideration of issues that might otherwise go unnoticed in some contexts but we do not intend to diminish the expectation that they would be implied where not expressly stated.

We hope the following Annotated Opinion Letter strikes a reasonable balance with respect to the length and content of Opinion Letters and will contribute to the understanding of Opinion Letter practice and the ongoing discussions of Opinion Letters in real estate secured transactions throughout the United States.

ANNOTATED REAL ESTATE FINANCE OPINION LETTER

[date]¹⁰

**[Name and Address
of Opinion Recipient]**

Re: \$[] Loan (the “**Loan**” or the “**Transaction**”) from [] (the “**Lender**”) to [] (the “**Borrower**”) [guaranteed by [] (the “**Guarantor**” and together with the Borrower, the “**[Borrower Parties]**”)]

Ladies and Gentlemen:

We provide to you this letter (this letter, including any attachments, this “**Opinion Letter**”) at the request of the above referenced Borrower Parties pursuant to Section [] of the [**Agreement**] described below.¹¹

14.
BACKGROUND

(a) Transaction Documents. We have acted as counsel¹² to the Borrower and the Guarantor in connection with the preparation of the following documents relating to the Transaction:¹³

Promissory Note dated as of _____, made by the Borrower (the “**Note**”).

[Mortgage/Deed of Trust/Deed to Secure Debt] dated as of _____, executed by the Borrower (the “**Mortgage**”) with respect to certain property including real

¹⁰ The Opinion Letter is usually dated the date of the closing. As the practice has transitioned to a practice where face-to-face closings occur with declining frequency, Opinion Letters sometimes are dated the closing date and submitted in advance with an appropriate transmittal letter or e-mail authorizing release upon satisfaction of certain conditions, but some Opinion Givers prefer to deliver their Opinion Letters only upon closing.

¹¹ The Opinion Giver should have the consent of the Borrower, and any other clients in the Transaction, to the rendering of the Opinion Letter. Such consent may be implied by the execution of a commitment letter or Transaction Document that requires an Opinion Letter. See the above discussion of Professional Responsibility.

¹² The Opinion Giver should describe its limited or special role, if appropriate. Opinion Givers sometimes refer to themselves as “special” counsel, but this may be ambiguous. In any event the absence of words like “special” modifying the word “counsel” should not be construed as implying a broader role or greater expertise or knowledge than that stated in the Opinion Letter.

¹³ Paragraph 1.1 sets forth examples of common real estate secured transaction documents. This opines as to the enforceability only of specifically identified Transaction Documents. The Opinion Giver should (i) add to the list any other operative documents for the Transaction, (ii) conform names in the list to actual names of documents, and (iii) create other defined terms as needed.

property located [briefly describe location of property] and more particularly described in the Mortgage (such real property, the “**Real Property**”).

Assignment of Leases and Rents dated as of _____, executed by the Borrower (the “**Assignment of Leases**”).

Security Agreement dated as of _____, executed by the Borrower (the “**Security Agreement**”).

Loan Agreement dated as of _____, executed by the Borrower and the Lender (the “**Agreement**”).

Guaranty dated as of _____ executed by the Guarantor (the “**Guaranty**”).¹⁴

The documents described in items (a) through (f) above are referred to in this Opinion Letter as the “**Transaction Documents**.”¹⁵ The Transaction Documents described in items (a) through (e) above are referred to in this Opinion Letter as the “**Borrower Transaction Documents**.” The Transaction Documents described in items (b) through (d) above are referred to in this Opinion Letter as the “**Security Documents**.” The Real Property, together with all other property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest, is referred to in this Opinion Letter as the “**Collateral**.”

(b) Authority Documents. In connection with this Opinion Letter we also have reviewed the following documents (collectively, the “**Authority Documents**”):¹⁶

- (i) [Certificate of Formation] of Borrower as filed in the office of the [Secretary of State of [____]] and certified in the Public Authority Documents described below; and
- (ii) Operating Agreement of Borrower dated [____] as certified to us in the Client Certificates described below (collectively, the “**Borrower Organizational Documents**”).¹⁷

¹⁴ Counsel should consider the particular issues raised, and any additional qualifications that would be appropriate, if a Guaranty is to be one of the Transaction Documents. Examples of such qualifications might include principles of cases or statutes in a given State that, unless these can be and have been validly waived, might exonerate a surety due to alteration of the original obligation of the principal without the consent of the surety, or election of remedies, or actions materially prejudicial to the surety, without notice, or if suit or other remedies against the principal are not pursued first or simultaneously with those against the surety, to the extent required in that State. These are covered by the Generic Enforceability Qualification.

¹⁵ In Opinion Letters where Financing Statements and other Uniform Commercial Code issues are covered more extensively than the language in the text of this Opinion Letter attempts to do, it is common to identify in the list of documents reviewed by the Opinion Giver individual Financing Statements and where they are to be filed. Because most Financing Statements do not themselves include enforceable covenants, they normally would not be included in the definition of “Transaction Documents” as to which opinions such as the Enforceability Opinion are rendered.

¹⁶ Some Opinion Givers prefer to identify each of the Authority Documents reviewed, as the language in the text does; others prefer to refer in more general terms to some or all of such documents.

¹⁷ See note 42 with respect to whether direct and indirect constituent member entities of Borrower or

[Consent/Resolution of partners, members, board of directors or other necessary persons of Borrower] as certified to us in the Client Certificates.

- (i) [Certificate of Formation] of Guarantor as filed in the office of the [Secretary of State of [____]] and certified in the Public Authority Documents described below; and
- (ii) Operating Agreement of Guarantor dated [____] as certified to us in the Client Certificates described below (collectively, the “**Guarantor Organizational Documents**”).

[Consent/Resolution of partners, members, board of directors or other necessary persons of Guarantor] as certified to us in the Client Certificates.

- (i) [certificate of status of Borrower issued by state of Borrower’s organization, dated [____]]; (ii) [certificate(s) of status of Borrower in any other states in which the Real Property is located, dated [____]]; and (iii) [certificate of status of Guarantor issued by state of Guarantor’s organization, dated [____]]; and (iv) [where relevant, certificates concerning tax status, certificates concerning Uniform Commercial Code filings or certificates concerning title registration or ownership] (collectively, the “**Public Authority Documents**”).¹⁸

Certificate of Borrower and Certificate of Guarantor attached hereto (the “**Client Certificates**”).

(c) Opinion Jurisdictions. The statutes, the judicial and administrative decisions, and the policies, rules and regulations duly promulgated by the governmental agencies (collectively “**Laws**”) covered by the opinions expressed in this Opinion Letter are limited to the Laws of the State of [____] (the “**State**”), [and the [Limited Liability Company Act] of the State of [____]]¹⁹ (such jurisdictions, collectively, the “**Opinion Jurisdictions**”), in each case as currently in effect. [Except as set forth in Paragraphs 3.1, 3.2 and 3.3 below,] we express no opinion concerning the Laws of any other jurisdiction, [the other Laws of [Insert aforesaid state where entity is formed,] or the effect thereof.²⁰ Further, and without limiting the foregoing provisions of this Paragraph

Guarantor should be addressed; if so, their organizational documents, consents and the like should be listed (if Authority Documents are being listed) and reviewed by the Opinion Giver.

¹⁸ Practitioners should be careful to use the correct title of each Public Authority Document. Note particularly that, in some places, certificates of “good standing” are provided by state officials; in others the words “good standing” do not appear in the certification. See Paragraph 3.1.

¹⁹ We note a trend in real estate Opinion Letter practice to exclude coverage of Federal Laws except where identified and expressly covered Federal Laws are relevant to the Transaction or the parties. Federal Laws sometimes are stated to be included in Opinion Letters even though, after taking account of exclusions of the kind set forth in the Exclusions in Paragraph 4.6 of this Opinion Letter, it is difficult to identify a Federal Law that would be relevant in Opinion Letters given in most real estate secured transactions. In general, if any Federal Laws are to be considered, they should be identified and covered expressly; otherwise no coverage of Federal Laws should be implied. Federal Laws should be covered only if there is a reason to do so, such as if a federal issue is material to the Transaction, and the Opinion Giver should consider the implications of covering Federal Laws.

²⁰ If the Borrower or Guarantor is an entity formed other than in the defined “State,” the applicable entity Laws of its state of formation should be named in the Opinion Letter. The Laws of other jurisdictions may be included as well, as appropriate. Opinions with respect to entity issues or transactional or other issues governed by Laws of jurisdictions in which the Opinion Giver does not practice may need to

or other limitations on coverage, our opinions in this Opinion Letter relate only to such Laws of the Opinion Jurisdictions that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to any or all of the Borrower, the Guarantor or the Transaction.²¹ [References in this Opinion Letter to the “**Uniform Commercial Code**” refer to the Uniform Commercial Code as in effect in the State.]²²

(d) Scope of Review. In connection with the opinions hereinafter set forth, we have reviewed copies or originals of the Transaction Documents and the Authority Documents and we have given consideration to such matters of Laws [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.²³

(e) Reliance Without Investigation. We have relied, without investigation or analysis, upon information in the Public Authority Documents. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied, without investigation or analysis, upon the information contained in representations [and warranties] made by the Borrower [Parties] in [Sections ____ of] the [Transaction Documents] and on information provided in the Client Certificates. [Other reliance if any, to be described here.]²⁴

be covered by an appropriate assumption as to compliance with such Laws, or, where the cost is justified, by engaging another counsel to opine as to such Laws. By including separate terms for “Opinion Jurisdictions” and “State,” the text shows certain coverage limitations that might appropriately be specified in multi-state transactions; where only one state is involved, an Opinion Letter normally would use only one term, such as “State” to describe which laws are addressed.

²¹ Accord, Section 2 says: “The Opinion Recipient may assume that the Opinion Giver has reviewed such documents and given consideration to such matters of law and fact (in accordance with the principles set forth in this Accord) as the Opinion Giver has deemed appropriate in its professional judgment to render the Opinion.” A slightly different formulation is in Business Opinion Principles, Section II.B, which says the following is implied by customary practice: “An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter (*see* II.A.) exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.”

²² If the Borrower or Guarantor is a regulated entity, additional qualifications may be appropriate.

²³ Even without a statement such as the one in the text above, customary practice implies that the Opinion Giver has undertaken a customary scope of review. Such a statement therefore is unnecessary in the Opinion Letter unless the Opinion giver intends the statement to be limiting but the language in Paragraph 1.4, as it now is written, is insufficient to limit the scope of review. The Opinion Giver may limit the scope of inquiry to specific documents or other items, but only if the limitation is explicit; *e.g.* “we have reviewed only the following documents and made no other investigation or inquiry.” Recitation of a list of documents without an express limitation as to the scope of review generally is not effective to limit the scope of review.

²⁴ If certain legal issues that are not addressed in this letter are addressed in the Opinion Letter of another counsel (the “**Other Counsel**”) separately provided to the Opinion Recipient, then it would be appropriate to state here the extent of reliance, or another statement with respect to such other Opinion Letter, such as “we assume no responsibility for the opinions expressed therein.”

15.
ASSUMPTIONS²⁵

(a) Assumptions. In rendering this Opinion Letter, we have relied,²⁶ without investigation,²⁷ upon the assumptions set forth below:²⁸

A Borrower Party who is a natural person, and natural persons who are involved on behalf of either of the Borrower Parties, have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it.

The Borrower Parties hold the requisite powers,²⁹ title and rights in and to any property involved in the Transaction.

²⁵ [Consider the extent to which assumptions in general overlap with other qualifications and if those assumptions that overlap with other qualifications should be moved to the exceptions, exclusions etc.]

²⁶ By customary practice, an Opinion Giver should not rely on certain information known to be unreliable or incorrect. The exact formulation of the principle may vary but the general concepts are similar. For example, the Business Opinion Principles, § III.A, say: “Customary practice permits such reliance [on factual information obtained from others] unless the factual information on which the lawyers preparing the opinion letter are relying appears to be irregular on its face or has been provided by an inappropriate source.” The ABA Business Law Accord Report, § 5, says: “As a general and overarching principle, the Opinion Giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if the Opinion Giver has Actual Knowledge that the information or assumptions are false or the Opinion Giver has Actual Knowledge of facts that under the circumstances would make the reliance unreasonable.” This inappropriate reliance is to be contrasted with the situation where reliance is appropriate if the Opinion Giver and recipient agree to an express hypothetical assumption contrary to facts (e.g., ...[Loan Documents]... are governed by New York Laws notwithstanding a contrary choice of law provision).

The Accord, § 4, and the Business Opinion Principles, § III.D, say that an opinion should not be based on an assumption or factual representation that is tantamount to the legal opinion being expressed other than legal conclusions in a certificate of a government official. The exact line between fact and law may not always be an obvious one.

²⁷ Customary practice implies that assumptions are made “without investigation” whether or not the Opinion Letter expressly so states.

²⁸ Customary Practice may imply many or all of the express assumptions stated in this Paragraph, and therefore some practitioners will omit from their Opinion Letters many or even all of these as express assumptions. An Opinion Giver may choose to add additional assumptions depending on the specific circumstances, the terms of the Transaction Documents and the nature of the opinions being rendered. The apparent comprehensiveness of the assumptions set forth in Paragraph 2.1 should not be taken as implying that others that may be implied by customary practice (or others stated elsewhere in the Opinion Letter) are not applicable; nor should anything within the stated assumptions imply in any way any expansion of the scope of the opinions set forth elsewhere in this Opinion Letter. [Consider if those assumptions that are or are not implied can and should be specified.]

²⁹ Note that the word power is included in the text of the Opinion Letter to address conditions such as the condition to enforceability of a security interest, as set forth in Uniform Commercial Code § 9-203(b)(2), that the debtor have either rights in the collateral or the “power” to transfer rights in the collateral.

Each party to the Transaction (other than the Borrower Parties) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it.

Each party to the Transaction (other than the Borrower Parties) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Borrower Parties.

Each Transaction Document, Authority Document and other document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of all Transaction Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this Opinion Letter from the form and content of such Transaction Documents as executed and delivered.³⁰

Each Public Authority Document is accurate, complete, and authentic and all official public records (including their due and proper recordation or filing, and their due and proper indexing) are accurate and complete.

There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence.

The conduct of the parties to the Transaction has complied and will continue to comply with any requirement of good faith, fair dealing and conscionability.

The Lender and any agent acting for the Lender in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by the Transaction, or of any adverse claim to any property, lien or security interest transferred or created as part of the Transaction or of any agreement or court or administrative order, writ, judgment or decree that would be violated by entering into the Transaction, or by execution, delivery or performance of the Transaction Documents.

There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Transaction Documents.

All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the Laws of the Opinion Jurisdictions are generally available (*i.e.*, in terms of access and distribution following

³⁰ Opinion Recipients occasionally request that an assumption that signatures are genuine not apply to signatures on behalf of the Borrower or the Guarantor. In effect, such a request might be construed to require the Opinion Giver to assure that the signatures of the Opinion Giver's clients are not forgeries and that the persons signing are in fact the persons they purport to be. In our view, such an assurance is not an opinion of law but assurance of a fact that is outside of the knowledge of the Opinion Giver. Even familiarity with the person over years of representation may not necessarily support a legal opinion that the person is who the person purports to be. As noted above in note 28 concerning assumptions generally, assuming that the signatures are genuine would be inappropriate if the Opinion Giver may know otherwise, and this should be sufficient. If greater assurance is required, it should be specifically discussed and the protocol upon which to establish such an assurance should be clearly established.

publication or other release) to lawyers practicing in the Opinion Jurisdictions, and are in a format that makes legal research reasonably feasible.

The constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision in the Opinion Jurisdictions has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.

Organizational documents of the Borrower Parties, and any Other Agreements and Court Orders (each as defined below), if any, governed by Laws other than those of the Opinion Jurisdictions would be enforced to the same extent, and only to the same extent, as under the Laws of the Opinion Jurisdictions.³¹

The Borrower Parties will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of Laws of the Opinion Jurisdictions or any other jurisdiction or constitute a breach or violation of any Other Agreement or Court Order.³²

The Borrower Parties will obtain all permits and governmental approvals required in the future, and take all actions similarly required, relevant to subsequent consummation of the Transaction or performance of the Transaction Documents.

All parties to the Transaction [other than the Borrower Parties] will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.³³

The Security Documents have been or will be duly and properly recorded or filed and duly and properly indexed in all places necessary (if and to the extent necessary) to create the encumbrance and lien as provided therein.³⁴

The description of the Collateral is accurate and reasonably identifies the Collateral.

³¹ For example, the contractual elements of a Delaware limited liability company operating agreement are governed by Delaware Laws.

³² Assumptions (n), (o) and (p) may have particular relevance to the general issues covered in a no breach or violation opinion as in Paragraphs 3.7 and 3.8 but those opinions as written do not purport to extend to future acts or omissions.

³³ The initial formulations of assumption (p), in the ABA Business Law Accord Report and the Inclusive Opinion, would have assumed that all parties, including the client of the Opinion Giver, would comply in the future with their respective obligations. In addition to being perhaps overly broad, this assumption speaks to future acts and omissions which are not within the subject matter of the corresponding opinions as written. [Consider if this assumption, where used, should be limited to payment obligations.]

³⁴ Assumption (q), assuming that documents are filed or recorded publicly, may not be necessary to an opinion limited to enforceability of agreements between the parties but the comfort that foreclosure is available under the Generic Enforceability Qualification may make this assumption appropriate. In any event, inclusion of this assumption does not imply an opinion as to creation, perfection or priority of liens or security interests or as to any other issues not expressly included elsewhere in the Opinion Letter.

Legally adequate value and consideration has been given for the Transaction and the obligations of the Borrower Parties in the Transaction Documents.

The matters as relied on in Paragraph 1.5 are true.

Each individual executing a certificate is authorized to do so and has adequate knowledge about all matters stated therein. The contents of each such certificate are accurate and complete and remain so as of the date of this letter.

[OTHER STATE, ENTITY OR TRANSACTION SPECIFIC ASSUMPTIONS]³⁵

16. OPINIONS

Based upon and subject to the foregoing and to the assumptions, exceptions, exclusions, limitations and other qualifications set forth in this Opinion Letter, we are of the opinion that:

(a) Status. The Borrower is a [limited liability company], validly existing in [its jurisdiction of organization].³⁶ [The Borrower is qualified to do business in the State.]³⁷ The Guarantor is a [corporation], validly existing in [its jurisdiction of organization].³⁸

(b) Power. The Borrower has the [limited liability company] power to execute and deliver the Borrower Transaction Documents. The Guarantor has the [corporate] power to execute and deliver the Guaranty.³⁹

³⁵ Consider adding an assumption that the Borrower is not regulated or participating in government programs if this cannot be efficiently verified.

³⁶ An opinion regarding "good standing" should be given only if the applicable corporation, limited partnership, limited liability company or other entity act in the Opinion Jurisdictions defines "good standing." When given, such an opinion often is given solely in reliance on Public Authority Documents, and for that reason many practitioners question the value of such an opinion.

³⁷ This opinion is appropriate if the Borrower is not formed in the State. If the issue of existence is to be addressed by the Opinion Letter and the Borrower is not formed in the State, it may be appropriate to include the second sentence of the text of the above Paragraph. As a matter of customary practice, the authors of this Report believe that the Opinion Giver may rely solely on a certificate of existence provided by the Secretary of State or other applicable state official, unless the Opinion Giver has reason to believe such certificate to be erroneous.

³⁸ In some cases Opinion Givers make reference to a governmental certificate as the basis for the opinion on good standing regarding a Borrower or Guarantor. The wording of the certificate from state authorities and statutory basis for "good standing" in a given state will affect the scope and exact wording of this opinion. The requisite diligence for this opinion will vary by state. In many routine opinions it is unnecessary to opine about initial organizational matters relating to events and circumstances at the time the entity was formed, as opposed to current existence. See Real Estate Opinion Guidelines § 1.5.b.

³⁹ This opinion on company (or other entity) power supplements other opinions such as the authorization opinion in Paragraph 3.3, but it is useful to state the company power opinion expressly as a reminder to the Opinion Giver to check applicable organizational documents, statutes and regulations

(c) Authorization. All [limited liability company] actions or approvals by the Borrower, [and its [members/managers],] necessary to bind the Borrower under the Transaction Documents have been taken or obtained.⁴⁰ All [corporate] actions or approvals by the Guarantor, [and its [directors/shareholders],] necessary to bind the Guarantor under the Guaranty have been taken or obtained.⁴¹

(d) Execution and Delivery. The Borrower has duly executed and delivered the Borrower Transaction Documents.⁴² The Guarantor has duly executed and delivered the Guaranty.

(e) Enforceability Opinion. The Borrower Transaction Documents are legal, valid, binding obligations of, and enforceable against, the Borrower, in accordance with their terms.⁴³ The Guaranty is the legal, valid, binding obligation of, and enforceable against, the Guarantor, in accordance with its terms.⁴⁴

(particularly in the case of certain regulated entities), and as comfort to the Opinion Recipient that the Opinion Giver has considered these issues. This opinion covers the legal power of the Borrower or Guarantor as a company, not the wherewithal or ability to perform. The expression originated as “corporate power” but commercial real estate financings most often involve entities other than corporations. Some practitioners use the phrase “power and authority” instead of just “power” but these generally are interpreted to have the same meaning.

⁴⁰ Such “actions or approvals by the Borrower” include any necessary actions by its management, such as the board of directors of a corporation. Where there are tiers of ownership from the Borrower or Guarantor to direct or indirect individual members, partners, shareholders or other owners, some Opinion Givers expressly state the extent to which they have reviewed and verified any necessary consents throughout the tiers of ownership or at specified levels of the organizational hierarchy.

⁴¹ The authorization opinion does not apply to third party or governmental approvals, but only to internal Company or other entity approvals regarding a Borrower or Guarantor.

⁴² For this and related opinions, the Opinion Giver should establish that all of the conditions necessary under contract Laws for formation of a contract have occurred (except as covered by assumptions or qualifications set forth elsewhere in the Opinion Letter). In addition to execution, the Transaction Documents must be delivered. Delivery may occur by mail or electronic means as long as the relevant requirements of the Opinion Jurisdictions are met. Parties should consider how best to assure that these requirements have been satisfied. Note that delivery or other aspects of closing may be governed by a different law than the Opinion Jurisdictions, in which case an express assumption as to delivery or such other aspects may be appropriate. It may be appropriate to consider adding, to the assumptions contained in the Opinion Letter, additional assumptions as to the completion of certain closing formalities such as obtaining signatures, obtaining consents and intent to deliver the Transaction Documents especially where the closing is not in person and closing formalities cannot otherwise be verified satisfactorily.

⁴³ Some view the Enforceability Opinion as covering “each and every” provision of every Transaction Document. Others view the same language as encompassing only the material provisions. As a practical matter the debate may be less contentious because many Opinion Givers assume the former interpretation may apply (whether or not they agree with the former interpretation), and they therefore include in their Opinion Letters assumptions and limitations that would be appropriate regardless of which interpretation is correct. In addition, the Generic Enforceability Qualification (discussed below) eliminates the practical difference between the two interpretations.

⁴⁴ A choice of law opinion generally is not implied by the Enforceability Opinion without more. See

(f) Form of Security Documents. The Mortgage is in a form sufficient to create a lien on all right, title and interest of the Borrower in and to the Real Property. Further, the [Security Agreement] is in a form sufficient to create a security interest in those items of the personal property stated as constituting part of the Collateral in which a security interest can be created under Article 9 of the Uniform Commercial Code.⁴⁵

(g) No Breach or Violation Opinion. The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Borrower Transaction Documents, do not: (i) violate the Borrower Organizational Documents, (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment [] hereto, or (iii) violate any existing obligation of the Borrower under any order, if any, which is identified as such in Attachment [] hereto, which the Borrower has confirmed to us are the only court and administrative orders that name the Borrower and are specifically directed to it or its property. Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Guarantor Organizational Documents, (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [] hereto, or (z) violate any existing obligation of the Guarantor under any order, if any, which is identified in Attachment [] hereto, which the Guarantor has confirmed to us are the only court and administrative orders that name the Guarantor and are specifically directed to it or its property. Our opinions in this Paragraph do not extend to any action or conduct of either of the Borrower Parties that a

Paragraph 4.4.

Conversely, the Enforceability Opinion may be read as implying an opinion on the legality of interest charged for the loan, or usury. If that is not intended, an express exception to the Opinion statement should be made; e.g. see the exclusion in Paragraph 4.6 (v); or consider: “No opinion is expressed hereby with respect to usury or whether any amounts might constitute unenforceable penalties.” Where it is appropriate under applicable law in the Opinion Jurisdictions, the usury Opinion may need to be qualified by reference to the effect of rate limitations, adjustments of rate, criminal maximums, compounding and other issues uniquely involved in the subject, to be included in the Qualifications portion of the Opinion Letter.

A separate usury opinion may be provided or requested when appropriate. The exact approach to usury in Opinion Letters, including the various assumptions and qualifications and the diligence necessary to support a usury opinion in a specific situation, is state specific.

⁴⁵ It is generally agreed that substantive opinions regarding a lien on real property are not appropriate; such liens usually are covered in most states by title insurance. It also is generally agreed that opinions on personal property security interests are not appropriate in real estate financings unless personal property is an important part of the collateral. However, some lawyers are prepared to give an opinion focusing on the form of documents, and for these cases, Paragraph 3.6 provides suggested language for such a focused opinion. Note that this opinion covers only the form of mortgage and security agreement, and does not cover other issues such as actual creation, attachment, perfection or priority of liens. Note that Uniform Commercial Code § 9-203 requires for creation of a security interest that the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party (as well as that value has been given and the debtor has signed or authenticated a security agreement or other applicable conditions have been satisfied).

Transaction Document may permit but does not require.⁴⁶ In this Opinion Letter, the agreements and documents referred to in clauses (ii) and (y) above in this Paragraph sometimes are referred to as “**Other Agreements**” and the orders referred to in clauses (iii) and (z) above in this Paragraph sometimes are referred to as “**Court Orders.**”⁴⁷

(h) No Violation of Laws Opinion. The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of Laws comprising statutes or regulations duly enacted or promulgated by the State (“**Statutes or Regulations**”) nor subject the Borrower to a fine, penalty or other similar sanctions under, any Statutes or Regulations. Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty or other similar sanctions under, any Statutes or Regulations. Our opinions in this Paragraph do not extend to any action or conduct of either of the Borrower Parties that a Transaction Document may permit but does not require.⁴⁸

17.
QUALIFICATIONS

Each of the opinions and confirmations set forth in this Opinion Letter is subject to the following additional exceptions, exclusions, limitations and other qualifications:

(a) Bankruptcy Exception. Each of⁴⁹ the opinions and confirmations set forth in this Opinion Letter is subject to the effect of bankruptcy, insolvency, fraudulent

⁴⁶ Even if not expressly stated as it is in the text, customary practice would imply that the Opinions in this Paragraph do not extend to any action or conduct of either of the Borrower Parties that a Transaction Document may permit but does not require.

⁴⁷ We believe that it is preferable and has become customary to list the specific material documents and orders to which the Borrower is a party, rather than to refer to all material documents and orders to which the Borrower is a party. Some practitioners list as the specified Other Agreements those contracts dealing with money borrowed by the Borrower. Often these are specified in a client certificate or a listing in Transaction Documents instead of in the Opinion Letter itself. Opinion Givers generally would not opine as to compliance with financial covenants or ratios; instead the Lender normally would rely on certification by the chief financial officer or equivalent official of the Borrower and the Guarantor.

⁴⁸ Some practitioners limit the no-violation of Laws opinion to specific named Laws. Note the limitation to statutory law and regulation. Some believe that a no-violation of Laws opinion may include by implication a kind of usury opinion, which should not be given, at least not inadvertently. Note also that the Laws covered by this Paragraph (and the others) exclude those set forth in Paragraph 4.6. (See Real Estate Opinion Guidelines, §3.4.)

For a regulated Borrower Party entity, the Opinion Giver should consider whether any governmental approvals or filings are needed to borrow money, enter into the loan Transaction or make the Transaction Documents enforceable.

⁴⁹ The Bankruptcy Exception applies to all opinions not only to the Enforceability Opinion.

transfer, reorganization, receivership, moratorium and other similar Laws affecting the rights and remedies of creditors generally.⁵⁰

(b) Equitable Principles Exception. Each of the opinions and confirmations set forth in this Opinion Letter is subject to the effect of general principles of equity, whether applied by a court of law or equity, including, without limitation, principles governing the availability of specific performance, injunctive relief and other equitable remedies, and principles of diligence, good faith, fair dealing, reasonableness, conscionability, materiality and other equitable defenses.⁵¹

(c) Generic Enforceability Qualification. Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other qualifications set forth in this Opinion Letter,⁵² any such unenforceability will not render

⁵⁰ The Bankruptcy Exception is so universally used and accepted that, under customary practice, this exception is deemed to be implied even if not expressly stated. Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of these issues, this exception includes (to the extent these issues otherwise might be covered in the Opinion Letter): (a) the Federal Bankruptcy Code, including among others, matters of turn-over, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses and the coverage of pre-petition security agreements applicable to property acquired after a petition is filed; (b) all other Federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors Laws that affect the rights and remedies of creditors generally (not just creditors of specific types of debtors); (c) all other Federal bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement, and assignment for the benefit of creditors Laws that have reference to or affect generally only creditors of specific types of debtors and state Laws of like character affecting generally only creditors of financial institutions and insurance companies; (d) state fraudulent transfer and conveyance Laws; and (e) judicially developed doctrines relevant to any of the foregoing Laws, such as substantive consolidation of entities. In referring to federal laws relating to bankruptcy and related matters in the foregoing list we do not intend to limit the exclusion of federal laws elsewhere in this Opinion Letter.

⁵¹ As in the case of the Bankruptcy Exception (see note above), the Equitable Principles Exception is so universally used and accepted that customary practice would imply this exception even if not expressly stated. Many practitioners use a shorter version of this exception, referring only to “equitable principles.” Whether or not expressly stated, and whether or not the wording of the exception includes reference to any or all of the listed items, this limitation includes principles: (a) governing the availability of specific performance, injunctive relief or other equitable remedies which generally place the award of such remedies in the discretion of the court to which application for such relief is made; (b) affording equitable defenses (*e.g.*, waiver, laches and estoppel) against a party seeking enforcement; (c) requiring reasonableness, diligence, good faith and fair dealing in the entering into, performance and enforcement of a contract by the party seeking its enforcement; (d) requiring consideration of the materiality of (i) the Borrower’s breach and (ii) the consequences of the breach to the party seeking enforcement; (e) requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement; (f) affording defenses based upon the unconscionability of the documents or the enforcing party’s conduct; and (g) that limit the effectiveness, validity or enforceability of waivers of any of the foregoing. This exception states an expansive concept, not limited to the Transaction Documents themselves or to acts and omissions that occur at any particular time, whether at, before or after formation of the contract.

⁵² It is understood that the “assurance” added to the generic qualification or exception, by customary practice, is subject to all of the other qualifications in the Opinion Letter; nevertheless, some practitioners

the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Laws of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty), and the judicial enforcement in accordance with applicable Laws of the obligation of the Guarantor to repay as provided in the Guaranty the amounts set forth in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived),⁵³ (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest or upon a material default by the Borrower in any other material provision of the Transaction Documents,⁵⁴ and (iii) the foreclosure⁵⁵ in accordance with applicable Laws of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above.⁵⁶

(d) Choice of Law. [Except as expressly stated below in this Paragraph,] this Opinion Letter does not express any opinion as to the enforceability of any choice of law

prefer to so state. It is not appropriate to request, and, ill-advised to provide, an “assurance” that in effect overrides all exclusions and other qualifications in the Opinion Letter (*e.g.*, “notwithstanding the foregoing qualifications, ...”).

⁵³ Clause (i) may have to be limited for states with single form of action rules and may also have to be limited for states that impose other limitations on deficiency judgments. The Opinion Giver should consider, as appropriate, adding to clause (i) an exception for non-recourse provisions, and providing for separate treatment for a Guaranty.

⁵⁴ Some would limit clause (ii) to provide comfort only that the loan can be accelerated for a material breach of the obligation to pay principal and interest and stop short of providing assurance with respect to breach of other material provisions. Some argue that this phrase can be a trap for the unwary and that such material provisions should be specifically identified by including in the Opinion Letter a list of the provisions that the Opinion Recipient has identified as significant. On the other hand, others would respond that this would just replace one laundry list, the provisions that may not be enforceable (prepared by the Opinion Giver), with another laundry list, the provisions important enough to merit specific treatment in the opinion (prepared by the Opinion Recipient).

⁵⁵ [Consider to what extent to address possible coverage—where appropriate and cost justified—of non-judicial foreclosure; enforcement of assignments of rents, as collateral or as actual or purported absolute assignments of rents; appointment of a receiver; or any other specific remedies or related issues. Consider ethical issues in disclosure, though the Opinion Letter process, of remedies not covered properly in loan documents as initially drafted.]

⁵⁶ An alternative to the assurance in clauses (i) through (iii) is what is known as the “practical realization” approach, for example: “such unenforceability does not make the Transaction Documents legally inadequate for the practical realization of the principal benefits or security intended to be provided thereby, subject to the economic consequences of any delay which may result from applicable Laws.” While this is sometimes referred to as the traditional approach (once referred to as “encrusted with tradition,” Tri-Bar Opinion Committee, Third Party “Closing” Opinions 53 Bus. Law. 591 (1998) § 3.4.1.), and is still sometimes encountered in Opinion Letters in unsecured transactions, its use has been heavily criticized for, among other things, its apparent ambiguity and subjectivity, and it has fallen into disfavor in many quarters.

or analogous provisions in the Transaction Documents.⁵⁷ [Insert any specific choice of law opinion here]. [To the extent governed by a Law of any jurisdiction other than the State (an “**Other Jurisdiction**”), including conflicts of laws principles thereof, we assume that: (i) the Transaction Documents constitute legal, valid and binding obligations of the respective parties thereto, enforceable against such parties in accordance with their respective terms under the Laws of each Other Jurisdiction; (ii) the Other Jurisdiction has a substantial relationship to the parties or the Transaction or there is other reasonable basis for the choice by the parties, and application of the Laws of an Other Jurisdiction would not be contrary to a fundamental policy of the State; and (iii) the selection of application of the Law of the Other Jurisdiction will be honored by courts in the Other Jurisdiction.]⁵⁸

(e) Other Common Qualifications. Each of the opinions and confirmations set forth in this Opinion Letter is subject to the effect of generally applicable rules of Laws that:⁵⁹

limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence, and reasonableness;⁶⁰

provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected;

limit the availability of a remedy under certain circumstances where another remedy has been elected;

limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;

⁵⁷ The ABA/ACREL Accord Adaptation Report said that, in a real estate secured transaction, an Opinion Letter excludes certain aspects of the choice of law opinion described in Accord § 10(d)(i), but recommended stating an express exclusion if all choice of law issues are to be excluded from opinion coverage. To avoid confusion, choice of law should be dealt with expressly in the Opinion Letter. The first sentence of the choice of law Paragraph, as written in the above text, disclaims any choice of law opinion. In some cases, where justified by its cost, a different approach is to provide an affirmative opinion to the effect that the Opinion Jurisdictions will enforce the parties’ choice of law set forth in the Transaction Documents. In those circumstances, in some states, some Opinion Givers will rely on a statute, if there is one, giving effect to the rights of the parties to choose the Laws of the Opinion Jurisdictions. If the issue is whether the courts of the Opinion Jurisdictions will enforce the parties’ stated intention that the Laws of another jurisdiction will govern, such an opinion often is provided as a reasoned opinion that requires additional factual assumptions and an analysis of statutes, cases, and other Laws in the Opinion Jurisdictions and perhaps other sources, such as Restatements.

⁵⁸ This assumption may be necessary, for example, to support an opinion that gives effect to remedies being interpreted and enforced under the Laws of the Opinion Jurisdictions with respect to breaches of obligations being interpreted and enforced under the laws of an Other Jurisdiction.

⁵⁹ [Consider which of these Other Common Qualifications may be unnecessary in light of the Generic Enforceability Qualification or other exceptions, exclusions, etc.]

⁶⁰ [Consider if this already is covered in Paragraph 4.3, the Equitable Principles Exception or the Assumptions above.]

relate to the sale or disposition of collateral or the requirements of a commercially reasonable sale, including, without limitation, statutory cure provisions and rights of reinstatement and limitations on deficiency judgments;

limit the enforceability of provisions releasing, exculpating or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves [gross]⁶¹ negligence, recklessness, willful misconduct or unlawful conduct;

may, where less than all of a contract may be unenforceable, limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;

govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;

may, in the absence of a waiver or consent, discharge a guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the guarantor, or (ii) guaranteed debt is materially modified;

may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;

limit or affect the enforceability of a waiver of a right of redemption;

impose limitations on attorneys' or trustees' fees;

limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents;

limit or affect the enforceability of provisions for late charges, prepayment charges or yield maintenance charges, acceleration of future amounts due (other than principal), without appropriate discount to present value, liquidated damages, penalties, or interest on interest;

limit or affect the enforceability of provisions that provide for the application of insurance or condemnation proceeds to reduce indebtedness;

limit or affect the enforceability of provisions that provide for the acceleration of indebtedness upon any transfer or change in the control, ownership, or management of any party;

limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the Collateral; and⁶²

⁶¹ In some states, waiver or indemnity for negligence may be a concern even if not gross negligence.

⁶² Qualification (q) above might be expanded, in appropriate circumstances, to exclude any "true sale" or "true lease" opinion, as well as disclaiming any opinion that a purported absolute assignment of rents would be enforced as such.

[Others to consider: regarding assignments of rents, guaranties, environmental indemnities, jury trial waivers, workers' compensation, special issues in arbitration, etc.]⁶³

(f) Exclusions. No opinions are implied beyond those expressly stated in this Opinion Letter. Without limiting the generality of the preceding sentence, unless explicitly addressed in this Opinion Letter, the opinions and confirmations set forth in this Opinion Letter do not address any of the following legal issues, and we specifically express no opinion with respect thereto:⁶⁴

securities Laws, “Blue Sky” Laws, and Laws relating to commodity (and other) futures and indices and other similar instruments;⁶⁵

margin regulations;

pension and employee benefit laws and regulations;

antitrust and unfair competition Laws;

Laws concerning filing and notice requirements, other than requirements applicable to charter-related documents such as a certificate of merger;

compliance with fiduciary duty requirements;

the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing matters in this Paragraph (“**Local Laws**”);

the characterization of the Transaction;⁶⁶

the creation, attachment, perfection or priority of a lien or security interest in or to Collateral, or enforcement of a security interest in Collateral comprising

⁶³ Additional express exclusions may be appropriate. Consider whether the possible omission of any of these qualifications would be unreasonable because of the added cost of due diligence if any are to be eliminated.

⁶⁴ As in the case of assumptions (see note 30 above), many of these items may be impliedly excluded by customary practice whether or not expressly excluded, and some Opinion Givers will omit many or all of these express exclusions.

⁶⁵ The Opinion Giver should consider whether any exclusions relating to Federal Laws are needed if Federal Laws are not generally covered pursuant to the definition of Laws in Paragraph 1.3 above.

⁶⁶ Some practitioners may wish to be more specific as to possible characterization issues. Characterization may include whether the Transaction constitutes a financing as opposed to a joint venture, lease, assignment or sale; whether an assignment of rents effects an absolute assignment as opposed to an encumbrance; or other characterizations. Some may limit this exclusion by excluding the characterization “except to the extent that the enforceability of remedies against the Borrower Parties set forth in the Transaction Documents is dependent on the characterization of the Transaction expressed by the parties to it.” The latter phrase, or another statement addressing the issue, might add to the comfort within the Generic Enforceability Qualification.

personal property [without implying that such otherwise would be implied in the Opinion Letter];

environmental Laws;

zoning, land use, condominium, cooperative, subdivision and other development Laws;

tax Laws;

patent, copyright and trademark, state trademark, and other intellectual property Laws;

racketeering Laws;

health and safety Laws;

labor Laws;

Laws concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture laws;

Laws of general application to the extent they provide for criminal prosecution (*e.g.*, mail fraud and wire fraud statutes);

bulk transfer Laws;

Laws concerning access by the disabled and building codes;

title to any property, the characterization of any property as real property, personal property or fixtures, or the accuracy or sufficiency of any description of collateral or other property; and

POSSIBLE OTHERS: [anti-terrorism; anti-money laundering; arbitration; know-your-borrower; ECOA; FDCPA; consumer protection Laws; Servicemembers Civil Relief Act; TARP/TALF; Interstate Land Sales Act; Federal Assignment of Claims/Contracts Acts; appointment of [the Lender as] attorney in fact; etc.].

(g) **Knowledge.** As used in this Opinion Letter, “**Actual Knowledge**” means, without investigation, analysis, or review of court or other public records or our files or inquiry of persons, with respect to the undersigned law firm (the “**Opinion Giver**”), the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group. “**Primary Lawyer**” means [the lawyer in the Opinion Giver’s organization who signs the Opinion Letter;] any lawyer in the Opinion Giver’s organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents or preparing the Opinion Letter; and solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (*e.g.*, pending or threatened legal proceedings), any lawyer in the Opinion Giver’s organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation. “**Primary Lawyer Group**” means: all of the Primary Lawyers when there is more than one.

(h) **[If not inserted in above assumptions, exclusions and qualifications, INSERT STATE or Transaction-SPECIFIC ASSUMPTIONS OR EXCEPTIONS]**⁶⁷

18.

ADDITIONAL CONFIRMATION

(a) Legal Proceedings. We hereby confirm to the Lender that [we have no Actual Knowledge of][alternative—we have not been engaged to give substantive attention to] any litigation or arbitration proceedings against any of the Borrower Parties, pending or overtly threatened in writing, which, except as disclosed in [the Agreement or an exhibit, annex or schedule thereto] [an officer’s certificate], seeks to enjoin the Transaction or challenge the validity or enforceability of the Transaction Documents or the performance by the Borrower Parties of their respective obligations thereunder] [alternative—come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold]].⁶⁸ Except for the information disclosed in this Opinion Letter, the Borrower, in requesting us to issue this Opinion Letter, did not intend to waive the attorney-client privilege. Moreover, please be advised that our response to you should not be construed in any way to constitute a waiver of the protection of the attorney work product doctrine with respect to any of our files involving the Borrower.⁶⁹]

19.

USE OF THIS OPINION

(a) Use. The opinions expressed in this Opinion Letter are solely for the Lender’s use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by the Lender for any other purpose whatsoever or relied on by any other person, except that: (i) this Opinion Letter may be delivered by the Lender to an assignee for value in good faith of all right, title and interest in and to the [Note], and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof, (ii) this Opinion Letter may be delivered to a regulatory

⁶⁷ If usury laws are to be excluded from coverage in the Opinion Letter, as may be customary practice in certain states, that needs to be disclosed expressly in an inter-state Opinion Letter. See the note to the Enforceability Opinion, Paragraph 3.5.

⁶⁸ The Opinion Giver should exercise care in how the objective standard is stated and applied. For example, some Opinion Givers believe it is prudent to disclose litigation even if the identified litigation falls short of an objective materiality standard.

⁶⁹ An increasing number of practitioners question the appropriateness of the purely factual confirmation of Paragraph 5.1. This is in part because of the possibility that, if the Opinion Recipient were to sue, alleging that the Opinion Giver had knowledge contrary to the factual confirmation, even if the Opinion Giver in fact lacked any such knowledge, such allegations might not be disposed of readily or inexpensively. Some practitioners will provide information only regarding litigation matters to which they have been engaged by the client to give substantive attention, which is a similar concept to the response lawyers give to auditors under the American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (December 1975).

agency having supervisory authority over the Lender for the purpose of confirming the existence of this Opinion Letter, (iii) this Opinion Letter may be delivered to the court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary, and (iv) this Opinion Letter may be delivered to other parties as required by the order of a court of competent jurisdiction in the United States. Nothing in the preceding sentence however shall give any person any greater rights with respect to this Opinion Letter than those of the Lender as of the date hereof or shall provide or imply any opinion being given with respect to an assignee that depends on the identity or characteristics of the named assignee or other circumstances of the original Opinion Letter.⁷⁰

(b) Governing Laws. This Opinion Letter shall be governed and construed in accordance with the Laws of the State.⁷¹

(c) Disclaimer of Implied Opinions. This Opinion Letter deals only with the specific legal issues that are addressed by it. Accordingly, any express opinion concerning a particular legal issue does not address any other matters.

(d) Expression of Professional Judgment. The opinions contained in this Opinion Letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.⁷²

⁷⁰ An Opinion Giver's liability under an Opinion Letter is grounded in the reasonable and foreseeable reliance of the Opinion Recipient. Such reliance is dependent on the nature and context of the Opinion Letter, as well as the identity of the Opinion Recipient, the Opinion Recipient's pre-existing knowledge of the relevant Laws, its familiarity with applicable customary practice, the passage of time, and other relevant circumstances, each of which may be significantly different for a subsequent investor than for the original addressee. As a result, in an effort to preclude reliance by otherwise unknown assignees, many Opinion Givers restrict reliance on, and delivery of, an opinion to the named addressee and other specifically identified parties. A compromise sometimes struck is to allow the Opinion Letter to be delivered to assignees but not relied on by them.

We believe it is not appropriate for counsel to the Lender to be able to rely on the Opinion Letter.

If there may be more than one assignee, that should be specifically addressed. Consider whether to require a single party be appointed as the representative of multiple holders of interests in the Note if any action to enforce this Opinion Letter or to settle any potential claims may be taken.

⁷¹ The Laws governing the Opinion Letter and potential liability under it will not necessarily be the same as the Laws governing the Transaction Documents. Though this issue is implicit in every Opinion Letter it generally has not been the subject of express treatment within Opinion Letters that we have seen. In the case of an Opinion Letter that may run to the benefit of multiple noteholders, consider if there is any need for a mechanism to avoid multiple litigations, at least with respect to a given issue in dispute.

⁷² Customary practice provides that Opinion Letters are expressions of professional judgment and not guarantees of particular results. Some practitioners prefer to expressly incorporate this concept into the text of the Opinion Letter. Whether or not stated in the text of the Opinion Letter, an Opinion Letter is an expression of professional judgment and not a guarantee that a court will reach a particular result.

(e) Effective Date; No Obligation to Update. This Opinion Letter is rendered as of its date, and we express no opinion as to circumstances or events which may occur subsequent to such date. Further, we undertake no, and hereby disclaim any, obligation to advise you of any changes in or any new developments which might affect any matters or Opinions set forth herein.

Very truly yours,⁷³

[SIGNATURE OF OPINION GIVER]

ATTACHMENTS:

Attachment []: Other Agreements of the Borrower

Attachment []: Court Orders Regarding the Borrower

Attachment []: Other Agreements of the Guarantor

Attachment []: Court Orders Regarding the Guarantor

⁷³ Electronically provided signatures generally are effective. *See* Uniform Electronic Transactions Act (1999), Electronic Records and Signatures in Commerce Act, 15 U.S.C. § 7001 *et seq.*].