

Sample California Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions

*By the Opinions Committee of the Business Law Section of the California Lawyers Association**

The Opinions Committee (the “Committee”) of the Business Law Section (the “Business Law Section”) of the California Lawyers Association (being the successor by operation of law to the committee of the same name of The State Bar of California) has prepared and issued the following sample California third-party legal opinion letter (the “UCC Opinion”) in consultation with the Commercial Transactions Committee of the Business Law Section and with the approval of the Executive Committee of the Business Law Section. The Committee has prepared the UCC Opinion as an illustration of what an opinion letter following the precepts of the opinion reports of the Business Law Section might look like. The UCC Opinion is intended as a sample and should not be construed as a prescriptive model.

As the basis for the UCC Opinion, the Committee chose a secured lending transaction involving a California corporation as the borrower, a California limited liability company as the guarantor, and transaction documentation governed by California law. The Committee believes that the chosen transaction allows it to illustrate certain opinions commonly given in a business transaction involving California corporations and limited liability companies, including opinions relating to the creation, attachment, and perfection of security interests under the California Uniform Commercial Code (the “UCC”). The UCC Opinion is based primarily on the sample opinion letter for an unsecured loan transaction¹ and the sample opinion letter addressing only personal property security interests under the UCC.² It is also rooted in the various opinion reports of the Business Law Section and other professional associations—for example, the American Bar

* The statements and views contained in the UCC Opinion are those of the Opinions Committee and are not necessarily those of the California Lawyers Association. This Sample Opinion Letter is made available with the express understanding that none of the California Lawyers Association, Business Law Section, or Opinions Committee is engaged in providing legal or other professional services, including as a result of publishing the UCC Opinion.

1. See OP. COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS (rev. 2014).

2. See COMMERCIAL TRANSACTIONS COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA ON LEGAL OPINIONS IN PERSONAL PROPERTY SECURED TRANSACTIONS 3 app. B (2005).

Association's Section of Business Law and the TriBar Opinion Committee—certain of which are listed in footnote 3.³

3. The UCC Opinion is also based on the reports of the Corporations Committee (the "Corporations Committee") of the Business Law Section, the Partnerships and Limited Liability Companies Committee (the "Partnerships and LLC Committee") of the Business Law Section, and the Commercial Transactions Committee f.k.a. the Uniform Commercial Code Committee (the "UCC Committee") of the Business Law Section, all of which reports are available at http://www.americanbar.org/content/aba/groups/business_law/migrated/tribar.html under the "State and Other Bar Reports" subsection. See generally CORP. COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., LEGAL OPINIONS IN BUSINESS TRANSACTIONS (EXCLUDING THE REMEDIES OPINION) (rev. 2007) [hereinafter 2007 *Business Transactions Report*]; BUS. LAW SECTION, THE STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINIONS: 2007 UPDATE (2007) [hereinafter 2007 *Remedies Report*]; P'SHIPS & LTD. LIAB. COS. COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., THIRD-PARTY CLOSING OPINIONS: LIMITED LIABILITY COMPANIES AND PARTNERSHIPS (2016) [hereinafter *California LLC Report*]; UNIF. COMMERCIAL CODE COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., LEGAL OPINIONS IN PERSONAL PROPERTY SECURED TRANSACTIONS (2005) [hereinafter *UCC Report* and *Original UCC Opinion*]; OP. COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS (rev. 2014) [hereinafter *Transactional Opinion*]; Op. Comm. of the Bus. Law Section of the State Bar of Cal., *Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions*, 70 BUS. LAW. 177 (2014) [hereinafter *Venture Opinion*, and together with the *Original UCC Opinion* and *Transactional Opinion*, the *Sample Opinions*]. These reports and the opinions refer at times to the TriBar Opinion Committee reports, American Bar Association Section of Business Law Legal Opinions Committee reports, and other reports. See, e.g., TriBar Op. Comm., *Report: Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter 1998 *TriBar Report*]; TriBar Op. Comm., *U.C.C. Security Interest Opinions—Revised Article 9*, 58 BUS. LAW. 1449 (2003) [hereinafter *TriBar UCC Report*]; TriBar Op. Comm., *The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483 (2004) [hereinafter *TriBar Remedies Opinion Report*]; TriBar Op. Comm., *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006) [hereinafter *TriBar LLC Report*]; TriBar Op. Comm., *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011) [hereinafter *TriBar LLC Membership Interests Report*]; TriBar Op. Comm., *Third Party Closing Opinions: Limited Partnerships*, 73 BUS. LAW. 1107 (2018); see also Am. Bar Ass'n Section of Bus. Law Legal Ops. Comm. et al., *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (2008) [hereinafter *Customary Practice Statement*]; Am. Bar Ass'n Comm. on Legal Ops., *Cross-Border Closing Opinions of U.S. Counsel*, 71 BUS. LAW. 139 (2015) [hereinafter *ABA Cross-Border Opinion Report*]; Legal Ops. Comm. of the Am. Bar Ass'n Bus. Law Section & Working Grp. on Legal Ops., *Statement of Opinion Practices*, 74 BUS. LAW. 803 (2019) [hereinafter *Statement of Opinion Practices*]; see also Gail Merel et al., *Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions*, 70 BUS. LAW. 121, 138 (2014). The UCC Opinion uses the language of the *Sample Opinions* (making only such changes as were necessary to meld the samples together). The UCC Opinion also adopts terminology from the 1998 *TriBar Report*, using the term "opinion preparer" to refer to a lawyer preparing—or whose knowledge is relevant to the preparing of—the opinion letter and the term "opinion giver" to refer to the firm that is professionally responsible for the work product.

Consistent with the *Sample Opinions*, the UCC Opinion is referred to as a "sample opinion letter" even though it contains a factual confirmation in addition to legal opinions. See *infra* Section D. Providing a factual confirmation is common in securities transactions, where "negative assurance" statements have traditionally been provided. See Task Force on Sec. Law Ops., Comm. on Fed. Reg. of Sec., Am. Bar Ass'n Section of Bus. Law, *Special Report: Negative Assurance in Securities Offerings* (2008 Revision), 64 BUS. LAW. 395 (2009) [hereinafter *Negative Assurance Report*].

As with the *Sample Opinions*, the UCC Opinion does not specifically state that it is to be interpreted in accordance with the customary practice of lawyers giving opinions. Regardless of whether such a statement is included, however, the opinion letter should be interpreted in light of such customary practice. See *Customary Practice Statement*, *supra*, at 1278; *Statement of Opinion Practices*, *supra*, § 2 (providing support in the last sentence). If the opinion giver nonetheless desires to include a reference to customary practice, one increasingly accepted method of doing so is to refer to the *Statement of Opinion Practices* (although a reference to the *Customary Practice Statement* would be appropriate). This is often done by including, either at the beginning or the end of the opinion letter, a statement such as: "This opinion letter shall be interpreted in accordance with the *Statement of Opinion Practices* [, a copy of which is

NOTE: Although the UCC Opinion summarizes certain basics of legal opinion practice, it does not restate in full the general principles of legal opinion practice, such as the definition and purpose of a legal opinion, the legal standards applicable to the preparation of a closing opinion, and the customary diligence undertaken in the preparation of an opinion letter. For these principles, the reader is referred to the *2007 Business Transactions Report* and the *1998 TriBar Report*. Unless the Committee specifically states in the UCC Opinion that it is modifying the interpretation of any element of legal opinion practice included in these or the other opinion reports cited in the UCC Opinion, the summaries of opinion practice included herein are qualified in their entirety by reference to the *2007 Business Transactions Report*, the *1998 TriBar Report*, and the other California and TriBar reports cited herein.

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attached hereto].” Practitioners are encouraged to consult Appendix 5 of the *Remedies Report*, which provides an extensive discussion of customary opinion practice.

A version of the UCC Opinion without footnotes is posted on *The Business Lawyer* website next to this sample opinion.

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SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION LETTER FOR
PERSONAL PROPERTY SECURED FINANCING TRANSACTIONS

[DATE]⁴

TALL OAKS BANK, N.A.
101 California Street
San Francisco, CA 94111

Ladies and Gentlemen:

We have acted as counsel to SPIRIT'S WILLING, INC., a California corporation (the "Borrower"), and FLESH'S WEAK, LLC, a California limited liability company (the "Guarantor"), in connection with the negotiation, execution and delivery of the Loan Agreement, dated as of [DATE] (the "Loan Agreement"), between the Borrower and TALL OAKS BANK, N.A., a national banking association (the "Lender"). The Borrower and the Guarantor are sometimes referred to in this letter individually as a "Loan Party" and collectively as the "Loan Parties." This letter is delivered to you⁵ pursuant to Section [] of the Loan Agreement.⁶ Each capitalized term used but not otherwise defined herein has the meaning given to it in the Loan Agreement. Subject to the preceding sentence, each term used but not otherwise defined herein has the meaning given to it in Division 9 of the California Uniform Commercial Code (the "UCC") [or, if not defined therein, in Division 8 of the UCC].⁷

4. By its nature, a third-party legal opinion letter speaks only as of the date it is issued. Accordingly, it does not cover subsequent changes in law or fact. See *Statement of Opinion Practices*, *supra* note 3, § 9.

5. An opinion letter in a loan transaction will usually be addressed to an institution and not to a specified individual at that institution. The subject of this UCC Opinion is a loan secured by the personal property of the Borrower and guaranteed by the Guarantor. The Lender is a national banking association (identifying the nature of the lender is relevant to compliance with California usury laws). See *infra* note 32. Note that, if the subject of the opinion letter were a syndicated loan, then the opinion letter would usually be addressed to the administrative agent for the lenders as well as to each of the lenders under the Loan Agreement. Cf. CAL. COM. CODE § 9102(a)(73) (2019) (providing that a secured party includes, *inter alios*, an agent in whose favor a security interest is created).

6. It is common to state the context in which the opinion letter is being delivered. Here, as is often the case, delivery of the opinion letter is a condition to the closing of the transaction, and reference is made to the provision in the Loan Agreement providing for its delivery.

While the opinion giver may wish to describe its role as "general" or "special" counsel for the Borrower or the Guarantor in the transaction, such descriptive terms have no generally recognized meaning. 2007 *Business Transactions Report*, *supra* note 3, § D.2. Therefore, they should not be viewed as substitutes for appropriate substantive qualifications or limitations on the scope of the opinion giver's role in the transaction. 2007 *Business Transactions Report*, *supra* note 3 (text accompanying notes 93–94). Moreover, the term "special counsel" does not limit the opinion giver's responsibility for the opinions given by it. *Id.* Accordingly, if the opinion giver is not involved generally in representing the client and has been asked for an opinion on a limited matter, it may be advisable for it to describe the scope of its limited involvement with the client or the transaction rather than rely solely on the implication of limited participation by the reference to "special" counsel. *Id.*

7. Unless otherwise indicated, section references herein are to sections of the UCC. Note that California uses "Divisions" instead of "Articles"; in addition, California does not use a hyphen to separate the Division of the UCC from the Section thereof.

A. DOCUMENTS EXAMINED⁸

We have reviewed the following documents⁹:

- (i) the Loan Agreement;
- (ii) the Promissory Note, dated [DATE] (the “*Promissory Note*”), in the original principal amount of [\$_____], executed by the Borrower to the order of the Lender;
- (iii) the Guaranty, dated as of [DATE] (the “*Guaranty*”), by the Guarantor in favor of the Lender;
- (iv) the Security Agreement, dated as of [DATE] (the “*Security Agreement*”), between the Borrower and the Lender;

This UCC Opinion does not address the creation or perfection of a security interest in personal property other than under Division 8 and Division 9 of the UCC, and except as set forth in Section C, numbered paragraphs 20–22, of this UCC Opinion, it does not address the priority of any security interest.

This sample language (or any similar alternative) may be used in lieu of repeating, in each instance where used, a statement that a particular term has the meaning ascribed to it in the Loan Agreement or the UCC, as applicable. *See, e.g., infra* text accompanying note 55. The sample language with respect to defined terms contained in the UCC is limited to Division 9, and where appropriate, Division 8 of the UCC because those are the Divisions of the UCC most relevant to the opinions set forth herein. It also eliminates confusion about terms that are defined differently within the UCC (for example, “instrument” is defined differently in Division 3 and Division 9 of the UCC) and avoids the inadvertent varying of terms as a result of a broader reference to the UCC and not just the specific Divisions thereof (for example, “agreement,” “knowledge,” and “security interest” are defined in Division 1 of the UCC).

8. The order in which the elements of an opinion letter are set forth varies from firm to firm. The order adopted in this UCC Opinion follows basically that set out in the *2007 Business Transactions Report*:

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

2007 Business Transactions Report, supra note 3, at 21 (footnote omitted).

This UCC Opinion, as does each of the Transactional Opinion and the Venture Opinion, departs from this framework in one significant respect: it separates a factual confirmation—whether or not traditionally expressed with the legal conclusions—from the legal conclusions by placing it in a separate section headed “Confirmation” immediately following the legal conclusions. *See infra* note 84.

9. Practice varies as to whether the opinion letter lists all of the documents that the opinion preparers have reviewed for purposes of preparing the opinion letter. *See 2007 Business Transactions Report, supra* note 3, at 24–32 (providing an extended discussion regarding the description of an opinion preparer’s factual examination).

This UCC Opinion assumes that each of the Loan Documents states that it is governed by California law. *See infra* notes 45, 68, 84 & 85. For sample language specifically addressing the validity of a governing law clause in loan documents that select as the governing law the law of a state other than California, see the suggested language at *infra* note 45.

- (v) the Acknowledgment, dated as of [DATE] (the “*Acknowledgment*”), between GIVE-AN-INCH BAILEE, INC., a California corporation (the “*Bailee*”), and the Lender;¹⁰
- (vi) Certificate No. C-1 (the “*Stock Certificate*”), representing 100 common shares of 222 COMPANY, INC., a California corporation (the “*Issuer*”), and reflecting the Borrower as the holder thereof, together with a stock power endorsed by the Borrower {[in blank] OR [in the name of the Lender]} (the “*Stock Power*”);¹¹
- (vii) Certificate No. C-2 (the “*Bearer Stock Certificate*”), representing 100 common shares of the Issuer and issued in bearer form;¹²
- (viii) the Deposit Account Control Agreement, dated as of [DATE] (the “*Deposit Account Control Agreement*”),¹³ among the Borrower, PENNYWISE BANK, N.A., a national banking association (the “*Depository Bank*”), and the Lender;¹⁴

10. This document would be included in connection with Opinion 12 of this UCC Opinion, where a bailee has possession of a portion of the collateral (other than certificated securities), the security interest therein is being perfected by possession by such bailee on behalf of the secured party, and a Perfection-by-Possession Opinion is given regarding such collateral. See generally *UCC Report, supra* note 3, § 5.2. Opinions on perfection by delivery are covered by Opinion 13 of this UCC Opinion.

11. This reference to a certificated security in registered form and the accompanying stock power would be included where (1) the security interest in the certificated security is being perfected under section 9313(a) by delivery (i.e., possession) pursuant to section 8301(a)(3) (i.e., perfection through possession by the secured party or a third party) and (2) a Perfection-by-Delivery Opinion, see *infra* Opinion 13 (Second Alternative), is given regarding such collateral. The stock power is not necessary to perfect a security interest in a certificated security in registered form that is perfected under section 9313(a) by delivery pursuant to sections 8301(a)(1) or (a)(2) (i.e., perfection through possession by the secured party or a third party who is not a securities intermediary); a Perfection-by-Delivery Opinion, see *infra* Opinion 13 (First Alternative), may be given regarding such collateral. See generally *UCC Report, supra* note 3, § 5.2, at 36 n.202, 38 n.22, 43 n.242.

12. This reference to a certificated security in bearer form would be included where (1) the security interest therein is being perfected under section 9313(a) by “delivery” pursuant to sections 8301(a)(1) or (2) and (2) a Perfection-by-Delivery Opinion, see *infra* Opinion 13 (First Alternative), is given regarding such collateral. The reference to the certificated security being in bearer form is relevant to any priority opinion concerning the security interest in such certificated security. See *infra* Opinion 21.

13. This document would be included where (1) the collateral includes a deposit account maintained by the Borrower with a depository bank that is not the Lender, (2) the security interest therein is being perfected under section 9314(b) by control under section 9104(a)(2) (i.e., by the use of a control agreement), and (3) a Perfection-by-Control Opinion, see *infra* Opinion 14 (Second Alternative), is given regarding such collateral. See generally *UCC Report, supra* note 3, § 5.3.1. Note that the sole method to perfect a security interest in a deposit account taken as original collateral is by control under section 9104. See generally *id.*

14. Where (1) the collateral includes a deposit account that has been placed in the name of the Lender and the Lender has become the customer of the depository bank, (2) the security interest therein is being perfected under section 9314(b) pursuant to control under section 9104(a)(3) (i.e., by the secured party becoming the depository bank’s customer as to the account), and (3) a Perfection-by-Control Opinion, see *infra* Opinion 14 (Third Alternative), is given regarding such collateral, it is customary to assume without so stating that the Lender has become the customer of the Depository Bank, and no separate reference to a customer agreement is typically made.

If, however, the security interest in the deposit accounts maintained by the Borrower with the Lender is being perfected under section 9314(b) by control under section 9104(a)(1), and the Security Agreement references deposit accounts as a collateral type, no separate reference to any customer

- (ix) the Uncertificated Securities Control Agreement, dated as of [DATE] (the “*Issuer Control Agreement*”), among the Borrower, the Issuer, and the Lender;¹⁵
- (x) the Third Party Acknowledgment, dated as of [DATE] (the “*Third Party Acknowledgment*”), between Friend Indeed, Inc., a California corporation (“*Third Party*”), and the Lender;¹⁶
- (xi) the Securities Account Control Agreement, dated as of [DATE] (the “*Securities Account Control Agreement*”), among the Borrower, MANY ARE CALLED BROKER, INC., a California corporation (the “*Securities Intermediary*”), and the Lender;¹⁷
- (xii) the Commodity Account Control Agreement, dated as of [DATE] (the “*Commodity Account Control Agreement*”), among the Borrower, FEW ARE CHOSEN BROKER, INC., a California corporation (the “*Commodity Intermediary*”), and the Lender;¹⁸

agreement between the Borrower and the Lender is required to give a Perfection-by-Control Opinion. See *infra* Opinion 14 (First Alternative); see generally *UCC Report*, *supra* note 3, § 5.3.1.

15. This document would be included where (1) the collateral includes uncertificated securities that are not credited to a securities account, (2) the security interest therein is being perfected under section 9314(a) by control under sections 9106(a) and 8106(c)(2) (i.e., by the use of a control agreement), and (3) a Perfection-by-Control Opinion, see *infra* Opinion 15 (Second Alternative), is given regarding such collateral. See generally *UCC Report*, *supra* note 3, § 5.3.4.

16. This document would be included where:

(1) (i) the collateral includes certificated securities; (ii) the security interest therein is being perfected under sections 9106(a), 8106(a), and 8301(a)(2) (i.e., by a third party acknowledging that the third party has possession of the certificated securities on behalf of or holds for the Lender); and (iii) a Perfection-by-Delivery Opinion, see *infra* Opinion 13, is given regarding such collateral, see generally *UCC Report*, *supra* note 3, § 5.3.2;

(2) (i) the collateral includes uncertificated securities; (ii) the security interest therein is being perfected under section 9314(a) by control under sections 9106(a), 8106(c)(1), and 8301(b)(2) (i.e., by a third party acknowledging that the uncertificated securities are registered in its name and that it has control on behalf of or holds for the Lender); and (iii) a Perfection-by-Control Opinion, see *infra* Opinion 15 (First Alternative), is given regarding such collateral, see generally *UCC Report*, *supra* note 3, § 5.3.4; or

(3) (i) the collateral includes securities accounts or security entitlements, (ii) the security interest therein is being perfected under section 9314(a) by control under sections 9106(a) and 8106(d)(3) (i.e., by a third party who has control of the securities accounts or security entitlements acknowledging that it has control on behalf of or holds for the Lender), and (iii) a Perfection-by-Control Opinion, see *infra* Opinion 16 (Second Alternative), is given regarding such collateral, see generally *UCC Report*, *supra* note 3, § 5.3.5.

17. This document would be included where (1) the collateral includes securities accounts or security entitlements, (2) the security interest therein is being perfected under section 9314(a) by control under sections 9106(a) and 8106(d)(2) (i.e., by the use of a control agreement), and (3) a Perfection-by-Control Opinion, see *infra* Opinion 16 (Second Alternative), is given regarding such collateral. See generally *UCC Report*, *supra* note 3, § 5.3.5.

18. This document would be included where (1) the collateral includes commodity accounts or commodity contracts, (2) the security interest therein is being perfected under section 9314(a) by control under section 9106(b)(2) (i.e., by the use of a control agreement), and (3) a Perfection-by-Control Opinion, see *infra* Opinion 17, is given regarding such collateral. See generally *UCC Report*, *supra* note 3, § 5.3.5.

- (xiii) the Assignment and Consent, dated as of [DATE] (the “Assignment and Consent”), among the Borrower, PAID PIPER BANK, N.A., a national banking association (the “Letter of Credit Issuer”), and the Lender;¹⁹
- (xiv) the Notification of Security Interest, dated as of [DATE] (the “Notification”), executed by the Lender[, acknowledged by the Borrower,] and addressed to AN OUNCE OF PREVENTION INSURANCE COMPANY, INC., a California corporation (the “Insurer”);²⁰
- (xv) a[n] [acknowledgement] [time-stamped] [unfiled] copy of the financing statement in the form of Exhibit 1 hereto [naming the Borrower as debtor and the Lender as secured party] (the “Financing Statement”), {[filed as Instrument Number [_____]] OR [to be filed]} in the Office of the Secretary of State of the State of California (the “Filing Office”);²¹
- (xvi) the articles of incorporation of the Borrower, as amended to date, certified by the California Secretary of State as of [DATE] (the “Articles”);
- (xvii) the bylaws of the Borrower, as amended to date, certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this letter (the “Bylaws”);
- (xviii) records certified to us by an officer of the Borrower as constituting the records of proceedings and actions of the board of directors and the shareholders of the Borrower relevant to the opinions set forth in this letter;²²

19. This document would be included where (1) the collateral includes letter-of-credit rights, (2) the security interest therein is being perfected under section 9314(a) by control under section 9107 (i.e., by the consent of the issuer or any nominated person, see *UCC Report, supra* note 3, at 53 n.306), and (3) a Perfection-by-Control Opinion, see *infra* Opinion 18, is given regarding such collateral. See generally *UCC Report, supra* note 3, § 5.3.7.

20. The general application of Division 9 of the UCC to security interests in insurance policies as original collateral is a non-uniform California provision. See generally *UCC Report, supra* note 3, § 5.4. This document would be included where (1) the collateral includes any policy of insurance (including unearned premiums) that does not constitute a health-care insurance receivable, (2) the security interest therein is being perfected under section 9312(b)(4) (i.e., by written notice to the insurer), and (3) a Perfection-by-Notification Opinion, see *infra* Opinion 19, is being given. See generally *UCC Report, supra* note 3, § 5.4. While the acknowledgement of the Borrower is not required under Division 9 of the UCC, it is customarily obtained as a matter of prudence. Note, however, that what law governs the perfection of a security interest in an insurance policy is not at all clear. See *infra* note 76.

21. For purposes of this UCC Opinion, the Filing Office is the Office of the Secretary of State of the State of California. But see *infra* note 56 (regarding the place to file a financing statement filed as a fixture filing).

22. Although it is customary for opinion preparers to rely on a secretary’s certificate confirming adoption of the relevant resolutions, some opinion preparers may also review the corporate minute books. See *Transactional Opinion, supra* note 3, at 4 n.8.

- (xix) a Certificate of Status—Domestic Corporation with respect to the Borrower, issued by the California Secretary of State on [DATE];²³
- (xx) the articles of organization of the Guarantor, as amended to date, certified by the California Secretary of State as of [DATE]²⁴ (the “Articles of Organization”);
- (xxi) the [limited liability company operating agreement] of the Guarantor, dated as of [DATE], as amended to date, certified to us by [an officer] of the Guarantor as being complete and in full force and effect as of the date of this letter (the “Operating Agreement”);
- (xxii) records certified to us by [an officer] of the Guarantor as constituting all records of proceedings and actions of the [manager(s) and members]²⁵ of the Guarantor relating to the Loan;
- (xxiii) a Certificate of Status—Domestic Limited Liability Company with respect to the Guarantor, issued by the California Secretary of State on [DATE];
- (xxiv) a certificate of the [Chief Financial Officer, General Counsel, or other appropriate officer] of the Borrower identifying certain agreements and instruments to which the Borrower is a party or by which the

23. Some opinion givers also obtain a good standing letter from the California Franchise Tax Board to confirm that no suspension of the corporation’s charter for nonpayment of taxes is imminent. The Committee believes that, absent some particular concern known to the opinion giver about tax delinquencies of the Borrower, a California Franchise Tax Board letter need not be obtained to give a good standing opinion on a California corporation. The Secretary of State’s good standing certificate reflects whether as a result of a tax delinquency the corporation’s charter has been suspended or forfeited. See *Transactional Opinion*, *supra* note 3, at 4 n.9 (citing the 2007 *Business Transactions Report*, *supra* note 3, at 42).

24. The certificate might be delivered by a member, manager, or officer depending on the management structure of the limited liability company. See generally *California LLC Report*, *supra* note 3, at 2–3 (noting different permitted management structures of limited liability companies). Note that the language “and certified to us by [an officer] of the [Borrower/Guarantor] as being complete and in full force and effect as of the date of this letter” contained in clause (xxi) is sometimes inserted at the end of each of clauses (xvi) and (xx), although such language is not necessary given the reference in such clauses to state-certified documents.

25. Who will need to take action on behalf of a California limited liability company will be a function of its articles of organization and operating agreement. The *California LLC Report* states that the opinion giver is entitled to assume, without so stating, the legal capacity of natural persons who are members, managers, and officers, as well as the fact that any entity member, manager, or officer has taken whatever internal entity proceedings (*i.e.*, proceedings internal to that entity member, manager, or officer) as are necessary to permit it to act on behalf of the entity member. See *California LLC Report*, *supra* note 3, at 5–6, 24. Accordingly, while the opinion preparers would still need to examine the actions taken by the limited liability company to approve its obligations under the relevant documents, they would be entitled to assume (unless they know or reasonably have reason to know to the contrary) that an entity member or manager has taken whatever entity action is necessary to enable it to take all required limited liability company action (*e.g.*, the entity’s board has approved the entity manager’s execution and delivery of the relevant documents if required by the entity’s organizational documents). Note that the opinion preparers would still need to examine whether limited liability company procedures have been followed.

Borrower's properties or assets are bound (the "*Certificate Relating to Agreements*");²⁶

- (xxv) a copy of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being a true and correct copy of the original (the "*Scheduled Agreements*");
- (xxvi) a certificate of the [Chief Financial Officer, General Counsel, or other appropriate officer] of the Guarantor identifying certain agreements and instruments to which the Guarantor is a party or by which the Guarantor's properties or assets are bound (the "*Guarantor's Certificate Relating to Agreements*");
- (xxvii) a copy of each of the agreements and instruments identified in the Guarantor's Certificate Relating to Agreements, certified to us as being a true and correct copy of the original (the "*Guarantor Scheduled Agreements*"); and
- (xxviii) a certificate of each of [the Chief Financial Officer, General Counsel, or other appropriate officer] of the Borrower and the Guarantor as to certain factual matters relevant to this letter.^{27 28}

26. If the Loan Documents include a schedule of the Borrower's material agreements, the opinion preparers may forego the receipt of a Certificate Relating to Agreements and instead expressly limit their review to the agreements and instruments identified on the relevant schedule. If the Borrower is a reporting company under the Securities Exchange Act of 1934, the opinion letter may instead refer to the material contracts filed as exhibits to the Borrower's most recent annual report on Form 10-K, together with any subsequent reports on Forms 10-Q or 8-K (although the parties may agree to carve-outs (e.g., employment agreements) from the material contracts reviewed). To avoid any suggestion that the opinion preparers have determined that the contracts listed are objectively "material" under some standard, for example, the standard included in Item 601(b)(10) of Regulation S-K promulgated by the Securities and Exchange Commission, the contracts listed are referred to as "Scheduled Agreements" and not "Material Agreements." Regardless of whether the term "material" is used, by referring to a list of agreements, opinion givers are not implicitly giving an opinion that the listed agreements are in fact "material" to the Borrower or comprise all "material" agreements to which the Borrower is a party. The determination of which agreements are "material" is a question of fact and not the responsibility of the opinion giver. Note that the Certificate Relating to Agreements or the relevant schedule to the Loan Documents impacts Opinion 9(b) of this UCC Opinion.

27. This certificate addresses factual matters relevant to the Borrower and the Guarantor if not known to the opinion preparers. These may include matters such as the absence of dissolution proceedings and the absence (or identification) of pending litigation; however, the inclusion of such a certificate, while highlighting specific matters for both the opinion giver and the opinion recipient, should not be treated as assurance that all relevant factual matters have in fact been disclosed by the opinion giver's client(s). Some opinion preparers omit this certificate and instead rely on the general statement about the making of "further legal and factual examination" to cover any such matters. Finally, some opinion preparers draft this certificate (as well as other, similar opinion-related certificates) to be signed by an officer on behalf of the Borrower. Other opinion preparers draft the certificate to be signed by an officer in such person's own name. The Committee believes that these approaches are all appropriate.

28. See *infra* note 77 (regarding the inclusion of a search report if this UCC Opinion were to include a Filing Priority Opinion (as hereinafter defined)).

Each of the documents identified in the foregoing items (i) through ([____]) is sometimes referred to herein as a “Loan Document.”²⁹

We have also examined such other documents and made such further legal and factual examinations and investigations as we have determined to be necessary for purposes of giving the following opinions.³⁰

B. CERTAIN ASSUMPTIONS

We have assumed, for purposes of our opinions expressed herein, that³¹:

29. Opinion preparers should take care that the documents included in the definition of “Loan Documents” are properly included (for example, they should not include the Articles or the Borrower’s other organizational documents or certificates of public officials). See *Venture Opinion*, *supra* note 3, at 185 n.31. In addition, opinion preparers may prefer to substitute a different term (e.g., “Transaction Documents”) for the term “Loan Documents” if that term is differently defined in the Loan Agreement.

30. Some opinion preparers include a statement highlighting that they have not conducted a search of the docket of any court or other tribunal. According to the *1998 TriBar Report*, no such disclaimer is necessary (and no such search is required in connection with a “no-litigation” confirmation). *1998 TriBar Report*, *supra* note 3, at 664; see also *2007 Business Transactions Report*, *supra* note 3, at 64 n.195 (concurring with TriBar); see *infra* Section D (concerning the “no-litigation” confirmation). Also, some opinion preparers omit the last paragraph, intending to imply that the list of documents reviewed constitutes the exclusive scope of their document review. Merely deleting the last paragraph, however, is not generally understood to be sufficient to limit the responsibility of the opinion preparers to review other pertinent documents. When such a limitation is intended, the opinion giver typically adds language that makes clear that the opinions being given are based solely on a review of the listed documents. *2007 Business Transactions Report*, *supra* note 3, at 25–26 (“If no specific limitation is included, a list of documents is not generally understood to constitute a limitation on the general responsibility of the opinion giver to follow customary diligence in rendering the opinion.”).

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

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

1998 TriBar Report, *supra* note 3, at 615. Section 4 of the *Third-Party Legal Opinion Report, Including the ABA Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167, 179–220 (1991) [hereinafter “ABA Accord”], also contains a list of assumptions (including the ones itemized above) that need not be stated expressly in a closing opinion, including assumptions as to (a) the relevant transaction documents not being defined, supplemented or qualified by any agreement, understanding, usage of trade or course of dealing and (b) the parties to the relevant transaction documents acting in accordance with, and refraining from taking any action that is forbidden by, the terms and conditions of such documents. *Id.* at 186–87 (providing the list). While the list in Section 4 of the *ABA Accord* applies only to those opinions that adopt the *ABA Accord*, “it provides a useful compilation of the assumptions that are understood as a matter of customary practice to be implicit in closing opinions.” DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS § 4.3.3, at 151–53 (3d ed. 2008) [hereinafter GLAZER AND FITZGIBBON].

Similarly, it is not necessary to state separately as an assumption that those who have approved an agreement have satisfied their fiduciary obligations and have disclosed any interest in the transaction, *1998*

- (a) (i) the Lender is (A) a subsidiary of a bank holding company (as such terms are defined in Section 1287 of the California Financial Code) or is a bank organized under the laws of the United States or any State thereof, (B) a foreign (other nation) bank described in Section 1768 of the California Financial Code meeting the criteria for exemption set forth therein, (C) licensed under the California Financing Law (Cal. Fin. Code § 22000–7780.1 (2019)), or (D) a lending institution otherwise belonging to an exempt class of persons and, as a result thereof, that the Lender is exempt from the restrictions of Section 1 of Article XV of the Constitution of the State of California relating to rates of interest upon the loan of money;
- (ii) the Loan will be made by the Lender for its own account or for the account of another party that qualifies for an exemption from the interest rate limitations of California law; and
- (iii) there is no agreement by the Lender to sell participations or any other interest in the Loan(s) to any person other than a party that qualifies for an exemption from the interest rate limitations of California law,³²

TriBar Report, *supra* note 3, at 629, or that contracts covered by the “no-breach” opinion that by their terms are governed by the laws of another jurisdiction whose law is not being covered in the opinion letter are being interpreted in accordance with their plain meaning, *id.* at 660. All of these assumptions may be relied on and left unstated so long as they are not known to be false or reliance on them in the particular circumstance would not be unreasonable. *Id.* at 610.

The 2007 *Business Transactions Report* endorses the approach of the 1998 *TriBar Report*. 2007 *Business Transactions Report*, *supra* note 3, at 21 n.85; see also 2007 *Remedies Report*, *supra* note 3, at 15 n.38; *TriBar Remedies Opinion Report*, *supra* note 3, at 1486–89.

The Committee notes that the decision in *Fortress Credit Corp. v. Dechert*, 934 N.Y.S.2d 119 (App. Div. 2011), may encourage some opinion givers to state expressly some or all of the assumptions of general applicability. The court in that case noted, as one of the bases for dismissing the action, that the subject opinion letter included an assumption regarding the genuineness of the documents reviewed. Although the result in the case was no doubt correct, the Committee believes that, absent facts suggesting to the opinion preparers that the documents were not genuine, the case should ultimately have been decided the same way whether or not an express assumption was included in the opinion letter. For many of the same reasons that some opinion givers are inclined to include an express reference to customary practice in their opinion letters, see, e.g., *supra* note 3, some opinion givers state some or all of the general assumptions. The Committee believes that, whether or not assumptions of general application are stated expressly, an opinion letter is read as if such assumptions were expressly stated—and the opinion preparers should not be responsible for affirmatively investigating their accuracy. The Committee notes that a “laundry list” approach to assumptions (and to qualifications/exceptions)—that is, utilizing a standard list of assumptions, qualifications, or exceptions that may include assumptions, qualifications, or exceptions that are not relevant to the actual terms of the agreement(s) being considered—can impair the value of an opinion letter as a communication tool. See *TriBar Remedies Opinion Report*, *supra* note 3, at 1486.

In addition to assumptions of general application, opinion givers sometimes include express assumptions about additional matters that are necessary predicates to one or more of the particular opinions being given but are not generally applicable to all of the opinions. These assumptions should be included if they are to be relied on, and their inclusion (so long as the opinion is not misleading) shifts to the opinion recipient the burden of confirming the matters assumed or taking the risk that they are not accurate. See 1998 *TriBar Report*, *supra* note 3, at 616.

32. An opinion that a loan agreement is enforceable includes an opinion that the underlying loan is not usurious. If no exemption from the California usury laws is available, then it is customary to state at a minimum that no opinion is expressed with respect to compliance with usury laws or the effect of noncompliance vis-à-vis the Loan Parties. This qualification is ordinarily included even if the

- (b) value has been given for the security interest granted in the Security Agreement;³³
- (c) the Financing Statement correctly states the name of the Borrower;³⁴
- (d) the Bailee is not a securities intermediary with respect to the securities described in Opinion {[13] OR [15]} of this letter;³⁵
- (e) the Third Party is not a securities intermediary with respect to the securities described in Opinion 15 of this letter; and³⁶
- (f) the Borrower is the registered owner of the securities described in Opinion 15 of this letter.³⁷

C. OPINIONS

Based on the foregoing and subject to the qualifications set forth in Section E of this letter, we are of the opinion that:

stated interest rate does not exceed the usury ceiling because of the possibility, absent statutory exceptions or express reservations, that charges or other consideration together with the stated interest may exceed the usury ceiling. If the opinion preparers conclude, however, that the loan is usurious in their professional judgment, the opinion preparers may appropriately consider whether giving any enforceability opinion at all is possible. *See, e.g., 2007 Business Transactions Report, supra* note 3, at 20.

The listed assumptions are frequently made by a California opinion giver with respect to loans made by an institutional lender, although customary practice permits the opinion giver to assume, without so stating, the matters in (ii) and (iii). *Transactional Opinion, supra* note 3, at 7 n.16. Also, note that the assumption in (i) is often not included where it is reasonable to assume (without so stating) based upon the identity of the lender (*e.g.*, a national banking association).

Depending on the facts of a particular transaction, it may be possible to rely on an exemption from the California usury laws based on the nature of the transaction or borrower under the California Corporations Code rather than the exempt status of the lender. *See* CAL. CORP. CODE §§ 25116–25118 (2019). For example, section 25118 of the California Corporations Code exempts a transaction involving one or more evidences of indebtedness aggregating at least \$300,000 under certain circumstances. CAL. CORP. CODE § 25118 (2019). If an exemption from usury laws is based on one of these statutory transaction exemptions, the opinion preparers would replace the assumptions in paragraph (a) of the text of the sample assumptions with assumptions supporting the basis for the chosen exemption.

33. This qualification is customarily understood without being stated; stating it expressly is appropriate solely if it is unclear whether value has been given. *See UCC Report, supra* note 3, § 4.2.1. Note that value need not be given directly to the debtor (*e.g.*, when the debtor is a guarantor). *See, e.g., Putnam Realty, Inc. v. Terminal Moving & Storage Co. (In re Terminal Moving & Storage Co.)*, 631 F.2d 547, 550–51 (8th Cir. 1980); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 9 (AM. LAW INST. 1996); RESTATEMENT (SECOND) OF CONTRACTS § 71(4) (AM. LAW INST. 1981).

34. This qualification is customarily appropriate solely in connection with a Perfection-by-Filing Opinion where the opinion giver is unable to verify the name of a debtor that is not a registered organization. *See generally UCC Report, supra* note 3, § 5.1.4(c).

35. This qualification is customarily appropriate solely in connection with a Perfection-by-Delivery Opinion where the collateral consists of certificated securities in the possession of a third party who does not appear to be a securities intermediary with respect to the securities. *See UCC Report, supra* note 3, at 8–9 nn.41–44, 10–11 nn.48–51; *see generally* CAL. COM. CODE § 8301(b)(2) (2019).

36. This qualification is customarily appropriate solely in connection with the First Alternative of Perfection-by-Control Opinion concerning uncertificated securities contained in this UCC Opinion, where the uncertificated securities are being registered in the name of the Third Party and not the Lender. *See UCC Report, supra* note 3, at 45 & n.256; *infra* note 66 and accompanying text.

37. This qualification is customarily appropriate solely in connection with the Second Alternative of Perfection-by-Control Opinion concerning uncertificated securities contained in this UCC Opinion. *See UCC Report, supra* note 3, at 45 & n.257; *infra* note 67 and accompanying text.

1. The Borrower is a corporation validly existing and in good standing under the laws of the State of California.³⁸
2. The Borrower has the corporate power to enter into and perform³⁹ its obligations under each of the Loan Documents to which it is a party.⁴⁰

38. A “validly existing” opinion means that the subject corporation has not dissolved or ceased to exist and that no dissolution proceedings have been initiated. *2007 Business Transactions Report, supra* note 3, at 41 (discussing the basis for giving this opinion); *see generally id.* at 40 (reporting that practice has moved toward giving the “validly existing” opinion and away from the “duly incorporated” opinion). Customary practice in California permits a “duly incorporated” opinion to be given based solely on a certified copy of a California corporation’s articles of incorporation; the California Corporations Code provides that the articles of incorporation, certified by the Secretary of State, are “conclusive” evidence of the corporation’s formation. CAL. CORP. CODE § 209 (2019). The “due incorporation” opinion, which in California means that a California corporation has complied with the statutory requirements under the California Corporations Code to become a California corporation at the time of its incorporation, adds little of practical value to the “validly existing” opinion. A “duly organized” opinion, however, encompasses not only incorporation but also the appointment of the initial board of directors, the adoption of the corporation’s bylaws, the election of officers, and the original authorization and issuance of shares, all in the context of the laws in existence at the time of incorporation. *2007 Business Transactions Report, supra* note 3, at 41. Thus, conducting the necessary due diligence with respect to any corporation other than one that has been recently formed can be onerous. The *2007 Business Transactions Report* concludes that it “would be appropriate for an opinion giver to decline to give” such an opinion with respect to a given entity unless the opinion giver incorporated the entity, and it notes that even then opinion givers more commonly give the much more limited “due incorporation” opinion, which does not cover any actions by the corporation after the initial articles of incorporation have been filed. *Id.* The “good standing” opinion means that the corporation’s charter has not been suspended or forfeited. *Id.* at 42.

This UCC Opinion omits the opinion that the Borrower is qualified to do business and is in good standing in any other jurisdiction. If given, this opinion is customarily based solely on a certificate from the foreign jurisdiction(s) in question, *id.* at 42, and would take the form of: “The Borrower has qualified to do business and is in good standing in the state[s] of [insert specific jurisdictions covered].” Accordingly, the opinion does not add anything to the information conveyed by the certificates themselves. The *2007 Business Transactions Report* also notes that “[i]t is generally accepted that an opinion giver should not be asked for an opinion that the [entity being opined upon] is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on [it].” *Id.* at 43.

39. The opinion on corporate power to “perform” (which is distinct from opinions as to due authorization and various other matters, covered separately by this UCC Opinion) covers both the obligations of the Borrower under the Loan Documents that are required to be met at closing and the obligations of the Borrower under the Loan Documents that are required to be performed in the future. *See 1998 TriBar Report, supra* note 3, at 652 n.139, 657–58 (general discussion of obligations to be performed in the future). Opinion preparers must determine whether California law prohibits the Borrower from performing its obligations under the Loan Documents both at and after the closing. For example, is the Borrower agreeing to conduct a banking business that would not be permitted under its articles of incorporation? *See, e.g., CAL. CORP. CODE* § 202 (2019).

In analyzing whether a party has the corporate power to “perform its obligations,” opinion givers might have concerns regarding circumstances that might arise in the future. Nevertheless, under customary practice, the opinion letter speaks only as of its date and does not address possible changes in the law or subsequent amendments to the articles of incorporation. *See GLAZER AND FITZGIBBON, supra* note 31, § 2.2.1, at 572. Note also that other assumptions may be necessary, depending on the nature of the obligation (for example, if the underlying document constitutes an amendment and restatement of a prior document but not a novation, *see In re Fair Fin. Co.*, 834 F.3d 651 (6th 2016)).

40. This UCC Opinion does not cover the power of the Borrower to “own and operate its assets.” Most opinion givers limit the “corporate power” opinion to the Company’s power to carry on its business as it is currently conducted. *See 2007 Business Transactions Report, supra* note 3, at 44.

Note that, if the corporate power opinion is written to extend beyond entering into and performing an agreement to the “power to carry on its business as it is currently conducted,” the opinion would

3. The Borrower has taken all corporate action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party, and the Borrower has duly executed and delivered the Loan Documents to which it is a party.⁴¹

customarily be based on (in addition to a review of the Borrower's Articles, which are reviewed to confirm the absence of any limitations on corporate powers) an officer's certificate or disclosure document describing that business or, in the alternative, a statement of the business as "known" to the opinion giver. *Id.*

41. This opinion follows the formulation recommended in the *Transactional Opinion*. *Transactional Opinion*, *supra* note 3, at 9 & n.19. While the formulation of this opinion is different in both the 2007 *Business Transactions Report* and the *Venture Opinion*, there is no substantive difference. Compare 2007 *Business Transactions Report*, *supra* note 3, at 45–48 ("The Agreement has been duly authorized by all necessary corporate actions on the part of the Company and has been duly executed and delivered by the Company."), with *Venture Opinion*, *supra* note 3, at 191–92 ("The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Company and have been duly executed and delivered by the Company.").

This opinion means that the execution, delivery, and performance of the relevant agreements have been authorized, and they have been executed by duly authorized officers or agents of the Borrower. As such, regardless of whether the word "performance" is included, this opinion is understood as a matter of customary practice to mean that the Borrower has taken all corporate action required to authorize its officers to bind the Borrower contractually to perform its obligations under the Loan Documents to which it is a party. *Transactional Opinion*, *supra* note 3, at 9 n.19. As a matter of customary practice, this opinion is understood *not* to provide assurance that the Borrower has taken the corporate action required to authorize performance after the closing of obligations in the Loan Documents when that action can be taken only at some future date. See generally *Venture Opinion*, *supra* note 3, at 191 n.48. This opinion is also understood not to cover authorizations required under laws other than the applicable corporation law. *Id.*

The last clause of this opinion means that the relevant agreements have been executed and delivered by duly authorized officers or agents of the Borrower:

The "duly executed" opinion involves a review of the minutes or reliance upon an officers' certificate to establish that the officers executing the documents on behalf of the Company have been validly elected, that they are or were officers of the Company at the time of execution, and that they were in fact authorized to execute the documents on behalf of the Company. While the "duly executed" opinion also addresses the genuineness of the signatures of the signing officers, such genuineness is expressly or implicitly assumed.

Giving an opinion that a document has been "duly delivered" generally means that the opinion giver is present at the delivery of the signed agreement or otherwise satisfied as to the implementation of procedures for actual delivery.

2007 *Business Transactions Report*, *supra* note 3, at 46.

As a matter of customary usage, "execution" means the signing of relevant documents by an authorized person, and "delivery" means the transmission of those documents to the appropriate parties at the consummation of the transaction, thus completing these elements of contract formation (to the extent required under contract law). Under this customary usage, "execution" alone—without "delivery"—would not result in the formation of a contract. The Committee is cognizant of section 1933 of the California Code of Civil Procedure but believes that, as a matter of customary usage, "executed," standing alone in an opinion letter, means only that appropriate persons have signed the agreement on behalf of the Borrower. See *Transactional Opinion*, *supra* note 3, at 9 n.19 (citing the 2007 *Business Transactions Report*, *supra* note 3, at 45–48); see also CAL. CIV. PROC. CODE § 1933 (2019) ("The execution of an instrument is the subscribing and delivering it, with or without affixing a seal."). The opinion should omit the words "and delivered" if the opinion giver is not able to satisfy the requirements discussed in the 2007 *Business Transactions Report* with respect to the "duly delivered" opinion.

Closings today often are effected by an electronic exchange of signature pages. When the opinion preparers do not witness the physical execution of the signature pages, they are permitted, as a matter of customary practice, to assume, without so stating, that all signatures are genuine. See GLAZER AND FITZGIBBON, *supra* note 31, § 4.3.3, at 152 (providing a partial listing of implied assumptions that need not be expressly stated under customary practice); see also *supra* note 31. In

4. The Guarantor is a limited liability company formed and [validly] existing and in good standing under the laws of the State of California.⁴²
5. The Guarantor has the limited liability company power to enter into and perform its obligations under the Guaranty.⁴³

addition, customary practice permits the opinion givers to assume, without so stating, that an electronic exchange of signature pages, coupled with expressed or implied authorization to attach them to the relevant documents, is an appropriate procedure to constitute actual delivery. Some opinion givers are not comfortable relying on customary practice, however, and instead obtain an officers' certificate regarding execution and delivery of the relevant documents and describe their reliance in the opinion letter as follows:

In providing the opinion set forth in Section C ("Opinions") numbered paragraph 3 of this letter, concerning the Borrower's execution and delivery of the Loan Documents, we have not necessarily observed their execution by the Borrower but have relied exclusively upon representations regarding the Borrower's execution and delivery of the Loan Documents made to us in a certificate and our review of copies, facsimiles, or PDF files of executed signature pages delivered to us by representatives of the Borrower or their agents.

The Committee believes that either approach is acceptable.

42. See *California LLC Report*, *supra* note 3, at 8–11; *TriBar LLC Report*, *supra* note 3, at 683–87. This UCC Opinion uses the alternative form of the status opinion presented in the *California LLC Report* and excludes a specific reference to the Guarantor's "due formation." See *California LLC Report*, *supra* note 3, at 8. As acknowledged by the *California LLC Report*, this simpler form of status opinion is increasingly accepted by opinion recipients, particularly in situations where the limited liability company has not recently been formed. The adverb "validly" is in brackets in this opinion because it may be omitted from a limited liability company status opinion without affecting the meaning of the opinion. *Id.* at 10.

A California limited liability company is not considered "validly existing" or "existing" without an operating agreement and at least one member. To establish this component of the status opinion, opinion preparers will need to satisfy themselves (or expressly assume) that an operating agreement has been entered into by at least one member of the limited liability company, that the member is a "person" within the meaning of the statute, that the member has satisfied the conditions for becoming a member set forth in the operating agreement, and that the limited liability company has not dissolved. See *id.* at 10–11.

A California limited liability company is in good standing when its articles of organization have not been suspended or forfeited, which can occur as a result of the failure to (a) pay state taxes, (b) file tax returns with the Franchise Tax Board, or (c) file a statement of information with the Secretary of State. Opinion preparers typically rely on a good standing certificate for the limited liability company, issued by the Secretary of State, to establish the good standing of the limited liability company. See *id.* at 11.

The status opinion for limited liability companies will sometimes address formation, as illustrated by the sample opinion included as Appendix C to the *California LLC Report*: "The [limited liability company] is a duly formed limited liability company and is [validly] existing and in good standing under the laws of the State of California." *Id.* at 8–10.

43. See *id.* at 13–15; *TriBar LLC Report*, *supra* note 3, at 687–89. As in Opinion 2, and following the form of the sample power opinion in the *California LLC Report* for a limited liability company, this sample opinion omits the "power to conduct business" component. As noted in the *California LLC Report*, the narrower form of the power opinion reflects current practice. As the *California LLC Report* notes, the broader form of opinion is sometimes given in special circumstances such as venture capital financings or for a special purpose entity or an entity engaged in a regulated industry. See *California LLC Report*, *supra* note 3, at 13 n.36.

The power opinion for a limited liability company is intended to assure the recipient that the limited liability company has the power to enter into and perform its obligations under the applicable limited liability company statute and governing documents. This means that the limited liability company has the power to enter into and perform its obligations under: (a) the California Revised Uniform Limited Liability Company Act ("RULLCA"), CAL. CORP. CODE §§ 17701.01–17713.13 (2019), or the Beverly–Killea Limited Liability Company Act, CAL. CORP. CODE §§ 17000–17355

6. The Guarantor has taken all limited liability company action necessary to authorize the execution and delivery of, and the performance of its obligations under, the Guaranty, and the Guarantor has duly executed and delivered the Guaranty.⁴⁴
7. Each of the Loan Documents to which the Borrower or the Guarantor is a party is a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.⁴⁵

(2013) (repealed 2014) (“Beverly–Killea Act”) (although RULLCA superseded the Beverly–Killea Act effective January 1, 2014, and is applicable to all limited liability companies whenever formed, the Beverly–Killea Act generally continues to apply to (a) “all acts or transactions by a limited liability company or by the members or managers of the limited liability company occurring, or contracts entered into by the limited liability company or by the members or managers of the limited liability company, prior to that date,” CAL. CORP. CODE § 17713.04(b)(2019); (b) its articles of organization; and (c) its operating agreement). With respect to guarantees, there is explicit statutory authority for parent, subsidiary, and sister subsidiary guarantees for limited liability companies. CAL. CORP. CODE § 17701.05(d)(2019); see also CAL. CORP. CODE § 207(g)(2019).

44. See *California LLC Report*, *supra* note 3, at 15–20; *TriBar LLC Report*, *supra* note 3, at 689–90. The limited liability company authorization opinion confirms that the steps required of the limited liability company under the applicable limited liability company statute and its governing documents (articles of organization and operating agreement) have been taken to authorize the execution and delivery of, and the performance of its obligations under, the documents addressed by the opinion. For a limited liability company, this means that: (a) neither RULLCA (nor if applicable, the Beverly–Killea Act) nor the articles of organization or operating agreement restricts the power or authority of the officers, members, or managers who are executing the relevant documents; (b) any conditions underlying any such restrictions have been met; and (c) the officers, members, or managers, as applicable, have complied with any applicable procedural requirements of RULLCA (or if applicable, the Beverly–Killea Act), the articles of organization, the operating agreement, and any delegation of authority adopted by resolution of the managers or members in executing and delivering the relevant documents. Note that the language of this opinion is consistent with the opinion applicable to corporations set forth in Section C, numbered paragraph 3, of this UCC Opinion.

For a discussion of the meaning of the “duly executed and delivered” language contained in this opinion, see *supra* note 41.

45. The 2007 *Remedies Report* addresses the meaning and scope of this opinion. According to that report, the remedies opinion is customarily understood to mean that “(i) a contract has been formed, (ii) a remedy will be available in the event of a breach of the undertakings in the contract (or the undertakings will otherwise be given effect), and (iii) remedies in the contract will be given effect, unless, in the case of (ii) or (iii), expressly or implicitly excluded.” 2007 *Remedies Report*, *supra* note 3, at 3. In establishing whether or not a contract has been formed, the opinion preparers will need to confirm or assume the predicates of formation—many of which, as a matter of customary practice, they are permitted to assume without so stating (for example, the capacity of individuals) and others of which are covered in other opinions that typically accompany a remedies opinion (for example, in the case of parties who are entities, opinions addressing power and due authorization). See *Transactional Opinion*, *supra* note 3, at 10 n.23. Note that, if the underlying contract includes a security agreement (as defined in section 9102(a)(74)), the remedies opinion, as a matter of customary practice, is understood “not to express any conclusion on the creation, attachment, perfection, or priority of the security interest purportedly created by the contract, whether the opinion letter contains a security interest opinion or not.” *TriBar UCC Report*, *supra* note 3, § 2.2 at 1461; see also *UCC Report*, *supra* note 3, § 2.3 (“[A] Security Interest Opinion [*i.e.*, an opinion as to the creation, perfection or priority of a security interest in collateral]) is customarily viewed as not implicitly containing an opinion as to the enforceability of a security agreement against any particular party.”).

The 2007 *Remedies Report* goes on to note:

[T]his report . . . concludes that the long-standing supposed continental divide over the meaning and scope of the remedies opinion—the “New York view” that it covers “each and every” provision of a contract versus the “California view” that it covers only the ‘essential provisions’—should no

longer be of concern in opinion practice. Instead, the focus should be on customary practice. Customary practice is comprised of customary diligence (particularly the legal diligence customarily undertaken in giving a remedies opinion), customary competence, and customary usage (the customarily understood meaning of terms used in third-party legal opinions).

2007 Remedies Report, *supra* note 3, at 1.

Giving a legal opinion in general—and giving an enforceability opinion in particular—requires that the opinion preparers conduct factual and legal diligence. A good discussion of customary factual diligence cited by the 2007 Remedies Report can be found in Article II of the 1998 TriBar Report. 1998 TriBar Report, *supra* note 3, at 608–19. Customary legal diligence, addressed in Appendix 8 of the 2007 Remedies Report, begins with a review by competent opinion preparers of the entire relevant contract or contracts. 2007 Remedies Report, *supra* note 3, at 5 app. 8. If a question about the enforceability of a particular provision of a relevant contract is identified, the opinion preparers must determine whether the opinion covers the issue. If it does, they must determine whether the issue can be resolved. If the issue cannot be resolved, it is appropriate to include an exception in the opinion letter. *Id.* at 5 app. 8, at 7–8.

Absent express qualifications or assumptions, a remedies opinion covers the enforceability of the choice-of-law clause in each agreement covered by the opinion. See TriBar Remedies Opinion Report, *supra* note 3, at 1495 (“The remedies opinion addresses the enforceability of the provision in most agreements that chooses the law of a particular jurisdiction as the governing law.”); 2007 Remedies Report, *supra* note 3, at 5 app. 10, at B-2.

This UCC Opinion relates to Loan Documents that by their terms are governed by California law. When California law is the law chosen by the parties to apply (*i.e.*, an “inbound” choice of law), that choice is effective under California’s choice-of-law rules in most commercial transactions involving at least \$250,000. CAL. CIV. CODE § 1646.5 (2019). For transactions involving less than \$250,000, the transaction must have a sufficient relationship to California to support that choice of law under the traditional analysis in section 187 of the Restatement (Second) of Conflict of Laws. See *Nedlloyd Lines B.V. v. Super. Ct.*, 834 P.2d 1148, 1151 (Cal. 1992) (applying the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971)). Here, the organization of the Borrower and the Guarantor in California should be sufficient to support application of California law. See 2007 Remedies Report, *supra* note 3, at 5 app. 10, at B-1 (citing *Application Grp., Inc. v. Hunter Grp. Inc.*, 72 Cal. Rptr. 2d 73, 84 (Ct. App. 1998)). Note that this opinion covers the enforcement of the Loan Documents in a proceeding in a court of the State of California; a court in another jurisdiction would not necessarily apply section 1646.5 of the California Civil Code.

Although some opinion givers continue to be of the view that no remedies opinion should be given when the documents in question select the law of a state other than California as the governing law, the Committee believes that, in general, practice “now greatly favors permitting the primary opinion giver to give an opinion to the effect that, if the law of the State of California were held to apply to the agreement, notwithstanding the choice of law of another jurisdiction, the agreement would be enforceable.” 2007 Remedies Report, *supra* note 3, 5 app. 10 at B-1 n.1; see also 2007 Remedies Report, *supra* note 3, at 5 app. 4, at 12 (supporting the use of this so-called “as if” approach as well). If such an opinion is given (assuming, for illustrative purposes, that the Loan Documents are governed by New York law), the lead-in to the enforceability opinion would be modified to read substantially as follows: “If a California court were to apply the law of California to the interpretation and enforcement of the Loan Documents, rather than the law of New York as provided therein, the Loan Documents would be . . .” In addition, although not required in such an event, many lawyers modify the statement about the law covered by the opinion (which appears at the beginning of Section E of this UCC Opinion) by adding to it the following:

We note that the Loan Documents provide that they are to be governed by the law of the State of [_____]. We express no opinion herein on [_____] law or the enforceability of the [Loan Documents] under [_____] law. Our opinion in Section C numbered paragraph 7 of this letter is given as though each of the Loan Documents were governed by California law. As used herein, “California Law” means the laws of the State of California applicable to a contract made by California residents in the State of California that selects California law as the governing law of such contract, without regard to any laws or equitable principles regarding choice of law, conflict of laws or public policies that might make any other law(s) applicable.

8. All consents, approvals, authorizations, or orders of, and filings, registrations, and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law (as defined in Section E of this letter)⁴⁶ required to execute and deliver, and to perform its obligations under, the Loan Documents have been obtained or made.⁴⁷

Because the “as if” remedies opinion assumes that the choice-of-law clause is not enforced, it does not cover the enforceability of the choice of law clause. See *TriBar Remedies Opinion Report*, *supra* note 3, at 1497 n.70 (“[The ‘as if’ remedies] opinion has the same meaning as any other remedies opinion except that it does not address the enforceability of the chosen law provision.”). Accordingly, if an “as if” remedies opinion is given, an exception that the opinion is not intended to address the enforceability under California law of the chosen law provisions of the Loan Documents is not necessary. If the opinion giver still desires to include an express exception, it may do so by adding to the statement above a statement that no opinion is expressed on “the enforceability under California law of the choice of New York law in the Loan Documents.”

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

In a proceeding in a court of the State of California for the enforcement of the Loan Agreement, and based on [describe contacts or bases for choosing law of chosen state], the court should give effect to Section [] [choice-of-law provision] of the Loan Agreement, except to the extent that (i) any provision of the Loan Agreement is determined by the court to be contrary to a fundamental policy of the state whose law would apply in the absence of that Section, and (ii) that state has a materially greater interest in the determination of the particular issue than does the state whose law is chosen.

See *2007 Business Transactions Report*, *supra* note 3, at 88–91; *2007 Remedies Report*, *supra* note 3, at 5 app. 10, at B-1–B-6. See also *TriBar Op. Comm., Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*, 68 *BUS. LAW.* 1161 (2013). This opinion could be given as a supplement to the “as if” remedies opinion. It also could be given as a stand-alone opinion, without any remedies opinion, if the Lender does not request an “as if” remedies opinion. See *2007 Business Transactions Report*, *supra* note 3, pt. VI, § A.2, at 90–91.

Note that this UCC Opinion does not address choice-of-law opinions in cross-border transactions. For a discussion of issues concerning such opinions, see *ABA Cross-Border Opinion Report*, *supra* note 3.

46. In the case of a “consents and approvals” opinion, opinion preparers may rely on the qualifications contained in Section E of this UCC Opinion, which, among other things, exclude from the coverage of this UCC Opinion securities laws and many other laws. See *infra* the last three sentences of the first paragraph of Section E of this UCC Opinion and note 69.

47. According to the *2007 Business Transactions Report*:

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

2007 Business Transactions Report, *supra* note 3, at 61 (footnotes omitted).

This opinion generally follows the formulation of the “consents and approvals” opinion appearing in the *2007 Business Transactions Report*. It does not, however, exclude securities laws because that exclusion is unnecessary in light of the last three sentences of the first paragraph of Section E of this UCC Opinion. See *id.* at 61; see also *supra* note 46 (discussing the exclusion of coverage of securities laws); *infra* note 48 (discussing requests for “performance” opinions). If the opinion giver gives an opinion on consents and approvals required for the Borrower’s performance of future obligations, then the opinion preparers should consider whether the Borrower’s future obligations under the Loan Documents are sufficiently clear that they can identify all the consents and approvals that the Borrower needs to perform those obligations. See *infra* note 48 (providing guidance which is equally applicable to Opinion 8).

9. The execution and delivery by the Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not⁴⁸:
 - (a) violate the Articles or the Bylaws of the Borrower or the Articles of Organization or the Operating Agreement of the Guarantor;
 - (b) result in a breach of or constitute a default under any Scheduled Agreement or Guarantor Scheduled Agreement or result in the creation of a security interest in, or lien upon, any of the Borrower's or the Guarantor's properties or assets under any Scheduled Agreement or Guarantor Scheduled Agreement, but excluding (i) financial covenants and similar provisions therein that require financial calculations or determinations to ascertain compliance and (ii) provisions relating to the occurrence of a "material adverse effect" or "material adverse change" or words or concepts to similar effect;⁴⁹

48. This opinion (as does Opinion 8) often refers to either the "performance of the [Borrower's/ Guarantor's] obligations" or "the consummation of the transactions," in each case under the Loan Documents. Although some bar association reports have taken the view that these formulations "may" be different (suggesting, of course, that they also may not be), the better view is that they are different, and that "performance" adds a future element to the opinion, while "consummation" only covers matters through the closing of the loan transaction. See GLAZER AND FITZGIBBON, *supra* note 31, § 15.5, at 572; 1998 *TriBar Report*, *supra* note 3, at 662–63.

As it relates to Opinion 9(d), coverage of "performance," although common, requires the opinion preparers to consider compliance with many laws (*i.e.*, Covered Law (as defined in Section E of this UCC Opinion)) because the Loan Documents often require the Borrower to perform numerous obligations after the closing. In contrast with the more limited scope of review attendant to the "due authorization" opinion, *see supra* note 41, Opinion 9 (and Opinion 8) may cover many more potentially applicable laws. To reduce the opinion preparers' factual and legal diligence when legal budgets are limited and time is critical, opinion givers sometimes use a narrower formulation that does not add a future element to the opinion. *See generally Venture Opinion*, *supra* note 3, at 198 n.65.

If the opinion giver agrees to give an opinion on the "performance" of all the Borrower's obligations under the Loan Documents, the opinion not only will cover "performance" by the Borrower of its obligations under the Loan Documents as of the closing but also the performance of its obligations after the closing. The analysis required to support an opinion covering the performance of future obligations can be difficult. *See generally* GLAZER AND FITZGIBBON, *supra* note 31, §§ 13.2.3, 16.3.7, at 548–52, 602–07; 1998 *TriBar Report*, *supra* note 3, at 657–58 (providing a general discussion of coverage of obligations to be performed in the future); *see also* 2007 *Business Transactions Report*, *supra* note 3, at 48–56 (discussing the diligence required to deliver a "no-violation" opinion that covers the performance of future obligations under the transaction documents). As the foregoing reports and treatise generally state, certain assumptions and limitations on the coverage of the opinion are understood as a matter of customary practice to apply, whether or not expressly stated in the opinion. *See generally* GLAZER AND FITZGIBBON, *supra* note 31, § 13.2.3, at 548–52 (explaining that the opinion only covers facts at the time of delivery, but, if an agreement obligates a company to take actions in specified circumstances, an exception may be necessary if those actions are prohibited; further, the opinion only covers required actions, not voluntary ones).

49. It is advisable to give this opinion based on an agreed list of reviewed documents (as here), rather than to make reference to a vague or insufficiently defined universe (as in "all agreements known to us"). The latter formulation is less certain and more susceptible to later disputes. As stated at *supra* note 26, the determination of which agreements are "material" is not the responsibility of the opinion giver.

This opinion, if given without qualification of the type included here, has been understood to cover financial covenants contained in any covered agreements. In the 2007 *Business Transactions Report*, however, the Corporations Committee concluded that evaluating compliance with such covenants is beyond the professional competence of lawyers. Accordingly, opinion preparers often will

- (c) violate any judgment, order or decree of any court or arbitrator ([identified on Schedule [] to the Loan Agreement] OR [applicable to either of them and known to us]);⁵⁰ or
- (d) violate any statute (or rule or regulation thereunder) under the Covered Law (as defined in Section E of this letter) to which either the Borrower or the Guarantor is subject.⁵¹

[Note: The opinions that follow cover issues arising under the UCC and, for convenience, have been labeled. If an opinion preparer desires to use any of the following samples, care should be taken not to include any of the labels (although doing so should not alter the substance of the opinion.)]

10. [Attachment Opinion.]

(1) include an express assumption that the financial covenants will not be violated, (2) include an express qualification disclaiming any opinion regarding the financial covenants, or (3) rely on an officer's certificate certifying that the financial covenants will not be breached by the [Borrower's] entry into the [Loan Documents]. See *2007 Business Transactions Report*, *supra* note 3, at 51–52 n.161. The *2007 Business Transactions Report* also contains a formulation of this opinion that included the reference to clauses relating to “material adverse change” or similar concepts; as with financial covenants, opinion preparers are generally not in a position to determine the materiality of a conflict or event. Given these considerations, the Committee suggests the exclusion noted at the end of clause (b) in the text. Use of this formulation ensures that the opinion will not cover matters that typically are outside the professional purview of lawyers. As noted at *supra* note 31, there is no need to state separately an assumption that the contracts covered by the “no-breach” opinion that by their terms are governed by the laws of another jurisdiction whose law is not being covered in the opinion letter are being interpreted in accordance with their plain meaning.

50. The Committee believes that the trend in practice is toward the first formulation of this opinion. The latter formulation, however, is not uncommon, and, with the statement (appearing in Section E numbered paragraph (2) of this UCC Opinion) as to what constitutes “knowledge” for purposes of this UCC Opinion, is also appropriate.

51. By customary usage, this opinion is limited to the law of the jurisdiction(s) expressly covered by this UCC Opinion, and it excludes both local laws and certain regulatory laws. See generally *infra* the first paragraph of Section E of this UCC Opinion; *2007 Business Transactions Report*, *supra* note 3, at 55–57; see also *2007 Remedies Report*, *supra* note 3, 5 at app. 10, at 13 (providing Further Notes, Law Covered by the Remedies Opinion). Within that sphere, the opinion is further limited to laws reasonably recognized to apply to transactions of the type that are exemplified by the Loan Documents and that are not otherwise understood to be excluded, even if applicable, unless referred to expressly (for example, securities and tax laws). *2007 Business Transactions Report*, *supra* note 3, at 56 n.168; see also *Statement of Opinion Practices*, *supra* note 3, § 6.2; *supra* note 29. Consequently, it is not necessary to include language expressly limiting the statement to “U.S. federal or California law” or stating that only laws “typically applicable” to transactions of the type at issue are covered. To resolve any doubt as to the law covered by this UCC Opinion, this UCC Opinion uses the term “Covered Law” and defines it to incorporate the foregoing understandings. Finally, the “no violation” opinion should be understood to mean that neither the execution and delivery by the Borrower or the Guarantor of the Loan Documents to which each is a party nor the performance by them of their obligations under those Loan Documents will subject either of them to a fine, penalty, or other similar sanction. See *2007 Business Transactions Report*, *supra* note 3, at 55. This opinion does not cover the enforceability of the Loan Documents. Rather, that is a matter covered by the remedies opinion contained in Section C, numbered paragraph 7, of this UCC Opinion. The Committee notes that the language in this numbered paragraph 9(d) differs slightly from the language of similar opinions in the other *Sample Opinions*, but no difference in meaning is intended—the change in language is intended merely to provide further clarification of the meaning of the opinion as it is understood as a matter of customary usage.

*First Alternative*⁵²: The Security Agreement is effective to create in favor of the Lender[, as security for the obligations described in the Security Agreement to be secured thereby,]⁵³ a security interest in the collateral described in the Security Agreement.

*Second Alternative*⁵⁴: The Security Agreement is effective to create in favor of the Lender[, as security for the obligations described in the Security Agreement to be secured thereby,] a security interest in that portion of the collateral described in the Security Agreement that consists of [(in each case, as defined in the UCC)]⁵⁵ [specify collateral covered by opinion either by type (e.g., accounts, deposit accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents, and instruments) or specifically (e.g., the Stock Certificate)].

Perfection Opinions.

11. [Perfection-by-Filing Opinion.]⁵⁶

First Alternative: The security interest in that portion of the collateral described in the Security Agreement in which a security interest may be

52. This alternative may be used if the opinion letter contains a UCC Scope Limitation (as defined in the *UCC Report*, *supra* note 3) (“UCC Scope Limitation”). See *UCC Report*, *supra* note 3, § 3; *TriBar UCC Report*, *supra* note 3, at 1504 app. A, at 1505 (providing the Opinion 2 (First Alternative)). For issues concerning the use of this formulation, see *UCC Report*, *supra* note 3, § 4.1, at 14 n.73.

An effective grant of a security interest is limited to property in which the debtor has rights or has the power to transfer rights. CAL. COM. CODE § 9203(b)(2019). As a matter of customary practice, no express qualification to this effect is necessary because the existence and extent of those rights is primarily factual (and no system exists for determining rights in most personal property). See *UCC Report*, *supra* note 3, § 4.2.3.

A security interest in identifiable proceeds of collateral automatically attaches when the debtor has rights in the proceeds. CAL. COM. CODE §§ 9203(f), 9315(a)(2)(2019). As a matter of customary practice, no qualification is necessary to note that a security interest in proceeds is governed by section 9315. See generally *UCC Report*, *supra* note 3, § 4.2.6.

53. This bracketed language (which is also included in the Second Alternative) typically need not be included. See *UCC Report*, *supra* note 3, at 14 n.72. If such language is not included, the opinion is nonetheless understood to mean that the security interest secures the obligations specified as being secured by the security agreement. *TriBar UCC Report*, *supra* note 3, at 1504 app. A, at 1505–06 nn.336, 339.

54. This alternative may be used if the opinion letter does not contain a UCC Scope Limitation or when it is otherwise appropriate to limit the opinion to specific collateral types. See generally *UCC Report*, *supra* note 3, § 4.1, at 14–15 nn.74–77; *TriBar UCC Report*, *supra* note 3, at 1504 app. A, at 1505 n.337.

55. See *supra* note 7 and accompanying text.

56. See *UCC Report*, *supra* note 3, § 5.1. The first alternative of this opinion is the same formulation included in the *TriBar UCC Report*. *TriBar UCC Report*, *supra* note 3, at 1504 app. A, at 1506. In general (e.g., exceptions to the general rule include perfection as to fixtures by filing a financing statement as a fixture filing, CAL. COM. CODE § 9102(a)(41)(2019), and perfection as to timber to be cut and as-extracted collateral, see CAL. COM. CODE §§ 9301(3–4)(2019)), the mandatory choice-of-law provisions of Division 9 of the UCC provide that perfection of a security interest by filing a financing statement is governed by the local law of the jurisdiction where the debtor is located for purposes of Division 9 of the UCC. CAL. COM. CODE § 9301(1)(2019). For a discussion of the appropriateness of the alternative opinions, see generally *UCC Report*, *supra* note 3, § 5.1.

Note that there are two ways to perfect a security interest in fixtures by filing under the UCC: (a) by

perfected by filing a financing statement under the UCC {[will be] OR [is]} perfected {[upon the filing of the Financing Statement with the Filing Office] OR [by the Financing Statement filed with the Filing Office]}.

Second Alternative: The security interest in that portion of the collateral described in the Security Agreement that consists of [specify collateral covered by opinion either by type (e.g., accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents, and instruments) or specifically (e.g., the Stock Certificate)] {[will be] OR [is]} perfected {[upon the filing of the Financing Statement with the Filing Office] OR [by the Financing Statement filed with the Filing Office]}.

12. **[Perfection-by-Possession Opinion Concerning Collateral Other Than Certificated Securities.]**⁵⁷ The security interest in that portion of the Collateral described in the Security Agreement that consists of [specify collateral covered by opinion that can be perfected by possession either by type (e.g., goods, instruments, money, negotiable documents, and tangible chattel paper) or specifically] (the “Possessory Collateral”) {[will be] OR [is]} perfected {[upon the {[Lender] OR [Bailee]} obtaining possession] OR [assuming the {[Lender] OR [Bailee]} has possession]} of the Possessory Collateral.

filing a financing statement with the Filing Office to perfect a security interest generally in the collateral, including in goods that are or are to become fixtures, see CAL. COM. CODE § 9501(a)(2)(2019); or (b) by filing a financing statement as a fixture filing, *id.* § 9102(a)(40), in the office in which a record of a mortgage on the real property would be filed, *id.* § 9501(a)(1)(B). Unless a security interest in fixtures is perfected by filing a financing statement as a fixture filing, the priority of such security interest may be impaired as against a subsequent encumbrancer or owner of the real property. See *id.* § 9334.

Note also that the UCC Report and this UCC Opinion do not address the creation, perfection, or priority of security interests in collateral to the extent these matters are governed by laws other than Division 9 (and if applicable, Division 8) of the UCC. See generally, e.g., CAL. COM. CODE § 9311(a)(1) (2019); *In re Peregrine Entm't, Ltd.*, 116 B.R. 194 (C.D. Cal. 1990) (holding that filing a financing statement in a state UCC filing office is not sufficient to perfect a security interest in federally registered copyrights); *In re World Auxiliary Power Co.*, 303 F.3d 1120, 1128 (9th Cir. 2002) (affirming a holding that a bank's filing of a financing statement was sufficient to perfect a security interest in unregistered copyrights); *In re Cybernetic Servs., Inc.*, 252 F.3d 1039 (9th Cir. 2001) (affirming a decision of a bankruptcy appellate panel that filing with the U.S. Patent and Trademark Office was not required to perfect a security interest in a patent); *In re Pasteurized Eggs Corp.*, 296 B.R. 283, 292 (Bankr. D.N.H. 2003) (holding that U.S. patent law does not preempt state law concerning security interests); *In re TR-3 Indus.*, 41 B.R. 128 (Bankr. C.D. Cal. 1984) (holding that a valid security interest was created even though no filings were made with the U.S. Patent and Trademark Office); *In re Roman Cleanser Co.*, 43 B.R. 940 (Bankr. E.D. Mich. 1984), (holding that the perfection of a security interest in trademarks is governed by Article 9 of the Uniform Commercial Code and not by the Lanham Act, 15 U.S.C. §§ 1051–1127 (1986)), *aff'd*, 802 F.2d 207 (6th Cir. 1986). If an opinion giver believes that its Security Interest Opinion, see *infra* note 97, whether by inclusion of a UCC Scope Limitation or otherwise, might be misleading to the opinion recipient, the opinion giver may either modify the opinion so as not to be misleading or decline to give the opinion. See generally *TriBar UCC Report*, *supra* note 3, § 2.1(b), and 1458 & n.27.

57. For a discussion of the usage of this specific opinion, see generally *UCC Report*, *supra* note 3, § 5.2; see also *supra* note 10.

13. [Perfection-by-Delivery Opinions Concerning Certificated Securities.]⁵⁸

*First Alternative*⁵⁹: The security interest in the {[Stock Certificate] OR [Bearer Stock Certificate]} {[will be] OR [is]} perfected {[upon the {[Lender's] OR [Third Party's]} obtaining] OR [assuming the {[Lender] OR [Third Party]} has]} possession of such collateral [pursuant to the Third Party Acknowledgment].

*Second Alternative*⁶⁰: The security interest in the Stock Certificate {[will be] OR [is]} perfected {[upon the Third Party's⁶¹ obtaining possession of the Stock Certificate and the registration of the Stock Certificate in the name of the Lender] OR [assuming the Third Party has possession of the Stock Certificate and the Stock Certificate has been registered in the name of the Lender] pursuant to the Third Party Acknowledgment}.

14. [Perfection-by-Control Opinion Concerning Deposit Accounts.]

*First Alternative*⁶²: The security interest in that portion of the collateral that consists of deposit accounts maintained with the Lender is perfected by control.

58. *Id.* Note that in the UCC Report, this opinion was referred to as a “perfection-by-possession opinion.” *UCC Report, supra* note 3, § 5.2. The change in nomenclature in this UCC Opinion is not substantive—it has been made solely to reflect that “delivery” under section 8301 is the critical element of such opinion.

Note that the UCC Report previously provided for a perfection-by-control opinion concerning certificated securities. *UCC Report, supra* note 3, § 5.3.3. Because “delivery” under section 8301 is sufficient to perfect a security interest in certificated securities without the need of the other elements of “control” under section 8106, the Committee believes there is no need to encourage perfection-by-control opinions instead of perfection-by-delivery opinions concerning certificated securities.

59. This alternative would be appropriate where perfection under section 9313(a) is effected by the secured party taking delivery of a security certificate in either registered or bearer form pursuant to section 8301(a)(1) or (2) (*i.e.*, in a situation where a securities intermediary is not involved). Section 8301(a) does not require a stock power (issued either in the name of the secured party or in blank) as a condition to possession. Section 8301(a)(2) does require that, if a third party has possession of the security certificate, the third party must acquire such possession on behalf of the secured party, or having previously acquired possession of the certificate, acknowledge that it holds the security certificate for the secured party. *See CAL. COM. CODE* § 8301(a)(2)(2019). In such circumstances, reference to the Third Party Acknowledgment to evidence that the Third Party acquires possession of or holds the security certificate for the benefit of the Lender would be appropriate. *See supra* note 16.

60. This alternative would be appropriate where perfection under section 9313(a) is effected pursuant to section 8301(a)(3), where the security certificate is not in bearer form and the third party acquiring possession of the security certificate on behalf of the secured party is a securities intermediary. *See also UCC Report, supra* note 3, at 36 n.201, 38 n.211. If the security certificate is not registered in the name of the Lender, reference to the Stock Power endorsed by the Borrower in the name of the Lender (and not the third party or in blank) would be appropriate. *See id.* Alternatively, the security certificate may be payable to the order of the Lender. *See CAL. COM. CODE* § 8301(a)(3)(B) (2019).

61. It is unnecessary to include an assumption that the Third Party is a securities intermediary. *See UCC Report, supra* note 3, at 37 & n.205. Reference to the Third Party Acknowledgment to evidence that the Third Party acquires possession of, or holds, the Stock Certificate for the benefit of the Lender would also be appropriate. *See supra* note 16.

62. This alternative would be appropriate where control over the deposit accounts is effected under section 9104(a)(1) because the deposit accounts are maintained with the Lender. *See generally*

*Second Alternative*⁶³: The security interest in [specify account] is perfected by control pursuant to the Deposit Account Control Agreement.

*Third Alternative*⁶⁴: The security interest in [specify account] maintained by the Lender as a customer of [specify depository bank] is perfected by control.

15. **[Perfection-by-Control Opinion Concerning Uncertificated Securities.]**⁶⁵

*First Alternative*⁶⁶: The security interest in that portion of the securities described [on Schedule 1 to the Security Agreement] will be perfected by control {[pursuant to the Third Party Acknowledgement upon registration by the Issuer of the Third Party] OR [upon registration by the Issuer of the Lender]} as the registered owner of such securities.

UCC Report, *supra* note 3, § 5.3.1. In that instance, a reference to the Deposit Account Control Agreement or any customer agreement would not be required. Note that, in any perfection opinion concerning a deposit account, the opinion giver is entitled to assume, without so stating, that such deposit account is a “deposit account” as defined in section 9102(a)(29) of the UCC. In addition, note that, if the grant of a security interest in a deposit account is made in favor of a lender, as agent on behalf of several lenders, the security interest in the deposit account maintained with such lender will be perfected, and a separate deposit account control agreement is not required. See CAL. COM. CODE § 9102(a)(73)(2019).

63. This alternative would be appropriate where control over the deposit account is effected under section 9104(a)(2) by the use of a control agreement. See generally *UCC Report*, *supra* note 3, § 5.3.1. In that instance, a reference to the Deposit Account Control Agreement would be appropriate but a reference to any customer agreement would not be required. See *supra* note 13.

64. This alternative would be appropriate where control over the deposit account is effected under section 9104(a)(3) by the Lender becoming the depository bank’s customer with respect to the deposit account. See generally *UCC Report*, *supra* note 3, § 5.3.1. In that instance, a reference to the applicable customer agreement may be included (but is not necessary) and a reference to a Deposit Account Control Agreement would not be required. See *supra* note 14.

65. See *supra* note 58.

66. This alternative would be appropriate where perfection of the security interest in uncertificated securities is being perfected under section 9314(a) by control under sections 9106(a), 8106(c)(1), and 8301(b)(1) or (2) (i.e., where the Lender or a third party who is not a securities intermediary becomes the registered owner of the securities). See generally *UCC Report*, *supra* note 3, § 5.3.4. In connection with delivery of the uncertificated securities to the Third Party, an assumption that the Third Party is not a securities intermediary, see CAL. COM. CODE § 8301(b)(2)(2019), would be appropriate. See *UCC Report*, *supra* note 3, at 45 n.256; see also *supra* note 34 and accompanying text. In that instance, reference to the Third Party Acknowledgement would also be appropriate. See *supra* note 16. Note that this opinion can be given only if the Issuer’s jurisdiction, determined in accordance with section 8110(d) (which provides that the local law of the state of organization of an issuer is the issuer’s jurisdiction), is California. Section 8110(d), however, allows an issuer organized under California law to specify another jurisdiction’s laws (for example, those of Delaware) as those governing the rights and duties of the issuer with respect to registration of transfer; the effectiveness of registration of transfer by the issuer; whether the issuer owes any duties to an adverse claimant of the security; and whether an adverse claim can be asserted against a person to whom transfer of a certificated security is registered or a person who obtains control of an uncertificated security. If in such circumstances (which are not commonplace) an opinion is to be given, then that opinion would address the laws of such other jurisdiction, either by the opinion giver (if the opinion giver is in a position to do so, in which case the definition of “Covered Law” (in Section E of this UCC Opinion) would need to be modified) or by another opinion giver. See generally *TriBar UCC Report*, *supra* note 3, app. B, at 1510–16 (discussing perfection opinions under the law of another state).

*Second Alternative*⁶⁷: The security interest in that portion of the securities described [on Schedule 1 to the Issuer Control Agreement] is perfected by control pursuant to the Issuer Control Agreement.

16. [Perfection-by-Control Opinion Concerning Securities Accounts/ Security Entitlements.]

*First Alternative*⁶⁸: The security interest in that portion of the collateral that consists of a securities account maintained with the Lender is perfected by control.

*Second Alternative*⁶⁹: The security interest in the securities account established in the name of the Lender and described [on Schedule 1 to the Security Agreement] is perfected by control.

*Third Alternative*⁷⁰: The security interest in {[the security entitlements with respect to financial assets credited to the securities account

67. This alternative would be appropriate where perfection of the security interest in uncertificated securities is effected pursuant to section 9314(a) by control under sections 9106(a) and 8106(c)(2) (*i.e.*, by the issuer agreeing to comply with instructions originated by the Lender without further consent of the Borrower (when the Borrower is the registered owner of the securities)). See generally *UCC Report*, *supra* note 3, § 5.3.4. Note that this opinion can be given only if the Issuer's jurisdiction, determined in accordance with section 8110(d), is California. See *supra* note 66.

68. This alternative would be appropriate where the security entitlement is granted by the entitlement holder to the entitlement holder's own securities intermediary (for example, in connection with a margin loan from a broker to its customer). CAL. COM. CODE § 8106(e)(2019).

Note that, in any perfection opinion concerning a securities account, the opinion giver is entitled to assume, without so stating, that such securities account is a "securities account" as defined in section 8501(a).

69. This alternative would be appropriate where the security interest in security entitlements is being perfected under section 9314(a) by control under sections 9106(a) and 8106(d)(1) (*i.e.*, by the Lender becoming the entitlement holder). See generally *UCC Report*, *supra* note 3, § 5.3.5. This UCC Opinion assumes that the Loan Documents state that they are governed by California law; that California law is the jurisdiction of organization of the Borrower, the Guarantor, and the other relevant parties; and that California law governs the other aspects of the transactions exemplified by the Loan Documents. In situations where indirectly held securities involve persons from two or more nations or there are other international aspects, it is possible that other laws might be implicated, such as the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Convention"), which became effective in the United States on April 1, 2017. This UCC Opinion does not address such situations. Note that, if the Covered Law, see *infra* notes 85–86 and accompanying text, includes federal law, then, absent an express exclusion by the opinion giver, the Covered Law would include the Hague Convention (which is very broad in its scope). For a description of other potential issues involving the Hague Convention, see Carl S. Bjerre, Sandra M. Rocks, Edwin E. Smith & Steven O. Weise, *A Guide to the Hague Securities Convention for U.S. Lawyers*, 47 U.C.C. L.J. 389 (2018); Carl S. Bjerre and Sandra M. Rocks, *Say Hello to the Hague Securities Convention*, 7 TRANSACTIONAL LAW., Feb. 2007, at 1, <https://blogs.law.gonzaga.edu/files/Transactional-Lawyer-2017-03.pdf>.

70. This alternative would be appropriate where the security interest in security entitlements is being perfected under section 9314(a) by control under sections 9106(a), 8106(d)(2) or 8106(d)(3). See generally *UCC Report*, *supra* note 3, § 5.3.5. A secured party having control of all security entitlements in a securities account has control over the securities account. CAL. COM. CODE § 9106(c)(2019); see *UCC Report*, *supra* note 3, § 5.35. A security entitlement is not, however, a specific property interest in any financial asset held by the securities intermediary through which the securities intermediary holds the financial asset. See *UCC Report*, *supra* note 3, at 47–48 n.270. As noted, see *supra* note 69, this UCC Opinion does not address situations where indirectly held

described [on Schedule 1 to the {[Securities Account Control Agreement] OR [Third Party Acknowledgment] OR [Security Agreement]}] OR [that portion of [specify security entitlements to particular financial assets] credited to the securities account described [on Schedule 1 to the {[Securities Account Control Agreement] OR [Third Party Acknowledgment] OR [Security Agreement]}] is perfected by control.

17. **[Perfection-by-Control Opinion Concerning Commodity Contracts/Commodity Account.]**⁷¹ The security interest in {[the account specified [on Schedule 1 to] the {[Commodity Account Control Agreement]⁷² OR [Security Agreement]}⁷³ OR [that portion of the contracts specified [on Schedule 1 to]⁷⁴ the {[Commodity Account Control Agreement] OR [Security Agreement]}] is perfected by control pursuant to the {[Commodity Account Control Agreement] OR [Security Agreement]}.
18. **[Perfection-by-Control Opinion Concerning Letter-of-Credit Rights.]**⁷⁵ The security interest in the letter-of-credit rights with respect to [the letter of credit identified on Schedule 1 to the Assignment and Consent] {[is] OR [will be]} perfected by control pursuant to the Assignment and Consent.
19. **[Perfection-by-Notification Opinion.]**⁷⁶ The security interest in [specify policy of insurance] {[is] OR [will be]} perfected [upon the giving of notice to the Insurer] pursuant to the Notice.

securities involve persons from two or more nations or other international aspects.

Note that, if the bracketed language limiting the opinion to security entitlements with respect to particular financial assets is used, only listed security entitlements are covered by the opinion (and not all security entitlements in the described account). See generally *UCC Report*, supra note 3, § 5.3.5.

71. For a discussion of the usage of this opinion, see generally *UCC Report*, supra note 3, § 5.3.6. Note that, in any perfection opinion concerning a commodity account, the opinion giver is entitled to assume, without so stating, that such commodity account is a “commodity account” as defined in section 9102(a)(14).

72. Reference to the Commodity Account Control Agreement would be appropriate where the Lender is not a commodity intermediary and its security interest in a commodity account or commodity contracts of the Borrower is being perfected under section 9314(a) by control pursuant to section 9106(b)(2) (i.e., by the use of a control agreement). See generally *UCC Report*, supra note 3, § 5.3.6.

73. Reference to the Security Agreement would be appropriate where the Lender is the commodity intermediary with which the commodity contracts of the Borrower are carried and the Lender’s security interest therein is being perfected by control pursuant to section 9106(b)(1).

74. If this alternative language is used, only the commodity contracts listed on the schedule will be covered by the opinion (and not all of the commodity contracts in the commodity account).

75. This opinion would be appropriate where the security interest in letter-of-credit rights is being perfected under section 9314(b) by control pursuant to section 9107 (i.e., by the consent of the issuer or any nominated person of the issuer). See generally *UCC Report*, supra note 3, § 5.3.7. Note that control under section 9107 is the only method of perfecting a security interest in letter-of-credit rights as original collateral (i.e., not as supporting obligations). CAL. COM. CODE § 9312(b)(2)(2019).

76. In California, the application of Division 9 of the UCC to security interests in insurance policies as original collateral is nonuniform. *UCC Report*, supra note 3, at 52 & n.303. This opinion would be appropriate where the security interest in an insurance policy is being perfected under section 9312(b)(4) by the security party giving written notification to the insurer. See generally *UCC Report*, supra note 3, § 5.4. Note that, unless the insurance policy is also governed by California law,

Priority Opinions.⁷⁷

20. [Priority Opinion Concerning Instruments and Tangible Chattel Paper.]⁷⁸ The security interest in that portion of the Collateral described in the Security Agreement that consists of instruments or tangible chattel paper that constitute Possessory Collateral {[will be] OR [is]} prior to any other security interest perfected other than by possession under Division 9 of the UCC.⁷⁹

California law may not operate to bind the insurance company as account debtor; moreover, if the policy states that it is governed by the law of a state other than California and states that it is not assignable, the effectiveness of the restriction on assignment under non-UCC choice-of-law principles would be governed by the laws of the other state and not California. See CAL. COM. CODE § 9401 (2019); U.C.C. § 9-401 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

77. The Committee strongly disfavors priority opinions concerning security interests in collateral (“Priority Opinions”), even if such opinions are limited to the rules contained in Division 9 of the UCC by a UCC Scope Limitation (“UCC Priority Opinion”). This view echoes that contained in the *UCC Report*, *supra* note 3, § 6.1. As articulated in the *UCC Report*:

[T]he parties to a transaction and their counsel have an obligation to act reasonably in assessing whether any Security Interest Opinion should be provided in the transaction. This is especially true in assessing whether there is justification for requesting even a limited form of a Priority Opinion, particularly in light of the greater uniformity in personal property secured transactions engendered by the widespread adoption of revised Article 9.

Id.

The *UCC Report* provides that, even in the limited instances where a UCC Priority Opinion is appropriate, “it should ordinarily be further confined to specific and limited types or items of collateral and to specific types of competing interests.” *Id.* The Committee notes, however, that, even if such opinions are limited in such fashion, they are often so qualified or based on so many assumptions that there is no real justification for requesting the opinion in the first instance.

In the rare case where it is appropriate to give a UCC Priority Opinion, it usually takes one of four forms: (a) in securitization transactions, an opinion regarding the priority of a security interest perfected by a secured party only by the filing of a financing statement under Division 9 of the UCC over a security interest perfected only by the filing of a financing statement under Division 9 of the UCC in the same filing office (a “Filing Priority Opinion”) (note that, if such an opinion is given, the documents reviewed by the opinion preparers would also include a UCC search report as to financing statements under the UCC naming the Borrower as debtor and on file in the Filing Office), *UCC Report*, *supra* note 3, § 6.2.1; *TriBar UCC Report*, *supra* note 3, § 5.2(b); (b) an opinion regarding the priority of a security interest that may be perfected by a secured party only by delivery or control under Division 9 of the UCC, *UCC Report*, *supra* note 3, § 6.2.2; *TriBar UCC Report*, *supra* note 3, §§ 5.3, 8.2, 8.4; (c) an opinion that a secured party who has perfected a security interest in a certificated security based on control (or delivery, if delivery gives rise to control) takes free of any adverse claim to that collateral if certain specified conditions are met, *UCC Report*, *supra* note 3, § 6.2.3; *TriBar UCC Report*, *supra* note 3, §§ 5.3, 8.1; or (d) an opinion that a purchaser (which includes a secured party) of a security entitlement who becomes an entitlement holder with respect to the security entitlement has protection against the assertion of adverse claims against the security entitlement if certain specified conditions are met, *UCC Report*, *supra* note 3, § 6.2.4; *TriBar UCC Report*, *supra* note 3, §§ 5.3, 8.3.

Given the few transactions where a Filing Priority Opinion may be appropriate, this UCC Opinion neither includes a sample of that opinion nor a detailed discussion of that type of opinion. For a discussion of the Filing Priority Opinion and the relevant assumptions (stated and unstated) and exceptions, see *TriBar UCC Report*, *supra* note 3, § 6.3.

78. For a more extensive discussion of this opinion, see *UCC Report*, *supra* note 3, § 6.2.2; *TriBar UCC Report*, *supra* note 3, § 5.3. For a discussion of relevant assumptions (stated and unstated) and exceptions to this opinion, see *TriBar UCC Report*, *supra* note 3, § 5.3.

79. In certain structured finance transactions where electronic chattel paper constitutes a substantial portion of the collateral, some opinion givers are asked and are willing to provide, in addition to a perfection-by-filing opinion, a perfection-by-control opinion under section 9105 with respect to a

21. [Priority/No Adverse Claim Opinion Concerning Certificated Securities.]

*First Alternative*⁸⁰: Upon the Lender taking delivery of the Stock Certificate, the security interest in the Stock Certificate {[will be] OR [is]} prior to any other security interest perfected under Division 9 of the UCC other than by control.

*Second Alternative*⁸¹: The security interest in the Stock Certificate {[will be acquired] OR [has been acquired]} free of adverse claims.

22. [Priority/No Adverse Claim Opinion Concerning Securities Accounts/ Security Entitlements.]

*First Alternative*⁸²: The security interest in the [describe securities account]{[will be] OR [is]} prior to any other security interest created under Division 9 of the UCC.

*Second Alternative*⁸³: No action based on an adverse claim to a financial asset credited to the [describe securities account] may be asserted against the Lender.

D. CONFIRMATION

We are not representing the Borrower or the Guarantor in any action or proceeding that is pending or overtly threatened in writing by a potential claimant which seeks to enjoin the transactions the subject of the Loan Documents or challenge the validity of the Loan Documents or the performance by the Borrower or the Guarantor of its respective obligations thereunder.⁸⁴

security interest in such collateral. Perfection by control may afford rights against certain parties superior to those afforded by perfection by filing. *UCC Report, supra* note 3, § 5.3.2; CAL. COM. CODE § 9330(a-b)(2019). In light of the extensive factual assumptions that are required, such an opinion is beyond the scope of this UCC Opinion.

80. The Lender's acquiring possession of the Stock Certificate constitutes "delivery" of the security certificate under section 8301 and effects perfection of the security interest under section 9313(a); as a result, the security interest has priority over a security interest perfected other than by control (e.g., by filing). CAL. COM. CODE § 9328(5)(2019); U.C.C. § 9-328(5) cmt. 6 (AM. LAW INST. & UNIF. LAW COMM'N 2010). For a more extensive discussion of this opinion, see *UCC Report, supra* note 3, § 6.2.2; *TriBar UCC Report, supra* note 3, §§ 5.3, 8.2, 8.4. For a discussion of relevant assumptions (stated and unstated) and exceptions to this opinion, see *TriBar UCC Report, supra* note 3, § 8.3.

81. For a more extensive discussion of this opinion, see *UCC Report, supra* note 3, § 6.2.3; *TriBar UCC Report, supra* note 3, §§ 5.3, 8.1. Note that this opinion requires that the security interest in the Stock Certificate be perfected by control. See CAL. COM. CODE § 8303(a)(2019) (providing that a "protected purchaser" of a certificated security is one who gives value, does not have notice of any adverse claim to the certificated security, and obtains control thereof).

82. For a more extensive discussion of this opinion, see *UCC Report, supra* note 3, § 6.2.2; *TriBar UCC Report, supra* note 3, §§ 5.3, 8.4. See also *supra* note 69 (regarding the possible application of the Hague Convention).

83. For a more extensive discussion of this opinion, see *UCC Report, supra* note 3, § 6.2.4; *TriBar UCC Report, supra* note 3, §§ 5.3, 8.3. See also *supra* note 69 (regarding the possible application of the Hague Convention).

84. In opinions provided in many transactional contexts, including financing transactions, opinion givers have historically been asked for a statement (based on the opinion giver's knowledge) as to

E. CERTAIN QUALIFICATIONS

Our opinions are limited to the federal law of the United States and the law of the State of California,⁸⁵ but in each case only to laws that in our experience are

the absence of litigation against the Borrower except as otherwise disclosed. This statement has usually been limited to litigation that adversely affects the transaction or that could have a material adverse effect on the Borrower. Despite the fact that this statement is actually a confirmation of a factual matter, it is often requested to be included with the legal opinions.

The text in the body of this UCC Opinion, which reflects evolving customary practice, limits the confirmation to matters being handled by the opinion giver, echoing the long-accepted scope limitation on audit letter responses and reflecting a reaction to the holding in *Dean Foods Co. v. Pappathanasi*, No. 01-2595 BLS, 2004 WL 3019442, at *12-15 (Mass. Super. Ct. Dec. 3, 2004), that limiting a “no-litigation” opinion to the opinion giver’s knowledge does not change the meaning of the opinion or the scope of the presumed diligence. It does not cover “investigations” because of the difficulty in determining whether they are ongoing, or if they ever were ongoing, whether they have concluded. See, e.g., Donald W. Glazer & Arthur Norman Field, *No-Litigation Opinions Can Be Risky Business*, BUS. L. TODAY 6 (July/August 2005) [hereinafter *No-Litigation Opinions*]. It is also limited to matters that relate to the transaction at hand rather than being a more general “status” statement about the Borrower or the Guarantor.

These limitations allow the opinion givers to avoid the need to rely, at least as heavily, on the less certain “knowledge” and “materiality” limitations. They also avoid the fundamental problem with the historic formulation, which is that, as a factual confirmation, it depends in significant part on information supplied to the opinion preparers by the Borrower (and, in our example, the Guarantor). If the opinion recipient desires a factual confirmation that is broader than that suggested in the text, the opinion recipient should ordinarily rely on an appropriate factual representation from the Borrower and the Guarantor. The 2007 *Business Transactions Report* and the 1998 *TriBar Report* reach a similar conclusion. See 2007 *Business Transactions Report*, *supra* note 3, at 64; 1998 *TriBar Report*, *supra* note 3, at 663-65.

The 2007 *Business Transactions Report* describes the meaning of the “no-litigation” confirmation and customary diligence. 2007 *Business Transactions Report*, *supra* note 3, at 62-64; see also *infra* note 88 and accompanying text for a discussion of the “knowledge” qualification. Note that the “knowledge” qualification, while helpful, may still require that opinion preparers conduct some inquiry before giving the confirmation. Further, while the “traditional” formulation in this footnote states that the no-litigation confirmation does not extend to litigation other than litigation that “may adversely affect the transactions contemplated by the Loan Agreement or that may have a material adverse effect on the Borrower or the Guarantor,” the Committee believes that it is not the responsibility of the opinion giver (and, therefore, it is inappropriate to ask the opinion giver) to assess the materiality of any particular litigation. As a result, the Committee believes that, if this common qualification is used, it too is appropriately based on an officer’s certificate and a statement that the opinion, insofar as it relates to materiality, is based solely on that certificate. For a discussion of reliance on officers’ certificates, see 2007 *Business Transactions Report*, *supra* note 3, at 30-31.

To the extent a no-litigation confirmation in any form is given, the confirmation—since regardless of where it appears, it is not a legal opinion—is best set forth in a separate section of the opinion (as here, in Section D) or in a separate letter.

85. By customary usage, the statement “[w]e express no opinion herein as to the application or effect of the law of any other jurisdiction” is understood even if not stated. 2007 *Business Transactions Report*, *supra* note 3, at 86-91; 1998 *TriBar Report*, *supra* note 3, at 631. If the law of a state other than California is selected to govern the Loan Documents, an “as if” remedies opinion may, if requested by the opinion recipient, be given and additional language would be required at this point in the opinion letter. See *supra* note 45.

If the Borrower were a regulated entity (for example, an investment company subject to regulation under the Investment Company Act of 1940), then the law addressed by the opinion letter would include federal or California laws regulating the Borrower unless an exception were taken by the opinion giver (as is done in the text of this UCC Opinion).

Furthermore, the 2007 *Business Transactions Report* states:

Another type of qualification may be appropriate when the opinion giver is unwilling to take responsibility for certain laws. For instance, an opinion giver may expressly exclude compliance

typically applicable to transactions of the type exemplified by the Loan Documents. We express no opinion with respect to compliance with any law, rule, or regulation that, as a matter of customary practice, is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically addressed herein], we express no opinion on local or municipal laws, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture laws, foreign corrupt practices, foreign asset or trading controls, or investment company laws, or laws or rules requiring preclearance with the Committee on Foreign Investment in the United States (or any successor thereto).⁸⁶ The laws covered by this letter are referred to herein as the “Covered Law.”

Our opinions are subject to the following additional qualifications:

- (1) Our opinions are subject to: (a) bankruptcy, insolvency, reorganization, arrangement, moratorium, and other similar laws of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including without limitation concepts of materiality, reasonableness, and good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.⁸⁷

with laws affecting certain regulated industries—such as the utility, telecommunications or banking industries—from its opinion. If the opinion recipient wants an opinion that the opinion giver cannot give, special counsel often will be engaged to render it.

2007 Business Transactions Report, *supra* note 3, at 34 (footnote omitted).

Many opinion givers expressly exclude compliance with laws affecting certain regulated industries within the initial paragraph of Section E of this UCC Opinion in the belief that they are more in the nature of scope limitations than qualifications. The placement of these express exclusions does not change their meaning.

As specifically noted, *see infra* note 68, this UCC Opinion assumes that the Loan Documents state that they are governed by California law; that California law is the jurisdiction of organization of the Borrower, the Guarantor, and the other relevant parties (assuming that each such party is a registered organization under section 9102(a)(71)); and that California law governs the other aspects of the transactions exemplified by the Loan Documents. If this is not the case, *see, e.g., supra* notes 64–67, then the opinion giver will need to determine whether it is in a position to address the laws of any other applicable jurisdiction (in which case the definition of “Covered Law” would need to be modified) or whether the opinion, if still required, will be addressed by a different opinion giver. In addition, the opinion giver might need to determine whether it is necessary to expressly exclude certain laws from the Covered Law if it is not in a position to address such laws (for example, the Hague Convention, *see supra* note 69).

86. *See 2007 Business Transactions Report*, *supra* note 3, at 24–31, 56. This sentence listing laws excluded from the scope of the opinion letter may be omitted without changing the scope of the opinions in transactions where the referenced laws would not generally be applicable. It is included to provide language that some opinion givers use to avoid misunderstanding. For example, as a matter of customary practice, securities, tax, and insolvency laws are understood not to be covered in an opinion letter unless expressly stated. *See Statement of Opinion Practices*, *supra* note 3, § 6.2. Note, however, that, depending upon the nature of the transaction and the experience of the opinion giver, it may be appropriate for the opinion giver to exclude other laws from the Covered Law. *See, e.g., supra* note 69 (regarding the Hague Convention).

87. *See 2007 Remedies Report*, *supra* note 3, at 5 app. 10, at 3–9 (discussing the bankruptcy and equitable principles exceptions).

In certain financing transactions, the Loan Agreement may include, whether by the inclusion of the

- (2) [Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been actively involved in representing the Borrower or the Guarantor in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.]⁸⁸
- (3) We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (a) broadly or vaguely stated rights; (b) the benefits of statutory, regulatory, or constitutional rights; (c) unknown future defenses; and (d) rights to one or more types of damages.⁸⁹

Loan Syndications and Trading Association’s model Contractual Recognition Provisions or otherwise, provisions under the E.U. Bank Recovery and Resolution Directive (the “BRRD”) and Part I of the United Kingdom Banking Act 2009 (“UKBA”) and the implementing legislation of European Economic Area member countries and the United Kingdom (the “Bail-In Legislation”) that enable bank regulators to write down, reform the terms of, cancel, or convert into equity the liabilities of failing European Economic Area or United Kingdom, as applicable, credit institutions and investment firms (the “Writedown and Conversion Powers”). If provisions regarding Writedown and Conversion Powers are included in the Loan Agreement (or any other Loan Document) (“Bail-In Language”), some opinion givers include an express exclusion as to any opinion with respect to the Bail-In Language. Such language might take the following form:

We express no opinion regarding the enforceability of [Section ___] of the [Loan Agreement [specify provision of Loan Agreement containing the Bail-In Language]], or the effect of such [Section ___] on any other provision of the Loan Agreement or any of the other Loan Documents.

Nonetheless, the Committee believes that because the Bail-In Language may present issues for U.S. opinion givers who are unfamiliar with the BRRD, the UKBA, and Bail-In Legislation and their respective effects, the bankruptcy and equitable principles exceptions should be understood to exclude any opinion as to the Bail-In Language to avoid an opinion giver implicitly providing an opinion on such language. For a discussion of the considerations faced by opinion givers with respect to the Bail-In Language and for thoughts on possible approaches for opinion givers (including the approach taken by the Committee with respect to the Bail-In Language in this UCC Opinion), see Anna Dodson, Simon Fulbrook, Ettore Santucci, & Ed Sibble, *Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States*, IN OUR OPINION, Spring 2016, at 11.

88. See generally 2007 Business Transactions Report, *supra* note 3, at 15–17, 32–34 (discussing confirmations of fact and limitations on the basis of knowledge, respectively). Note that, if reference is not made to “knowledge” in Opinion 9(c) of this UCC Opinion, then this qualification can be deleted from this UCC Opinion. Further note that the bracketed language is by custom understood to be applicable whether or not stated. But at least one court has held that a reference to knowledge in an opinion constitutes an affirmative statement of the opinion givers’ knowledge and not a limitation on the actual knowledge of such opinion givers. *Nat’l Bank of Can. v. Hale & Dorr LLP*, No. 2000-00296, 2004 WL 1049072 (Mass. Super. Ct. Apr. 28, 2004). Accordingly, some opinion givers refer to the “conscious awareness” rather than the “actual knowledge” of the lawyers involved. See, e.g., Donald W. Glazer & Stanley Keller, *A Streamlined Form of Closing Opinion Based on the ABA Legal Principles*, 61 BUS. LAW. 389, 397 n.21 (2005).

89. See 2007 Remedies Report, *supra* note 3, at 5 app. 10, § 6, at B-9–B-11 (discussing waivers of the types addressed in clauses (a–d) of the sample language). Note that this and any of qualifications (4), (5), (6), (7), (8), (9), and (10) are appropriate to be included in this UCC Opinion only if contractual provision(s) of the type addressed by the qualification are actually included in the Loan Documents.

- (4) [The enforcement of Section [] of [the Loan Agreement], relating to the payment of attorneys' fees and costs, is subject to the effect of section 1717 of the California Civil Code.]⁹⁰
- (5) [We express no opinion regarding the enforceability of: (a) [Section] of the [Loan Agreement], which purports to fix the venue of proceedings relating to the Loan];⁹¹ (b) [Section] of the [Loan Agreement], which purports to waive the parties' rights to a jury trial;⁹² or (c) [Section] of the [Loan Agreement], which purports to submit disputes to arbitration.]⁹³

90. See *id.* § 21, at B-24–25 (discussing attorneys' fee provisions).

91. See *id.* § 13, at B-13–B-14 (discussing forum selection clauses and consents to jurisdiction). Note that there have been considerable case developments in these areas.

92. See *id.* § 15, at B-15–B-16 (discussing jury trial waivers).

93. See *id.* § 20, at B-22–B-24 (discussing arbitration provisions). The enforceability of "judicial review" provisions is unsettled. Federal courts applying the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2018) (the "Arbitration Act"), will not enforce them, see *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), but California courts may well, see *Cable Connections, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008).

The Committee has noted that some opinion givers are increasingly excluding arbitration clauses from the coverage of their remedies opinions. The Committee notes that many recent judicial decisions have considered challenges to the enforceability of arbitration clauses. Both federal and California case law make clear that public policy strongly favors enforcement of arbitration agreements. In the past, California courts often held that particular arbitration clauses were unenforceable because they were unconscionable. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 694 (Cal. 2000); *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005). The Arbitration Act generally provides that an agreement to arbitrate is enforceable except on grounds that may exist for the revocation of any contract (for example, unconscionability or fraud). In *AT&T Mobility LLC v. Concepcion*, the Supreme Court concluded that the Arbitration Act preempted state law where the unconscionability was based on the terms of an arbitration clause itself and therefore held that the Arbitration Act preempted the holding in *Discover Bank*. 563 U.S. 333, 352 (2011). Subsequently, the Supreme Court held that where the pro-arbitration policy of the Arbitration Act conflicts with the enforcement of another federal law (for example, antitrust law) under the terms of a particular arbitration agreement, the policies of the other law must give way so long as the other law does not otherwise provide. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013). California courts have upheld arbitration provisions and have not allowed class arbitrations in the absence of an agreement permitting class arbitration. See *Truly Nolen of Am. v. Super. Ct.*, 145 Cal. Rptr. 3d 432 (Ct. App. 2012); see also *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 221 (Cal. 2013), *cert. denied*, 234 S. Ct. 2734 (2014) (holding that, under the Arbitration Act, courts applying state unconscionability principles cannot mandate procedural rules that are inconsistent with fundamental attributes of arbitration; however, a court applying an unconscionability analysis may consider the value of benefits provided to employees by state statutes in determining whether a particular arbitral scheme provides an accessible, affordable process for resolving wage disputes); see also *Iskanian v. CLS Transp. Los Angeles LLC*, 327 P.3d 129, 152 (Cal. 2014) (holding that class action waivers in arbitration clauses in labor contracts are enforceable under the Arbitration Act; however, the Arbitration Act does not preempt state law that provides for the unenforceability of waiver of the rights of aggrieved persons to bring court actions as designated actors for the state). As a result of the Supreme Court decisions, the Committee believes that, as a general rule, opinion givers need *not* include an exception for the enforceability of arbitration clauses in agreements among parties in commercial loan financings. Nevertheless, many opinion givers remain uncomfortable giving opinions on the enforceability of arbitration clauses because they believe that (1) the law is not completely settled, (2) they do not closely follow developments in the law in this area, or (3) although arbitration clauses may be generally enforceable, they are unsure whether certain provisions of the arbitration clause are enforceable such that the unenforceability of the particular provision might make the entire arbitration clause unenforceable. In the case of such uncertainty, opinion givers may consider including this

- (6) We advise you of California statutory provisions and case law to the effect that a guarantor may be discharged, in whole or in part, if the beneficiary of the guaranty alters the obligation of the principal, fails to inform the guarantor of material information pertinent to the principal or any collateral, elects remedies that may impair either the subrogation or reimbursement rights of the guarantor against the principal or the value of any collateral, fails to accord the guarantor the protections afforded a debtor under Division 9 of the UCC or otherwise takes any action that prejudices the guarantor, unless, in any such case, the guarantor has effectively waived such rights or the consequences of such action or has consented to such action. While section 2856 of the California Civil Code and case law provide that express waivers of a guarantor's right to be discharged, such as those contained in the Guaranty, are generally enforceable under California law, we express no opinion regarding the effectiveness of the waivers in the Guaranty.⁹⁴
- (7) [We express no opinion regarding the enforceability of any provisions of the Loan Documents imposing or providing for the collection of liquidated damages, late charges, prepayment charges, increased interest rates, premiums, or other amounts or accelerating future amounts due (other than principal) without appropriate discount to present value to the extent they constitute a "penalty" or "forfeiture."] ⁹⁵
- (8) [We express no opinion as to the enforceability of any exculpation, exoneration, indemnification, or contribution provisions in the Loan Documents to the extent that the enforceability of such provisions is limited by public policy or statutory provisions.] ⁹⁶
- (9) [[We express no opinion as to the creation or perfection of any security interest except to the extent that [Division 8 and]Division 9 of the UCC govern[s] either such matter.] OR [The law covered by the security interest opinions set forth in paragraphs [specify opinion paragraphs] is limited to [Division 8 and] Division 9 of the UCC and is covered only to the extent referred to therein.]] ⁹⁷

qualification. Note, however, that some opinion givers omit clause (3) of the last sentence (relating to arbitration) as unnecessary.

94. See 2007 Remedies Report, *supra* note 3, at 5 app. 10, § 18, at B-18–B-20 (discussing waivers of defenses available to guarantors).

95. See *id.* § 3 at B-7–B-9 (discussing penalty provisions). The enforceability of these provisions generally turns on their reasonableness. Opinion preparers "should not be expected to determine whether a given economic remedy is reasonable, and . . . as a matter of customary practice a remedies opinion is understood as not extending to the reasonableness of such remedies." *Id.*

96. *Id.* §§ 23, 25, at B-26–B-31 (discussing indemnities). This provision substantively tracks its counterpart in the Transactional Opinion. *Transactional Opinion*, *supra* note 3, at 18 n.41. It is not intended to change the meaning of the exception included in Section E, numbered paragraph (3), of this UCC Opinion but makes the exception clearer.

97. The common practice is for a Security Interest Opinion (as defined in the *UCC Report*, *supra* note 3, § 2.3 ("Security Interest Opinion")) to include a form of UCC Scope Limitation. See generally *UCC Report*, *supra* note 3, § 3 ("It is typically appropriate for the opinion giver to limit the

- (10) [We express no opinion as to the perfection of any security interest referenced herein other than by the filing of the Financing Statement with the Filing Office.]⁹⁸

This letter may be relied upon solely by the Lender for use in connection with the transactions contemplated by the Loan Agreement. No other party may rely upon this letter or the opinions expressed herein without our prior written consent.⁹⁹

scope of the [Security Interest Opinion] to personal property subject to Division 9. Section 9109(a) specifies the types of security interests and liens to which Division 9 applies, and sections 9109(c) and (d) specify transactions, security interests and liens to which Division 9 does not apply.”)

In the very limited instances, *supra* note 77; *UCC Report, supra* note 3, at 55 & n.316, and accompanying text, where it is appropriate for a Security Interest Opinion to include a UCC Priority Opinion, then it is customary to modify the UCC Scope Limitation accordingly (i.e., “the creation, perfection or priority of any security interest . . .” [emphasis supplied]). *Id.* For a discussion of limited UCC Priority Opinions, see *supra* note 77.

Note that, except to the extent that it does so expressly, a Security Interest Opinion “does not address which state’s law governs the perfection, the effect of perfection or nonperfection, or the priority of any security interest.” *TriBar UCC Report, supra* note 3, § 2.1(d), at 1460; see also *id.* at 1460 & n.38.

98. This qualification is inherent and customarily added solely in connection with a Perfection--by-Filing Opinion where, without the qualification, the opinion might otherwise be misleading. See generally *UCC Report, supra* note 3, § 5.1.2(a).

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

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

See generally *2007 Business Transactions Report, supra* note 3, at 21–22 (providing the Addressee).

Opinion recipients may request that specified third parties (for example, assignees) be allowed to rely on the opinion letter. As a general rule, careful attention should be given to whether parties other than the addressee should be allowed to rely on the opinions and/or any confirmation. See, e.g., Reade H. Ryan, Jr., *The Role of Lead Counsel in Syndicated Lending Transactions*, 64 *BUS. LAW.* 783, 790–91 (2009) (discussing reliance by assignees); *Negative Assurance Report, supra* note 3, at 405 n.57 (discussing restricting access to negative assurance confirmations). The preferred practice is to address the opinion letter to any persons (if known) who are allowed to rely on it, or if not known, to clearly define the universe of such persons. An example of language allowing reliance by permitted assignees under the Loan Documents follows:

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

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

Very truly yours,

BETTER SAFE THAN SORRY LLP

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

Exhibit 1
UCC-1 Financing Statement
[Please see attached.]

Annex 1

A version of the UCC Opinion without footnotes is posted on *The Business Lawyer* website next to this sample opinion.