

Model Opinion of Counsel

By Joshua Stein

Whenever any commercial real estate borrower obtains a loan, the lender typically asks the borrower to have its counsel deliver one or more legal opinions, depending on the deal structure and the lender's appetite. The "basic" opinions relate to two areas: (1) "corporate" (really limited liability company or sometimes partnership) matters; and (2) "enforceability" of the loan documents. From that starting point, lenders can ask for more, sometimes much more. For a CMBS loan, the rating agencies seem to regard legal opinions as a general panacea for every possible problem or risk, some quite arcane. So opinions multiply.

This Model Document offers a reasonable template for a variety of common opinions of counsel for commercial real estate loan closings. It covers the basic matters listed above—excluding opinions specific to CMBS transactions—plus usury and choice of law (really part of the enforceability opinion), noncontravention and some security interests. It has options for New York, including issuance of a New York local real estate counsel opinion and a New York law enforceability opinion with real property out of state.

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Given how many great minds have devoted tremendous effort to legal opinions in the last few decades, it may be presumptuous to offer a model legal opinion prepared without extensive deliberation by a bar association committee or multiple committees of multiple bar associations. Nonetheless, that is exactly what follows. It reflects the author's experience and lessons learned through extensive work on legal opinions for several decades, including a decade as a member of the finance opinions committee of a global law firm.

This model opinion incorporates ideas from bar association opinion reports. It also reflects the author's efforts to simplify and improve the wording of opinions consistent with industry standards and expectations. The result: a virtually comment-proof model opinion that also does not expose any reasonably careful opinion giver to risk. Although endnotes address a few opinion issues, the substantive discussion of those issues is minimal. Anyone desiring to learn more about them can look at any of the dozens of opinion reports issued by dozens of bar associations, plus books on the topic.

As a practical matter, the value of an opinion derives primarily from the process of thinking through exactly what the opinion should say and how the opinion giver can get comfortable with those conclusions, and not so much from the precise words on the page.

In all the excitement about opinion verbiage (particularly assumptions, exceptions, exclusions, limitations, qualifications, etc.), any opinion giver should not overlook a not-so-minor detail: the need to read and think about the documents the opinion covers. Counsel should look for issues on enforceability or anything else and otherwise confirm the "standard" process conclusions. That process represents a separate discussion outside the scope of this model document. Exactly what does counsel need to see to conclude that loan documents are "enforceable"? What would make a document "unenforceable" or prevent counsel from issuing an enforceability opinion? Those are great questions, but they are not answered here.

This model opinion also does not try to describe the conditions that a transaction must meet so counsel can give each opinion conclusion. Those conditions are certainly important—they add up to much of the law that applies to everything the opinion covers—but they lie outside the scope of this document. It is assumed that counsel using this model opinion already knows the law without restating or summarizing it here. The goal here simply consists of providing a reasonable template for "ordinary" opinions of counsel. The template does include a few substantive legal comments, mostly tied to the opinion preparation process, but they do not amount to exhaustive commentary of the type often found in opinion reports.

Though not often requested from local counsel, and generally disfavored in any case, this opinion template offers conclusions and qualifications on "pending litigation" and compliance with "material agreements." These conclusions should come, if at all, from Borrower's internal counsel and not any form of outside counsel, except maybe Borrower's outside general counsel. To issue these conclusions, local counsel will generally need to rely entirely on certificates from Borrower. If local counsel with no other connection to Borrower relies on unverified certificates from Borrower, those conclusions are worthless. Counsel would perform no useful function.

The bulk of most opinions consists of a mishmash of assumptions, exceptions, limitations, qualifications and restrictions (the "caveats")—every caveat the opinions committee can think of or has ever seen in any opinions report or the absence of which has led any opinion giver to incur liability or a whiff of possible liability under a

legal opinion. This model opinion seeks to impose some order on that accumulation to help opinion givers and recipients think through what might and might not make sense in a particular case. As a first step, this model opinion collects each category of caveats separately. The user will need to exercise judgment to decide which caveats to keep or delete. Endnotes offer a bit of guidance.

Opinions often tie particular caveats to particular conclusions, particularly the enforceability conclusions. That practice may feel very precise and careful. But it creates a risk that the opinion giver might fail to tie a particular caveat to a particular conclusion to which it should have been tied. For example, suppose paragraph 2 consists of an enforceability conclusion on Borrower. The caveats can refer to paragraph 2. Later, though, the parties might add paragraph 3 with a separate enforceability conclusion on Guarantor. The opinion giver might forget to tie the caveats to the newly added conclusion.¹ Hence this model opinion refrains from tying caveats to conclusions. All caveats apply to all conclusions. That varies from the typical expectation that the caveats will tie only to the enforceability conclusion. But why shouldn't they apply to all conclusions? If an opinion recipient wants to see more tying, the opinion giver can add some rope. It adds no value while creating risk. But some people like rope.

This opinion seeks to apply principles of Plain English writing: short and direct sentences, verbs, ordinary words, active voice, not too many parentheses, basic principles expressed before their exceptions and presentation of concepts in an orderly and logical way. Sometimes the result doesn't sound like "the usual wording." Lawyers often don't like that. They feel more comfortable doing everything exactly as it has always been done, whether or not some other way might be better. The author favors improvement over time, accomplished carefully and thoughtfully.

When counsel other than the borrower's main closing counsel (typically loan counsel) issues an opinion, that can require some coordination. In the worst case, local counsel will refuse to allow its opinion to be released until it has seen complete, final and fully executed documents. In other cases, local counsel may establish elaborate escrow mechanisms for release of the signed opinion, as if it has extraordinary value and must be guarded like the Crown Jewels. The author prefers not to stand on ceremony about any of this.

Instead, counsel should deliver the signed opinion with the same level of formality, if any, that would apply to delivering any other signed closing document to trusted counsel for another party. If one does not have confidence in that counsel to handle these matters professionally, then why would one expect that counsel not to substitute pages without authorization, or otherwise

misbehave? And if one has any such doubts, one should probably decline the assignment entirely.

Along similar lines, the Marc Dreier drama² demonstrated the risks of acting "just" as an opinion giver, especially on due authorization and execution, in a transaction where one has no other involvement. An opinion giver may want to decline that role, or at least ask questions before proceeding.³

"Any law firm should keep an organized record of opinions issued with details on who did the background work to assure each opinion was correct."

To accommodate the typical chaos of a transaction—"just this one time we're really in a hurry"—counsel will usually need to send out a draft opinion without having fully reviewed the documents, with the idea that if any issues appear the parties will deal with them. As a practical matter, if the documents raise issues, they will more likely lead to changes to the documents than changes to the opinion, so the practice of sending out the opinion before reading the documents makes sense. The opinion giver just needs to remember to pay attention to the documents, identify and raise any concerns and make sure they get addressed.

This model opinion arose out of many transactions where the author and his colleagues at Joshua Stein PLLC acted as New York counsel or borrower's closing counsel with documents governed by New York law. Use in other states will require significant adjustment and checking.

Instructions and comments to the user appear in the endnotes.

This model opinion has no internal section cross-references. They just cause mischief.

The template opinion has a table of contents and an index of defined terms, originally just for pedagogical reasons but ultimately for reader convenience, after the signature page. The template opinion uses a coordinated section numbering system, to better highlight building blocks and structure. Both measures described in this paragraph are "off market" but helpful.

If the user keeps the index of defined terms, then any changes or additions to defined terms should be suitably marked for that index.

Any law firm should keep an organized record of opinions issued with details on who did the background work to assure each opinion was correct. This can include preparing a backup memo to support the opinion conclusions.

MODEL OPINION OF COUNSEL

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[LETTERHEAD OF COUNSEL]

_____, 201_ (the "Closing Date")

_____, as Administrative Agent for the Lenders (in that capacity, "Administrative Agent")⁴

Loan of \$_____ (the "Loan") Referring to Premises (the "Premises") Located at _____ in State of _____ (the "Real Property Jurisdiction")⁵ – File No. ____

Ladies and Gentlemen:

1. CONTEXT

We have acted as special⁶ counsel in the State of New York (the "State") to these parties ("Borrower Parties"):

- 1.1. _____, a _____ ("Borrower");
- 1.2. _____, a _____, Borrower's sole member;
- 1.3. _____, an individual ("Guarantor"); and
- 1.4. _____, a _____ ("Manager").⁷

Borrower Parties asked us to give you this opinion to meet [the condition in Loan Agreement § ____] [your Loan requirements]. In this opinion: (a) definitions in the Loan Agreement apply except where this opinion defines a term⁸; (b) we may use a term before defining it; and (c) "Loan Activities" means execution and delivery of the Loan Documents and Borrower's borrowing and repaying the Loan. An index of defined terms follows the signature page.⁹

2. ITEMS CONSIDERED

We considered matters of fact and questions of law as appropriate to support this opinion. We reviewed, among other things:

2.1. Loan Documents. These documents (the "Loan Documents"), all dated as of the Closing Date and entered into between Borrower and (or from Borrower to) Administrative Agent except as stated:¹⁰

- 2.1.1. Loan Agreement ("Loan Agreement");
- 2.1.2. Promissory Note ("Note");
- 2.1.3. Security Agreement ("Security Agreement");

2.1.4. Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Financing Statement ("Mortgage"), which we have been advised will be submitted for

recording in the real property records of _____¹¹ (the “Real Property Records”), in the Real Property Jurisdiction, describing certain real and personal property (the “Mortgaged Property”¹²);

2.1.5. Assignment of Leases and Rents, to be submitted for recording in the Real Property Records (with the Mortgage [and the Fixture Filing], the “Real Property Documents”¹³);

2.1.6. Cash Management Agreement among Borrower, Administrative Agent and Manager;

2.1.7. Deposit Account Control Agreement (the “DACA”) among Borrower, Administrative Agent, Manager and _____ (“Cash Bank”);

2.1.8. Environmental Indemnity Agreement made by Borrower and Guarantor to Administrative Agent as Indemnitee;

2.1.9. Guaranty of Recourse Obligations from Guarantor to Administrative Agent; and

2.1.10. _____.

2.2. Organizational Documents. These documents for Borrower [, certain of Borrower’s direct and indirect constituents,] and _____ (the “Organizational Documents”):¹⁴

2.2.1. Borrower’s filed certificate of formation dated _____ as amended _____ and _____;

2.2.2. Borrower’s operating agreement dated _____ as amended _____ and _____;

2.2.3. Borrower’s certificate of limited partnership dated _____ as amended _____ and _____;

2.2.4. Borrower’s agreement of limited partnership dated _____ as amended _____ and _____;

2.2.5. Borrower’s good standing certificate dated _____;¹⁵

2.2.6. Officer’s Certificate dated _____; and

2.2.7. Consent dated _____, signed by _____.

2.3. Material Agreements. Only those agreements and instruments that evidence or secure each Borrower Party’s indebtedness for borrowed money (or that are otherwise material to a Borrower Party) as listed in the Officer’s Certificate (the “Material Agreements”).¹⁶

2.4. Financing Statements. Photocopy(ies) of these UCC-1 financing statement(s) naming Borrower as debtor and Administrative Agent as secured party (“Secured Party”), with all schedules and exhibits, copies of which are attached as Exhibit ,¹⁷ each intended to be filed in the office indicated below (the “Central Filing Office”¹⁸) for the state indicated (collectively, the “Financing Statements”):

2.4.1. Financing Statement to be filed with Secretary of State (“SOS”) of the State; and

2.4.2. Financing statement to be filed with SOS of _____.

2.5. Fixture Filing. Photocopy of a UCC-1 financing statement naming Borrower as debtor and Secured Party as secured party, with all schedules and exhibits, referring to goods that are or may become fixtures under State UCC § 9-102(a)(41) (“Fixtures”), a copy of which is attached as Exhibit , intended to be filed in the Real Property Records (the “Fixture Filing”).¹⁹

2.6. _____.²⁰

3. RELIANCE BY COUNSEL AND SCOPE OF REVIEW

With your consent, we relied on all the foregoing and, for some factual matters: (1) representations and warranties in the Loan Documents;²¹ (2) statements in the Organizational Documents; and (3) certificates of Borrower Parties' officer(s) and of government officials, as of recent date. We have not independently verified those factual matters. We have no reason to believe any of these documents are inaccurate.²² We have not obtained datedowns of any Organizational Documents filed with any SOS beyond the certificates recited above.²³

Where we make a statement “to our knowledge,” or with a similar qualification, we mean that the attorneys in this law practice who reviewed the Loan Documents and prepared this opinion have no current actual knowledge of any inaccuracy. Except where we state otherwise, we have not independently investigated the accuracy of any such statement.

We are admitted to practice law only in the State. We opine on only these laws (the “Included Laws”): (1) United States federal law²⁴; (2) internal law of the State [excluding any law on choice of law²⁵]; (3) recording requirements for the Real Property Records (the “Recording Requirements”); (4) only for our Borrower Status Conclusion and our Execution and Delivery Conclusion, the Delaware Limited Liability Company Act, Delaware Code Title 6 Chapter 18 (“DLLCA”) and Delaware Revised Uniform Limited Partnership Act, Delaware Code Title 6, Chapter 17 (“DRULPA”) (DLLCA and DRULPA, together, “Delaware Corporate Law”)²⁶; and (5) only for our Perfection by Filing Conclusion, the Delaware Uniform Commercial Code, Delaware Code Title 6 Article 9 (the “Delaware UCC”).²⁷

To the extent we opine on the Delaware UCC or Delaware Corporate Law, we do so based only on that statute as published on or about the Closing Date on the State of Delaware website (<http://delcode.delaware.gov>), without regard to regulations or judicial interpretations.²⁸ We are not licensed in Delaware.

In this opinion, “UCC” means: (1) if preceded by a state’s name, the Uniform Commercial Code in that state²⁹; and (2) otherwise, whatever Uniform Commercial Code applies.

4. CONCLUSIONS

Subject to the foregoing and the further matters in this opinion, we opine that, as of the Closing Date:

4.1. Borrower Status. Borrower is a validly existing [limited liability company/limited partnership] under the _____ law of _____ with company power and authority to

conduct the Loan Activities. Based solely on certificates from public officials, Borrower is in good standing under the laws of _____ and qualified to do business in _____. (We refer to this paragraph as our “Borrower Status Conclusion.”)

4.2. Execution and Delivery. Each Borrower Party’s execution, delivery and performance of the Loan Documents to which it is a party are within that Borrower Party’s company powers and have been duly authorized by all necessary action of that Borrower Party. (We refer to this paragraph as our “Execution and Delivery Conclusion.”)

4.3. Enforceability. To the extent New York law governs, each Loan Document is a valid and binding obligation of each Borrower Party that is a party to that Loan Document, enforceable against that Borrower Party in accordance with its terms (our “Enforceability Conclusion”).³⁰

4.4. Usury. Without limiting our Enforceability Conclusion, the Loan Documents violate no law on usury, interest rates or compound interest.³¹

4.5. Choice of New York Law. Without limiting our Enforceability Conclusion, a New York state court, or a federal court applying New York law, should³² enforce any contractual choice of New York law or venue in the Loan Documents.³³

4.6. Noncontravention. The Loan Activities of the Borrower Parties do not do any of the following (collectively, our “Noncontravention Conclusion”):

4.6.1. Organizational Documents. Violate any Organizational Document (our “No-Violation-of-Org-Docs Conclusion”);

4.6.2. Violation of Law. Violate any Included Law that applies to any Borrower Party (our “No-Violation-of-Law Conclusion”);

4.6.3. Government Approvals. Require any Borrower Party to obtain any consent, approval or authorization from or make any registration, declaration or filing with any Government Authority (a “Government Approval”), on or before the Closing Date, except any Government Approval: (1) necessary to perfect or protect Administrative Agent’s security interests; or (2) already obtained or accomplished (our “No-Government-Approval Conclusion”)³⁴; or

4.6.4. Material Agreements. Result in a breach or default under any Material Agreement (our “Material Agreements Conclusion”).³⁵

4.7. Qualification of Borrower. Borrower is qualified to do business [and in good standing] [as a foreign entity] in the State.

4.8. Mortgage UCC Attachment Conclusion. The Mortgage creates, in favor of Administrative Agent as secured party, a security interest in Borrower’s rights in that part of the Mortgaged Property described in Mortgage § __ in which Borrower has rights and a security interest may be created under State UCC Article 9, including Fixtures (the “Mortgage UCC Collateral”). That security interest secures the Obligations.³⁶ (We refer to this paragraph as our “Mortgage UCC Attachment Conclusion.”)

4.9. Account Collateral Attachment.³⁷ The Security Agreement creates a UCC security interest in favor of Administrative Agent in Borrower’s rights in the Account Collateral

under the Security Agreement. The Cash Management Agreement creates in favor of Administrative Agent a security interest in Borrower's rights in the Cash Management Account under the Cash Management Agreement, account number _____ maintained by Cash Bank and its subaccounts. That security interest secures the Obligations. (We refer to this paragraph as our "Account Collateral Attachment Conclusion.")

4.10. Perfection by Filing Conclusion. The Financing Statement is in appropriate form to file in the State's Central Filing Office. Upon proper filing of the Financing Statement there, Secured Party's security interest in Borrower's rights in the Mortgage UCC Collateral described in the Financing Statement³⁸ will be perfected to the extent a security interest in that collateral can be perfected under the State UCC by filing a financing statement in that Central Filing Office. (We refer to this paragraph as our "Perfection by Filing Conclusion.")

4.11. Fixtures Perfection Conclusion. Upon proper recording and indexing of the Mortgage against the Real Property in the Real Property Records, Administrative Agent's security interest in Borrower's rights in the Fixtures that are, or are to become, affixed to any Real Property constituting Mortgaged Property (the "Pledged Fixtures") will be perfected to the extent a security interest in the Pledged Fixtures can be perfected under the State UCC by recording a mortgage in the Real Property Records.³⁹ (We refer to this paragraph as our "Fixtures Perfection Conclusion.")

[The previous Conclusion and the next Conclusion are alternative paragraphs. See commentary in endnotes.]

4.12. Fixtures Perfection Conclusion. The Fixture Filing is in appropriate form to file (or record) in the Real Property Records. Upon proper filing (or recording) and indexing of the Fixture Filing in the Real Property Records, Secured Party's security interest in Borrower's rights in that part of the Mortgaged Property consisting of Fixtures located on the real property described in Exhibit __ to the Fixture Filing will be perfected to the extent a security interest in those Fixtures can be perfected under the State UCC by filing (or recording) a financing statement for Fixtures in the Real Property Records.⁴⁰ (We refer to this paragraph as our "Fixtures Perfection Conclusion.")

4.13. Account Perfection Conclusion. To the extent the Collateral consists of one or more "deposit accounts" under UCC § 9-102(a)(29)⁴¹ (each a "Deposit Account"), the DACA perfects Administrative Agent's security interest in Borrower's rights in those Deposit Accounts, when they hold funds. (We refer to this paragraph as our "Account Perfection Conclusion.")

4.14. Proper Form to Record. The Real Property Documents are in proper form to record in the Real Property Records,⁴² if accompanied by all required affidavits, tax returns, cover pages and other deliveries, all in proper form and executed and acknowledged as required and accompanied by proper payment of mortgage recording tax, on which we do not opine.

4.15. Mortgage Form Conclusion.⁴³ The form of the Mortgage is sufficient to create a valid lien⁴⁴ on Borrower's right, title and interest in any Mortgaged Property that constitutes real property [except Fixtures]⁴⁵ (the "Real Property"). The recording and proper indexing of the Mortgage in the Real Property Records⁴⁶ constitutes the only filing or recording necessary to give later purchasers and mortgagees of the Real Property constructive notice of any lien the Mortgage creates on the Real Property. No other recording, filing, re-recording or re-filing is necessary to maintain any such lien on the Real Property. (We refer to this paragraph as our "Mortgage Form Conclusion.")⁴⁷

4.16. Mortgage Tax Conclusion. The Real Property Jurisdiction imposes no documentary, filing, intangible, mortgage, note, privilege, recording or stamp tax (or other tax or fee) on delivery, execution, filing or recording of any Real Property Document, except these, on which we express no opinion: (i) nominal recording fees; (ii) any tax or fee imposed by local ordinance; (iii) transfer taxes on any transfer of title, including by foreclosure or deed in lieu and (iv) New York mortgage recording tax. We express no opinion on any business license, franchise, income, sales, withholding or other tax that may result from the Loan Activities, Loan Document enforcement or any other matter arising from the Loan Documents. (We refer to this paragraph as our “Mortgage Tax Conclusion.”)⁴⁸

4.17. Pending Litigation. Except as the Officer’s Certificate discloses, we have no actual knowledge of any outstanding judgment or pending or threatened claim or litigation against any Borrower Party, which judgment, claim or litigation would materially adversely affect or impair the Loan Documents or the Loan Activities. (We refer to this paragraph as our “Pending Litigation Conclusion.”)⁴⁹

Our preceding conclusions are subject to these further assumptions, exclusions, qualifications and restrictions.⁵⁰

5. ASSUMPTIONS

5.1. Entity Matters. We assume each party to the Loan Documents, including⁵¹ each Borrower Party and Cash Bank: (1) is a legally recognized entity, duly formed and validly existing under the laws of a state of the United States, with power and authority to undertake its Loan Activities; and (2) has duly authorized, executed and delivered the Loan Documents to which it is a party.

5.2. Enforceability Against Others. We assume the Loan Documents constitute legally valid and binding obligations of all parties, except Borrower Parties, enforceable against each in accordance with their terms.

5.3. Noncontravention. [Except as we state in our Noncontravention Conclusion,⁵²] we assume the Loan Activities of all parties, including Borrower Parties, do not violate any: (1) Excluded Law; (2) organizational documents; (3) agreement or instrument by which a party is bound; (4) court or governmental order; or (5) requirement, under any Excluded Law, to make or obtain any Government Approval.

5.4. Administrative Agent and Lenders. We assume Administrative Agent and each Lender: (1) has qualified to do business in New York, the United States and the Real Property Jurisdiction; and (2) is legally authorized and empowered to make the Loan and receive, hold and enforce the Loan Documents.

5.5. Guarantor. We assume Guarantor is legally competent to become obligated under, execute, deliver and perform its obligations under the Loan Documents to which it is a party.⁵³

5.6. Loan Document Matters. We assume all: (1) conditions precedent in the Loan Documents except delivery of this opinion have been satisfied or waived; and (2) rights and remedies in the Loan Documents were granted without fraud or duress⁵⁴ or intent to hinder, delay or defeat any rights of any creditor of any Borrower Party.

5.7. Other Opinion(s). We understand you are receiving the opinion of ____ on ____ law and the opinion of ____ on _____. We express no opinion on any matter those opinions address. To the extent any such matter is necessary to our conclusions, we assume it.⁵⁵

5.8. Real Property. We assume: (1) the Real Property is located in the geographic areas the Real Property Records cover; (2) the Loan Documents adequately, accurately and completely describe the Real Property; and (3) Borrower has or will have a record interest in the Real Property when the Real Property Documents are recorded.⁵⁶

5.9. Accuracy/Completeness. We assume each document or certificate, including those from public officials, submitted to us for review or reliance is: (1) accurate, complete and correct; (2) an authentic original if it looks like an original; and (3) an authentic copy if it looks like a copy. We assume all signatures are genuine. We assume all documents were executed and delivered in substantially the same form we last received.⁵⁷

5.10. Amendment of Original Documents.⁵⁸ Some Loan Documents amend, restate or modify documents previously signed (the "Original Documents"). We did not represent any parties to the Original Documents (collectively, "Original Parties") for the Original Documents. We assume: (a) all assumptions and conclusions we state in this opinion on the Loan Documents are accurate as they relate to the Original Documents; (b) the Original Documents remain in full force and effect; (c) no act or omission of any Original Party has impaired or waived any term of any Original Document or its enforceability; and (d) Administrative Agent and the Lenders hold the Original Documents.

5.11. Bankruptcy Approvals. We assume all necessary bankruptcy court approvals for Borrower's acquisition of the Mortgaged Property have been obtained, are valid, in full force and effect and not subject to appeal and fully authorize this transaction. We did not review them.⁵⁹

6. EXCLUSIONS

6.1. Certain Clauses. We express no opinion on enforceability of any: (i) consent to, or restriction on, judicial relief, jurisdiction or venue, except any express submission to New York law and jurisdiction⁶⁰; (ii) advance waiver of claims, defenses, rights granted by law or notice, opportunity for hearing, evidentiary requirements, statutes of limitation, trial by jury or at law or other procedural rights; (iii) provision for exclusivity, election or cumulation of rights or remedies; (iv) restriction on non-written modifications and waivers; (v) provision authorizing or validating conclusive or discretionary determinations; (vi) grant of setoff rights; (vii) provision that a guarantor is liable as a primary obligor and not as a surety; (viii) provision for payment of attorneys' fees if it violates law or public policy; (ix) proxy, power or trust, including any power of attorney or appointment of an attorney in fact; (x) provision prohibiting, restricting or requiring consent to assignment or transfer of any right or property; (xi) provision for liquidated damages, default interest, late charges, monetary penalties, prepayment or make-whole premiums or other economic remedies; (xii) power of sale remedy in the Mortgage; (xiii) provisions stating that contingent obligations survive repayment of the Loan or exercise of remedies after default; or (xiv) provision that makes a Guarantor personally liable if a Borrower Party defends against Loan enforcement, absent an exception for good faith defenses.

6.2. Excluded Laws. We express no opinion on these laws (the "Excluded Laws"): (1) any Delaware law except Delaware Corporate Law [and the Delaware UCC]; (2) the law of any jurisdiction we do not mention in the definition of Included Laws; (3) zoning, land use or environmental law; (4) laws, ordinances, codes and other requirements of any municipality, agency or other political subdivision of any state or commonwealth, including the State, except

Recording Requirements; (5) securities law, bank or other lender regulatory law, tax law, antitrust or trade regulation law, insolvency or fraudulent transfer law, bankruptcy law, margin regulations, NASD or NYSE rules, pension or employee benefit law (including ERISA), compliance with fiduciary duty requirements and other laws not customarily recognized as applying to general business organizations engaged in transactions like the Loan; or (6) any law or regulation that applies because of anyone's legal or regulatory status.⁶¹

6.3. Security Interests. [Except to the extent of (1) any Conclusion the defined term for which includes the word "Attachment" or the word "Perfection"; and (2) our Mortgage Form Conclusion, to the extent it addresses attachment of any UCC security interest ("(1)" and "(2)," each, a "Security Interest Conclusion"),⁶²] we express no opinion on attachment, creation, existence, perfection, priority or validity of any security interest.

6.4. Property Matters. We express no opinion on: (1) ownership of, title to or any rights or interests in the Mortgaged Property (or any exceptions to ownership or title) or anything else the Real Property Records might disclose; or (2) accuracy, adequacy or completeness of any categorization, classification or description of property.

6.5. Liens; Licenses; Certain Clauses. We express no opinion on (1) whether any Real Property Document actually creates any lien, security interest or other interest in or affecting any Real Property [except Pledged Fixtures]⁶³; (2) any business license, franchise, income, sales, transfer, withholding or other tax, or reassessment for real estate taxes, that may result from any Loan Activities or Loan Document enforcement; or (3) enforceability against third parties of any "after-acquired property" or "dragnet" clause in any Loan Document.

6.6. Cash Bank. We are not counsel to and we have no relationship with Cash Bank.⁶⁴

6.7. Out of State Real Property. For any real property security outside the State, we express no opinion on: (a) whether a court in the State would or could entertain any action: (i) to enforce any real property remedy, including any preliminary remedy such as appointment of a receiver or any other remedy arising from, relating to or governed by real property law; (ii) to affect title to or possession or occupancy; or (iii) otherwise of a nature requiring jurisdiction over real property; or (b) which provisions of the Real Property Documents the law of the Real Property Jurisdiction would govern.

7. QUALIFICATIONS (GENERAL)

7.1. Generic Limitations. We note the effect of the following (the "Generic Limitations"): (1) bankruptcy, fraudulent transfer, insolvency, moratorium, preference, reorganization, and other similar laws relating to or affecting creditors' rights or remedies; (2) general principles of equity, whether considered in a proceeding in equity or at law, including possible unavailability of specific performance or injunctive relief and possible limitations on enforcement of full recourse "carveout guaranties" triggered by immaterial defaults or other immaterial matters; (3) concepts of fair dealing, good faith, materiality and reasonableness; (4) the discretion of the court before which a proceeding is brought; and (5) unenforceability under certain circumstances of provisions for indemnification, exculpation, or contribution.⁶⁵

7.2. Practical Realization. The Generic Limitations do not make the Loan Documents inadequate for practical realization of the benefits intended to be provided by the Loan Documents under Included Law. By that we mean only that the Generic Limitations, as applied to and taking into account the terms of the Loan Documents and Included Law, should not, either alone or in combination, make the Loan Documents entirely invalid or entirely preclude: (i)

acceleration of Borrower's obligation to repay principal and interest on the Loan if Borrower fails to pay or perform a substantial obligation under the Loan Documents, continuing beyond cure periods; or (ii) judicial enforcement, subject to the restrictions and requirements of Included Law, of Borrower's obligations to pay principal and interest.⁶⁶

7.3. Law Considered. Our conclusions in this opinion reflect our consideration of only statutes, rules and regulations that a commercial real estate finance lawyer in the State, with an ordinary degree of professional competence in the area, would recognize normally apply to borrowers and guarantors in secured commercial loans.

7.4. Assignment Restrictions. We note the effect of UCC §§ 9-406, 9-407, 9-408 and 9-409 on any Loan Document provision that purports to prohibit, restrict, require consent for or otherwise condition or limit any assignment.⁶⁷

7.5. Material Agreements and Pending Litigation Conclusions. Our Material Agreements Conclusion and Pending Litigation Conclusion: (a) rely solely on the Officer's Certificate, which we have not verified; and (b) reflect no investigation or searches on our part. We have no knowledge on these matters beyond the Officer's Certificate.⁶⁸

8. QUALIFICATIONS (NEW YORK)

8.1. UCC Limitations. New York UCC § 1-301 imposes mandatory choice of law provisions, which may not be varied by contract.⁶⁹

8.2. Out of State Real Property. To the extent our Enforceability Conclusion relates to any contractual choice of New York law or forum in the Loan Documents but New York is not the Real Property Jurisdiction, we have relied exclusively upon, and assume federal constitutionality of, New York General Obligations Law § 5-1401. At least one federal district court has questioned that constitutionality if New York has no connection to the parties or the transaction and use of New York law would violate an important public policy of a more interested jurisdiction.⁷⁰ We express no opinion on whether a jurisdiction outside New York would enforce a contractual choice of New York law or a judgment resulting from that choice of law.⁷¹

8.3. RPAPL Limitations. Our opinions are subject to New York Real Property Actions and Proceedings Law ("RPAPL") §§ 1301 and 1371. These statutes set procedural and substantive standards, and sequencing requirements, that limit a mortgagee's ability to enforce, or obtain a deficiency or other personal judgment on, a loan secured by New York real property or a related guaranty (the "New York Limitations").⁷² It is a traditional rule of New York law that the New York Limitations do not apply if a mortgagee seeks a personal judgment against a mortgagor or guarantor in New York after foreclosing on real property outside New York ("Out-of-State Collateral").⁷³ Recent cases both in and out of New York suggest, however, that courts may apply the New York Limitations even for Out-of-State Collateral, notwithstanding the traditional rule that they do not apply there.⁷⁴ Thus a New York court could apply the New York Limitations even to Out-of-State Collateral, so Administrative Agent would need to consider them before commencing enforcement.⁷⁵

8.4. CPLR Enforcement Limitation. We note Civil Practice Law and Rules § 5236(b), which states a mortgage lender cannot enforce a personal judgment against the mortgaged property.⁷⁶ We have not considered whether or how that restriction would apply to out-of-state real property under loan documents partly governed by New York law.

8.5. Lien Law. We express no opinion on any compliance with the New York Lien Law (the “Lien Law”), including: (1) proper characterization of any “costs of improvement”; (2) compliance with filing requirements for any building loan agreement or any other filing the Lien Law may contemplate; (3) compliance with Lien Law provisions on statutory trusts (Article 3-A); and (4) accuracy of the § 22 Lien Law Affidavit attached to the Building Loan Agreement. The Lien Law states that the Building Loan may be used only to pay “costs of improvement.” To the extent it funds other items, the Building Loan Mortgage may be subordinated. We have tried to help Borrower and Administrative Agent characterize costs to be funded from the Loan as “costs of improvement” or otherwise. The governing case law is inconsistent and uncertain. We do not guarantee those characterizations. We recommend: (a) erring on the side of caution; (b) categorizing any unclear future disbursement of Loan proceeds as not covering “costs of improvement”; and (c) hence funding those unclear future disbursements from the Project Loan, not the Building Loan. Also, it has become common for construction lenders to file a Notice of Lending to seek to mitigate exposure under Lien Law Article 3-A, although some commentators question the need for that.⁷⁷

9. QUALIFICATIONS (SECURITY INTERESTS)

Our Security Interest Conclusions are subject to these qualifications:⁷⁸

9.1. Attachment. We assume Administrative Agent’s security interest in the Mortgage UCC Collateral has attached.⁷⁹

9.2. Non-Mortgage UCC Collateral. We express no opinion on any: (1) collateral outside the scope of UCC Articles 8 and 9; (2) priority of any security interest or lien; (3) agricultural lien; (4) property subject to a statute, regulation or treaty that preempts the UCC; or (5) collateral that consists of letter-of-credit rights, commercial tort claims, goods covered by a certificate of title, claims against any government or government agency, consumer goods, crops grown or to be grown, uncut timber or goods that are or are to become Fixtures, as-extracted collateral or cooperative interests.

9.3. Sufficiency. We assume the Loan Document collateral descriptions sufficiently describe the intended collateral. We express no opinion on whether general phrases such as “all personal property” or “all assets,” used in a security agreement, would create a valid security interest in anything described that way.

9.4. Rights; Value. We assume Borrower has (or for after-acquired property will have) rights or the power to transfer rights in the Collateral.⁸⁰ We express no opinion on Borrower’s rights in any Collateral. Administrative Agent’s security interest in any after-acquired property will not attach until Borrower acquires it.

9.5. Deposit Accounts. To the extent the Collateral consists of one or more Deposit Accounts, we assume no one except Administrative Agent or Borrower has “control” of that Collateral under UCC § 9-104.⁸¹

9.6. Bankruptcy Code. If a debtor acquires property while subject to any proceeding under the United States Bankruptcy Code (the “Bankruptcy Code”), then Bankruptcy Code § 552 limits the effect of any previous security agreement.⁸²

9.7. Assignment Prohibitions. We express no opinion on any security interest in any collateral subject to an agreement that prohibits, restricts or conditions its assignment, except to the extent that the UCC overrides that agreement or Borrower has complied with it.

9.8. Security Interest Limitations. UCC § 9-315 limits perfection of a security interest in “proceeds” (under the UCC) of collateral.⁸³ UCC § 9-335 or 9-336 limits any security interest in any goods that are accessions to, or commingled or processed with, other goods.⁸⁴ UCC § 9-515 limits the Fixture Filing’s duration.⁸⁵

9.9. UCC Restrictions. We also note: (i) unenforceability of contractual provisions waiving or varying the rules in UCC § 9-602;⁸⁶ (ii) unenforceability in certain cases of contractual provisions on self-help or summary remedies without notice or opportunity for hearing or correction; and (iii) UCC provisions that require a secured party to act in good faith and in a commercially reasonable manner.

9.10. Transmitting Utilities. We assume Borrower is not a “transmitting utility” under UCC § 9-102(a)(80).⁸⁷

10. RESTRICTIONS

This opinion speaks only as of the Closing Date. We disclaim any duty to advise you of anything occurring after the Closing Date that might affect any of our conclusions.

We furnish this opinion only to you and only for your benefit for the Loan. You may not rely on it for any other purpose.⁸⁸ You may not furnish or quote from this opinion to anyone else for any other purpose. No one else may rely on this opinion. This paragraph is subject to the remaining paragraphs (below) of this opinion.

We consent to reliance on this opinion by: (a) Administrative Agent and each Lender; (b) the successors, assigns or any replacement of any addressee of this opinion and (c) any trustee or servicer for any securitization that includes the Loan. Notwithstanding the previous sentence, this opinion may not be relied upon by any: (x) person acquiring its interest in the Loan in violation of the Loan Documents; (y) title insurer, even if it acquires an interest in the Loan by subrogation or any other means; or (z) successor or assign of either.

You may share this opinion, for review but not reliance, with any (a) accountant, attorney, auditor or other professional adviser; (b) participant or assignee; (c) rating agency that rates any notes or certificates issued in a securitization that includes the Loan; (d) non-hired nationally recognized statistical rating organization so long as it obtains access only through a password-protected website and complies with Rule 17g-5 under the Securities Exchange Act of 1934 or other law that applies, but we do not admit such review needs our consent; (e) government agency with regulatory authority over holder(s) of the Loan; or (f) designated persons by order of government authority.

No Further Text on This Page.

Any reliance on or review of this opinion shall be on the conditions and understandings that: (i) it must be actual and reasonable under the circumstances at the time; and (ii) any person that relies upon or reviews this opinion shall keep it confidential, except for disclosures necessary and appropriate given the review or reliance otherwise allowed above.

Very truly yours,⁸⁹

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Endnotes

1. See *In re SonicBLUE Inc.*, No. 03-51775, WL 926871, at *3 (Bankr. N.D. Cal. Mar. 26, 2007) (“In what may have been a scrivener’s error, the bankruptcy limitation in paragraph 9 referenced only paragraph 2 and not paragraph 3 of the opinion letter.”). Counsel or its insurance carrier settled the resulting claims, plus some others, for about \$10 million.
2. Marc Dreier, once a prominent New York transactional lawyer, used left-over extra signature pages from closings to create new “loan documents” out of whole cloth. He engaged major law firms to issue opinions on those documents. When Dreier’s victims sued everyone in sight, the opinion issuers became defendants, though they generally prevailed. For details, visit <http://tinyurl.com/zs7kfgj> and www.bop.gov (inmates; find an inmate).
3. Every time something goes wrong with a legal opinion, new caveats are born, much like the development of insurance policies. In this case, one might add something like this:
Communications with Lead Counsel. We have communicated entirely with Borrower Parties’ lead closing counsel, _____ (“Lead Counsel”), not with any Borrower Party, about the Loan Documents, this engagement, our engagement letter and issuance of this opinion. We have no relationship with any Borrower Party beyond that engagement by Lead Counsel. We assume Lead Counsel acts (and is fully authorized to act) for all Borrower Parties regarding this engagement. We disclaim any responsibility to confirm Lead Counsel’s authority to engage us or to act for Borrower Parties. If any issue may exist regarding that authority, we encourage you to take such actions as may be necessary or appropriate to confirm Lead Counsel’s authority and bona fides. If one has enough doubts to consider adding a paragraph like this one, that’s also a good reason to take a pass.
4. This template assumes “Administrative Agent” holds the Mortgage acting for a Lender group. The Real Property Documents should identify Administrative Agent accordingly. Because all Loan Documents run to Administrative Agent for the Lenders, so should the opinion.
5. For a transaction entirely in New York, replace “Real Property Jurisdiction” with “State” throughout and define “State” just once.
6. If the opinion giver had only a limited role or engagement, say so, e.g., “special,” “local” or “New York” counsel. Even if a firm does most or all of a client’s legal work, it will rarely identify itself as “general counsel.”
7. If Manager is unrelated, remove it from Borrower Parties and add it later to the parties on whom counsel makes assumptions (due formation, execution, etc.).
8. Though convenient, incorporation by reference might cause errors. One should try to define in the opinion, precisely, any terms it uses. To the extent an opinion uses terms defined in the Loan Documents, confirm: (1) the Loan Documents do in fact define them; and (2) the opinion uses each correctly. As an example of “2,” the Loan Agreement probably defines “Loan Documents” to include every document in any way ever connected to the Loan. Counsel should not opine on those “Loan Documents,” but instead only on specific “Loan Documents” defined in the opinion.
9. Most opinions do not have an index of defined terms. Given the extensive use of defined terms in this model, partly to avoid cross-references, an index of defined terms makes sense. One can certainly delete it.
10. Adjust as appropriate to capture all “significant” documents. To the extent those documents require new or different conclusions, adjust the opinion caveats accordingly.
11. Fill in the location of the Real Property Records, typically “County of _____.”
12. When opining on real property security document(s), identify them here. If the documents do not define Mortgaged Property, edit appropriately.
13. If the transaction involves Real Property Documents in only one state, the Real Property Jurisdiction, this defined term will work. One can globally replace it and the definite article that precedes it with the actual jurisdiction, e.g., “New York” or the “State.” If the transaction involves Real Property Documents in multiple states, edit accordingly.
14. Edit for entity type. These options cover only limited liability companies and limited partnerships. Corporations rarely appear in real estate transactions and opinions. Trusts sometimes appear, typically requiring involvement by the trust’s counsel. When a transaction starts, clarify who will obtain entity searches and filings—typically Borrower’s main closing counsel or Lender’s counsel, not local counsel. Among other things, an entity’s charter documents represent the best and only authoritative evidence of the entity’s name.
15. Only for domestic entities or foreign entities registered in New York.
16. Include only in the unusual case where the opinion refers to Material Agreements.
17. Lender’s counsel should distribute draft UCC financing statements, including exhibits and riders, early in the process. If they appear at the last minute, then this opinion will become a last-minute emergency. Prevention of that common problem requires help from Lender’s counsel. Pre-filing has some appeal.
18. Particularly for filings in only one state, replace this defined term with the exact name of the office.
19. If the Mortgage acts as a fixture filing, delete this paragraph. Most states allow a Mortgage to act as a fixture filing if it satisfies UCC § 9-502(c). That eliminates a separate Fixture Filing as well as issues on expiration, continuation and future changes of the debtor’s name or status. In New York, this approach has one possible downside to a secured party. Any New York Mortgage must limit its principal amount. If the Mortgage for any reason secures less than the entire Loan, one might prefer that the “principal amount” limitation not burden the fixture filing. One could use a separate fixture filing in addition to, or instead of, the fixture filing in the Mortgage. One can also try to assure that the “principal amount” limitation does not limit the granting language for the security interest in Fixtures. Although these New York concerns are technically valid, they may not justify incremental legal fees.
20. List other matters here as appropriate.
21. If the addressee rejects reliance on Borrower’s representations and warranties, delete the concept. Counsel would then need to beef up the officers’ certificates to deliver equivalent comfort, thus incurring legal fees to produce no value.
22. The preceding sentence may not be necessary. It just states the only basis on which opinion giver could proceed. It might raise opinion giver’s standard of care. But it is reasonable for Lender to request. It is also reasonable for opinion giver to omit.
23. If the preceding sentence causes concern, consider adding this nonstandard statement: “Instead, with your consent, we have relied on SOS website(s), confirming the ‘Active’ or equivalent status of each Borrower Party as of shortly before the Closing Date, as a substitute for a further datedown.”
24. Although federal law is customary, local real estate counsel has no reason to opine on it. One hopes that someone with a more central role has considered the existence and effect of federal law.
25. In New York, typically delete the bracketed language because counsel can issue a choice of law opinion based on a favorable statute, as appears in the text of this opinion template. Other states often require a “reasoned opinion” not worth the trouble.
26. Include this clause only if counsel opines on these matters for Delaware entities. Clearly identify any conclusions on Delaware law. Non-Delaware counsel will often opine on “routine” matters of Delaware corporate or UCC law, but not “enforceability” of, e.g., the terms of an operating agreement. In “non-routine” cases, use Delaware counsel.
27. Include this clause when opining on UCC filings against Delaware entities.
28. The preceding sentence often appears in “routine” Delaware corporate opinions issued by non-Delaware lawyers. One could say Lender should reject it, insisting instead on either (a) an opinion from Delaware counsel; or (b) more diligence by non-Delaware counsel. As a practical matter, the formulation in text accurately describes industry standards and expectations for

simple Delaware entities the opinion giver formed. One would engage Delaware counsel for complex entities, entities with issues or history or (maybe) entities not formed by the opinion giver.

29. When opining on more than one jurisdiction's UCC (e.g., where different states' UCC's govern validity and perfection), say which state's UCC governs which conclusion.
30. Sometimes one sees the word "legal" before the word "valid" or "binding." This may imply an opinion on legality, better addressed elsewhere in terms of noncontravention.
31. In New York, counsel can almost always readily issue a usury opinion for any substantial transaction with minimal due diligence. Rather than wait for such a request, this model opinion includes suitable language. This helps prevent sloppiness if counsel puts together a usury conclusion at the last minute in opinion negotiations.
32. Lender will often ask counsel to replace "should" with "will" or "shall."
33. Like usury, this conclusion will usually raise no concerns for a transaction whose documents choose New York law, and appears here to prevent last-minute sloppiness. New York law expressly validates New York choice of law clauses. See *Ministers & Missionaries Benefit Bd. v. Snow*, 26 N.Y.3d 466, 470, 45 N.E.3d 917, 919, 25 N.Y.S.3d 21, 23 (2015). But see below for caveats.
34. Counsel often raises an exception here for any Government Approval "any securities law may require for sale of any collateral." That seems unnecessary. The opinion refers only to Government Approvals required at the Closing Date.
35. This conclusion is disfavored for outside counsel, especially local counsel. It should come, if at all, from Borrower's general or in-house counsel.
36. Confirm that whatever document creates the security interest states it secures all Obligations under the Loan Documents.
37. Edit this paragraph based on circumstances and which document does what.
38. This language limits the perfection conclusion to only any collateral described in both the Mortgage and the Financing Statement. Absent Borrower consent, the description in the Financing Statement should not exceed that in the Mortgage. Borrower may, for example, consent to "all assets" in the Financing Statement even though the Mortgage or some other security agreement actually covers less.
39. Include this paragraph or the next, but not both. This way, the opinion will define "Pledged Fixtures" only once. For the reasons stated in the endnote accompanying the definition of Fixture Filing, usually the Mortgage should act as a fixture filing under UCC § 9-502(c). This eliminates the next opinion paragraph. Conceivably Lender might perfect both within the Mortgage and with a separate fixture filing, in which case keep both paragraphs but adjust the definition of Fixtures Perfection Conclusion. Counsel typically does not opine on perfection of a security interest in Fixtures unless the same counsel opines on its attachment.
40. Use this paragraph when opining on New York Fixture Filings.
41. N.Y. U.C.C. § 9-102(a)(29) (2016). Administrative Agent might instead ask opinion giver to determine and confirm that the Deposit Accounts are in fact deposit accounts. Counsel might want to go a step further and add an assumption that Cash Bank's jurisdiction (determined under UCC § 9-304) consists of a certain state. Counsel should be able to resolve that issue without making an assumption.
42. This opinion conclusion may sound "routine," but it is not. If Lender will obtain title insurance, delete it. If counsel must include it, consider county recording requirements. Think of all the ways the recording office might "bounce" the document, e.g., inadequate acknowledgment or notary stamp, missing legal description or other identifying information, inconsistent or incomplete names of parties or signers, missing block and lot number, inadequate space to file-stamp the document, prohibition of blue ink, requirement for blue ink, other technical details. We didn't go to law school to master these technical details, but getting them wrong can inflict worse damage than getting some sophisticated legal concept wrong. Counsel must consider everything about the "form" of the document when opining on recordable form.
43. Lender sometimes ask counsel to confirm that the documents contain the usual State-specific "magic language." This should be resisted, as it is not a typical opinion conclusion. It is best covered in a memo, an email or a conversation after due regard to conflict waivers. If counsel is completely confident on the documents and its allegiances, counsel might say:

State Law Provisions. The Loan Documents contain all material State-specific provisions on Lender's rights and remedies that typically appear in secured commercial loan documents governed by State law.
44. Counsel does not opine that a mortgage creates or will create a lien on real property. That is the province of title insurance. Use the language suggested here. Don't refer to "perfection" of a mortgage lien on real property.
45. If the Mortgage covers fixtures and satisfies UCC Section 9-502(c), delete bracketed text.
46. If asked, counsel can identify the proper office in which to record the Mortgage.
47. In this opinion paragraph, don't use broad terms like "Mortgaged Property." These include all kinds of collateral for which this opinion paragraph would not apply.
48. If Administrative Agent's counsel seeks comfort that Administrative Agent and any Lender need not qualify in New York to make a Loan secured by New York real property, then consider this language:

No Qualification. Administrative Agent and the Lenders need not qualify to do business in New York solely to make the Loan; acquire their rights and security under the Loan Documents; or collect or enforce the Loan or its security. We express no opinion on any requirement that could apply if any person took title to any collateral in New York or made multiple loans secured by New York real property.
49. This conclusion was once common but is now rare. Administrative Agent and the Lenders should know whether they are or need to be qualified, without help from local counsel. Any request for this conclusion from local counsel by a major financial institution is rather silly. If counsel provides this conclusion, then counsel should satisfy itself that the Loan is a commercial loan and not a residential loan.
50. This conclusion is disfavored. It should come just from Borrower or from Borrower's inside counsel. If counsel provides this conclusion, then the Officer's Certificate should state appropriate facts. Consider whether reliance on an Officer's Certificate creates a duty to rely justifiably, especially for pending litigation, a matter of public record. Obtain such a certificate from each party the Pending Litigation Conclusion covers. If the Pending Litigation Conclusion is removed, then search for that phrase and adjust as appropriate.
51. In addition to the listed generic caveats, counsel should raise a specific qualification if counsel knows the parties attach particular importance to specific provisions of their agreement and such provisions are of dubious enforceability. Consider whether other deal-specific conclusions in the opinion require any special exceptions.
52. If counsel opines on some of these matters, edit accordingly. Nevertheless raise an assumption for any of these matters under any Excluded Law and for all matters outside the opinion, such as Cash Bank and (if not a Credit Party) Manager.
53. If counsel opines on any of these matters for Borrower Parties, then Lender may worry about the assumptions in this paragraph, even with the introductory exception. Counsel can resolve that concern by making clear that counsel is not assuming its own conclusions, and adjusting the assumptions accordingly.
54. Omit this paragraph if Guarantor is an entity covered by the opinion conclusions.

54. Counsel sometimes also assumes rights and remedies in the Loan Documents were granted in exchange for “good, valuable and adequate consideration” and “will be exercised in good faith.” Counsel ought to get comfortable on consideration without raising an assumption. And future good faith should have no effect on enforceability on the Closing Date.
55. Refer to other opinions when they cover issues that are predicates for this one. Assume the predicates, not the correctness of the other opinion, which may be subject to numerous caveats. Reliance on other opinions might create some duty to rely only justifiably, and consider the other firm’s competence and the substance and scope of its opinion.
56. Add bracketed language if opinion covers a security interest in Fixtures located on the Real Property.
57. The preceding sentence is nonstandard. Lender may object to it. It seeks to recognize the timing constraints of modern emergency closings.
58. Add this exception for amendments to documents prepared by other counsel.
59. Include this paragraph only if Mortgaged Property is subject to a bankruptcy proceeding.
60. New York law makes this exception-to-an-exception easy. That’s not always true elsewhere.
61. If there is any possibility of an issue, counsel may want to add to the excluded laws: “any law or regulation that applies only to any personal, family, residential or other noncommercial transaction (for example, “truth in lending,” “fair credit reporting” and any other disclosure or consumer protection law) (“Consumer Law”).” Counsel would also want to add a statement like: “We express no opinion on whether any Consumer Law would, to any degree, apply to this transaction.” Although this sounds like a good idea, a better idea would be to determine with certainty whether the transaction is actually subject to Consumer Law and, if it is, figure out what that entails. That’s more work than assuming the problem away, but it comports better with why one endures the legal opinion process.
62. If the opinion includes no Security Interest Conclusions, then delete everything in this paragraph before this endnote. Keep the language after the endnote.
63. Add bracketed language if opinion covers creation of a security interest in Pledged Fixtures.
64. If Manager is not a Credit Party, add a reference to Manager in this exclusion.
65. Omit this exception if the Loan Documents contain no such provisions.
66. If asked, opinion giver can include this conclusion, or one of many possible variations, but would often try to omit it from the first draft. It effectively forces opinion giver to characterize and describe in a paragraph the effect of all law that might possibly affect the Loan Documents. Lender and its counsel should have considered those issues, without help from the opinion giver, when Lender prepared its Loan Documents at Borrower’s expense. Consider this alternative: “To the extent the Generic Limitations impair enforceability of the Loan Documents, that impairment falls within the ordinary range of impairment suffered by any typical set of institutional loan documents.” In other words, these loan documents are no worse than average, which is really the point.
67. All remaining Qualifications apply only in particular circumstances and would ordinarily not apply.
68. Both conclusions mentioned here are disfavored. Delete this paragraph to the extent the disfavored conclusions are also deleted. These conclusions, subject to the qualifications in this paragraph, give Administrative Agent no benefit. If Material Agreements do exist, counsel will need to review and consider them. If they raise any issues at all, counsel should highlight them and raise appropriate exceptions. If Excluded Law governs Material Agreements, counsel might add this qualification: To the extent our Material Agreements Conclusion requires us to interpret the Material Agreements, we: (i) assume any court would enforce them in accordance with their plain meaning; (ii) applied New York law, even if some other state’s law governs; and (iii) express no opinion on any Borrower Party’s action or inaction that may violate any Loan Document or Material Agreement, or anything that requires a calculation or financial or accounting determination.
69. See N.Y. U.C.C. § 1-301 (McKinney 2016).
70. See *Lehman Bros. Commercial Corp. v. Minmetals Int’l Non-ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 137 (S.D.N.Y. 2000) (it remains to be seen if a state with no connection to either party or the transaction can apply its own law when it would conflict with the public policy of a more-interested state).
71. This qualification applies only where New York law governs non-New-York real property.
72. N.Y. Real Prop. Acts. Law §§ 1301, 1371 (McKinney 2016). For New York real property, keep the text before this endnote and delete the text that follows. For real property outside New York with documents governed by New York law, keep the whole paragraph. Adjust defined terms accordingly.
73. See *Fielding v. Drew*, 94 A.D.2d 687, 463 N.Y.S.2d 15, 16 (1st Dep’t 1983).
74. See *Wells Fargo Bank, N.A. v. Pena*, 51 Misc. 3d 241, 248-49, 24 N.Y.S.3d 865, 871 (Sup Ct. Kings County 2016); see also *Credit Suisse v. Boespflug*, 2009 WL 800214, 4 (D. Idaho 2009).
75. Counsel should check for any new cases on the New York Limitations.
76. N.Y. C.P.L.R. § 5236(b) (McKinney 2016).
77. Even for a building loan, this paragraph may be unnecessary. Counsel may, however, prefer to be safe not sorry. The author is tempted to include this statement at the end of the paragraph, but it would not be opinion-like: “Unfortunately, ordinary legal research and analysis will usually not answer questions under the Lien Law.”
78. Remove security interest qualifications if counsel does not opine on security interests.
79. Include only if counsel opines on perfection but not attachment of a security interest.
80. Counsel might assume: “and that value has been given.” But counsel should be able to determine that without assuming it, just like confirming “consideration” or thinking about most other legal issues that arise in a transaction.
81. See generally N.Y. U.C.C. § 9-104 (McKinney 2016).
82. 11 U.S.C.A. § 552 (West 2016).
83. N.Y. U.C.C. § 9-315 (McKinney 2016).
84. N.Y. U.C.C. § 9-335, 9-336 (2016).
85. N.Y. U.C.C. § 9-515 (2016). Use this sentence only for a Fixture Filing outside the Mortgage.
86. N.Y. U.C.C. § 9-602 (2016).
87. Usually counsel can delete this assumption rather easily.
88. What possible “other purpose” causes concern?
89. After “Very truly yours,” a partner (or sole principal) should sign the firm’s name by hand. One does not typically type out the firm name or identify individual(s).

The author, Joshua Stein, chaired the Real Property Law Section for the year ending in May 2006. For more information on the author, visit www.joshuastein.com. The author thanks these reviewers for their helpful comments and criticism: Christopher Delson of Morrison & Foerster LLP; Charles McCreary of Bricker & Eckler LLP; Gregory P. Pressman of Schulte Roth & Zabel LLP; Chris Smith of Shearman & Sterling LLP; Alfredo R. Lagamon, Jr., of Ernst & Young LLP; and James Patalano, the author’s associate. Blame only the author for any error or omission. Copyright (c) 2016 Joshua Stein, www.joshuastein.com. All rights reserved. Permission is granted to adapt and use for transactions, but only to the extent appropriate and correct in context, and provided that the user forwards to the author any comments, improvements, suggestions or corrections.