2021 MORTGAGE LOAN OPINION REPORT

Introduction

In 1989, committees composed of members of the Real Property Law Committee of the New York City Bar Association (then known as the Association of the Bar of the City of New York) and the Real Property Law Section of the New York State Bar Association prepared a Mortgage Loan Opinion Report (the "1989 Report") relating to legal opinions in commercial mortgage loan transactions; and in 1998, those committees, as then constituted, issued a complete revision and restatement of the 1989 Report (the "1998 Report"; together with the 1989 Report, the "Prior Reports").

Since publication of the Prior Reports, opinion letter practice, especially as it relates to opinions given in connection with commercial real estate mortgage loans, has substantially evolved. When we began this latest effort over three years ago, our objective was to examine and discuss the evolution that has occurred more than two decades on, with a view towards smoothing the process between lender's and borrower's counsel in connection with opinion practice. This Report is informed by the combined experience of the Committee and those from whom the Committee received input.

The 1998 Report placed significant reliance on a report entitled "Third Party 'Closing' Opinions" by the TriBar Opinion Committee (the "TriBar II Report"), and a report entitled "Third Party Legal Opinion Report," including the "Legal Opinion Accord" (the "Accord"), published by the Section of Business Law of the American Bar Association. Since the Prior Reports were issued, many other opinion practice reports have been issued. This Committee also considered the influential Real Estate Opinion Letter Guidelines issued by the American College of Real Estate Lawyers, Attorneys' Opinion Committee and the American Bar Association Section of Real Property, Probate and Trust Law Committee (the "ABA/ACREL 2003 Report"), and its recent supplement Revising Real Estate Finance Opinion Letter Guidelines by the American Bar Association Real Property, Probate and Trust Law Section (the "ABA 2020 Report"). A selected bibliography is attached to this Report.

The 2021 Mortgage Loan Opinion Report (the "2021 Report"), as did the Prior Reports, takes the form of a model opinion letter (the "Model Opinion") for a commercial real estate mortgage loan transaction with the property located in the State of New York. The model opinion letter is liberally annotated with endnotes that discuss and explain various aspects of the model opinion letter.

The Committee determined that the most useful product to present would be an amalgam of current opinion letter practice in the form of a consensus reached by the Committee with respect to each portion of the Model Opinion, including assumptions, the opinions themselves, and typical exceptions and qualifications. Numerous of those assumptions, opinions, exceptions and qualifications are then discussed to provide clarity and rationale. The Committee hopes that the explanations will provide both lender's counsel and borrower's counsel with the basis for expeditiously reaching a meeting of the minds.

The 2021 Report includes new and/or expanded discussion of (i) opinions with respect to usury, (ii) creation and perfection under the Uniform Commercial Code, and (iii) the concept of controlled bank accounts. The Committee believes that these changes are necessary to reflect current opinion letter practice and to facilitate the negotiation of opinions in commercial mortgage loan transactions.

The most significant changes in the 2021 Report concern the additions of a usury opinion and Uniform Commercial Code issues that were not separately discussed in the Prior Reports. This is consistent with modern opinion letter practice and the Committee decided that these have become an important component of opinion letters.

The Committee would like to thank the Real Property Law Committee members and Chairs (Jason Polevoy and Dorothy Heyl) for their support and patience during these unprecedented times, from which we are thankfully starting to emerge.

The introduction to the 1989 Report included the following statement:

> We believe that the work product, as a whole, is fair to both borrowers and lenders and their counsel, and can be used to guide parties in reaching agreement on the issues raised by the requirement that borrower's counsel deliver an opinion letter in a commercial real estate mortgage loan transaction.

The statement was repeated in the 1998 Report. The Committee believes that the same is true with respect to the 2021 Report. We hope that the 2021 Report will prove to be a practical and helpful resource to real estate law practitioners.[1]

[1] This Report reflects the consensus of the Committee. It does not necessarily reflect the views of individual members of the Committee or their respective firms or organizations. The 2021 Report has been prepared for educational purposes only. Its suggestions and recommendations are not intended to establish an independent measure of the standard of care or to constitute evidence of the appropriate standard of care for the issuance of legal opinions.

Real Property Law Committee
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August 2021

Citations to Other Reports and Selected Bibliography

ABA/ACREL/ACMA Report	Section of Real Property, Probate and Trust Law of the American Bar Association, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys, Opinions Committee, *Real Estate Finance Opinion Report of 2012*, 47 Real Prop. Prob. & Tr.J. 213 (2012).
ABA/ACREL 2003 Report	Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers, *Real Estate Opinion Letter Guidelines*, 38 Real Prop. Prob. & Tr.J. 241 (2003).
ABA 2020 Report	Section of Real Property, Probate and Trust Law of the American Bar Association, *Revision Real Estate Finance Opinion Letter Guidelines,* Opinions Matters, Volume 5, Number 1 (Spring 2020).
ABA Local Counsel Report	Section of Real Property, Probate and Trust Law of the American Bar Association, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys, Opinions Committee, *Local Counsel Opinion Letters in Real Estate Finance Transactions A Supplement to the Real Estate Finance Opinion Report Of 2012.*
Accord	Section of Business Law, American Bar Association, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 57 Bus. Law 167 (1991); republished at 29 Real Prop. Prob. & Tr.J. 487 (1994).
1989 Report	Committee on Real Property Law, Association of the Bar of the City of New York and Real Property Law Section of the New York State Bar Association, *Joint Mortgage Loan Opinion Report,* 62 N.Y. St. B.J. 55 (July 1990).
1998 Report	Committee on Real Property Law, Association of the Bar of the City of New York and Real Property Law Section of the New York State Bar Association, *Joint Mortgage Loan Opinion Report, N.Y. Real Property Law Journal (NYSBA)* (Fall 1998).
TriBar II Report	Report of the TriBar Committee: *Third Party "Closing" Opinions,* 53 Bus. Law. 591 (1998).
S&P Ratings Guide	*Structured Finance Ratings Real Estate Finance: Legal and Structured Finance Issues in Commercial Mortgage Securities*, Standard & Poor's Ratings Group

Letterhead of Opinion Giver Law Firm

_____ __, 20__[1]

Name of Lender[2]
Address of Lender

Re: $_____ Mortgage Loan to [Borrower][3]
Premises: _____

Ladies and Gentlemen:

We have acted as counsel to _____, a [Delaware] [limited liability company] [corporation] [general partnership] [limited partnership] ("Borrower"), and _____, an individual ("Individual Guarantor") and _____, a [New York] [limited liability company] [corporation] [general partnership] [limited partnership] ("Entity Guarantor"; and together with Individual Guarantor, "Guarantor"; and together with Borrower, the "Opinion Parties"), in connection with that certain $_____.00 mortgage loan (the "Loan") from _____ (together with its successors and assigns, "Lender") to Borrower pursuant to a Loan Agreement of even date herewith (the "Loan Agreement") between Borrower and Lender.[4] Capitalized terms used and not otherwise defined herein have the respective meanings given to those terms in the Loan Agreement.[5] In connection with this opinion, we have examined originals, or copies certified or otherwise identified to our satisfaction, of the following documents,[6] all dated the date hereof (the "Closing Date") except as otherwise noted:

(a) The Loan Agreement;

(b) Gap Promissory Note (the "Gap Note") made by Borrower in favor of Lender;

(c) Amended, Consolidated and Restated Promissory Note (the "Note") made by Borrower in favor of Lender;

(d) Gap Mortgage made by Borrower in favor of Lender (the "Gap Mortgage");

(e) Agreement of Mortgage Consolidation, Modification and Security Agreement made by Borrower in favor of Lender (the "Mortgage") as security for the Note and describing therein certain real property located at _____, New York (the "Real Property") and certain personal property (including fixtures and other rights) located thereon or used in connection therewith[7] (the "Personal Property"; and together with the Real Property, the "Collateral");

(f) Assignment of Leases and Rents (the "Assignment of Leases") made by Borrower in favor of Lender;

(g) Continuing and Unconditional Guaranty made by Individual Guarantor in favor of Lender (the "Individual Guaranty");

(h) Continuing and Unconditional Guaranty made by Entity Guarantor in favor of Lender (the "Entity Guaranty; and together with the Individual Guaranty, the "Guaranty");

(i) Environmental Indemnity Agreement (the "Environmental Indemnity") made by Borrower and the Guarantor in favor of Lender;

(j) Cash Management Agreement (the "Cash Management Agreement") by and among Borrower, Lender, [Management Company] and [Depository Bank] ("Depository Bank");

(k) Deposit Account Control Agreement (the "DACA") by and among Borrower, Lender and Depository Bank; and

(l) the unfiled copy of a UCC-1 financing statement naming Borrower as debtor and Lender as secured party attached as Exhibit A hereto (the "New York Fixture Filing"), which we assume will be filed with the Recorder's Office.

The Loan Agreement, the Gap Note, the Note, the Gap Mortgage, the Mortgage, the Assignment of Leases, the Environmental Indemnity, the Cash Management Agreement, and the DACA are hereinafter collectively referred to as the "Loan Documents" and together with the Guaranty are hereinafter collectively referred to as the "Opinion Documents."[8]

In rendering our opinion we have also examined: copies of (a) [articles of organization] [certificate of incorporation] [partnership agreement] [certificates of formation] of Borrower and Entity Guarantor, (b) copies of the [limited liability company operating agreements] [by laws] of Borrower and Entity Guarantor, (c) all amendments to the items referred to in clauses (a) and (b) (collectively, the items referred to in clauses (a), (b) and (c), the "Organizational Documents") and (d) certificates of public officials, and such other records, certificates, documents and instruments as we have deemed necessary for the purposes of the opinions herein expressed.[9] As to various questions of fact material to our opinion, we have relied upon certificates and written statements of members of the Opinion Parties.[10],[11] We have assumed that the Gap Mortgage, the Mortgage and the Assignment of Leases will be duly recorded in the Office of the [Clerk] [Register] of the county in which the Real Property is located (the "Recorder's Office") and that all applicable mortgage recording tax imposed thereon will be paid.[12] We assume that the New York Fixture Filing [has been/will be] filed by [Lender] [title company] in the Recorder's Office and any and all recording or filing fees will be paid.[13]

In our examination of the documents referred to above, we have assumed, without independent investigation, the genuineness of all signatures, the legal capacity of all individuals

who have executed any of the documents reviewed by us, the authenticity of all documents submitted to us as originals, the conformity to the originals of all documents submitted to us as certified, photostatic, reproduced or conformed copies of valid existing agreements or other documents, the authenticity of the latter documents and that the statements regarding matters of fact in the certificates, records, agreements, instruments and documents that we have examined are accurate and complete. We have also assumed, without independent investigation, that certificates of public officials dated earlier than the date of this opinion remain accurate from such earlier date through and including the date of this opinion. We also have assumed, with respect to questions of fact material to this opinion, that we are entitled to rely, without any independent investigation, on each of the representations and warranties contained in the Opinion Documents. With your permission, all assumptions and statements of reliance herein have been made without independent investigation except to the extent otherwise expressly stated.

Further, we have assumed, without independent investigation, that:

(A) Each of the parties to the Opinion Documents (other than the Opinion Parties): (i) is duly organized, validly existing and in good standing under the laws of the jurisdiction in which it is organized, (ii) has the corporate or other entity power and authority to execute, deliver and perform its obligations under each of the Opinion Documents to which it is a party, and (iii) has duly authorized, executed and delivered each of the Opinion Documents to which it is a party;

(B) The Opinion Documents are enforceable against each party other than the Opinion Parties.

(C) Lender has acted and will act in good faith and will seek to enforce its rights and remedies under the Opinion Documents in a manner that is commercially reasonable and in accordance with the terms and provisions of the Opinion Documents and applicable laws;

(D) the proceeds of the Loan have been or will be distributed to Borrower pursuant to the terms of the Loan Documents;

(E) the Loan is being made for business and commercial purposes and not for any personal, family or household purpose or services;

(F) there has not been any material mistake of fact or misunderstanding on the part of any of the Opinion Parties; and

(G) all terms and conditions of, or relating to, the transactions contemplated by the Opinion Documents are correctly and completely embodied in the Opinion Documents, and there are no written or oral terms or conditions agreed to among the parties to the Opinion Documents that could vary the truth, completeness, correctness, effect or validity of the statements made in, or provisions of, the Opinion Documents.

For purposes of this letter, the term "our knowledge" means the conscious awareness of facts or other information, at the time of execution and delivery of this opinion, by the lawyer or lawyers in our firm who have actively participated in the negotiation and preparation of the Opinion Documents. Those lawyers are _____ and _____.

We express no opinion with respect to (i) the title to or the rights or interests of Borrower in the Collateral, (ii) the adequacy of the description of the Collateral, or (iii) except as provided in Paragraphs 12, 13, 14, 15, and 16, the creation, attachment, perfection, priority or enforcement of any liens thereon and/or security interests therein. We assume that, with respect to the title to the Real Property and the creation and priority of the lien of the Mortgage, you will be relying upon the title insurance policy issued to you by [title company] and dated as of the Closing Date.[14]

The law covered by this opinion is limited to the law of the State of New York, the [Limited Liability Company Act] [General Corporation Law] [Revised Uniform Limited Partnership Act] [Revised Uniform Partnership Act] of the State of Delaware, and the federal law of the United States (in each case that is, in our experience, normally applicable to credit transactions of the type contemplated by the Loan Agreement) (the "Covered Laws").[15] We express no opinion with respect to the law of any other jurisdiction and no opinion with respect to the statutes, administrative decisions, rules, regulations or requirements of any county, municipality, subdivision or local authority of any jurisdiction.[16]

We have assumed that you have complied with all state and/or federal laws and regulations applicable to you arising out of the Loan or your status as Lender under the Opinion Documents.[17]

In rendering the opinions expressed herein, we have assumed that: (i) the execution, delivery and performance by each Opinion Party of the Opinion Documents to which it is a party do not violate, except as expressly provided in Paragraphs 8 and 9 of this opinion, any provisions of law, regulation or treaty applicable to such Opinion Party; (ii) except as expressly provided in Paragraph 16 of this opinion or except for consents, approvals, authorizations, orders, filings, registrations and qualifications that have been obtained, filed or made, no consent, approval, authorization, order, filing, registration or qualification of or with, any governmental authority or other person or entity is required for the valid execution, delivery or performance by an Opinion Party of any of the Opinion Documents to which it is a party, and (iii) each Opinion Party has received a benefit from the transactions completed under the Opinion Documents as may be required by the laws of the jurisdiction of its organization.[18]

Based on the foregoing, and upon such investigation[19] as we have deemed necessary, and subject to the qualifications and exceptions herein contained, we are of the opinion that:

1. Based solely on our review of the good standing certificate issued by the Secretary of State of the State of [Delaware], Borrower is a limited liability company validly existing and in good standing under the laws of the State of [Delaware]. [Based solely on our review of the certificate of authority issued by the Secretary of State of the State of New York ("NY SOS"), Borrower is duly qualified to carry on business and is in

good standing as a foreign [limited liability company] [corporation] [general partnership] [limited partnership] in the State of New York.][20],[21],[22]

2. Based solely on our review of the certificate of existence issued by the NY SOS, Entity Guarantor is a [limited liability company] [corporation] [general partnership] [limited partnership] validly existing and in good standing under the laws of the State of New York.[23]

3. Each of Borrower and Entity Guarantor has all necessary [limited liability company] [corporate] [partnership] power and authority to execute, deliver and perform its respective obligations under each Loan Document to which it is a party.[24] The execution, delivery and performance by each of Borrower and Entity Guarantor of each Loan Document to which it is a party has been duly authorized by all necessary [limited liability company] [corporate] [partnership] action on the part of such Opinion Party and do not violate the Organizational Documents of such Opinion Party.[25] The individuals who, on behalf of Borrower and Entity Guarantor, are executing the Opinion Documents to which Borrower and Entity Guarantor are a party have been duly authorized to do so.[26]

4. Each Loan Document to which Borrower or Entity Guarantor is a party has been duly executed and delivered by such Opinion Party.[27],[28]

5. The Opinion Documents to which Borrower is a party are the valid and binding[29] obligations of Borrower, enforceable against Borrower in accordance with their respective terms[30] (including the choice of law provision as it relates to election by the parties of the law of the State of New York as governing law for the Opinion Documents, pursuant to Section 5-1401 of the New York General Obligations Law[31]), except as may be limited by[32]: (i) bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally[33]; and (ii) general principles of equity. In addition, we advise you that certain provisions of the Opinion Documents to which Borrower is a party may be further limited or rendered unenforceable by applicable law, but in our opinion, such law does not render such Opinion Documents invalid as a whole or preclude (i) the judicial enforcement of the obligation of the Borrower to repay the principal, together with interest thereon as provided in the Note, (ii) the acceleration of the obligation to repay such principal and interest upon a material default under the Loan Documents, (iii) the judicial foreclosure in accordance with applicable law of the lien created by the Mortgage upon failure to pay such principal and interest at maturity or upon acceleration pursuant to clause (ii) above, and (iv) the judicial enforcement of the Assignment of Leases (and any similar provisions in the Mortgage) upon acceleration pursuant to clause (ii) for purposes of collecting rents accruing after the appointment of a receiver in an action to foreclose the Mortgage.[34]

6. The Opinion Documents to which Guarantor is a party are the valid and binding obligations of Guarantor, enforceable against Guarantor in accordance with their respective terms (including the choice of law provision as it relates to election by the parties of the law of the State of New York as governing law for the Opinion Documents, pursuant to Section 5-1401 of the New York General Obligations Law), except as limited

by: (i) bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally; and (ii) general principles of equity. With respect to our opinion regarding the enforceability of the Guaranty, we note that the Guaranty contains provisions which purport to waive certain rights and defenses which Guarantor might otherwise have with respect to, among other things, amendments and modifications of the Loan Documents, notice of default or the election of remedies by Lender following a default by Borrower under the Loan Documents. Although we believe that such provisions are generally enforceable (subject to the limitations and qualifications set forth in this Paragraph 6), we advise you that certain waivers and other provisions of the Opinion Documents to which Guarantor is a party may be further limited or rendered unenforceable by applicable law, but in our opinion, such law does not render the Guaranty invalid as a whole or preclude judicial enforcement of the Guaranty upon a material default by Guarantor thereunder.[35]

7. The execution and delivery by Borrower of the Opinion Documents to which it is a party do not, and the payment of the indebtedness evidenced by the Note will not, result in (a) a violation of its Organizational Documents,[36],[37] or (b) a violation of any court order listed on Schedule ___ hereto.[38]

8. The execution and delivery by Borrower of the Opinion Documents to which it is a party do not, and, subject to the provisions of Paragraph 17, the payment of the indebtedness evidenced by the Note will not, result in any violation of any Covered Laws.[39],[40]

9. The execution, delivery and performance by Guarantor of the Opinion Documents to which Guarantor is a party do not violate any Covered Laws.

10. To the best of our knowledge without independent investigation,[41] Borrower is not a party to any pending (or in the case of threatened actions or proceedings, the subject of, any overtly threatened in writing) actions or proceedings that would adversely affect the transactions contemplated by the Opinion Documents to which Borrower is a party.[42]

11. To the best of our knowledge without independent investigation, Guarantor is not a party to any pending (or in the case of threatened actions or proceedings, the subject of any overtly threatened in writing) actions or proceedings that would adversely affect the transactions contemplated by the Opinion Documents to which Guarantor is a party.

12. The Mortgage is in proper form for recording with the Recorder's Office. Upon the due recordation of the Mortgage in the Recorder's Office, the Mortgage will provide constructive notice of the lien thereof.[43]

13. The Mortgage is effective to create a valid security interest in favor of Lender in the Collateral to secure the Loan to the extent that a security interest in such Collateral may be created under Article 9 of the Uniform Commercial Code of the State of New York as in effect on the date hereof (the "NY UCC") (such security interest, the "Security Interest"). Upon filing and proper indexing of the New York Fixture Filing in the

Recorder's Office, with the appropriate filing fees paid, Lender will have a perfected security interest in that portion of the Personal Property in which a security interest is perfected by filing a financing statement under Article 9 of the NY UCC.[44]

14. The Assignment of Leases is in proper form for recording with the Recorder's Office. Upon the recordation of the Assignment of Leases in the Recorder's Office, Lender will have a valid security interest in, and a perfected lien upon, the Collateral described therein.[45]

15. Upon the execution and delivery of (i) the DACA by the parties thereto, Lender shall have a perfected security interest in the "DACA Account" (as defined in the DACA) (the "Deposit Account") and (ii) the Cash Management Agreement by the parties thereto, Lender shall have a perfected security interest in the "Cash Management Account" (as defined in the Cash Management Agreement) (together with the Deposit Account, the "Accounts").

16. No authorizations or approvals of, and no filings with, any Federal or New York State governmental or regulatory authority or agency are necessary under any Covered Law for the execution or delivery by the Opinion Parties of the Opinion Documents or the payment of the indebtedness evidenced by the Note, except for (a) filings or approvals, authorizations that have been obtained, filed or made and (b) filings which are necessary to perfect the Security Interest granted under the Loan Documents and any other filings, registrations, authorizations, approvals and other actions as are specifically provided for in the Loan Documents to record and/or perfect the Security Interest and liens created by any of the Loan Documents.

17. In accordance with the provisions of [Section 1104 of the New York Limited Liability Company Law] [Section 5-521 of the General Obligations Law] and clause (b) of subdivision 6 of Section 5-501 of the New York General Obligations Law but subject to the provisions of [subdivision (c) of Section 1104 of the New York Limited Liability Company Law] [subdivision 3 of Section 5-521 of the General Obligations Law] and Section 190.40 and Section 190.42 of the Penal Law of the State of New York, the Loan is not usurious. We note that the Loan Documents contain provisions pertaining to amounts that may, in certain circumstances, be collected by you that, even though they are not denominated as interest, may be categorized as "interest on the loan or forbearance of any money or other property" and, in certain circumstances, such amounts could cause you to collect amounts at a rate exceeding twenty-five percent per annum, which would be in violation of Section 190.40 or Section 190.42 of the Penal Law of the State of New York. We also note that the Loan Documents contain provisions that purport to re-characterize such amounts as reducing the principal balance of the Loan following such collection. Such provisions may not be enforceable and we offer no opinion with respect to such provisions or the effect of any such collection on any amounts collected by you in respect of the Loan, including the effect thereof on the Guaranty. Section 190.40 and Section 190.42 of the Penal Law of the State of New York state in pertinent part that a person who knowingly charges or collects interest on a loan in excess of the rate of 25 percent per annum is guilty of the crime of criminal usury.

This opinion is subject to the following additional assumptions, limitations and qualifications:

a. With respect to the election by the parties of the law of the State of New York as governing law for the Opinion Documents, Section 5-1401 of the New York General Obligations Law states in pertinent part that the parties to any contract, agreement or undertaking relating to a transaction in excess of $250,000.00 may agree that the law of New York shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to the State of New York.

b. We express no opinion as to the enforceability of any provisions in the Opinion Documents that: (i) purport to preserve the liability of any party to a guaranty despite the fact that the guaranteed debt is unenforceable due to illegality; (ii) purport to establish (or may be construed to establish) evidentiary standards; (iii) constitute waivers which are prohibited under Section 9-602 of the NY UCC; (iv) constitute forum selection clauses in the federal courts or the courts of any state other than New York state courts; (v) provide for indemnification against, or release or exculpation of, criminal violations, intentional harm, violations of securities laws or acts of gross negligence or willful misconduct to the extent the enforcement of those provisions is contrary to public policy; (vi) purport to grant a right of setoff in respect of any Opinion Party's assets to any person other than a direct creditor of such Opinion Party or (vii) impose penalties or liquidated damages under certain circumstances. In addition, we express no opinion as to the validity, enforceability or legality of any security interest granted by any Opinion Party to secure any "swap" (as defined in the Commodity Exchange Act), to the extent such Opinion Party is not an "eligible contract participant" (as defined in the Commodity Exchange Act).

c. We express no opinion as to the enforceability against any Opinion Party, or the validity or effectiveness, of any power of attorney or proxy in any Opinion Document to the extent executed by an individual in a manner that does not comply with the requirements of Title 15 of the New York General Obligations Law.

d. For purposes of our opinion in Paragraph 15, we have assumed that the State of New York is Depository Bank's jurisdiction pursuant to Section 9-304(b)(1) of the NY UCC and that the Accounts are "deposit accounts" (as defined in Section 9-102(a)(29) of the NY UCC).

e. With respect to the foregoing opinions, we have assumed, without independent investigation, that value has been given within the meaning of Section 9-203(b)(1) of the NY UCC, and we express no opinion as to: (i) Borrower's right, title or interest in or to any Collateral; (ii) the perfection and effect of perfection or non-perfection of a security interest in any collateral to the extent subject to any laws other than the laws of the State of New York; (iii) the perfection of security interests in fixtures (except as set forth in paragraph 13 above), as-extracted collateral, timber to be cut, consumer goods, commercial tort claims and ownership interest in real property

cooperative organizations; (iv) the creation, validity, perfection, priority or enforceability of any security interest sought to be created in any items of property to the extent that a security interest in them is excluded from the coverage of Article 8 and Article 9 of the NY UCC; or (v) any security interest sought to be created in any collateral identified in any Opinion Documents as "all other personal property" or a similar supergeneric description. In addition, (x) except as specifically set forth in paragraph 13, 14 and 15 of this Opinion, we express no opinion as to the perfection of any security interest and (y) we express no opinion as to the priority of any security interest.

f. We note that a court may not enforce certain covenants or other agreements or allow acceleration of any amounts due under the Loan Documents if it concludes that: (i) such enforcement is not reasonably necessary for the protection of the enforcing party's interests; (ii) such enforcement or acceleration would be commercially unreasonable; (iii) the application of such covenants would be unconscionable at the time that the same were made or at the time of enforcement, or would constitute a contract of adhesion; or (iv) such enforcement is not undertaken in good faith under the then existing circumstances.

g. We call to your attention that under Section 9-315 of the NY UCC, events occurring subsequent to the date hereof may affect any security interest subject to the NY UCC; and in addition, actions taken by a secured party (e.g., releasing or assigning the security interest, delivering possession of the collateral to a debtor or another person and voluntarily subordinating a security interest) may affect any security interest subject to the NY UCC.

No opinion is expressed herein as to:

(1) the solvency or financial condition of any entity;

(2) the legality, validity or enforceability of any provisions of the Mortgage or any other Loan Document authorizing the appointment of a receiver without notice of hearing, waiver of notice of sale, waiver of a right of redemption, waiver of exemption from execution or sale, waiver, stay, extension or moratorium law, waiver of valuation or appraisal, or any right to specific performance of any term of the Mortgage or such other Loan Document;

(3) the payment of any recording tax (including mortgage recording tax) or filing fees which may be due in connection with the transactions contemplated by the Loan Documents, or of the effect that non-payment of the same would have on Lender's ability to foreclose on the Real Property;

(4) the legality, validity or enforceability of any provision of the Loan Documents that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Loan Documents; or

(5) the legality, validity or enforceability of (i) any provisions purporting to grant a right of setoff in respect of any Opinion Party's assets to any person other than a direct creditor of such Opinion Party, or granting a party rights in its sole discretion providing for conclusive presumptions or determinations, non-effectiveness of oral modifications, arbitration, waiver of or consent to service of process, or waiver of offset or defense, (ii) any provision for indemnification against, or release or exculpation of, criminal violations, intentional harm, violations of securities laws or acts of gross negligence or willful misconduct to the extent the enforcement of those provisions is contrary to public policy, (iii) any submission to jurisdiction provision of any of the Opinion Documents in which an Opinion Party submits to the jurisdiction of any court other than a federal or state court located in the State of New York, (iv) any provision of any of the Opinion Documents that constitute forum selection clauses in any federal or state court other than a federal or state court located in the State of New York, (v) provisions which purport to establish evidentiary standards, (vi) provisions awarding attorneys' fees, (x) any provision that would impose penalties or liquidated damages under certain circumstances, (vii) any provision imposing penalties, forfeitures, late payment charges, prepayment premiums, "make-whole" payments, yield maintenance premiums, exit fees or an increase in the interest rate upon delinquency in payment or the occurrence of a default or an event of default to the extent any of the foregoing are deemed to be unenforceable penalties, (viii) any provision absolving Lender from the responsibility of acting in good faith, with fair dealing, or in a commercially reasonable manner, (ix) any provision purporting to constitute a waiver of illegality as a defense to performance of contract obligations or a waiver of any statute of limitations, (x) any provision relating to the non-waiver of any of the rights of Lender, (xi) any provision granting Lender the right to enter judgment by confession, (xii) any provision purporting to preserve the liability of any party to a guaranty despite the fact that the guaranteed debt is unenforceable due to illegality, or (xii) any provision that entitles Lender to injunctive relief without the necessity of proving actual damages.

The opinions set forth in Paragraph 13 of this letter are further subject to the following:

i. (x) Article 9 of the NY UCC requires the filing of continuation statements within the period of six months prior to the expiration of each five-year period from the date of the original filing of financing statements in order to maintain the effectiveness of the filings referred to in this opinion, and (y) additional filings may be necessary if Borrower changes its name, identity or corporate structure or the jurisdiction in which it is organized.

ii. The enforceability and perfection of any security interests in Collateral could be limited as a result of the operation of Sections 363, 364(d), 510(c) or 1129(b) of the United States Bankruptcy Code.

iii. Sections 547 and 552 of the United States Bankruptcy Code might limit the extent to which a security interest encumbers property acquired by Borrower subsequent to the filing of a bankruptcy petition by or against Borrower.

This opinion is furnished by us as counsel for the Opinion Parties solely for the purposes contemplated by the Loan Documents. The opinions expressed herein may be relied upon only by you and by permitted transferees of the Note, including a person or entity acting as agent or trustee and rating agencies in connection with a securitization of the Loan and only in connection with the Loan. Our opinion may not be used, quoted from, referred to or relied upon by you or by any other person for any other purpose, nor may copies be delivered to any other person, without, in each instance, our prior written consent; except that you may deliver copies of this opinion to (but such persons may not rely on this Opinion): (a) your independent accountants, attorneys and other professional advisors acting on your behalf in connection with the Loan or the transactions contemplated thereby; (b) governmental regulatory agencies having jurisdiction over you to the extent disclosure of the opinion is required by applicable law or regulation; (c) designated persons pursuant to order or legal process of any court or governmental agency or authority of competent jurisdiction; and (d) prospective purchasers of the Note and permitted participants in the Loan. We shall have no obligation to revise or reissue this opinion with respect to any change in law or any event, fact, circumstance or transaction which occurs after the date hereof. In addition, we express no opinion with respect to any issue arising out of or related to: (i) the identity or status of any transferee of the Note or participant in the Loan; (ii) a securitization of the Loan; or (iii) any subsequent transaction.[46]

Very truly yours,

[Name of Opinion Giver Law Firm]

ENDNOTES

[1] The opinion is usually dated the date it is delivered, which is usually the closing date. If the opinion is delivered in advance of the Closing Date (as is sometimes the case in multistate transactions where the opinion giver is acting as local counsel), it is usually delivered to counsel for the opinion recipient in "escrow" with conditions specifying whether and when it can be dated and released to the opinion recipient; the most important condition is that the opinion giver reviews the final compiled loan documents.

[2] The opinion is usually addressed to the Lender. In a syndicated or securitized transaction, the opinion may be addressed to a financial institution "for itself and as agent for the Lenders" or to their "successors and/or assigns." For a discussion with respect to who is entitled to rely on the opinion, *see infra* note 46.

[3] The "Re:" is optional and is for convenience of reference only. Sometimes it is used to introduce various defined terms, such as "Borrower," "Loan," "Collateral," "Guarantor," etc. This form introduces those terms in the body. Include any affiliated additional parties that the Opinion will cover, such as a property manager, managing member of an LLC or general partner of a limited partnership either here or in the body.

[4] The opening sentence is intended to indicate the capacity in which counsel is rendering the opinion and to identify the transaction. The formulation "acted as counsel ... in connection with" is intended to make clear the limited nature of the opinion giver's engagement. It is particularly appropriate where the opinion giver has been retained for a particular transaction. Where the opinion giver is not the regular counsel for Borrower and is only responsible for closing the mortgage loan, some lawyers will state that "We have acted as *special* counsel" (emphasis added) since that term denotes somewhat less contact with Borrower and Borrower's affairs than in other situations. However, the term "special counsel" does not, by itself, limit the opinion giver's responsibility or affect the standard of care. If the opinion preparers wish to limit their responsibility to review certain documents or conduct due diligence activities, such limitations should be expressly set forth in the opinion. In some transactions, such as multistate transactions where the opinion giver is acting only as local counsel, such limitations may be appropriate.

A lawyer has a professional obligation to protect the confidences and secrets of his or her client. NYSBA Disciplinary Rule 4-101. The issuance of a legal opinion to a third party regarding the validity and enforceability of the transaction may affect or limit the client's ability to raise issues or defenses in the future. Thus, the client must consent, specifically or by implication, to disclosures about the client or the transaction. TriBar II Report § 1.7 The reference to the Loan Agreement provision regarding the delivery of a legal opinion confirms that the client has consented to the delivery of the opinion to the recipient, that the acceptance of the opinion by the recipient satisfies the condition and that the recipient is entitled to rely upon it.

[5] Inclusion of this sentence may simplify the use of terms which are customarily defined in the Loan Agreement and avoid repetition of such definitions in the opinion. If the transaction does not involve a Loan Agreement, references to the Loan Agreement should be deleted and the opinion preparers should consider whether any additional terms should be defined for purposes of the opinion. If the opinion preparers are opining as to other documents with defined terms (such as a guaranty), the opinion preparers should consider referring to those documents as well.

[6] The recital of the Loan Documents is not an exhaustive list. The responsibility of the opinion preparers is not ordinarily limited by a listing of documents reviewed unless an express limitation is included. In some transactions, such as multistate transactions where the opinion preparers are acting as local counsel, the parties may agree that only a limited review is appropriate. In such cases, if the opinion preparers are asked to review only the Mortgage (and perhaps the Note, the Assignment of Leases and the Financing Statements) and are not expected to review the Loan Agreement or other Loan Documents, an express statement to such effect should be included in the opinion. An example is set forth below:

At your request and with your permission, we have reviewed only the Mortgage [and the Assignment of Leases and the Financing Statements]; we have not reviewed the Loan Agreement or the other Loan Documents nor have we made any other investigation or inquiry.

[7] Mortgages typically include a description of real property, personal property and fixtures and are intended to constitute both a mortgage and a security agreement. The Mortgage may also be intended to operate as a fixture filing. As set forth in notes 13 and 14 below, the opinion does not typically cover the perfection or priority of security interests in personal property, and in many cases also may not cover creation or attachment of security interests in personal property (in which case opinion paragraphs 13 and 15 would be omitted).

[8] Add any additional Loan Documents as necessary. The Guaranty may *not* be included in the definition of "Loan Documents" because either (i) the Guarantor is a separate entity and because its obligations under the Guaranty are not secured by the Mortgage, or (ii) the Guarantor was formed in a state where the opinion preparers do not have an office (most typically the case for a Maryland REIT). Accordingly, the Guaranty may be covered separately in the opinion covering the Loan Documents, in which case the Guaranty and the Loan Documents may be defined for some purposes as the Opinion Documents, or by a separate opinion giver in another opinion.

[9] Some opinions recite at length the documents examined with respect to the existence and authority of Borrower. The Committee believes that no purpose is served by doing so unless the opinion giver intends by the listing of such documents to limit the scope of the opinion solely to the documents listed, in which case such limitation should be stated explicitly. The mere listing of certain documents will not have the effect of limiting the basis of the opinion to such documents. The Model Opinion states that the opinion giver has relied on "such other records, certificates, documents and instruments" as counsel has deemed necessary for purposes of the opinion. The Committee believes that this statement represents customary practice. If the opinion giver is opining as to the Borrower's valid existence, power and authority, it may be assumed that the opinion preparers have examined the appropriate certificates from public officials and organizational documents evidencing Borrower's existence and its power to enter into the contemplated transaction and to execute and deliver the Loan Documents. Such examination will be particularly relevant and critical in the case of a general or limited partnership or a limited liability company where the applicable agreements may set forth limitations on the authority of the partners or managers to enter into mortgage transactions without the consent of the other partners or members. In addition, non-corporate entities (e.g., a partnership or a limited liability company) may not always act with the same degree of formality as corporations. Accordingly, the opinion preparers should consider whether further due diligence is required in order to confirm that the entity is validly existing and that the transaction was duly authorized or approved. See *infra* notes 20, 22, 24.

[10] Officers' certificates have traditionally been used to establish factual matters. In the case of a non-corporate entity (e.g., a partnership or a limited liability company), reliance may be placed on certificates or written statements from the managing partner, managing member or other appropriate person.

[11] Opinion givers typically annex copies of the certificates to their opinion. This practice has the merit of disclosing to the opinion recipient the basis for the opinion and, perhaps, foreclosing any argument by the opinion recipient or its counsel that reliance on the certificates was unjustified. In any case, the Committee cautions that reliance on a statement or certificate which the opinion preparers know is false or unreliable cannot be justified. Accord § 5; See *infra* notes 20, 22, 25.

[12] Section 253 of the Tax Law of the State of New York imposes a tax on the recording of mortgages. Certain cities are authorized by state law to impose (and do impose) their own mortgage recording tax in addition to the state tax. Section 258 of the Tax Law of the State of New York provides that no mortgage may be recorded unless appropriate mortgage recording taxes are paid. In addition, the Mortgagee may be unable to assign, release or discharge the mortgage unless the appropriate mortgage recording taxes are paid. Furthermore, no judgment or final order in any action or proceeding will be made for the foreclosure or enforcement of any mortgage if the mortgage recording taxes are not paid. Therefore, it is appropriate that any opinion with respect to the enforceability of a mortgage expressly assume both recording of the mortgage and due payment of the mortgage recording tax.

[13] In commercial loan transactions which do not involve real property collateral, financing statements are often filed prior to the Closing Date in order to insure priority over certain competing security interests. *See, e.g.*, NY U.C.C. § 9-312. However, in loans secured by both real and personal property where the personal property is not a material part of the collateral, financing statements are usually filed on the Closing Date. In such circumstances, Borrower's counsel may or may not be responsible for filing the financing statements. Accordingly, an assumption is included to confirm that Lender's counsel, a title company or other service company is responsible for filing matters. It should be noted that, since no opinion is being given on the perfection of security interests in personal property (*see infra* note 14), it is not necessary to include an assumption that the Financing Statements have been duly filed. Instead, the statement is included in the Model Opinion to confirm that the opinion giver is not responsible for filing the Financing Statements.

[14] The Model Opinion excludes any opinion with respect to the title to the Real Property or the creation and priority of the lien of the Mortgage. Although an opinion that a mortgage is enforceable implicitly includes both contract and conveyancing issues, conveyancing issues are typically excluded. In lieu of an opinion, lenders customarily obtain a title insurance policy insuring the validity and priority of the lien created by the mortgage, certain matters relating to the status of the mortgagor as an entity capable of granting the insured Mortgage, and the mortgagor's execution and delivery of the Mortgage. Accordingly, although a title policy implicitly covers certain matters relating to the status of the Borrower and the execution and delivery by it of the Mortgage, these issues are also covered by legal opinions. Because title and conveyancing issues are excluded from the opinion, a reference to the issuance of a title insurance policy is included in the Model Opinion to confirm that (i) such exclusions are reasonable, (ii) the opinion preparers have no duty to independently verify such title matters, and (iii) the Lender is relying on the title policy for assurance with respect to such matters.

[15] Many opinion law commentaries largely agree that the term "law" means statutory, decisional and regulatory law at the state or federal level, but not at the local level. Within that framework, the opinion preparers are responsible only for areas of law customarily understood to be covered by the opinion. As a matter of customary practice, the opinion does not cover tax laws, insolvency laws, antitrust laws and securities laws.

Some borrowers may be organized under the law of another state (typically Delaware). With respect to Delaware corporations, partnerships or limited liability companies, many New York lawyers are willing to give limited opinions under Delaware law regarding issues relating to the Borrower's valid existence and its power to enter into the transaction.

[16] If New York counsel cannot or chooses not to opine as to the law of another state, then an opinion of local counsel should be obtained. In most instances, such local counsel opinion will be addressed directly to the opinion recipient. The second sentence of this paragraph makes it clear that matters of local law (*e.g.*, zoning and land use laws and building codes) are *not* covered by the opinion unless specifically requested. Opinions on such matters are not customary and, if requested, should be limited to specific issues of material importance to the transaction.

[17] Certain institutional lenders may be limited by applicable laws or other regulations with respect to permitted investments, the aggregate amount of loans to a single borrower, compliance with ERISA and FIRREA, qualification to do business, licensing and other similar matters. Matters relating to compliance with such requirements and with other laws relating to or arising out of the lender's status as a regulated financial institution should be appropriately addressed by lender's counsel, not by borrower's counsel. Accordingly, a specific assumption regarding compliance is appropriate. On the other hand, the absence of such an assumption should not be deemed to imply that such matters are included in the opinion.

[18] Clause (iii) establishes the assumption that adequate consideration has been received by each party to, and beneficiary of, the Opinion Documents as necessary to create enforceable contracts.

[19] The term "investigation" is understood to relate to both law and fact. If counsel desires to limit the scope of investigation, an explicit disclaimer should be made. The appropriateness of disclaimers might depend on the breadth of matters on which counsel ultimately opines. Where counsel is rendering a special opinion, such as when acting as local counsel, a limitation of the scope of the investigation and/or examination of documents may be appropriate. Contrast this to the express disclaimers of independent investigation set forth elsewhere in the opinion letter.

[20] The "status opinion" opinion appears as the first opinion in most opinion letters and serves as a cornerstone for the opinions that follow by establishing that Borrower does in fact exist and has the general legal standing to enter into a contract. Traditionally, opinions regarding the status and existence of the borrower have included an opinion that the borrower has been "duly organized." However, such an opinion may present onerous or even impossible diligence requirements for counsel, particularly if Borrower was formed a long time ago. On the other hand, if Borrower has been recently organized specifically for the transaction, such an opinion may be appropriate and issuing the opinion would not be difficult or burdensome. The Committee has taken the approach of limiting counsel's obligation to inspecting a certificate of good standing from the State of Delaware, which would establish

the date of formation or incorporation of Borrower and that its existence has not been terminated voluntarily or involuntarily (e.g., due to lack of payment of franchise taxes or filing of annual reports) – i.e. that Borrower is validly existing and able as a general matter to enter into a contract.

[21] The second sentence of this paragraph establishes that counsel has verified that Borrower is qualified and legally authorized to do business and in good standing in New York. Note, for example, the requirements of the New York State Business Corporation Law and Limited Liability Company Law for a foreign entity (i.e. an entity incorporated or formed under the laws of a different jurisdiction) to apply to the New York Department of State in order to do business in New York. While the test for doing business in New York is not a bright-line test, it would be reasonable to assume that owning property in New York and collecting rents from tenants thereof would qualify as doing business in New York.

[22] Notwithstanding the scope of the opinion, it would be prudent for counsel to perform its own diligence into the organizational status of Borrower by ordering and reviewing certified (by the Secretary of State) copies of its incorporation or formation documents (e.g., certificate of incorporation, certificate of formation) and carefully reviewing complete, non-public organizational documents (certified by an appropriate officer of Borrower) such as the limited liability company agreement, bylaws or partnership agreement, as well as any amendments and supporting ownership documents, in order to render other opinions set forth herein, such as the due authorization and execution of documents. Note also that the title company will likely require such documents as well in order to issue the owner's and lender's title insurance policies.

[23] The analysis in notes 20 through 22 also apply here.

[24] A "power" opinion means that Borrower has the power under its Organizational Documents and applicable law governing its status as a legal entity to enter into the Loan transaction and carry out its obligations thereunder. With respect to corporations, few unusual issues are likely to arise. Applicable corporate law and the corporation's certificate of incorporation and bylaws will usually provide a broad grant of power and authority to enter into the transaction. Unless the transaction involves an unusual activity, the transaction is not likely to be ultra vires or require any special governmental approval.

With respect to non-corporate entities, the issue of the power of the entity to enter into the transaction may be a bit more difficult. It is not unusual for the partnership agreement or limited liability company agreement to contain limitations on the business and activities of the entity and on the power of its partners or managers to enter into certain transactions without the approval of some or all of the other partners or members. Accordingly, counsel must review the relevant documents and understand the decision-making process of the entity. If the agreement is silent with respect to such matters, the power and authority of the partners or members may be governed by applicable law relating to partnerships or limited liability companies. For example, in a general partnership, every partner has an equal voice in the management and control of the firm unless the agreement provides otherwise. In large partnerships, however, managerial authority is often delegated to a managing partner or committee. In limited partnerships, the general partners conduct the affairs of the business; the limited partners generally may not participate in management, except with respect to certain limited issues, without jeopardizing their limited liability. In a limited liability company, the entity may be managed by a manager(s) or managing members, or may be managed by all of the members.

Accordingly, counsel must examine the partnership agreement, limited liability company agreement or other applicable organizational document and applicable law to determine whose consent is required for the contemplated transaction.

[25] The "all necessary action" opinion means that the Loan was approved (and the execution and delivery of the Loan Documents were authorized) in a manner consistent with Borrower's Organizational Documents and applicable law and by the proper persons (e.g., officers, directors, stockholders, partners, members, etc.). In the case of a Borrower organized in tiers, the Committee believes that an opinion as to due authorization, execution and delivery by Borrower necessarily means that the action and the documents in question have in turn been duly authorized, executed and delivered by all appropriate entities. For example, if a limited partnership Borrower is acting through a corporate general partner, it is not necessary to state explicitly that the delivery of the Loan Documents has been duly authorized by all requisite corporate action of such general partner. Of course, counsel is required to exercise appropriate due diligence to assure that the execution, delivery, and performance of the Loan Documents have been approved and authorized at all levels.

[26] Typically, Borrower and Entity Guarantor resolutions authorizing and approving the Loan Documents will specifically designate and authorize certain officers or individuals to execute the Loan Documents on behalf of the relevant entity. Counsel should take care to verify that that the individual(s) executing each document on behalf of each entity was in fact so authorized to do so. In certain circumstances, resolutions may not have been used (e.g., if a managing member or manager or general partner is given the power under the applicable organizational documents to make all decisions on behalf of the entity), and so counsel should take care to ensure that the individual(s) executing on behalf of each entity was in fact so authorized under the entity's organizational documents.

[27] Regarding execution, counsel should confirm that the correct, authorized person executed the document on behalf of the applicable entity. See notes 25 and 26, *supra*, regarding establishing authorized signatories. Note also in the fourth unnumbered paragraph of the Model Opinion that counsel states that it has assumed, without independent investigation, the genuineness of all signatures, the legal capacity of all individuals who have executed any of the documents reviewed by us, the authenticity of all documents submitted to counsel as originals, the conformity to the originals of all documents submitted to counsel as certified, photostatic, reproduced or conformed copies of valid existing agreements or other documents, and the authenticity of the latter documents; these assumptions are critical to reducing the burden on counsel in order to opine on due execution. Counsel should also confirm that, to the extent required by a document, the signatures were witnessed or notarized. Counsel should also take care when signature pages are signed separately from the underlying agreement. For example, counsel should ensure all the parties have received and agreed on a final draft of the Loan Documents. Ideally, counsel should circulate the signature pages (even if separate) with the final and agreed draft so the parties to each agreement know and understand the version of the document to which these pages will be attached, or alternatively notate each signature page (i.e. in the footer) with the name of the document to which it belongs.

[28] Regarding delivery, if signatures are delivered electronically or by fax, counsel should confirm that the Loan Documents expressly provide that such signatures are valid and shall be treated for all purposes as originals.

[29] The "remedies opinion" is probably the most nuanced part of the opinion, particularly as regards qualifications, exceptions and limitations. The Committee believes that it will be most useful to preparers, and is consistent with the Committee's approach throughout the 2021 Report, to provide practical guidance with respect to those nuances. Although the remedies opinion implicitly includes an opinion that a mortgage is in a form sufficient to create a lien (*see infra* note 44), in multistate transactions where the opinion giver is acting as local counsel, a specific opinion that the mortgage is in proper form is sometimes requested. Such an opinion may also be requested by rating agencies when the loan is to be included in a subsequent securitization. *See, e.g., S&P Ratings Guide* at 126-27. A request may also be made for an opinion that identifies the proper place for recording the mortgage and assures the opinion recipient that, upon due recordation, the mortgage will create a "perfected" lien on the real property. "Perfection" is a concept under the Uniform Commercial Code and has no direct counterpart in real property law. Instead, the focus of any such opinion should be on the concept of "constructive notice" created by the recording laws. (*See* opinion paragraph 12, *supra*).

If the transaction involves a construction loan, the opinion preparers should consider whether a reference should also be made to the requirement of filing the building contract in order to preserve the initial priority of the mortgage against the claims of mechanics' liens filed subsequent to the recording of the mortgage. *See* Lien Law § 22. The foregoing opinion relates only to that portion of the Collateral that constitutes real property under New York law. To the extent a similar opinion is requested regarding personal property and fixtures, *see infra* note 16.

"Valid and binding" is a phrase that is inextricably bound together. While some practitioners suggest that the validity of a particular provision implies that it is binding, the Committee includes the phrase, even if it is redundant, because it is customary and encrusted with hoary tradition. It should be noted, however, that since "valid" means "legally sound, legally sufficient or efficacious," the Committee eschews the further inclusion of "legal" to the phrase, thereby avoiding increased redundancy.

[30] While the Committee believes that "valid and binding" includes enforceability and necessarily suggests that there is, therefore, a judicial remedy, the enforceability portion of the remedies opinion requires explicit mention for the avoidance of doubt. Similar to the phrase "valid and binding," the word enforceable is bound to the additional words "in accordance with its terms" and the Committee specifically includes the entire phrase. See ABA/ACREL/ACMA Report at page 15.

The Committee believes that it is important to state that the formulation "the Loan Documents are 'enforceable ***against Borrower***' in accordance with their respective terms" is intended to make clear that parties other than Borrower are excluded from the ambit of those against whom the Lender's remedies would be effective.

[31] An increasing number of transactions explicitly select New York law to govern the Loan Documents even if there are few New York contacts. The General Obligations Law specifically validates that choice. Accordingly, the Committee believes that it is appropriate to specify that the choice of law is a valid choice and application of the statute.

[32] The Committee has chosen to qualify the entire "valid, binding and enforceable" opinion with the bankruptcy and equitable principles limitations. It is generally accepted that the bankruptcy exception may affect, in certain circumstances, the validity of the transaction as a whole. For example, fraudulent conveyance concerns may be

present in a complex workout. Examples of equitable principles that could affect the validity (and not merely the enforceability) of an agreement are fraud and duress.

[33] Treatment of the bankruptcy exception in opinion form language varies to a limited extent. Some opinion forms expand the language of exceptions to include bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditor's rights in general or the collection of debtor's obligations generally. The Committee has adopted, for the bankruptcy exception, the limitations as to "bankruptcy, insolvency or other laws affecting the rights of creditors generally." The Committee believes that this formulation adequately informs the opinion recipient that bankruptcy and other laws affecting creditor's rights may release the debtor from some or all of its obligations.

[34] The Committee has rejected the "practical obligation" approach since this may not be universally understood as to its meaning concerning enforceability. The Committee prefers the "judicial enforcement" approach combined with the "material default" formulation, which is more generally accepted in modern opinion practice. See the ABA 2020 Report at page 19, Guideline 4.02.

[35] Guarantees may be broadly categorized as either "unlimited," wherein the guarantor is obligated to perform, including payment, all of the obligations of the borrower under the Loan Documents, or "limited," wherein the guarantor's obligation to perform and pay are more narrowly defined. A guaranty may be limited by time periods such as with "burn downs," the guarantor's equity in the borrower, or with so called "bad boy" carveouts such as fraud and waste committed by the borrower. For purposes of the Model Opinion, we are assuming that the lender is requiring an "unlimited guaranty" that provides that the guaranty shall remain in full force and effect until such time as the borrower's obligations under the Loan Documents have been indefeasibly paid and performed by the borrower. The issues discussed herein are applicable to all guarantees.

Guarantees tend to be extremely lender favorable at the obvious expense of the guarantor. Guarantees usually contain several provisions whereby the guarantor agrees to waive certain rights and defenses that it would otherwise have at common law, all of which waivers are intended to provide the lender with the ability to expeditiously pursue the guarantor for a breach by the borrower of its obligations under the Loan Documents. Common waivers include, but are certainly not limited to, the right of the lender, without notice to or the consent of the guarantor, to increase or decrease the loan obligations or to modify the Loan Documents; waiver by guarantor of any right to require lender to first bring suit against the borrower or to otherwise exhaust its remedies against the borrower or others obligated under the Loan Documents, or to first enforce rights against the collateral, or to first seek enforcement against other guarantors; waiver by guarantor of any right to notice of any loan advances to borrower, notice of borrower default, notice of transfer of the loan by lender, or notice of sale or foreclosure of any collateral; waiver by guarantor of the discharge of any loan obligations from a Bankruptcy proceeding by or against the borrower; waiver of common law, equitable, statutory or other rights including statute of limitations defense; waiver of any defense of invalidity of the guaranteed obligations; waiver of any defense related to the release of any other party liable for the obligations; waiver of any defense of unenforceability of the loan obligations against the borrower; waiver of the guarantor's rights to subrogation and reimbursement against the borrower until the loan obligations are indefeasibly paid; waiver of any defense related to the release of any collateral; and waiver of the right of the guarantor to object to lender's offset against any property of guarantor in the possession of the lender.

While a guaranty containing such waivers of rights and defenses is generally enforceable against a guarantor, assuming there is adequate consideration for the giving of the guaranty, there may be specific instances where courts may not enforce such waivers. Paragraph 6 of the Model Opinion, which opines as to the enforceability of the guaranty, provides that enforceability is expressly subject to (i) bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally, and (ii) general principles of equity. With specific reference to the waiver of certain rights and defenses that a guarantor might otherwise have available, Paragraph 6 further provides that although the waivers are generally enforceable, such enforceability may be limited or rendered unenforceable by applicable law, but in the opinion of the party providing such Model Opinion, such law does not render the guaranty invalid as a whole or preclude judicial enforcement of the guaranty upon a material default by the guarantor. These very broad qualifications should suffice to protect the party providing the Model Opinion from any liability arising from opining as to enforceability of the guaranty containing the various waivers of rights and defenses while providing the enforceability opinion that lenders require.

[36] The opinion expressed in paragraph 7 of the Model Opinion is often referred to as the "no breach or violation" opinion. Earlier commentaries have noted that, historically, such opinions addressed whether the execution and delivery of the Loan Documents and the performance by the Borrower of its obligations thereunder would "conflict" with the Borrower's Organizational Documents. However, because of a growing concern regarding the imprecision of the word "conflict," prior opinion reports that have considered the issue elected to replace the word "conflicts" with "violations" when the opinion refers to the Borrower's Organizational Documents. The Committee concurs.

The ABA/ACREL/ACMA Report notes that since an "opinion letter only speaks as of its date," then this opinion should not be read to apply to occurrences after the opinion date, even if the future tense is used in the opinion. ABA/ACREL/ACMA Report *§ 3.7*. The Loan Documents will typically contain provisions requiring the Borrower to construct improvements, to repair and maintain the Collateral, to lease and manage the project, to comply with laws and other similar matters. In the ordinary course of business, such activities may require the consent or approval of ground lessors, tenants, the holders of easements, contractors, neighbors, other lien holders, insurers, governmental authorities and other third parties. Accordingly, it is not possible to predict whether the Borrower's future "performance" will constitute a breach or default with respect to any agreement with any such person.

[37] To the extent that the "no violation" opinion covers the Borrower's Organizational Documents, it may be redundant with the power and remedies opinions but the practice of requesting such opinions is "well established." The Committee notes, however, if the Borrower is a newly formed, special purpose entity whose only asset is the Collateral and whose only obligations are the Loan Documents, the "no breach or default" opinion may be unnecessary.

[38] The ABA/ACREL/ACMA Report notes that "[i]t is preferable, and has become customary, to list for this opinion … court orders to which the borrower is a party," instead of referring to "material" orders ABA/ACREL/ACMA Report *§ 3.7*. In many transactions, the most practical solution is for the opinion preparers to rely upon a certificate of an appropriate officer, partner or member of the Borrower which identifies the relevant court orders and to list such documents in a schedule attached to the opinion. In real estate transactions, identifying such documents should be relatively easy, especially if the Borrower is a special purpose entity whose only asset is the Real Property. Also, the use of a schedule identifying specific orders may make it unnecessary to qualify the opinion by the phrase "to our knowledge."

[39] The "no violation of law" opinion addresses the legal consequences of the transaction that may be significant to the opinion recipient. Despite its apparent breadth, it does not cover all laws and is generally deemed to exclude laws relating to tax, insolvency, antitrust and securities matters, environmental laws as well as local laws, such as city ordinances, zoning regulations, building codes and other similar laws. *See supra* notes 15, 16. It also should not be read to include common law, but should include judicial and administrative interpretations of statute. *ABA/ACREL/ACMA Report § 3.8(a).*

[40] To the extent the opinion covers future performance, the analysis applied to the "no breach or violation" opinion should also apply to the "no violation of law" opinion. *Supra* note 39. For the reasons set forth in note 39, the Committee believes that the scope of the opinion should be limited to the payment of the indebtedness evidenced by the Note and should not include "performance" by the Borrower of its obligations under the Loan Documents. An opinion that the performance of the Borrower's obligations will not violate applicable law could be interpreted as an opinion that the Borrower's obligation to construct, repair and maintain the Collateral and other similar activities will then comply with and be permitted under applicable zoning, building and other laws. The Committee believes that such an interpretation is not appropriate. Matters of local law are ordinarily excluded from the scope of the opinion. *See supra* note 45. If an opinion regarding the Borrower's "performance" is requested, the opinion giver should be entitled to assume that the Borrower will perform its obligations in compliance with applicable law and will obtain, in the ordinary course, such licenses and permits as may then be required. On the other hand, if there is some fundamental requirement of law that would prevent (instead of merely regulate) future performance by the Borrower, and if the opinion preparers exercising customary diligence would reasonably recognize it as being applicable to the transaction, it should be identified as an exception in the opinion. *TriBar Report II* §§ 6.5.4, 6.6. It should be noted that, whether or not the opinion covers performance under the Loan Documents, an opinion that payment of the indebtedness evidenced by the Note will not violate any applicable law implies an opinion that the Loan is not usurious. The ABA/ACREL/ACMA Report concurs, but goes further to state that, unless an opinion that the Loan is not usurious is explicitly included (See opinion 17, *supra*), an opinion letter should explicitly carve out usury in order to avoid an inadvertent opinion. *ABA/ACREL/ACMA Report* § *3.8*. The Committee agrees.

When a usury opinion is explicitly included in the opinion letter it will generally be in the form of a “reasoned opinion” as New York State law includes a variety of conditions and exceptions concerning when a loan is not usurious. The law concerning usury is also in flux. On March 30, 2020, the United States Court of Appeals for the Second Circuit in *1077 Madison Street, LLC v March* (Docket No. 17-2903-cv) held that, in certain circumstances, a lender may charge post-default amounts that may exceed the civil statutory maximum after default or maturity (see also Kraus v. Mendelsohn, 948 N.Y.S.2d 119, 120 (2d Dept. 2012) but see Madden v. Midland Funding, LLC, 237 F.Supp.3d 130, 144 (SDNY 2017) denying claim that a lender may charge interest above twenty-five percent (25%) per annum without being guilty of criminal usury).

[41] Earlier commentaries suggest that the phrase "to the best of our knowledge without independent investigation" or some similar phrase is unnecessary and the inclusion of the phrase does not limit the customary diligence that lawyers undertake to support the opinion but, nevertheless, note that, as a matter of customary diligence, the opinion preparers are not expected to check court records or review the Borrower's files. Although the Committee concurs in this view, it believes that the phrase "to the best of our knowledge, without independent investigation" appropriately alerts the opinion recipient regarding the lack of investigation undertaken by the opinion preparers. Such a limitation may be especially important in circumstances where pending litigation may, directly or indirectly, affect the Collateral but not name the Borrower as a party.

[42] The opinion set forth in paragraph 10 of the Model Opinion is usually referred to as the "no litigation" opinion. TriBar notes that opinion recipients sometimes seek information regarding pending or threatened actions against the Borrower that may affect the transactions contemplated by the Loan Documents. It is important to note that the "no litigation" opinion does not pass on the merits of particular actions or predict their likely outcome and, in most cases, an evaluation of pending or threatened litigation would not be appropriate. *TriBar II Report* § 6.8

According to TriBar, the opinion has the following purpose:

"The no litigation opinion is intended to elicit information regarding the existence of pending and threatened actions and proceedings ("litigation" for purposes of the following discussion) that might be of concern to the opinion recipient. Thus, the opinion often takes the form of a statement that the Company is not a party to any litigation known to the opinion preparers that may have an adverse effect on the transaction or a material adverse effect on the Company and that is not identified in a schedule to the agreement, an officer's certificate or some other list of litigation referred to in the opinion letter. The presence or absence of a "to our knowledge" qualifier does not change the meaning of the opinion. With or without "to our knowledge," the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable. As a matter of customary diligence the opinion does not require that the opinion preparers check court or other public records or review the firm's files (and an express disclaimer to that effect in the opinion letter is not necessary). Nevertheless, the opinion preparers may check the firm's litigation docket (if one exists) and, if they are not themselves familiar with the litigation the firm is handling for the Company, may seek the advice of a litigator or other lawyer in the firm who is." *Id.* § 6.8 (*footnote and cross references omitted*).

It is also important to note that the opinion addresses only actions pending or threatened against the Borrower; it does not cover actions which might affect the Collateral.

[43] When acting as local counsel, one main objective is to prepare an opinion letter about the mortgage of real estate in the local jurisdiction. A typical lender request is an opinion as to the sufficiency of the form of the mortgage to grant a lien or security interest; that being said, it is not customary practice to provide an opinion as to the effect of recording, such that the mortgage creates a lien or security interest, as that conclusion is insured by title insurance. A form-of-documents opinion addresses only whether the form of the mortgage reviewed by the opinion giver includes those provisions that are required under applicable local law for the creation of a security interest in the real estate that is encumbered by the mortgage. The form-of-documents opinion above includes language assuring that the document is in a form suitable for recording or filing in the local jurisdiction. This opinion addresses only whether the documents are in a form sufficient to satisfy the state law requirements for recordation or filing in the appropriate recording office designated under state law as the office to record or file the relevant document to provide record notice of such document. Note that for purposes of the form-of-documents opinion, the document reviewed does not need to be executed.

Additionally, the form-of-documents opinion requested by the lender may request a statement that the mortgage will provide constructive notice of the lien. As stated above, anything further than the standard “form-of” opinion may not be required if title insurance is being obtained. However, if you are providing a constructive notice opinion statement, then the statement should not address more than notice of record and should not provide assurance regarding recording to create the lien or real estate security interest. *See ABA Local Counsel Report at pages 39-53*.

[44] Although this paragraph refers to creating a valid security interest in the Collateral, which is defined in Paragraph (e) at the beginning of the Model Opinion as the Real Property and Personal Property, this particular paragraph addresses the security interests in Personal Property and perfection of that security interest. The security interest is granted in the Mortgage and is perfected with the filing of a UCC-1 Financing Statement in the office of the county clerk or register (in the case of New York City) located in the county where the property is located. This is often referred to as a "Fixture Filing." Assuming that the Collateral Description in the Mortgage and the Collateral description in the UCC-1 Financing Statement match and are correct and further assuming that the Debtor and Secured Party descriptions, property address, section, block and lot numbers in the UCC-1 Financing Statement are correct, the security interest granted is perfected upon the filing of the UCC-1 Financing Statement, which filing is assumed will be done by the Secured Party/Lender. Therefore, it is important to carefully review the Collateral descriptions and the UCC-1 Financing Statement to confirm their accuracy. Borrower's counsel should resist opining as to the priority of the perfected security interest as the issue of priority is not within the control of the Borrower or its counsel.

[45] Although the remedies opinion implicitly includes an opinion that an assignment of leases and rents is in a form sufficient to create a lien, in multistate transactions where the opinion giver is acting as local counsel, a specific opinion that the assignment of leases and rents is in proper form is sometimes requested. A request may also be made for an opinion that identifies the proper place for recording the assignment of leases and rents and assures the opinion recipient that, upon due recordation, the assignment of leases and rents will create a "perfected" lien. "Perfection" is a concept under the Uniform Commercial Code and has no direct counterpart in real property law. As a result, real property counsel should exercise care when addressing Uniform Commercial Code issues. If requested by a lender, practitioners may limit this opinion by focusing on the form of assignment of leases and rents as it pertains to perfection, rather than the document's effectiveness.

[46] The opinion is usually addressed to the lender or, in a syndicated loan, to an agent acting on behalf of all lenders. Typically, the named opinion recipient, together with its successors and assigns including, to the extent applicable, any trustee in a securitization, are entitled to rely on the opinion.