

NEW MEXICO FORM OF OPINION

[date]

[Name and Address of
Lender and/or Lender's counsel]

Re: [Identification of the loan transaction; define "**Lender**", "**Borrower**" and/or "**Guarantor**"] (1)

Ladies and Gentlemen:

We have acted as [special New Mexico](2) counsel to Borrower [and Guarantor] in connection with that certain \$_____ loan transaction (the "**Transaction**") evidenced by the documents described below.(3) This Opinion Letter ("Opinion Letter")_ is provided to you at the request of Borrower [and Guarantor] [pursuant to Section [____] of the Agreement described below]. The Law covered by the opinions expressed in this Opinion Letter is limited to the law of the State of New Mexico [and federal law].(4) For purposes of this Opinion Letter, the law ("**Law**") is the statutes, the judicial and administrative decisions and the rules and regulations of the governmental agencies of New Mexico, but not including its Local Law. (5) Local law ("**Local Law**") is the ordinances, the administrative decisions, and the rules and regulations of counties, towns, and municipalities and special political subdivisions (whether created or enabled through legislative action at the federal or state level), and judicial decisions to the extent that they deal with any of the foregoing. Statutory references are to New Mexico Statutes Annotated (1978) as amended, unless otherwise indicated.

Documents Reviewed. For purposes of this Opinion Letter, we have examined the following documents:(6)

1. Promissory Note [use the exact document title] (the "**Note**"), dated _____, in the stated principal amount of \$_____, by Borrower and payable to Lender.

2. [Mortgage or Deed of Trust - use the exact document title] [(the "**Mortgage**") or (the "**Deed of Trust**")], dated the same date as the Note, by Borrower in favor of [_____] as Trustee for benefit of] Lender.

3. Assignment of Leases and Rents [use the exact document title] (the "**Assignment of Leases**"), dated the same date as the Note, by Borrower in favor of Lender.

4. Loan Agreement [use the exact document title] (the "**Agreement**"), dated the same date as the Note, between Borrower and Lender relating to the Transaction.

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5. _____ [other operative document(s) related to the Transaction].

6. Guaranty Agreement [use the exact document title] (the "**Guaranty**"), dated the same date as the Note [or, if applicable, another date], by _____ ("**Guarantor(s)**").

7. Freedom to Choose Insurance Company and Insurance Professional and Authorization for Lender to Obtain Insurance dated the same date as the Note, executed by Borrower. (7)

8. Financing Statements by Borrower as debtor, naming Lender as secured party.

9. _____ [other notice documents related to the Transaction].

10. [Here list certificates issued by the Secretary of State or any other government official, office or agency concerning a person's property or status, such as certificates of corporate, partnership or limited liability company good standing, certificates concerning tax status, certificates concerning Uniform Commercial Code filings or certificates concerning title registration or ownership] (the "**Public Authority Documents**").

11. [Here list the articles of incorporation, bylaws, partnership documentation, limited liability company documentation, or similar organizational documents of Borrower] (the "**Constituent Documents**").

The documents described in items (2) and (3) above are referred to in this Opinion Letter as the "**Security Documents**." (8) The documents described in items (1) through (6) above are collectively referred to in this Opinion Letter as the "**Transaction Documents**" and individually referred to in this Opinion Letter as a "**Transaction Document**". All of the documents listed above are referred to together as the "**Documents**". All property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest is referred to in this Opinion Letter as the "**Collateral**."

Scope of Review; Reliance. In connection with the opinions set forth below, we have limited the scope of our review to the Documents, and we have relied, without investigation or analysis, upon information in the Documents. (9) Except to the extent that the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we have relied, without investigation or

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analysis, upon the information contained in representations made by the parties in the Documents [and on information provided to us by representatives of Borrower in certificates of officers of Borrower]. (10)

Opinions of Other Counsel. We note that various issues concerning [specify legal issues] are addressed in the opinion of [_____] ("**Other Counsel**"), separately provided to you. [In rendering the opinions set forth below, we have relied upon the information contained in such opinion of the Other Counsel without investigation or analysis, and we express no opinion with respect to those matters.] [Since we had no role in the selection of Other Counsel, we give no opinion as to the competence of Other Counsel to render its opinion.] (11)

Actual Knowledge. The phrase "**to our actual knowledge**" means the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group, without independent investigation. (12)

Primary Lawyer. "**Primary Lawyer**" means:

1. The lawyer in the Opinion Giver's organization who signs this Opinion Letter;
2. Any lawyer in the Opinion Giver's organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents or preparing this Opinion Letter; and
3. Solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (*e.g.*, pending or threatened legal proceedings), any lawyer in the Opinion Giver's organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation.

Primary Lawyer Group. "**Primary Lawyer Group**" refers to all of the Primary Lawyers when there are more than one.

Opinions.

Based upon and subject to the foregoing and the Assumptions and the Qualifications set forth below, we are of the opinion that:

1. Status. Borrower [or Guarantor, as applicable] is a [specify entity] [validly existing] [in good standing] [duly qualified to do business as a foreign specified entity] in New Mexico. (13)

2. Authorization. All actions or approvals by Borrower [or Guarantor, as applicable], and its [shareholders or _____], necessary to bind Borrower [or Guarantor] under the Transaction Documents have been taken or obtained. (14)

3. Execution. Borrower [or Guarantor, as applicable] has duly executed and delivered the Transaction Documents. (15)

4. Form of Security Documents. The Security Documents are in a form sufficient to create a lien on or security interest in all right, title, and interest of Borrower in the Collateral, except to the extent the Collateral includes items or types of personal property in which a security interest cannot be created under Article 9 of the Uniform Commercial Code as adopted in New Mexico ("**U.C.C.**"). (16)

5. Remedies Opinion. The Transaction Documents constitute legal, valid and binding obligations of Borrower [and Guarantor, as applicable], enforceable against Borrower [and Guarantor, as applicable] in accordance with their respective terms. (17)

6. No Breach or Default Opinion. The execution and delivery by Borrower of, and the performance by Borrower of its agreements in, the Transaction Documents do not: (a) violate the Constituent Documents; (b) to our actual knowledge, breach or result in a default under, any existing obligation of Borrower under Other Agreements (as defined below); or (c) to our actual knowledge, breach or otherwise violate any existing obligation of Borrower under any Court Orders (as defined below). (18)

7. No Violation of Law Opinion. The execution and delivery by Borrower of the Transaction Documents, and the performance by Borrower of the payment obligations of the Transaction Documents, will not violate applicable provisions of Law nor subject Borrower to a fine, penalty or other similar sanction under any Law. (19)

8. No Pending Action Opinion. To our actual knowledge, there are no actions or proceedings against Borrower, pending or overtly threatened in writing, before any court, governmental agency or arbitration which seek to affect the enforceability of the Transaction Documents. (20)

9. Usury Opinion. Assuming that collection of the interest and other charges provided for in the Transaction Documents is undertaken strictly in

accordance with the terms thereof, the Transaction Documents will not violate the usury laws of the State of New Mexico. (21)

Assumptions. In rendering the opinions set forth above, we have relied, without investigation, upon the assumptions set forth below: (22)

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

2. Borrower holds the requisite title and rights to any property involved in the Transaction.

3. Each party to the Transaction (other than Borrower [and Guarantor]) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it. (23)

4. All parties to the Transaction (other than Borrower [and Guarantor]) have legal existence.

5. The Transaction Documents have been duly authorized by all necessary [specify entity] or other action on the part of all parties (other than Borrower [and Guarantor]) and the Transaction Documents have been duly executed and delivered by, and are valid as to, binding upon and enforceable against all such other parties.

6. Persons acting on behalf of the parties to the Transaction (other than Borrower [and Guarantor]), including agents and fiduciaries, are duly authorized to act in that capacity.

7. Adequate consideration exists for the Transaction. (24)

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

9. Each document submitted to us for review is accurate and complete, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine.

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

11. There has been no mutual mistake of fact or misunderstanding, fraud, duress or undue influence. (25)

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

13. Lender and any agent acting for Lender in connection with the Transaction have acted in good faith and without notice of any defense against the enforcement of any rights created by, or adverse claim to any property or security interest transferred or created as part of, the Transaction.

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

15. All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the law of New Mexico are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in New Mexico, and are in a format that makes legal research reasonably feasible.

16. The constitutionality or validity of a relevant statute, rule, regulation or agency action is not in issue unless a reported decision binding upon New Mexico courts has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.

17. Contracts, other than the Transaction Documents, to which Borrower is a party or by which it is bound ("**Other Agreements**") and any court or administrative orders, writs, judgments and decrees that name Borrower and are specifically directed to it or its property ("**Court Orders**") will be enforced as written.

18. Borrower will not in the future take any discretionary action (including a decision not to act) permitted under the Transaction Documents that would result in a violation of law or constitute a breach or default under any Other Agreements or Court Orders. (26)

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

20. All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.

21. The description of the Collateral is accurate and is sufficient under Law: (a) to provide notice to third parties of the liens and security interests provided in the Security Documents; and (b) to create an effective contractual obligation under Law.

22. To the extent that any license, franchise, lease or other contract constituting Collateral requires by its terms the consent of another party for its assignment or the creation of an encumbrance, such consent has been obtained.

[Additional Deed of Trust Assumptions]

23. The real property (the "**Real Property**") described in the Deed of Trust constitutes and qualifies as "trust real estate" within the meaning of §48-10-3(L) of the New Mexico Deed of Trust Act, §§48-10-1 *et seq.* ("**Deed of Trust Act**"). Any of the "trust real estate" which is the subject of a recorded subdivision plat is described for purposes of a legal description in the Deed of Trust, "by the use of lot, block, tract or parcel as shown on such recorded subdivision plat." §48-10-5(B). The named trustee is qualified under §48-10-6. The Transaction is a business or commercial loan in the amount of Five Hundred Thousand Dollars (\$500,000.00) or more or a loan to benefit a low income household. The Transaction Documents correctly state the names and mailing addresses of Lender, Borrower and, in the case of the Deed of Trust, the trustee under the Deed of Trust.

[FACTUAL ASSUMPTIONS SPECIFIC TO TRANSACTION, IF ANY]

We have no actual knowledge that the foregoing assumptions are false. We have no actual knowledge that, under the circumstances, would make our reliance on the foregoing assumptions unreasonable. (27)

Qualifications. Notwithstanding any provision in this Opinion Letter to the contrary, the foregoing opinions are subject to the following qualifications:

1. **Exclusions.** None of the foregoing opinions include any implied opinion. (28) Moreover, unless explicitly addressed in this Opinion Letter, the foregoing opinions do not address any of the following legal issues, and we specifically express no opinion with respect thereto: (29)

(a) Federal securities laws and regulations administered by the Securities and Exchange Commission, state "Blue Sky" laws and regulations, and laws and regulations relating to commodity (and other) futures and indices and other similar instruments.

(b) Federal Reserve Board margin regulations.

(c) Pension and employee benefit laws and regulations.

(d) Federal and state antitrust and unfair competition laws and regulations.

(e) Federal and state laws and regulations concerning filing and notice requirements, other than requirements applicable to charter related documents.

(f) Compliance with fiduciary duty requirements.

(g) Local Law.

(h) The following aspects of the real estate mortgage lien:

(i) The characterization of the Transaction as one involving the creation of a lien on Real Property or a security interest in Personal Property, except to the extent that the enforceability of remedies against the Borrower set forth in the Transaction Documents is dependent on the characterization of the Transaction expressed by the parties to it;

(ii) Title to Collateral or the accuracy of its description;

(iii) The sufficiency of the description of the Collateral to provide notice to third parties of the lien or security interest provided for in the Transaction Documents;

(iv) The creation, attachment, perfection, or priority of a lien on the Real Property portion of Collateral or a security interest in the personal property portion of the Collateral, or enforcement of a security interest in Personal Property Collateral separately from enforcement of the lien on Real Property Collateral as contemplated by §55-9-501(4); (30) and

(v) The creation, attachment, perfection, or priority of a lien on water, water rights, air rights, solar rights, minerals (including sand and gravel) and/or mineral rights. (31)

(i) Fraudulent transfer and fraudulent conveyance laws.

(j) Federal and state environmental laws and regulations.

(k) Federal and state land use and subdivision laws and regulations.

(l) Federal and state tax laws and regulations.

(m) Federal patent, copyright and trademark, state trademark, and other Federal and state intellectual property laws and regulations.

(n) Federal and state racketeering laws and regulations.

(o) Federal and state health and safety laws and regulations.

(p) Federal and state labor laws and regulations.

(q) Federal and state laws, regulations and policies concerning: (i) national and local emergency; (ii) possible judicial deference to acts of sovereign states; and (iii) criminal and civil forfeiture laws.

(r) Other Federal and state statutes of general application to the extent they provide for criminal prosecution.

2. **Bankruptcy and Insolvency Exception.** The Remedies Opinion (32) is subject to the effect of bankruptcy, insolvency, reorganization, receivership, moratorium and other similar laws affecting the rights of creditors generally. This exception includes: (33)

(a) The Federal Bankruptcy Code and thus comprehends, among others, matters of turn-over, automatic stay, avoiding powers, fraudulent transfer, preference, discharge, conversion of a non-recourse obligation into a recourse claim, limitations on *ipso facto* and anti-assignment clauses, and the coverage of pre-petition security agreements applicable to property acquired after a petition is filed.

(b) All other Federal and state bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement, and assignment for the benefit of creditors laws that affect the rights and remedies of creditors generally (not just creditors of specific types of debtors).

(c) All other Federal bankruptcy, insolvency, reorganization, receivership, moratorium, arrangement and assignment for the benefit of creditors laws that have reference to or affect generally only creditors of specific types of debtors and state laws of like character affecting generally only creditors of financial institutions and insurance companies.

(d) State fraudulent transfer and conveyance laws.

(e) Judicially developed doctrines relevant to any of the foregoing laws, such as substantive consolidation of entities.

3. **Equitable Principles Limitation.** The Remedies Opinion is subject to general principles of equity. This limitation includes principles: (34)

(a) Governing the availability of specific performance, injunctive relief, or other equitable remedies which generally place the award of such remedies, subject to certain guidelines, in the discretion of the court to which application for such relief is made.

(b) Affording equitable defenses (e.g., waiver, laches and estoppel) against a party seeking enforcement.

(c) Requiring good faith and fair dealing in the performance and enforcement of a contract by the party seeking its enforcement.

(d) Requiring reasonableness in the performance and enforcement of an agreement by the party seeking enforcement of the contract.

(e) Requiring consideration of the materiality of: (i) the Borrower's breach; and (ii) the consequences of the breach to the party seeking enforcement.

(f) Requiring consideration of the impracticability or impossibility of performance at the time of attempted enforcement.

(g) Affording defenses based on the unconscionability of the enforcing party's conduct after the parties have entered into the contract.

4. **Other Common Qualifications.** The Remedies Opinion is subject to the effect of generally applicable rules of Law that: (35)

(a) Limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence and reasonableness.

(b) Provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the forum selected.

(c) Limit the availability of a remedy under certain circumstances where another remedy has been elected.

(d) Limit the right of a creditor to use force or cause a breach of the peace in enforcing rights.

(e) Relate to the sale or disposition of Collateral or the requirements of a commercially reasonable sale. (36)

(f) Limit the enforceability of provisions releasing, exculpating or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction involves negligence, recklessness, willful misconduct or unlawful conduct. (37)

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

(h) Govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs.

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

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

(k) Impose limitations on attorneys' or trustees' fees.

(l) Limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession notwithstanding any enforcement actions taken under the Transaction Documents.

(m) Limit or affect the enforceability of provisions for late charges, prepayment charges, or yield maintenance charges, and acceleration of future amounts due (other than principal) without appropriate discount to present value, liquidated damages and penalties. (38)

(n) Govern the actions of lenders, including the New Mexico Unfair Trade Practices Act, §§57-12-1 to 57-12-22.

(o) Limit the enforceability of certain provisions of the Security Documents, as provided in §55-9-602. (39)

5. **Generic Qualification.** Certain remedies, waivers and other provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the assumptions and qualifications expressed elsewhere in this Opinion Letter, such unenforceability will not render the Transaction Documents invalid as a whole or preclude: (a) the judicial enforcement of the obligation of Borrower [and Guarantor] to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note (subject to §48-10-17 in the event of non-judicial foreclosure, if applicable) and further subject to non-recourse provisions in the Transaction Documents, if applicable; (b) the acceleration of the obligation of Borrower [and Guarantor] to repay such principal, together with such interest, upon a material default by Borrower in the payment of such principal or interest or upon a material (40) default in any other material provision of the Transaction Documents; (c) the foreclosure, in accordance with applicable Law, of the lien on and security interest in the Collateral created by the Transaction Documents upon maturity or upon the

acceleration pursuant to (b) above; (41) [and (d) the non-judicial foreclosure (*i.e.*, pursuant to the power of sale as specified in the Deed of Trust), in accordance with applicable Law and the Transaction Documents, of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon an acceleration described in subparagraph (b) above]. (42)

6. **Choice of Law.** The Remedies Opinion is given as if the Law of New Mexico governs each Transaction Document, without regard to whether each of the Transaction Documents so provides, and without regard to any choice of law rules except as provided below in this Paragraph. (43) While the preceding sentence excludes any opinion on the effectiveness of any governing law provision in the Transaction Documents, if a Transaction Document contains a governing law provision choosing the law of New Mexico to govern the contract, the Remedies Opinion includes an opinion (subject to the other qualifications in this Opinion Letter) that such governing law provision choosing the law of New Mexico will be given effect under the choice of law rules of New Mexico; however, the Remedies Opinion does not include an opinion as to what law governs: (a) if the Transaction Document contains a governing law provision choosing the law of an other jurisdiction or does not contain a governing law provision; or (b) to the extent the opinion as to what law governs requires a determination that the law of New Mexico is not contrary to a fundamental policy of the law of an other jurisdiction. (44)

7. **Description of Personal Property.** We express no opinion as to the adequacy of any portion of the description of the personal property component of the Collateral in the Transaction Documents which refer to all personal property or all assets as such language does not give subsequent secured parties adequate notice of a security interest. §55-9-108. (45)

8. **Release of Mortgage [Deed of Trust].** Upon payment in full of the indebtedness, a mortgagee is required to record in the real property records of the county clerk of the county where the mortgage is recorded a document indicating that the mortgage has been fully satisfied. § 48-7-4(A). However, even if all sums due have been paid in full, if the Mortgage provides that it secures a series of loans or a line of credit by a mortgage and the notation "Line of Credit Mortgage" is prominently placed on the Mortgage, at any time the obligation secured by such mortgage is fully satisfied, the Mortgage may remain of record unless the mortgagor requests in writing that it be released. § 48-7-4(B) & (C).

9. **Future Advances: Maximum Amount Secured.** The rights of Lender under the Mortgage will be and the Assignment of Leases may be limited by §48-7-9, providing that the lien of any instrument constituting a lien on real estate shall not exceed at any one time the maximum amount stated therein. (46)

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[date]

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10. **Notice of Intent to Accelerate.** Exercise of any rights under the Transaction Documents to accelerate all sums due pursuant to the Transaction Documents upon a default may be ineffective, absent notice by Lender of Lender's intent to accelerate, even where Borrower has waived notice of acceleration. *Comer v. Hargrave*, 93 N.M. 170, 598 P.2d 213 (1979).

11. **Due on Sale.** In a contract involving a real property loan, enforceability of any due-on-sale clause authorizing a lender, at its option, to accelerate an indebtedness secured by the lender's security instrument if all or any part of the property, or an interest therein, is sold or transferred, or to demand an increase in the interest rate as a condition of approving an assumption of the loan, may be limited by: (a) §48-7-21, requiring a lender to prove that its security interest in the property would be substantially impaired by such transfer, as a condition of its foreclosing; and (b) §48-7-20, prohibiting a lender from exercising any option in a "due-on-sale" clause, upon occurrence of any of the events there set forth. A New Mexico court would likely find that Section 341 of the Garn - St. Germain Depository Institutions Act of 1982, as amended (the "**Act**"), 12 U.S.C. §1701j-3, preempts application of §§48-7-20 and 48-7-21 to those due-on-sale clauses, or portions thereof, in the Transaction Documents authorizing acceleration, at the option of Lender, if all or any part of the Collateral, or an interest therein, is sold or transferred. Because the New Mexico due-on-sale statute applies to increased interest on assumption or transfer clauses, as well as to acceleration on transfer clauses, §48-7-16, and the Act preempts state law only with respect to due-on-sale clauses conferring an acceleration option on transfer, 12 U.S.C. §1701j-3(a)(1), we express no opinion about the enforceability of provisions in the Transaction Documents authorizing Lender to demand an increase in the interest rate as a condition of approving an assumption of the Loan or a transfer of all or any part of the Collateral, or any interest therein.

12. **Tax and Insurance Escrow.** Enforceability of certain provisions of the Transaction Documents may be limited by §48-7-8, under which any balance in an escrow fund held by a mortgagee or beneficiary for payment of taxes, insurance premiums and other charges, which exceeds two months' total escrow charges for such items plus the pro rata accrual for the taxes, insurance premiums and other charges, must, upon demand of the mortgagor but not more than once each year, be credited to the principal amount of the mortgage, or as provided by contractual agreement, within sixty (60) days of the demand. Failure of a mortgagee to credit upon demand any excess accumulation of escrow funds causes a penalty payable to the mortgagor to run on the amount of such excess accumulation of escrow funds, at the rate of six percent per year.

13. **Redemption Period.** Although the Mortgage shortens the redemption period after a judicial foreclosure sale from the nine-month period provided for in §39-5-18 to one month, as permitted in §39-5-19, a court may, upon a sufficient showing before judgment that redemption will be effected, increase the period of redemption to not to exceed nine months, notwithstanding the terms of the Mortgage. [No real estate may be redeemed from a trustee's sale except by an omitted junior encumbrancer who did not have actual notice or knowledge of the trustee's sale, who was otherwise omitted from the trustee's sale proceeding and who petitions the court in the county where the trustee's sale was held, for redemption. §39-5-18(E). The purchaser of trust real estate at a trustee's sale or the successors and assigns of such purchaser may likewise petition the court to terminate the right of redemption of an omitted junior encumbrancer. *Id.* In any such action, the redemption period shall be nine months, or the period provided in the Deed of Trust, whichever is the lesser, and shall begin to run from the date judgment is entered in the action. *Id.*] Any purported waiver by Borrower in the Loan Documents, prior to default, of a right to redeem any of the Collateral that is subject to the terms of Article 9 of the U.C.C. is not effective. §§55-9-602, 55-9-623 and 55-9-624.

14. **Powers of Attorney and Cognovit Notes.**

(a) We render no opinion as to the enforceability of provisions in the Transaction Documents purporting to authorize Lender, as attorney-in-fact, to take actions Borrower otherwise would be required to take or to dispose of an interest in the Mortgaged Property. Insofar as any power of attorney would purport to permit a disposition of an interest in property, the law of New Mexico does not recognize the grant of a power of sale outside the scope of the Deed of Trust Act. §§48-7-7 and 48-10-10.

(b) We render no opinion as to the enforceability of provisions in the Transaction Documents purporting to authorize an attorney-in-fact on behalf of the Borrower [or Guarantor] to waive issuance of personal service of process, confess judgment, release errors or the right of appeal from a judgment, or consent to the issuance of execution on a judgment. Section 39-1-18 makes it a misdemeanor to accept or enforce any note or agreement containing such a provision. Section 39-1-17 voids enforcement of any foreign judgment obtained by virtue of any such provision.

15. **Owner-Resident Relations Act.** Upon any termination of the interest of Borrower, as owner, in any of the Collateral that is subject to the provisions of the State's Uniform Owner-Resident Relations Act, §47-8-1 *et seq.*, Lender, as the successor in interest to the owner, could be liable for all Borrower's obligations under the Owner-Resident Relations Act and any rental agreement covering all or part of the

Collateral, notwithstanding any provisions to the contrary in the Transaction Documents. *See e.g.*, §47-8-21(A). (47)

16. **Guarantor Jurisdiction.** We express no opinion as to whether Guarantor is subject to the jurisdiction of New Mexico courts. (48)

17. **Limitation of Indemnification.** The enforceability of each Transaction Document containing an indemnification provision to which § 56-7-1 applies may be subject to, and dependent upon, the compliance of each such indemnification provision with §56-7-1.

18. **Limitation on Community Property Indemnities.** No community property shall be liable for any indebtedness incurred as a result of any contract of indemnity, unless both husband and wife sign the contract of indemnity. §40-3-4.

19. **Condemnation.** A New Mexico court in a condemnation proceeding has the power over a condemnee's compensation to "make orders as the court deems necessary with respect to encumbrances, liens, rents, insurance, and other just and equitable charges." §42A-1-24(C).

[In instances where a Deed of Trust pursuant to the New Mexico Deed of Trust Act is involved, the following paragraphs should be included.]

20. **Deficiency Actions.** In the case of a trustee's sale, the determination of any deficiency and Lender's remedies may be delayed or limited by the fact of pendency of other actions or proceedings to liquidate other collateral securing the obligations secured by the Transaction Documents. Section 48-10-17(B) provides that if no action is commenced for deficiency judgment within 12 months after the trustee's sale, the proceeds of the sale, regardless of amount, shall be deemed to be in full satisfaction of the debt and no right to recover a deficiency in any separate civil action may exist.

21. **Substitute Trustee.** The enforceability of the provisions of a deed of trust relating to resignation and substitution of a trustee, is subject to §48-10-7, requiring that a written notice of substitution or resignation, as the case may be, in the form provided in the statute, signed and acknowledged by all parties specified in the statute, be recorded in the office of the county clerk of each county in which any trust real estate is situated at the time of the substitution or resignation, and that written notice of such substitution or resignation be given in accordance with the statute.

22. **Trustee's Sale.** The enforceability of provisions in a deed of trust may be limited by §48-10-13, requiring the trustee at the trustee's sale to sell the trust real estate at public auction for cash to the highest bidder and to take, and to have taken, a number of prescribed steps to determine the highest bidder.

23. **Rights to Reinstate.** Lender's rights of acceleration under a deed of trust may be limited by §48-10-16, entitling a debtor, up to the day before a trustee's sale or the filing of an action to foreclose a deed of trust, to reinstate a deed of trust by paying the entire amount then due, other than such portion of the principal as would not then be due had no default occurred, together with certain other amounts specified in the statute.

Closing.

The opinions expressed in this Opinion Letter are solely for your use in connection with the Transaction for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by you or any other person for any other purpose whatsoever, except this Opinion Letter may be used: (1) in connection with review of the Transaction by a regulatory agency having supervisory authority over Lender for the purpose of confirming the existence of this Opinion Letter, (2) in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary, or (3) in response to a court order.

Very truly yours,

By _____

Footnotes

1. Reference to a Section (§) or a Paragraph (§) in the footnotes to this Opinion Letter is a reference to a Section of the Accord or a Paragraph of the ABA/ACREL Report. See the New Mexico Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions ("Statement").

2. Describe limited or special role, as appropriate.

3. The Client must consent to the rendering of this Opinion Letter. Such consent may be implied by the Client's execution of a Transaction Document that requires an opinion letter. See Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions following the Accord, Part II, F.

4. See Accord, §§1, 10, and 22. The laws of other jurisdictions may be included as well. For example, "federal law" may be added. The inclusion of the law of the state of Borrower's Organization is normally addressed by either an assumption of compliance with such laws or reliance upon an opinion from counsel admitted to practice in the appropriate jurisdiction. See footnote 11.

5. See Paragraph 1(g) of the Qualifications of this Opinion Letter.

6. Set forth below in the text of this Opinion Letter are examples of common real estate loan transaction documents. This form of Opinion Letter opines only as to the specifically identified Transaction Documents. Add to the list any other operative documents for the Transaction; conform names in the list to actual names of the documents; create other defined terms as needed.

7. See §59A-16-14 and 13 New Mexico Administrative Code 7.2.

8. The "Security Documents" should include all documents that provide for the creation of a lien or security interest to secure obligations of Borrower under the Transaction Documents.

9. Accord §2 and the accompanying commentary permit the Opinion Giver to limit the scope of inquiry to specific documents, but only if the limitation is explicit; *e.g.* "we have reviewed only the following documents and made no other investigation or inquiry." Some opinion givers prefer to identify each of the documents reviewed, and to disclaim any factual inquiry beyond the identified documents. In the event the Opinion Giver has a broader relationship with Borrower, such as instances where the Opinion Giver is Borrower's general counsel, it may be appropriate for the lawyer to expand the scope of review. The following language is illustrative:

In addition, in connection with the opinions hereinafter set forth, we have reviewed such other documents and certificates of public officials

and certificates of representatives of the Borrower, and have given consideration to such matters of law and fact, as we have deemed appropriate, in our professional judgment, to render such opinions.

10. See Accord §3 with the accompanying Commentary as to permissible reliance on information provided by others. The Opinion Giver may rely on information provided by others if the Opinion Giver reasonably believes the provider is an appropriate source for the information. Consider specifying the Public Authority Documents, Borrower certificate and other documents so relied upon.

11. Compare Accord §8, describing the relationship of the Opinion Giver with Other Counsel giving opinions in the same transaction. Consider carefully the appropriate level of assurance to be given by an Opinion Giver receiving the legal opinions of Other Counsel.

12. The concept of "actual knowledge" is applied in §§15 through 17 of the Accord, as supplemented by ¶¶14 and 15 of the Report. The words "without independent investigation" are added to clarify the Accord definition of "actual knowledge."

13. The opinion in this paragraph is implicit under the Accord. See Accord Commentary ¶ 10.4(ii)(A).

14. The opinion in this paragraph is implicit under the Accord. See Accord Commentary ¶ 10.4(ii)(B). Actions by the "Borrower" include actions by its management, such as the board of directors of a corporation.

15. Accord Commentary ¶ 10.4(i) states that the Opinion Giver must have established that all of the conditions necessary under contract law for formation of a contract have occurred.

16. Note that this opinion covers only the form of documents, and does not cover the financing statements or other issues such as creation, attachment, perfection or priority of liens.

17. See Accord §10, which interprets this opinion as follows: (i) a contract has been formed; (ii) a remedy will be available with respect to each agreement of the Client in the contract or such agreement will otherwise be given effect; and (iii) any remedy expressly provided for in the contract will be given effect as stated. Contrary to the Accord position, however, this remedies opinion is not intended to give an implied usury opinion. In instances where a usury opinion is appropriate, it should be explicitly given. See Opinion 9.

18. See Accord §15.

19. See Accord §16.

20. This opinion is a deviation from the Accord, but is sometimes given in New Mexico.

21. Under ¶¶10 and 16 of the Report a usury opinion is implied in the remedies opinion. In New Mexico, a usury opinion is not implied by the remedies opinion and, when appropriate, a usury opinion should be explicitly given. See §7 of the Statement which discusses usury in New Mexico.

22. Most of these assumptions are taken from Accord §4. Assumption 21 was added by ¶4 of the Report. However, Report ¶4 includes an assumption that the Security Documents have been or will be duly recorded. Since this Opinion Letter does not include any opinion as to perfection or priority of any lien or security interest, the requirements of filing or recording are not assumed in this opinion. Assumptions 7, 22 and 23 contained in this Opinion Letter are not taken from the Accord. See §11 of the Statement.

23. See §4.3 of the Accord, which discusses assumptions 3, 4 and 5.

24. See Footnote 15 above. While the enforceability opinion is subject to a Bankruptcy and Fraudulent Conveyance Exception, these areas of law shed light on the issue of consideration. See [get cite §548] §548 of the Bankruptcy Code and §56-10-18 of the New Mexico Fraudulent Conveyance Act.

25. As to Assumptions 11, 12 and 13, See §4.5 of the Accord.

26. As to Assumptions 18, 19 and 20, See §9.2 of the Accord.

27. Accord §5 describes circumstances when assumptions may not be relied upon.

28. This sentence represents a deviation from the Accord. The Task Force does not consider it appropriate for the Opinion Giver to intentionally or unintentionally provide any implied opinion. Opinions should be expressly stated.

29. This list of excluded legal issues generally is taken from Accord §19.

30. This paragraph (iv) is taken from ¶17 of the Report. The Report ¶18 notes that this qualification is not inconsistent with the opinion in paragraph 4. Opinion paragraph 4 speaks to the form of documents, while paragraph (iv) covers the actual status of the lien or security interest. The Report notes that the status of the lien on Real Property Collateral is customarily dealt with solely by title insurance, and an opinion, if any, as to the status of a security interest on Personal Property Collateral should be given separately (if at all).

31. This is an additional provision which relates to issues encountered in New Mexico.

32. Qualifications 2, 3 and 4 of this Opinion Letter correspond to the General Qualifications described in §§11-14 of the Accord. Consistent with the presumption established by the Accord, this Opinion Letter is written as if the General Qualifications are to apply only to the Remedies Opinion (Paragraph 4 of this Opinion Letter). The Accord would permit any or all of the General Qualifications to be made applicable, by private ordering, to any opinion in addition to the Remedies Opinion. Similarly, the Report would permit the Generic Qualification in Paragraph 5 of this Opinion Letter to be made applicable to opinions in addition to the Remedies Opinion.

33. This is the "Bankruptcy and Insolvency Exception" in Accord §12.

34. This is the "Equitable Principles Limitation" in Accord §13.

35. These are the "Other Common Qualifications" in Accord §14, as modified by Report ¶¶12 and 13.

36. See Report ¶13, adding ¶14.1 to the Accord Commentary.

37. While the Accord language is "to the extent the action or inaction involves *gross* negligence...", this Opinion Letter broadens the concept to include any negligence. New Mexico has both statutory law and case law limiting the enforceability of agreements to indemnify a party against its own negligence including §56-7-1, §56-7-2 and *Herrera v. Amoco Prod, Co.*, 629 F.Supp. 474 (D.N.M. 1986) and *Metropolitan Paving Co. v. Gordon Herkenhoff & Assoc.*, 66 N.M. 41, 341 P.2d 460 (S.Ct. 1959).

38. The following additional subparagraphs might be added in the appropriate instance. These subparagraphs were part of the Accord §14 as set forth in the "Exposure Draft" of the Report, but were deleted from the Report in the "prepublication" and "publication" drafts:

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

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

(q) limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the Real Property portion of the Collateral.

Some or all of these additional qualifications may be appropriate in certain circumstances. Qualification (q) above might be expanded, in appropriate circumstances, to disclaim any "true sale" or "true lease" opinion, as well as

disclaiming any opinion that a purported absolute assignment of rents would be enforced as such.

39. See P. Ebling & S. Weise, *What a Dirt Lawyer Needs to Know about New Article 9 of the UCC*, 37 Real Prop. Prob. & Tr. J., No. 2, 191 (2002).

40. See Accord §13(e). Note that a guarantor may waive various rights under New Mexico law, including homestead exemption rights. See *First State Bank v. Muzio*, 100 N.M. 98, 666 P.2d 777 (1983).

41. This is a "Generic Qualification" as discussed in ¶11 of the Report. Paragraphs 11 and 11A of the Report include an extensive discussion of the use of Generic Qualifications and a number of alternative formulations of such provisions. The Report did not specifically endorse any particular form of Generic Qualification.

42. This subparagraph is added to address foreclosure by trustee's sale under the Deed of Trust Act.

43. The first sentence in this Paragraph follows Accord §10(b), as modified by the Report ¶8.

44. The second sentence in this Paragraph follows Accord §10(d)(i) as supplemented by the Report ¶9. Despite the wording in this Paragraph of this Opinion Letter, the Report notes that it would "not be uncommon" for a real estate secured transaction opinion to exclude any choice of law opinion, and that choice of law opinions, when given, often are given as reasoned opinions, and upon assumptions of factual matters having a bearing on the opinion conclusion. Nevertheless, the Report would presume (in the absence of a contrary indication in the opinion letter) that the Opinion Giver has addressed certain aspects of choice of law, such as whether: (i) the Opining Jurisdiction has sufficient nexus to the transaction, (ii) an Other Jurisdiction has a closer nexus, and (iii) the Other Jurisdiction has a "materially greater interest than the chosen state in the determination of the particular issue," citing Restatement (Second) of Conflict of Laws §187(2)(b)(1969). Note that New Mexico courts have not explicitly adopted the Restatement (Second) approach to selecting the law governing a contract. *Regan v. McGee Drilling Corp.*, 123 N.M. 68, 933 P.2d 867 (1997).

45. Compare with §55-9-504, which permits such general descriptions in a financing statement. Qualifications 17 through 23 are New Mexico state specific provisions which have been added by the Task Force.

46. See §48-7-9 which, in pertinent part, provides:

Every mortgage or other instrument securing a loan upon real estate and constituting a lien, or the full equivalent thereof, upon the real estate securing such loan, may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from

the time of recording as to all advances, whether obligatory or discretionary, made thereunder until such mortgage is released of record; provided, that the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage.

47. This exception is appropriate where the Collateral includes dwelling units subject to the New Mexico Version of the Uniform Owner-Resident Relations Act. §§47-8-1, *et seq.*

48. This provision is applicable in the event of an out-of-state guarantor. See *F.D.I.C. v. Hiatt*, 117 N.M. 461, 872 P.2d 879 (1994) and *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.*, 77 N.M. 92, 419 P.2d 465 (1966), which require certain minimum contacts between non-resident guarantors and the State of New Mexico.

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Letter C
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