

DRAFTING ESCROW AGREEMENTS IN BUSINESS AND REAL ESTATE

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1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. **(60 minutes)**

Escrow agreements are essential to most significant business and real estate transactions. They are mechanisms for allocating risks – whether for non-performance or contingent liabilities – among the parties to the transaction. In business transactions, an investor in a capital funding deal or a buyer in a merger transaction may be unwilling to close the transaction unless funds are held back until certain contingencies fail to materialize. In real estate deals from construction projects to leasing, counter-parties mitigate the risk of non-performance through escrow arrangements. But escrow agreements are fraught with potential conflicts and traps that may give rise to delays in finally closing a transaction. This program will provide you with a practical guide to drafting effective escrow agreements in business and real estate transactions, risk allocation, conflict avoidance and working with escrow agents.

- Drafting and using escrow agreements in business and real estate transactions – practical uses, risk allocation, and key terms
- Essential terms – scope, reps and warranties, money or other property held, instructions to agents, investments
- Escrow in mergers and acquisitions, capital raising, and ordinary business transactions
- Uses in construction and development deals, leasing, and in buying and selling property
- Notice and claim procedures for first-party claimants & mitigating risk of third-party and creditor claims
- Identifying the right escrow agent or title company, and clearing potential conflicts

Speaker:

Peter C. Buck is a partner in the Charlotte, North Carolina office of Robinson, Bradshaw & Hinson, P.A., where his practice focuses on mergers and acquisitions, energy law, banking and finance. Earlier in his career, he served as deputy general counsel of Duke Energy Corporation. He has been named in the book “The International Who’s Who of Corporate Governance Lawyers” and has served as chair of the corporations committee of the North Carolina Bar Association Business Law Section. He earned his A.B. from Duke University and his J.D. from Duke University School of Law.

John S. Hollyfield is of counsel and a former partner in the Houston office Norton Rose Fulbright, LLP. He has more than 40 years’ experience in real estate law practice. He formerly served as chair of the ABA Real Property, Probate and Trust Law Section, president of the American College of Real Estate Lawyers, and chair of the Anglo-American Real Property Institute. He has been named a “Texas Super Lawyer” in Real Estate Law by *Texas Monthly* magazine and is listed in *Who’s Who in American Law*. He is co-editor of *Modern Banking and Lending Forms* (4th Edition), published by Warren, Gorham & Lamont. He received his B.B.A. from the University of Texas and his LL.B. from the University of Texas School of Law.

Manuel A. Fernandez is partner in the Miami office of Akerman, LLP, where he has an extensive real estate practice representing commercial mortgage lenders, developers, and institutional and non-institutional investors in connection with the acquisition, development, financing, leasing and management of commercial and residential real estate assets and distressed real estate transactions. He also represents hedge funds, pension funds, and other real estate opportunity funds in connection with joint ventures. Mr. Fernandez received his B.A., *cum laude*, from the University of Miami and his J.D., *magna cum laude*, from the University of Miami School of Law.

PROFESSIONAL EDUCATION BROADCAST NETWORK

Speaker Contact Information

DRAFTING ESCROW AGREEMENTS IN BUSINESS AND REAL ESTATE

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**Drafting Escrow Agreements in Business & Real Estate
Teleseminar
February 23, 2015
1:00PM - 2:00PM
1.0 MCLE GENERAL CREDITS**

VBA Members \$75
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Date: February 23, 2015

Seminar Title: Drafting Escrow Agreements in Business & Real Estate

Location: Teleseminar - LIVE

Credits: 1.0 MCLE General Credit

Program Minutes: 60 General

Luncheon addresses, business meetings, receptions are not to be included in the computation of credit. This form denotes full attendance. If you arrive late or leave prior to the program ending time, it is your responsibility to adjust CLE hours accordingly.

ESCROW AGREEMENT

This ESCROW AGREEMENT (this "Agreement"), is made and entered into as of [____], 201A, by and among [BBB], a Delaware corporation ("Parent"), L[CCC], solely in its capacity as Stockholder Representative under the Merger Agreement (as defined below) (the "Stockholder Representative") and [DDD] Bank N.A., as escrow agent (the "Escrow Agent").

WHEREAS, Parent and the Stockholder Representative are parties to that certain Merger Agreement, dated as of [____], 2011A by and among Parent, Merger Sub, Inc., a Delaware corporation and wholly-owned subsidiary of Parent ("Merger Sub"), [EEE], a Delaware corporation (the "Company"), and the Stockholder Representative (as such agreement may be amended, restated or otherwise modified from time to time, the "Merger Agreement"). Each capitalized term which is used but not otherwise defined in this Agreement has the meaning assigned to such term in the Merger Agreement.

WHEREAS, the Merger Agreement requires Parent and the Stockholder Representative to enter into this Agreement;

WHEREAS, at the Effective Time, pursuant to the terms and conditions of Section 2.6(b) of the Merger Agreement, Parent will deliver to the Escrow Agent \$F,000,000 (the "Escrow Amount", and together with any and all interest and other amounts earned thereon from and after the date hereof and as reduced by any disbursements, withdrawals or losses on investments, the "Escrow Funds") which amount shall held in a segregated account to serve as a source of payment of any Excess Amount owed to Parent by the Stockholders pursuant to Sections 2.8(g)(ii) and (iii) of the Merger Agreement (the "Post Closing Payments").

NOW, THEREFORE, in consideration of the premises and mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

Section 1 Appointment of and Acceptance by Escrow Agent. The Parent and the Stockholder Representative hereby appoint and designate the Escrow Agent to acquire and maintain possession of the Escrow Funds on behalf of the Stockholders and to act as escrow agent for the purposes set forth herein, and the Escrow Agent hereby accepts such appointment and designation under the terms and conditions set forth herein.

Section 2 Receipt of Deposit; Establishment of Escrow; Interest.

2.1 At or prior to the Effective Time, Parent will deliver the Escrow Amount to the Escrow Agent, and the Escrow Agent will acknowledge to Parent and the Stockholder Representative the Escrow Amount upon receipt. The Escrow Agent shall hold in escrow, invest and disburse the Escrow Funds in accordance with the terms of this Agreement. Each of Parent and the Stockholder Representative confirms in writing to the Escrow Agent and to each other that the Escrow Funds are free and clear of all Liens, except as may be created by this Agreement and the Merger Agreement.

2.2 The Escrow Agent shall establish a segregated account in which to hold the Escrow Funds in which the Escrow Funds (or any portion thereof) may, from time to time, be invested (the "Escrow Account"). The Escrow Agent shall keep appropriate records to reflect the current value from time to time of the Escrow Funds, including appropriate adjustments for disbursements and income or losses earned in respect thereof.

Section 3 Investment of the Escrow Funds. At the joint written direction of Parent and the Stockholder Representative, the Escrow Agent will invest the Escrow Funds in one or more of: (i) [•] [Special Account], (ii) direct obligations of the United States of America, (iii) obligations for which the full faith and credit of the United States of America is pledged to provide for the payment of principal and interest, (iv) commercial paper rated of the highest quality by Moody's Investors Services, Inc. ("Moody's") or Standard & Poor's Corporation ("S&P"), (v) certificates of deposit issued by commercial banks having at least \$1 billion in assets, (vi) federally tax-exempt municipal obligations bearing interest and rated AAA or better by Moody's or rated AA or better by S&P, and/or (vii) money market funds authorized to invest in short-term securities issued or guaranteed as to principal and interest by the U.S. Government and repurchase agreements with respect to such securities (collectively, the "Permitted Investments") with the income from such investments being held by the Escrow Agent as part of the Escrow Funds. The Escrow Agent is hereby authorized to execute the purchase and sale of Permitted Investments

through the facilities of its own trading or capital markets operations. In the event that the Escrow Agent does not receive investment instructions to invest funds held in the Escrow Account, the Escrow Agent shall invest such funds in a [EEE] Bank, N.A. money market deposit account (“MMDA”). The rate of return on an MMDA varies from time to time based upon market conditions. The Escrow Agent may liquidate any investment in order to comply with payment instructions pursuant to this Agreement without any liability for any resulting loss resulting from investments made in accordance with the provisions of this Agreement. Any loss incurred from an investment will reduce the balance of the Escrow Funds. The Escrow Agent shall send statements to each of the parties hereto on a monthly basis reflecting activity in the Escrow Account for the preceding month.

Section 4 Escrow Agent’s Payment of the Escrow Funds. Except as otherwise provided herein, the Escrow Agent shall administer and release the Escrow Funds as follows:

- 4.1 If the Adjustment Amount is zero or if any Additional Merger Consideration is due to Stockholders pursuant to Section 2.8(g)(i) of the Merger Agreement, then, within five (5) Business Days after the Conclusive Date, Parent and the Stockholder Representative shall deliver a joint written instruction to the Escrow Agent instructing the Escrow Agent to promptly transfer the Escrow Funds then on deposit in the Escrow Account from the Escrow Account by wire transfer to the Paying Agent on behalf of the Stockholders.
- 4.2 If an Excess Amount that is less than or equal to the amount of the Escrow Funds then on account is due to Parent pursuant to Section 2.8(g)(ii) of the Merger Agreement, then, within five (5) Business Days after the Conclusive Date, Parent and the

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Stockholder Representative shall deliver a joint written instruction to the Escrow Agent instructing the Escrow Agent to promptly deliver from the Escrow Account by wire transfer (A) to Parent, the Excess Amount and (B) to the Paying Agent an amount in cash equal to, if greater than zero, (x) the Escrow Funds minus (y) the Excess Amount.

- 4.3 If an Excess Amount greater than the amount of the Escrow Funds then on deposit in the Escrow Account is due to Parent pursuant to Section 2.8(g)(iii) of the Merger Agreement, then, within five (5) business days after the Conclusive Date, Parent and the Stockholder Representative shall deliver a joint written instruction to Escrow Agent to promptly deliver from the Escrow Account by wire transfer to Parent all of the funds then in the Escrow Account.
- 4.4 Notwithstanding the foregoing, in accordance with Section 8.16(g) of the Merger Agreement, and prior to the delivery of any amounts to Parent or the Stockholders pursuant to this Section 4, the Stockholder Representative shall promptly provide a written notice (the “Expense Notice”) to Parent setting forth any out-of-pocket fees and expenses (including legal, accounting and other advisors’ fees and expenses, if applicable) reasonably incurred by the Stockholder Representative in performing any actions under the Merger Agreement or this Agreement that have not been reimbursed or otherwise paid by the Company (the “Stockholder Representative Expenses”). The Stockholder Representative shall be entitled to submit an Expense Notice and receive payment of the Stockholder Representative Expenses as and when such fees and expenses are incurred. Upon receipt of the Expense Notice, Parent, together with the Stockholder Representative, shall promptly deliver a joint written instruction to the Escrow Agent with instructions to distribute an amount equal to the Stockholder Representative Expenses from the Escrow Funds to an account specified by the Stockholder Representative in such joint written instruction.
- 4.5 The Escrow Agent shall pay the amounts set forth in a joint written instruction of Parent and the Stockholder Representative, promptly, and in any event within two (2) Business Days, following its receipt of such notice or instructions. Such payment shall be made by wire transfer of immediately available funds to the account specified in the joint written instruction or to any other account designated by the party entitled to receive such payment. The Escrow Agent shall act upon the instructions that it receives and shall not be responsible for determining whether any such instructions are in accordance with the Merger Agreement.

Section 5 Liability and Duties of the Escrow Agent.

- 5.1 The Escrow Agent’s duties and obligations under this Agreement shall be determined solely by the express

provisions of this Agreement which shall be deemed purely ministerial in nature, and no other duties shall be implied, and the Escrow Agent shall not pay the Escrow Funds, or any portion thereof, except in accordance with the terms of this Agreement. The Escrow Agent shall be under no obligation to refer to any documents other than the Merger Agreement and this Agreement and the instructions and requests delivered to the Escrow Agent hereunder. The Escrow Agent shall not be obligated to recognize, and shall not have any liability or responsibility arising under, any agreement to which the Escrow Agent is not a party, even though reference thereto

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may be made herein. The Escrow Agent shall neither be responsible for, nor chargeable with, knowledge of, nor have any requirements to comply with, the terms and conditions of any other agreement, instrument or document between Parent and the Stockholder Representative in connection herewith, if any, including, without limitation, the Merger Agreement, nor shall the Escrow Agent be required to determine if any person has complied with any such agreements, nor shall any additional obligations of the Escrow Agent be inferred from the terms of such agreements, even though reference thereto may be made in this Escrow Agreement. In the event of any conflict between the terms and provisions of this Escrow Agreement, those of the Merger Agreement, any schedule or exhibit attached to the Merger Agreement or any other agreement among Parent and the Stockholder Representative, the terms and conditions of this Escrow Agreement shall control. The Escrow Agent shall have no duty to solicit any payments which may be due it or the Escrow Account, nor shall the Escrow Agent have any duty or obligation to confirm or verify the accuracy or correctness of any amounts deposited with it hereunder.

- 5.2 The Escrow Agent, including its officers, directors, employees and agents, shall act in good faith and shall not be liable to anyone whomsoever by reason of any error of judgment or for any act done or step taken or omitted by the Escrow Agent, or for any mistake of fact or law or anything which the Escrow Agent may do or refrain from doing in connection herewith, unless caused by or arising out of the Escrow Agent's fraud, gross negligence or willful misconduct. The Escrow Agent may consult with counsel of its own choice and shall have full and complete authorization and protection for any action taken or suffered by the Escrow Agent hereunder in good faith and in accordance with the opinion of such counsel. Parent and the Stockholder Representative shall jointly and severally indemnify and hold the Escrow Agent and its affiliates and their respective successors, assigns, agents and employees (collectively, the "Indemnitees") harmless from and against any and all losses, damages, claims, liabilities, penalties, judgments, settlements, litigation, investigations, costs or expenses (including, without limitation, the reasonable fees and expenses of outside counsel) (collectively "Losses") arising out of or in connection with (i) the Escrow Agent's execution and performance of this Escrow Agreement, tax reporting or withholding, the enforcement of any rights or remedies under or in connection with this Escrow Agreement, or as may arise by reason of any act, omission or error of the Indemnitees, except in the case of any Indemnitee to the extent that such Losses are finally adjudicated by a court of competent jurisdiction to have been primarily caused by the gross negligence or willful misconduct of such Indemnitee, or (ii) its following any joint written instructions or other joint written directions from Parent and the Stockholder Representative which the Escrow Agent in good faith believes to be genuine, except to the extent that its following any such instruction or direction is expressly forbidden by the terms hereof. Such indemnification shall survive the Escrow Agent's resignation or removal, or the termination of this Agreement.
- 5.3 This Agreement is a personal one, the Escrow Agent's duties hereunder being only to Parent and the Stockholder Representative, their successors and permitted assigns, and to no other person whomsoever.

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- 5.4 The Escrow Agent may rely or act upon joint written instructions bearing a signature or signatures properly believed in good faith by the Escrow Agent to be genuine of Parent and the Stockholder Representative.
- 5.5 In case any property held by the Escrow Agent shall be attached, garnished or levied upon under a court order, or the delivery thereof shall be stayed or enjoined by a court order, or any writ, order, judgment or decree shall be made or entered by any court, or any order, judgment or decree shall be made or entered by any court affecting the property deposited under this Agreement or any part thereof, the Escrow Agent is hereby expressly authorized, in its sole discretion, to obey and comply with all writs, orders, judgments or

decrees so entered or issued, which is binding upon it as advised by legal counsel of its own choosing, whether with or without jurisdiction, and in case the Escrow Agent obeys or complies with any such writ, order, judgment or decree, the Escrow Agent shall not be liable to Parent or the Stockholder Representative or to any other person by reason of such compliance in connection with such litigation. Parent agrees to pay to the Escrow Agent on demand its reasonable costs, attorneys' fees, charges, disbursements and expenses in connection with such litigation, and such fees and expenses shall not be paid out of the Escrow Funds.

- 5.6 The Escrow Agent reserves the right to resign at any time by giving written notice of resignation to Parent and the Stockholder Representative specifying the effective date thereof. Within thirty (30) days after receiving such notice, Parent and the Stockholder Representative jointly shall appoint a successor escrow agent to which the Escrow Agent shall distribute the property then held under this Agreement, less the Escrow Agent's fees, costs and expenses, whereupon the Escrow Agent shall upon such distribution to a successor escrow agent, be discharged of and from any and all further obligations arising in connection with this Agreement, except for such liability and expenses which results from the Escrow Agent's fraud, gross negligence or willful misconduct. If a successor escrow agent has not been appointed or has not accepted such appointment by the end of such thirty-day period, the Escrow Agent may apply to a court of competent jurisdiction for the appointment of a successor escrow agent, and Parent and the Stockholder Representative shall each pay one-half of the costs, expenses and reasonable attorneys' fees which are incurred in connection with such proceeding. Until a successor escrow agent has accepted such appointment and the Escrow Agent has transferred the Escrow Funds to such successor escrow agent, the Escrow Agent shall continue to retain and safeguard the Escrow Funds until receipt of (i) a joint written instruction by Parent and the Stockholder Representative, or (ii) an order of a court of competent jurisdiction. Parent and the Stockholder Representative shall have the right upon their mutual written consent to substitute a new escrow agent by giving thirty (30) days prior joint written notice thereof to the Escrow Agent then acting. In such event, the Escrow Agent shall, within thirty (30) days upon receipt of written notice of such removal, account for and deliver to such substituted escrow agent the Escrow Funds.
- 5.7 In the event of any disagreement between Parent and the Stockholder Representative resulting in adverse claims or demands being made in connection with the Escrow Funds or in the event that the Escrow Agent is in doubt as to what action it should take

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hereunder, the Escrow Agent shall be permitted to refrain from taking any action and its sole obligation shall be to keep safely all property held in escrow until it shall be directed otherwise in writing by all of the other parties hereto or by a final order or judgment of a court of competent jurisdiction or to interplead all of the assets held hereunder into a court of competent jurisdiction, and thereafter be fully relieved from any and all liability or obligation with respect to such interpleaded assets and to retain the Escrow Funds until the Escrow Agent shall have received (i) an order of a court of competent jurisdiction directing delivery of the Escrow Funds, or (ii) a joint written instruction executed by Parent and the Stockholder Representative directing delivery of the Escrow Funds, at which time the Escrow Agent shall disburse the Escrow Funds in accordance with such court order or joint written instruction.

- 5.8 The Escrow Agent does not have any interest in the Escrow Funds but is serving as escrow holder only and has only possession thereof. If any payments of income from the Escrow Funds shall be subject to withholding regulations then in force with respect to United States taxes, Parent and the Stockholder Representative agree to provide the Escrow Agent with appropriate forms for or with respect to such withholding. This Section 5.8 and Sections 5.1 and 6 shall survive notwithstanding any termination of this Agreement or the Escrow Agent's resignation.
- 5.9 All income or losses from the cash and investments of the Escrow Funds held in the Escrow Account shall be taxable to Parent. The Escrow Agent shall report such income or loss on such tax returns as required by the Internal Revenue Service and any state and local departments of revenue. The Escrow Agent shall thereafter hold, maintain and utilize the Escrow Funds pursuant to the terms and conditions of this Agreement. At the Closing Parent shall provide the Escrow Agent with W-9 or W-8 IRS tax forms and the Escrow Agent will file the appropriate 1099 or other required forms pursuant to Federal and applicable state laws. A statement of citizenship will be provided if requested by the Escrow Agent. The Escrow

Agent shall have no liability for the payment of taxes.

Section 6 Compensation of the Escrow Agent. The Escrow Agent shall be entitled to fees and reimbursement for expenses, including, but not by way of limitation, the reasonable fees and costs of attorneys or agents which it may find necessary to engage in the performance of its duties hereunder, in accordance with the fee schedule attached hereto as Exhibit A. Such fees and expenses shall be paid, one-half by Parent and one-half by Stockholder Representative on behalf of the Stockholders. The Escrow Agent shall have, and is hereby granted, a prior lien upon any property, cash, or assets of the Escrow Account, with respect to its unpaid fees and non-reimbursed expenses, superior to the interests of any other persons or entities and shall be entitled and is hereby granted the right to set off and deduct any unpaid fees and/or non-reimbursed expenses, that have not been paid within sixty (60) days from the date of the invoice in question, from amounts on deposit in the Escrow Account, on a pro rata basis.

Section 7 Funds Transfer Agreement. In the event funds transfer instructions are given (other than in writing at the time of the execution of this Agreement), whether in writing, or by telecopier, the Escrow Agent is authorized to seek confirmation of such instructions by telephone call-back to the person or persons designated on Exhibit B hereto, and the Escrow Agent may

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rely upon the confirmations of anyone purporting to be the person or persons so designated. Each funds transfer instruction shall be executed by an authorized signatory, a list of such authorized signatories is set forth on Exhibit B. The undersigned is authorized to certify that the signatories on Exhibit B are authorized signatories. The persons and telephone numbers for call-backs may be changed only in writing actually received and acknowledged by the Escrow Agent. The parties hereto acknowledge that such security procedure is commercially reasonable. It is understood that the Escrow Agent and the beneficiary's bank in any funds transfer may rely solely upon any account numbers or similar identifying number provided by any party hereto to identify (i) the beneficiary, (ii) the beneficiary's bank or (iii) an intermediary bank. The Escrow Agent may apply funds for any payment order it executes using any such identifying number, even where its use may result in a person other than the beneficiary being paid, or the transfer of funds to a bank other than the beneficiary's bank, or an intermediary bank, so designated.

Section 8 Notices. All notices, demands or other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when delivered personally, mailed by certified or registered mail, return receipt requested and postage prepaid, or sent via a nationally recognized overnight courier, or sent via facsimile, to the recipient with telephonic confirmation by the sending party. Such notices, demands and other communications will be sent to the address indicated below:

Notices to Parent:

Any party may change the address to which notices are to be delivered by giving the other parties notice in the manner provided in this Section 8. Notwithstanding the above, in the case of communications delivered to the Escrow Agent pursuant to this Section 8, such communications shall be deemed to have been given on the date received by the Escrow Agent.

Section 9 Miscellaneous.

- 9.1 **Instructions by Parent and Stockholder Representative.** Any instructions or notice delivered by Parent and/or the Stockholder Representative pursuant to this Agreement shall only be valid if signed by a person listed on Exhibit B under the heading of Parent and the Stockholder Representative, as applicable.
- 9.2 **Binding Effect; Assignment.** Except as otherwise provided herein, this Agreement may not, without the prior written consent of each of the other parties hereto, be assigned by Parent or the Stockholder Representative by operation of law or otherwise, and any attempted assignment shall be null and void; provided, that upon prior written notice to each of the Escrow Agent and the Stockholder Representative, Parent may,

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without prior written consent of any other party hereto, (i) assign any or all of its rights hereunder to one or more of its Affiliates, (ii) designate one or more of its Affiliates to perform its obligations hereunder, (iii) assign this Agreement in connection with any merger, sale of substantially all of its or any of its Affiliate's assets, or sale of all of its or any of its Affiliate's outstanding equity interests, and/or (iv) assign its rights, but not its obligations, under this Agreement to any of its, or any of its Affiliate's, financing sources (in any or all of which cases described in subclause (i), (ii), (iii) or (iv), Parent shall nonetheless remain responsible for the performance of all of its obligations hereunder). Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns.

- 9.3 Severability. If any provision of this Agreement for any reason shall be held to be illegal, invalid or unenforceable, such illegality shall not affect any other provision of this Agreement, this Agreement shall be amended so as to enforce the illegal, invalid or unenforceable provision to the maximum extent permitted by applicable Law, and the parties shall cooperate in good faith to further modify this Agreement so as to preserve to the maximum extent possible the intended benefits to be received by the parties.
- 9.4 No Strict Construction. The language used in this Agreement will be deemed to be the language chosen by Parent and the Stockholder Representative to express their mutual intent, and no rule of strict construction will be applied against any person.
- 9.5 Headings. The headings used in this Agreement are for convenience of reference only and do not constitute a part of this Agreement and will not be deemed to limit, characterize or in any way affect any provision of this Agreement, and all provisions of this Agreement will be enforced and construed as if no heading had been used in this Agreement.
- 9.6 Counterparts. This Agreement may be executed and delivered (including by facsimile transmission) in one or more counterparts, any one of which need not contain the signatures of more than one person, but all such counterparts taken together will constitute one and the same instrument.
- 9.7 Governing Law. All issues and questions concerning the construction, validity, enforcement and interpretation of this Agreement shall be governed by, and construed in accordance with, the laws of the State of New York without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of New York or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of New York.
- 9.8 Amendment. This Agreement may not be amended or modified, except by a written instrument executed by Parent, the Stockholder Representative and the Escrow Agent.

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- 9.9 Termination. This Agreement shall remain in effect unless and until (i) the Escrow Funds are distributed in full, or (ii) it is terminated in a written instrument executed by Parent and the Stockholder Representative, in which event, termination shall take effect no later than ten (10) Business Days after notice to the Escrow Agent of such termination. Termination of this Agreement shall not impair the obligations of Parent and the Stockholder Representative, as applicable, set forth in Sections 5.1, 5.8 and 6, which such obligations shall survive.
- 9.10 Merger or Consolidation. Any banking association or corporation into which the Escrow Agent (or substantially all of its corporate trust business) may be merged or converted or with which the Escrow Agent may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Escrow Agent shall be a party, or any banking association or corporation to which all or substantially all of the corporate trust or escrow business of the Escrow Agent shall be sold or otherwise transferred, shall succeed to all the Escrow Agent's rights, obligations and immunities hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding.
- 9.11 Entire Agreement. This Agreement and in regards to the parties to this Escrow Agreement other than the Escrow Agent the agreements and documents referred to herein contain the entire agreement and understanding among the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings, whether written or oral, relating to such subject matter in any way. In

regards to the Escrow Agent, this Escrow Agreement contains the entire agreement and understanding among the parties hereto with respect to the subject matter hereof.

- 9.12 No Third-Party Beneficiaries. This Agreement is for the sole benefit of the parties hereto and their permitted successors and assigns and nothing herein expressed or implied shall give or be construed to give any Person, other than the parties hereto and such permitted successors and assigns, any legal or equitable rights hereunder.
- 9.13 Waiver of Jury Trial. Each of the parties hereto waives any right it may have to trial by jury in respect of any litigation based on, arising out of, under or in connection with this Agreement or any course of conduct, course of dealing, verbal or written statement or action of any party hereto.
- 9.14 Jurisdiction. Each of the parties hereto submits to the jurisdiction of any state or federal court sitting in the County of New York, State of New York, in any action or proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the action or proceedings may be heard and determined in any such court and hereby expressly submits to the personal jurisdiction and venue of such court for the purposes hereof and expressly waives any claim of improper venue and any claim that such courts are an inconvenient forum. Each of the parties hereby irrevocably consents to the service of process of any of the aforementioned courts in any such suit, action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to its address set forth in Section 8, such service to become effective five (5) days after such mailing.

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- 9.15 Limited Liability. IN NO EVENT SHALL THE ESCROW AGENT BE LIABLE, DIRECTLY OR INDIRECTLY, FOR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL LOSSES OR DAMAGES OF ANY KIND WHATSOEVER (INCLUDING BUT NOT LIMITED TO LOST PROFITS), EVEN IF THE ESCROW AGENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES AND REGARDLESS OF THE FORM OF ACTION.
- 9.16 Force Majeure. Notwithstanding any other provision of this Agreement, the Escrow Agent shall not be obligated to perform any obligation hereunder and shall not incur any liability for the nonperformance of any obligation hereunder to the extent that the Escrow Agent is delayed in performing, unable to perform such obligation because of acts of God, war, terrorism, fire, floods, strikes, electrical outages, equipment or transmission failures, or other causes reasonably beyond its control.
- 9.17 Identification. Parent and the Stockholder Representative acknowledge that the Escrow Agent, pursuant to the requirements of the USA PATRIOT Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the "Patriot Act"), is required to obtain, verify and record information that identifies each person who opens an account and, upon request, Parent and the Stockholder Representative agree to provide the Escrow Agent with information sufficient to establish their identity in accordance with the Patriot Act.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "**Escrow Agreement**") is made and entered into on this 10th day of July, 2014, by and among ~~100 GRANT DEED~~ (the "**Seller**"), ~~GRANT AVENUE PROPERTIES LLC~~ (the "**Purchaser**") and ~~STEWART TITLE GUARANTEE COMPANY~~ (the "**Escrow Agent**").

RECITALS

A. Seller and Purchaser have entered into that certain Real Estate Purchase and Sale Agreement of even date herewith, as the same may hereafter be amended and/or assigned as provided therein (the "**Agreement**"), providing for the sale by Seller of property commonly known as ~~100 Grant Avenue~~ Avenue, San Francisco, CA (the "**Property**").

B. The parties wish to enter into this Escrow Agreement to provide for (1) the holding and disposition of the earnest money under the Agreement, and (2) the closing of the transaction contemplated by the Agreement.

NOW, THEREFORE, the parties hereto agree as follows:

1. On or before July 14, 2014, Purchaser shall deliver to Escrow Agent funds in the amount of \$3,500,000 (the "**Earnest Money**"). Escrow Agent shall deliver to Purchaser an acknowledgment of receipt of a check or funds representing the Earnest Money.

2. On or before July 10, 2014 (or July 15, 2014 if Purchaser has duly extended in accordance with **Section 23(o)** of the Agreement) at 5:00 p.m. (Chicago time) (the "**Approval Date**") Purchaser may deliver to Escrow Agent a notice in the form of **Schedule 1** attached hereto that Purchaser has elected to terminate the Agreement pursuant to **Section 10(a)** of the Agreement (the "**Approval Termination Notice**"). In the event that Purchaser shall deliver to Escrow Agent the Approval Termination Notice on or before the Approval Date, Escrow Agent shall promptly deliver to Purchaser the Earnest Money, together with all interest earned thereon, and this Escrow Agreement shall terminate.

3. Unless terminated pursuant to **Paragraph 2** above, on or before the Closing Date set forth in the Agreement:

a. Seller will deposit or will cause to be deposited with the Escrow Agent the following documents:

- (1) Grant Deed executed by Seller (the "**Deed**");
- (2) Bill of Sale executed by Seller (the "**Bill of Sale**");
- (3) Assignment and Assumption (of contracts, licenses and leases) executed by Seller (the "**Assignment and Assumption**");
- (4) Non-Foreign Affidavit executed by Seller;
- (5) Evidence of Seller's good standing and existence and authority to perform its obligations under the Agreement;

- (6) Current Rent Roll; and
- (7) A certificate executed by Seller recertifying the representations and warranties contained in the Agreement.

b. Purchaser will deposit or will cause to be deposited the following documents:

- (1) Purchaser's counterpart of the Assignment and Assumption executed by Purchaser; and
- (2) Wire transfer of funds in the amount required to close as shown on the Closing Statement;

c. Purchaser and Seller (or their respective attorneys) will jointly deposit the following:

- (1) Closing and Proration Statement (the "**Closing Statement**"); and
- (2) Transfer Tax Declarations, if applicable;

4. When Escrow Agent has received all of the deposits listed in **Paragraph 3** above and is prepared to issue an Owner's Policy of Title Insurance ("**Title Policy**") having an effective date as of the date the Deed is recorded, in the amount of the Purchase Price and insuring the title of Purchaser in the Property, subject only to those matters permitted by the Agreement, Escrow Agent is then authorized and instructed to simultaneously proceed as follows:

- a.** Record the Deed.
- b.** Pay the disbursements as shown on the Closing Statement from the funds deposited by Purchaser.
- c.** Deliver to Purchaser the Title Policy, the recorded Deed, the Bill of Sale, one original of the Assignment and Assumption, the Rent Roll, the recertification of the representations and warranties, the Closing Statement and copies of all other deposits.
- d.** Deliver to Seller one original of the Assignment and Assumption, the Closing Statement and copies of all other deposits made hereunder.

5. In the event all escrow deposits have not been received herein, if Title Company is not prepared to issue the Title Policy or if Escrow Agent is not able to comply with the other instructions contained herein on or before 2:00 p.m. (Chicago time) on the Closing Date, Escrow Agent is hereby authorized and directed to continue to comply with this Escrow Agreement until Escrow Agent has received a written demand from any party hereto for the return of the deposits made hereunder by said party. Upon receipt of such demand, Escrow Agent is hereby authorized and directed to return to the party making such demand the deposits made by such party without notice to any other party and may return all remaining deposits to the respective depositors thereof, except that, notwithstanding the terms hereof, (A) joint deposits shall be destroyed, and (B) the Earnest Money, together with interest earned thereon,

shall be retained by Escrow Agent, until Escrow Agent receives a joint instruction executed by Purchaser and Seller. Notwithstanding the foregoing, if the Deed has been recorded, then prior to returning any deposits to Purchaser, Escrow Agent must receive and record a quit claim deed of reconveyance reconveying the Property to the grantor in the Deed deposited by Seller, and Title Company must be prepared to issue an owner's policy of title insurance in the amount stated herein insuring the title of Seller, free and clear of acts done or suffered by or judgments against Purchaser. Seller shall pay for the recording of the reconveyance deeds and the title policy.

6. Escrow Agent shall invest all funds held hereunder in such investments, or types thereof, as shall be designated in writing by Purchaser by the execution of Title Company's standard investment instructions. If Purchaser does not designate any investments, then the funds shall be held by Escrow Agent in a non-interest bearing account, in a financial institution which has FDIC insurance covering up to \$250,000 of such funds. Interest shall accrue to the benefit of, and risk of loss shall be borne by, Purchaser.

7. It is agreed that the Escrow Agent shall have no obligation or liability hereunder except as a depository to retain the cash that may be deposited with it hereunder and to dispose of the same in accordance with the terms hereof. The Escrow Agent shall be entitled to rely and act upon any written instrument received by it from either party, and if a corporation, purporting to be executed by an officer thereof, and if a partnership, purporting to be executed by a general partner thereof and shall not be required to inquire into the authority of such officer or partner or the correctness of the facts stated in said instrument. By acceptance of this Escrow Agreement, Escrow Agent agrees to use its best judgment and good faith in the performance of any of its obligations and duties under this Escrow Agreement and shall incur no liability to any person for its acts or omissions hereunder, except for those acts or omissions which may result from its gross negligence or willful misconduct. Upon disposition by the Escrow Agent, in accordance with the terms hereof, of the cash deposited with the Escrow Agent hereunder, the Escrow Agent shall be fully and finally released and discharged from any and all duties, obligations, and liabilities hereunder.

8. The Escrow Agent shall be reimbursed for any reasonable expenses incurred by it hereunder, including the reasonable fees of any attorneys that it may wish to consult in connection with the performance of its duties hereunder. Such compensation and expenses shall be paid and reimbursed to the Escrow Agent one-half by Purchaser and one-half by Seller.

9. In the event of a dispute between any of the parties hereto as to their respective rights and interests hereunder, the Escrow Agent shall be entitled to hold any and all cash then in its possession hereunder until such dispute shall have been resolved by the parties in dispute and the Escrow Agent shall have been notified by instrument jointly signed by all of the parties in dispute, or until such dispute shall have been finally adjudicated by a court of competent jurisdiction.

10. Any notice or other communication that any party may be required or may desire to give hereunder shall be delivered as set forth in the Agreement.

11. The Escrow Agent hereby consents and agrees to all of the provisions hereof, and agrees to accept, as Escrow Agent hereunder, all cash and documents deposited hereunder, and agrees to hold and dispose of said cash and documents deposited hereunder in accordance with the terms and provisions hereof.

12. This Escrow Agreement and all of the provisions hereof shall be binding upon and shall inure to the benefit of the parties hereto and their respective legal representatives, successors and assigns.

13. This Escrow Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

[Signature Page Follows]

Schedule 1 to Escrow Agreement

APPROVAL TERMINATION NOTICE

The undersigned does hereby affirm and state that the undersigned, as Purchaser under that certain Real Estate Purchase and Sale Agreement dated July 10, 2014, as amended and/or assigned, providing for the sale of property commonly known as ~~1234 Street~~ Avenue, San Francisco, CA, Purchaser has terminated the Agreement pursuant to **Section 10(a)** thereof.

The undersigned hereby demands return of all earnest money deposited under the Agreement, including interest thereon, in accordance with the Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Approval Termination Notice on this ___ day of July, 2014.

PURCHASER

~~1234 STREET AVENUE PROPERTIES LLC~~

By: ~~Venture Capital LLC~~ Inc., a Delaware corporation, sole member

By: _____
Name: _____
Title: _____