

American Bar Association Annual Meeting
2011 Toronto

The Purchase and Sale Agreement: Negotiating
Strategies from a US and International Perspective

Saturday, August 6, 2011
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Metro Toronto Convention Center
Room 715B, 700 Level, MTCC, South Building
255 Front Street West
Toronto, ON Canada

Speakers:

Barbara Gregortatos

John Hutmacher

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Dan Matsuda

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Moderator: Jin Liu

R. Terry Carroll II
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PURCHASE AND SALE AGREEMENT²

THIS AGREEMENT (this “**Agreement**”) dated _____, 20__ (the “**Effective Date**”) by and among _____, a _____, (“**Seller**”); _____, a _____, (“**Purchaser**”); and _____, a _____ (“**Escrow Agent**” or “**Title Company**”);

RECITALS:

A. Seller owns a parcel of land in _____, _____ County, _____, with a street address of _____, and commonly referred to as [trade name, if any], which is improved

¹ This annotated Purchase and Sale Agreement is prepared by R. Terry Carroll II (King & Spalding LLP, Atlanta, Georgia), Barbara Gregoratos (Jones Day, San Francisco, California), Joshua M. Kamin (King & Spalding LLP, Atlanta, Georgia), Stephen A. Linde (Simone Development Companies, Bronx, New York), Jin Liu (Carlton Fields, P.A., Tampa, Florida), and Mitchell R. Meisner (Honigman Miller Schwartz and Cohn LLP, Detroit, Michigan).

² An agreement of purchase and sale (or “purchase agreement,” “sale contract,” etc.—the terms are interchangeable) is the standard document governing the contractual relationship between a buyer and seller of real property up to the point when the actual conveyance of title and payment of the price (usually referred to as the “closing”) occurs. In essence, it provides a road map for the pre-sale or pre-closing period. Some provisions of the agreement may also be made to apply after the closing. In a commercial real estate transaction, the purchase agreement is typically heavily negotiated document. Although a contract is formed upon signing, the agreement typically contains a number of interim rights benefiting the parties (especially the buyer) and conditions that need to be satisfied or waived in order to get to the point of closing the sale. These conditions focus especially on allowing the buyer sufficient time and opportunity to evaluate the real estate assets to be purchased, including with respect to physical and environmental condition, economic performance, and status of title and land use rights. Thus, if during the period leading up to the closing the buyer becomes dissatisfied with an aspect of the property, the buyer will usually have the right to decline to proceed with the purchase. Sometimes this situation simply leads to another round of negotiation of price or other terms.

There is really no completely standard or neutral form of purchase agreement—sometimes the agreement will be more pro-buyer or pro-seller, and the list and outline of terms will vary. However, there are a number of fairly standard issues covered, such as: identification of the assets to be sold, earnest money deposits, title conditions and examination of title, inspection and evaluation of the property, conditions that must be satisfied before each party is required to close the transaction, identification of the closing documents and what happens at closing, representations and warranties given by the parties, proration (division) of property taxes, rents and other ongoing expenses and revenues, default provisions and general contract terms. Some purchase agreements will also include as exhibits agreed forms of conveyance documents to be signed and delivered at closing, such as deeds, bills of sale, assignment of leases, assignments of contracts and warranties pertaining to the property, general contract terms, and so forth.

Keep in mind also that the legal framework for the formation and interpretation of an enforceable purchase agreement is governed in the U.S. by state law, and for that reason, some terms may differ as to phrasing and legal effect depending on what state’s law governs (usually the law of the state where the property is located). Notwithstanding, the laws tend to be substantially similar from jurisdiction to jurisdiction, and this form agreement represents a good overview of what would be practiced in most U.S. state jurisdictions. Perhaps universally, a contract for the sale and purchase of real property will have to be in writing to be valid and enforceable.

with a multi-tenant office building, as well as certain related real and personal property, which is, collectively, more specifically defined below as the Property.

B. Purchaser desires to buy the Property.

C. Seller and Purchaser have agreed to set forth in this Agreement the terms governing the purchase and sale of the Property.

NOW, THEREFORE, for Ten Dollars (\$10.00), in consideration of the mutual covenants and promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:³

ARTICLE 1 PURCHASE AND SALE

1.1 Agreement of Purchase and Sale. Subject to the terms of this Agreement, Seller will sell and Purchaser will purchase the Property, comprising the Land, the Related Rights, the Tangible Personal Property, the Leases and the Intangible Personal Property, as such terms are defined in clauses 1. 2. 1 through 1.2.6 below.⁴

1.2 Definition of “Property”. For all purposes hereof, the “Property” shall be deemed to include the following real and personal property assets:⁵

1.2.1 Land. The land consisting of approximately ___ acres, located in _____, _____ County, _____ and legally described on Exhibit A (the “**Land**”);⁶

1.2.2 Easements and Appurtenances. The rights, easements and appurtenances pertaining to the Land including Seller’s interest (if any) in and to any adjacent streets, alleys or rights-of way (the “**Related Rights**”);⁷

³ This is a typical statement of mutual consideration to bind the parties to the contract. Note that the money consideration (\$10.00) is “nominal”—but this is generally viewed as satisfactory.

³ This paragraph contains the principal mutual promises made between the seller and buyer. However, as noted, there are numerous conditions that will have to be satisfied before the parties (especially the buyer) are actually irrevocably obliged to “sell” and “purchase”.

⁵ Although this is a real property transaction, there may be some personal property assets associated with the real estate, particularly a fully built and leased commercial development, so personal property is covered in the list of assets.

⁶ A legal description (of which there are several possible formats) describes the actual land parcel to be sold along with buildings and other components. The legal description may be found in an earlier deed, in title insurance documents or developed by a surveyor. The legal description will be used to index the property in the land or real estate registry upon recording (registering) the deed. Typically approximate acreage is given and the city or county where the property is located is identified, though with the legal description attached, these are not really necessary.

⁷ Easements and other rights that belong to the land probably do not actually have to be listed since conveyance of a parcel of land generally will automatically convey the associated “appurtenances” such as easements benefiting the property, contingent rights to the land underlying and adjoining public street, and other similar rights. However, it is

1.2.3 Improvements. The buildings and other physical structures on the Land, [including _____] (the “**Improvements**”);

1.2.4 Tangible Personal Property. Seller’s interest in all tangible personal property located on the Land or within the Improvements, and used exclusively in connection with the ownership, use, maintenance or operation of the Land and the Improvements (the “**Tangible Personal Property**”);⁸

1.2.5 Leases. Seller’s interest as landlord under all agreements listed on Exhibit B (the “**Leases**”);⁹ and

1.2.6 Contracts; Warranties; Intangibles. Seller’s interest under and to (i) the assignable Service Contracts (as defined in Section 6.1.5 of this Agreement), (ii) all assignable warranties and guaranties issued to or inuring to the benefit of Seller in connection with the Improvements or Tangible Personal Property, (iii) all assignable licenses and permits held by Seller at the time of Closing relating to the operation of the Property (the “**Licenses**”), (iv) Seller’s tradenames used in connection with the Land and the Improvements, and (v) all environmental studies and reports, promotional materials, surveys, building plans, monthly parking contracts and lease files (including any original leases) possessed by Seller and used by Seller exclusively in connection with the Land and the Improvements (items (i) - (v) are collectively known as the “**Intangible Property**”).¹⁰

1.3 Property Defined. The Land, the Related Rights, the Improvements, the Tangible Personal Property, the Leases and the Intangible Personal Property are collectively called the “**Property**”.

ARTICLE 2 PURCHASE PRICE AND EARNEST MONEY

customary to list these expressly. Similarly, improvements (such as buildings and other structures) are usually legally conveyed in conveying the legally described parcel of land, but it is appropriate to identify them separately, and, sometimes the buildings may be separately owned .

⁸ Often commercial real estate does not really have much in the way of tangible personal property—sometimes some maintenance and cleaning equipment , furniture or equipment in common areas of the building, and so on. In some commercial buildings (e.g., a hotel), personal property can be more significant. Still, whatever it is, the agreement should refer to it as part of the property to be purchased and state expressly if anything on the premises is not to be conveyed.

⁹ The list of leases attached to a purchase agreement can be quite elaborate, including the term of each lease, location of the leased space, length of term, rental amounts, specific rights of each tenant (such as an option to extend the lease), and other terms. This list is often referred to as a “rent roll”, and the seller may be asked to certify as to its accuracy.

¹⁰ This is a typical list of other, miscellaneous personal property rights that a buyer will expect to get along with the real property itself.

2.1 Purchase Price. The purchase price (“**Purchase Price**”) for the Property is _____ (\$_____), payable by wire transfer of immediately available funds, against which the Earnest Money (as defined below) shall be applied, subject to adjustment at closing as provided in Section 5.4.

2.2 Earnest Money. No later than two (2) business days after the Effective Date, Purchaser must deposit with the Escrow Agent _____ (\$_____) (together with any additional deposits and all interest accrued, the “**Earnest Money**”). If the closing hereunder occurs, the Earnest Money will be applied towards payment of the Purchase Price. The Escrow Agent will hold and dispose of the Earnest Money strictly in accordance with Article 9.¹¹

2.3 Consideration. If Purchaser is entitled to a return of the Earnest Money under this Agreement, then Escrow Agent will deliver One Hundred Dollars (\$100.00) of the Earnest Money to Seller as good and sufficient independent consideration for entering into this Agreement. In addition, Seller acknowledges that Purchaser, in performing its due diligence investigation of the Property, will incur expenses, and that Purchaser’s expenses also constitute good, valuable and sufficient consideration for this Agreement.¹²

ARTICLE 3 TITLE AND SURVEY

3.1 Title Examination. No later than 10 days prior to the Inspection Period Termination Date (the “**Title Objection Date**”), Purchaser must, at Purchaser’s expense, cause the Title Company to issue to Purchaser an owner’s title insurance commitment (as initially issued to Purchaser, the “**Title Commitment**”) and deliver the Title Commitment to Seller, along with copies of all exception matters listed in the Title Commitment.¹³

¹¹ Typically, the parties will request that the title insurance company will act as the escrow agent to hold the deposit and also to handle closing documents. The title company (or other person acting as escrow agent) may be asked to sign the purchase agreement to acknowledge receipt of the deposit and the other responsibilities of the escrow agent. If the earnest money deposit is paid after the agreement is signed, the title company should notify the parties that it has been received. If the deposit is not received by the stated deadline, the seller would likely be entitled to elect to terminate the purchase agreement and its further obligations.

¹² One may argue that if nominal consideration is needed, it should be added to the statement of consideration in the NOW, THEREFORE clause, which is typical. Therefore, this clause may not be typical in many jurisdictions.

¹³ U.S. real estate practitioners rely heavily on the system of title insurance to provide a platform for the parties to (i) ascertain the status of title to the property in question and which person or persons hold various possible interests in the property, and (ii) to give financial assurance, in the form of title insurance, to the buyer that the buyer will receive good title to the real property when the purchase is completed. The title insurance company is charged with searching the official local property registry (recording office, register of deeds, or other terms) to see what interests have been recorded against the property and reporting this information to the buyer and seller. A title commitment is a per-closing statement by the title insurance company in which it (i) shows who owns the real estate, (ii) discloses other interests in the property shown (or suggested to exist) in the property records, and (iii) indicates the conditions that have to be satisfied at or before closing so that it can insure the title that the buyer receives in commercially acceptable condition. It is difficult to explain without a very lengthy discussion how the title insurance system works, but it is a vital and practical element of the property conveyancing (and financing) system in the U.S. today and can be important in both identifying and resolving problems relating to title to real property

3.2 Survey. On or before the Title Objection Date, Purchaser must, at Purchaser's expense, deliver to Seller a survey of the Property (the "**Survey**") which has been drawn in accordance with the 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys adopted by ALTA/ACSM, and with all Table A requirements other than 5, 12 and _____, by a licensed surveyor or engineer reasonably approved by Seller.¹⁴

3.3 Title Objections; Cure of Title Objections.

3.3.1 Objections. No later than the Title Objection Date, Purchaser will notify Seller in writing and in reasonable detail of what objections, if any, Purchaser has to the Title Commitment or Survey (the "**Title Objections**"), other than the Permitted Exceptions (as defined below) to which Purchaser is not permitted to object. Prior to notifying Seller of any Title Objections Purchaser must endeavor in good faith to cause Title Company to modify and update the Title Commitment to reflect Purchaser's requested corrections and revisions. Failure to so timely notify Seller is deemed a Purchaser waiver of Purchaser's rights under this Section 3.3.¹⁵

3.3.2 Seller Remedies. Seller must notify Purchaser no longer than five (5) calendar days after receiving Purchaser's notice of Title Objections under Section 3.3.1 above of whether Seller will cause any Title Objections to be removed from title, insured over or cured (either by endorsement or by "writing over" in a manner satisfactory to Purchaser). Seller's failure to provide such notice to Purchaser within the required period as to the action Seller will take with respect to any Title Objection is deemed an election by Seller to not remove from title, insure over or cure the Title Objection.

3.3.3 Purchaser Termination Right. If Seller so notifies or is deemed to have notified Purchaser elected under Section 3.3.2 that Seller will not remove, insure over or cure

and to facilitating closing of transactions. Appropriate escrow arrangements through the title company, including handling the funds used to pay the purchase price and other costs, can be part of that facilitation.

¹⁴ It is good practice for a buyer to obtain a survey of the real estate prior to purchasing and as a guide to understanding the state of title. Typically, the title insurance commitment (title report) and the survey will be reviewed together. A survey will typically show the boundaries of the land, where easements are located, and if the property is developed, the location of buildings, paved areas, driveways and sidewalks, various utility structures, and a variety of other information. ALTA/ACSM stands for American Land Title Association/American Congress of Surveying and Mapping, trade associations for title insurers and surveyors particularly, The "standard detail" and "table" items indicate details to be covered on the survey. This provision rather favors the seller. Although the buyer should get a survey, there is no clear reason why the seller should require this to be done. As to who pays, it is negotiable, though it is probably more usual for the buyer to pay the cost of a survey, just as it is more typical, although, again, negotiable, for the seller to pay the cost of title insurance searches and title insurance premiums.

¹⁵ Reviewing the title information is part of the buyer's examination of the state of the property prior to completing its purchase (often referred to as the buyer's "due diligence"). If the buyer finds matters relating to title that it objects to (for example, there is a mortgage lien encumbering the property, a third party appears to have a claim of some interest in the property, or there is an unacceptable easement right—e.g., a right to have a driveway or utility line in the middle of the area where the buyer plans to build a building), the buyer may object. Then the parties have to decide what to do about the objection, if anything. This paragraph places much of the burden on the buyer, and would typically be viewed as rather pro-buyer. "Permitted Exceptions", which the parties agree may not be objected to by buyer in order to terminate the agreement, are further discussed in footnote 17.

any or all of the Title Objections, then Purchaser has until the Inspection Period Termination Date to notify Seller whether it will (i) proceed with the purchase and acquire the Property subject to the Title Objections and without any reduction in the Purchase Price, in which case the Title Objections are deemed approved, or (ii) terminate this Agreement, in which case the Earnest Money (subject to Section 2.2) will be refunded to Purchaser. Purchaser's failure to give Seller such notice shall be deemed to be an election by Purchaser under clause (i) above.

3.3.4 No Obligation to Cure. Notwithstanding anything to the contrary, Seller has no obligation to take any steps, bring any action, or incur any costs, effort or expenses whatsoever regarding any Title Objection.¹⁶

3.4 Permitted Exceptions. “**Permitted Exceptions**” includes and refers to: (i) all exceptions to title in the Title Commitment approved or deemed approved by Purchaser pursuant to Section 3.3; (ii) the rights and interests of parties claiming under Leases; (iii) Title Company's standard printed exceptions, exclusions and conditions contained in an ALTA Owner's Title Policy; (iv) zoning ordinances and regulations and other laws or regulations governing use or enjoyment of the Property; (v) matters affecting title created by, on behalf of, or with the consent of Purchaser; and (vi) liens to secure taxes and assessments not yet due and payable.¹⁷

ARTICLE 4 INSPECTION

4.1 Right of Inspection.

4.1.1 Seller hereby grants to Purchaser and Purchaser's agents, consultants and contractors, subject to the conditions set forth below, the right to enter the Property during the “**Inspection Period**” commencing on the Effective Date and ending on ____, 20__ (the “**Inspection Period Termination Date**”) in order to inspect and evaluate the Property.¹⁸

¹⁶ While it is rare to require the seller to “cure” all title conditions raised as issues by the buyer, some conditions the seller may be required to deal with, for example, to pay off existing liens if the proceeds of sale are large enough to cover them. This, like many of the terms in this part of the agreement, is all a matter of negotiation.

¹⁷ Section 3.4 sets forth a list of generic types of matters affecting title or use of the property that the parties have agreed the buyer may not object to in order to terminate the purchase agreement and get its deposit back. Sometimes (though this agreement does not do it) the parties will also identify in an exhibit to the agreement, usually proposed by the seller, a list of preexisting title encumbrances (for example, existing easements, subdivision restrictions, on-going special tax assessments and other conditions). Again, these are negotiable. For example, in a less pro-seller form, the so-called “standard exceptions” that will otherwise appear in the title insurance policy will be required by the buyer to be deleted from the title insurance policy as a condition to closing (provided that the buyer or seller may be required to furnish a survey for the title company to examine) and the seller may have to certify as to other facts of concern to the title company. The existence of zoning and other land use regulations are not a title condition strictly speaking, but may be identified as permitted exceptions. If a buyer has the right to examine and be satisfied with the zoning provisions that apply to the property before closing the sale, then it would not automatically agree to include “zoning ordinances”, etc., as permitted exceptions.

¹⁸ Any extended right to inspection of the property (and to review financial and physical information concerning the property) is a distinctive, highly practical part of U.S. real estate purchase and sale practice, and typical provisions are included in this Article 4. Typically, the potential buyer is given fairly wide-ranging rights to access to property records and to have its consultants enter the property to evaluate its condition. Generally, sellers do not

Purchaser shall have access to the Property during reasonable business hours and upon reasonable prior notice to Seller in order to perform non-invasive inspections and tests on the Property; provided that Purchaser must obtain Seller's advance written approval for the scope and method, described with reasonable specificity, of (i) intrusive, or invasive testing or inspection (including any environmental testing other than a so-called Phase I audit), (ii) any testing or inspection which could alter the physical condition of the Property, or (iii) any testing or inspection which requires a consent under a Lease or Service Contract or which could result in a default under the Lease or Service Contract.¹⁹ Purchaser will deliver to Seller promptly all information produced or procured by Purchaser.²⁰ Purchaser will promptly restore the Property to a condition that is at least as good as its previous condition immediately following any entry, test or inspection.

4.1.2 Purchaser is liable for all damage or injury to any person or property resulting from, relating to, or arising out of Purchaser's activities on the Property pursuant to Section 4.1.1, whether due to the acts of Purchaser or any person acting by or on behalf of Purchaser, and Purchaser must keep the Property free and clear of any liens arising from work performed on behalf of Purchaser in connection with its inspection activities. Purchaser indemnifies, defends and holds harmless Seller and Seller's agents, property manager, employees, directors, officers, affiliates, interest holders, successors and assigns (collectively, the "**Indemnitees**") from and against any and all claims, costs, damages, liabilities or liens of any kind arising out of or due to Purchaser's activities pursuant to Section 4.1.1.

4.1.3 In furtherance of Purchaser's exercise of its inspection rights hereunder, promptly following the Effective Date, Seller will make available to Purchaser for Purchaser's review copies of environmental and engineering studies, as-built plans, operating statements and other financial materials, correspondence relating to Leases and Service Contracts, existing title insurance documents, surveys and site plans, warranties and other documentation in Seller's possession and reasonably relevant to Purchaser's evaluation of the Property. Purchaser's access

resist allowing the buyer to carry out a broad inspection—in essence, there is a trade off between allowing the buyer a thorough inspection and requiring the seller to give broad representations and warranties about the condition and performance of the property. In effect, the seller would rather let the buyer see for itself and, as a result, not be called on to “insure” the property by means of broad representations. That is, the longer and more extensive the buyer's inspection rights, the weaker will buyer's argument be that it should receive broad warranties of condition or financial performance. There will be negotiations about the length of the inspection period so that the property is not kept off the market for too long, and about the right of the seller to supervise the inspection and agree to more intrusive inspections (such as testing for environmental contaminants), and to maintain confidentiality.

¹⁹ This clause gives the seller a reasonable degree of control over more extensive investigations on the property. Sellers are especially concerned about extensive environmental testing (which may involve soil borings, sinking wells to evaluate groundwater, and other measures, which may implicate its environmental liability under governmental regulations) (see also Section 4.4, which specifically protects the seller on this point), and about the degree to which consultants circulating about the property may interfere with or annoy tenants.

²⁰ The requirement for a buyer to furnish the results of inspections to the seller is a sensible one. Since the buyer typically has the right to terminate the purchase agreement if it is dissatisfied with the results of its inspections without any payment to seller, and if it elects to terminate, to receive its deposit back, then it is fair to have reports prepared regarding the property turned over to the seller for its own use.

to and use of such materials is subject to the confidentiality provisions set forth in Section 4.3 below.²¹

4.2 Insurance Requirement. Before Purchaser may enter the Property, Purchaser must provide Seller with a certificate of insurance naming Seller (and any other persons designated by Seller) as an additional insured and with an insurer satisfactory to Seller and with insurance limits in a minimum amount of \$1 million of personal injury and property damage liability coverage, including contractual liability).²²

4.3 Confidentiality. Unless Seller specifically and expressly otherwise agrees in writing, Purchaser agrees that (a) the results of all inspections, analyses, studies and similar reports relating to the Property prepared by or for Purchaser utilizing any information acquired in whole or in part through the exercise of Purchaser's inspection rights; and (b) all information (the "**Proprietary Information**") regarding the Property of whatsoever nature made available to Purchaser by Seller or Seller's agents or representatives, is confidential and shall not be disclosed to any other person except those assisting Purchaser with the transaction, or Purchaser's lender, if any, and then only upon Purchaser making such persons aware of the confidentiality restriction and procuring such persons' agreement to be bound thereby. Purchaser agrees not to use, or allow to be used, any such information for any purpose other than to determine whether to proceed with the contemplated purchase, or if same is consummated, in connection with the operation of the Property post-closing. Further, if Closing does not occur for any reason whatsoever, Purchaser agrees to return to Seller, or cause to be returned to Seller, all Proprietary Information. The provisions of this Section 4.3 shall survive any termination of this Agreement.²³

4.4 Contact with Governmental Authority. Purchaser shall not disclose any information about the environmental condition of the Property to, or contact, any governmental authority having jurisdiction over the Property regarding environmental matters that come to Purchaser's attention in the course of its inspections without the prior written consent of Seller, unless otherwise required by law. In the event such disclosure is required by law, Seller shall

²¹ Obligating the seller to furnish information in its records concerning the property is very important to the buyer, especially if this information is provided early in the inspection period. A purchase agreement that is most favorable to the buyer will include a detailed schedule of the types of information to be provided, and may delay commencement of the inspection period until such information has been delivered to it.

²² Liability insurance covering personal injury and property damage that may occur during the inspection process is typical and should be required by the seller. The buyer should require adequate insurance coverage from its consultants such as building engineers and environmental inspection firms. The amount of coverage is debatable—sometimes figures like the \$1 million of coverage in this sample agreement get inserted and carried over by attorneys without reference to the specific property or the entities involved. Best practice would be for the seller to consult with its insurance or risk management advisor, if it has one. In addition to the insurance, the buyer gives an agreement to indemnify the seller if there are claims for personal injury or property damage occurring during the inspections, or if the property is not properly restored after invasive testing. A buyer's obligations under such an indemnity to the extent they cover personal injury and property damage claims can be covered under buyer's liability insurance policy.

²³ Sellers who are very particular about maintaining confidentiality obligations will sometimes require that the buyer's third party consultants sign an acknowledgment that they are bound by the confidentiality provisions as well.

have the right, but not the obligation, to elect to satisfy such obligation by making the required disclosure. Routine searches of government data bases or other typical inquiries made by an environmental consultant in the course of a Phase I audit are not subject to the restriction set forth in this Section 4.4.²⁴

4.5 Sale of Property “As-Is”. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND EXCEPT FOR SELLER'S REPRESENTATIONS AND WARRANTIES IN SECTION 6.1 AND ANY WARRANTY CONTAINED IN THE DEED TO BE PROVIDED BY SELLER AT CLOSING (COLLECTIVELY, THE “**WARRANTIES**”), THIS SALE IS MADE AND WILL BE MADE WITHOUT REPRESENTATION, COVENANT, OR WARRANTY OF ANY KIND (WHETHER EXPRESS, IMPLIED, OR, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, STATUTORY) BY SELLER. AS A MATERIAL PART OF THE CONSIDERATION FOR THIS AGREEMENT, PURCHASER AGREES TO ACCEPT THE PROPERTY AT CLOSING ON AN “**AS IS**” AND “**WHERE IS**” BASIS, WITH ALL FAULTS AND ANY AND ALL LATENT AND PATENT DEFECTS, AND WITHOUT ANY REPRESENTATION OR WARRANTY, ALL OF WHICH SELLER HEREBY DISCLAIMS, EXCEPT FOR THE WARRANTIES.²⁵

4.6 Right of Termination. Seller agrees that Purchaser may terminate this agreement for any reason or no reason by giving written notice to Seller on or before the Inspection Period Termination Date. Upon such termination, the Earnest Money shall be returned to Purchaser in accordance with Article 9, and Seller and Purchaser will have no further rights and obligations hereunder except those which expressly survive termination of this Agreement. Failure to timely deliver a termination notice is deemed a Purchaser waiver of Purchaser's rights to terminate under this Section 4.6. and agreement to consummate the purchase of the Property subject only to the satisfaction of Seller's closing obligations as set forth in Section 5.2 below.²⁶

²⁴ A property owner always wants to control the flow of information to government agencies charged with enforcement powers in the environmental area so as to avoid triggering enforcement actions before they themselves have had the opportunity to evaluate the issue and develop a plan of action for how they would like to deal with the compliance requirements under environmental statutes, including by informal consultations and the like. Thus, the seller will not want the buyer to engage in direct discussions with governmental authorities as to the results of environmental testing if they reveal adverse conditions without prior approval by the seller. This is appropriate, given that the buyer can walk away from the agreement without any cost or future consequences if it does not like what it finds, while the seller will be left to deal with the problem.

²⁵ This is a typical “as is” clause. The buyer has been given an extensive opportunity to investigate the property—in return, the seller will be expected to give only a very limited set of warranties and representations, generally limited to disclosure of adverse conditions that would be less likely to be revealed by the buyer's inspections. The reference to warranties in the deed refers to warranties regarding the seller's title that are part of a typical deed conveying real estate. Depending on the jurisdiction, there may be common law or statutory limits on some disclaimers of warranty notwithstanding the express language of the clause—this is a matter for particular legal research.

²⁶ The termination clause gives the buyer the right to terminate the agreement if it is dissatisfied with the results of its inspection. Typically it does not have to give any reason, so that even though the inspection period will typically be used exactly as set forth, that is, to allow for a thorough inspection and evaluation of the property, in fact, it can also function as a “free look”, in the sense that the buyer may simply use the period to ponder whether it wishes to proceed with the transaction, taking into account reasons such as the state of the market, its financial condition, and other opportunities that may arise in the interim, that really have nothing to do with the evaluation of the property. In the event the buyer does find adverse facts about the condition of the property or its financial performance, the

ARTICLE 5 CLOSING

5.1 Time and Place of Closing. The consummation of the transactions contemplated by this Agreement (the “**Closing**”) will be held by escrow deliveries to the Escrow Agent and the closing of escrow²⁷ on _____, 20__ or such earlier date as Purchaser and Seller mutually agree upon (the “**Closing Date**”).

5.2 Seller’s Closing Obligations.

Not later than one (1) business day prior to the Closing Date²⁸, Seller shall deposit the following items into escrow with the Escrow Agent:

5.2.1 Deed. A duly executed [**limited/special/grant/covenant**] warranty deed²⁹ in substantially the form attached as Exhibit D (the “**Deed**”);

right to terminate does not mean that the buyer will, in fact, terminate. The right to terminate may simply function as a new hinge point of negotiation, as the buyer may attempt to bargain for price concessions or other benefits to ameliorate its finding, or even for an extension of the inspection period in order to further evaluate a questionable situation (one example is the appearance of possible environmental contamination, which may require a substantial period of additional testing). Note that once the inspection period is over and the buyer has agreed to go forward, then so long as the seller can convey title to the property in the agreed condition at closing, the buyer will lose the right to terminate, and its deposit will be fully at risk. In fact, some purchase agreements will require the buyer to put down an additional, nonrefundable deposit in order to recognize that the inspection period is over and that buyer’s rights to terminate are now substantially limited.

²⁷ Although a sit-down closing still is available in some deals, the advantages of an escrow closing have made escrow closings far more popular than sit-down closings in large commercial transactions. An escrow closing eliminates the need for, and thus the expenses associated with, having signatories from both sides available at the same location at the same time. In an escrow closing, parties can have the undated documents signed far in advance of the closing date and deliver those signed documents, and even the closing funds, to the Escrow Agent with clear instructions to the Escrow Agent governing if and when the closing documents may be distributed and closing funds may be disbursed out of escrow. In some situations, especially when both parties are in the same city, a sit-down closing may still be beneficial in that it allows the principals from both sides to resolve last minute issues on the table.

²⁸ The timing for each party to deliver closing deliverables into escrow is negotiable; however, from the escrow closing standpoint, it is beneficial to have the closing deliverables in escrow in advance of the closing date to enable the escrow agent to examine the closing documents and closing funds to timely spot and resolve any issues. It is not unusual for a party to miss executing some closing documents or missing a notary block or witnesses; therefore, checking the quality of those closing deliverables is one of the important tasks of the Escrow Agent.

²⁹ Local practice, in addition to the bargaining powers of both parties, must be consulted in determining whether limited/special/grant/covenant or other form of deed will be accepted. In general, a deed includes the following elements: identity of the grantor, identity of the grantee, consideration, description of the property, permitted exceptions or encumbrances, and warranties, if any. Some deeds also carry restrictions or covenants that the grantor imposes on, and thus will run with, the property. The differences among different types of deeds generally lie with the extent of warranties, if any. For instances, in a general warranty deed, the grantor warrants the title against everyone and anyone, while in a special warranty deed, the grantor warrants the title only against those who claim by, through or under the grantor but no one else. The list of permitted exceptions and encumbrances usually come from the title search; however, exceptions not created by the grantor do not need to be included in a special warranty deed because those exceptions were not created by, through or under the grantor and the grantor in a special warranty deed does not warranty anything that is not created by, through or under the grantor anyway. Some cases hold that the inclusion of a list of permitted encumbrances may turn a quit claim deed into a general warranty deed

5.2.2 Bill of Sale and Assignment. Two (2) duly executed counterparts of a bill of sale and assignment and assumption of Leases, licenses, permits and Service Contracts³⁰, in substantially the form attached as Exhibit E (the “**Bill of Sale and Assignment**”);

5.2.3 Tenant Notice. A counterpart of a notice (the “**Tenant Notice**”), which Purchaser shall send to each tenant under each of the Leases informing such tenant of the sale of the Property and of the assignment to Purchaser of Seller’s interest in, and obligations under, the Leases and directing that all rent and other sums payable after the Closing under each such Lease shall be paid as set forth in the notice;

5.2.4 Authority. Such evidence as the Title Company may reasonably require as to the authority of the person or persons executing documents on behalf of Seller³¹;

5.2.5 FIRPTA. An affidavit duly executed by Seller stating that Seller is not a “foreign person” as defined in the Federal Foreign Investment in Real Property Tax Act of 1980 and the 1984 Tax Reform Act, in the form attached as Exhibit F;

5.2.6 Title Affidavit. A title insurance affidavit, if required by the Title Company, duly executed by Seller, in form and content satisfactory to Seller and Title Company and sufficient to allow the Title Company to remove the standard exceptions from the Title Commitment;

5.2.7 Closing Statement. An executed counterpart settlement statement setting forth the amounts paid by or on behalf of or credited to Purchaser and Seller; and

5.2.8 Other Items. Deliver such additional documents as shall be reasonably requested by the Title Company or required to consummate the transactions contemplated by this Agreement [, *including, if applicable, Broker’s lien waivers and state specific affidavits or deliveries*].

in that there is no warranty to begin with in a quit claim deed and the attachment of a list of permitted exceptions indicates the grantor’s intent to warrant things that are not on the permitted exceptions list.

³⁰ Bill of sale is generally used to convey tangible personal properties, while assignment and assumption is commonly employed to transfer intangible personal properties, such as contracts, leases, licenses, permits and development rights. In this form, both the bill of sale and the general assignment are combined into one document. In many deals, they are also frequently separated as independent closing documents. The property that is subject to the bill of sale and/or general assignment may be described in generic terms, such as any personal property used in connection with the real property, or with a specific list if certain important rights or interests critical to the buyer must be conveyed. Additionally, part of the buyer’s due diligence is to identify any contracts or permits that are unassignable under their own terms or that are not desired by buyer due to their potential liabilities. Those unassignable or undesirable items should be excluded from the assignment.

³¹ The title commitment or title guaranty that the title company issues usually contains a requirements section. At least one of the requirements usually is related to the authority of the seller. Because the title company will be insuring title based on the deed and the owner’s affidavit, among other things, delivered by seller at the closing, the title company requires proof that the seller be in active status or good standing and that the person executing the title related documents have the proper authority to sign those particular documents on behalf of the seller. Buyer also will require that the other closing documents, even if they are not related to title, be signed by someone with authority to bind on the seller.

At the Closing, Seller also shall deliver to Purchaser:

5.2.9 Property Items³². All keys and original copies of the Leases, the Service Contracts and licenses and permits [and any letters of credit received by Seller as a security deposit from any tenant under any of the Leases], if any, in Seller's possession, together with material leasing and property files and records which are in Seller's possession (provided that Seller may retain copies of any such files and documents as it deems necessary); and

5.2.10 Occupancy³³. Possession and occupancy of the Property subject to the Permitted Title Exceptions and rights of tenants and occupants.

5.3 Purchaser's Closing Obligations. No later than 12:00 Noon _____ Time on the Closing Date³⁴, Purchaser will deliver into escrow with the Escrow Agent the following items:

5.3.1 Purchase Price. The full amount of the Purchase Price, as adjusted by prorations and credits, in immediately available federal funds wire transferred to Escrow Agent's account and deliver to Escrow Agent instructions to immediately release the full amount to Seller;

5.3.2 Tenant Notice. A counterpart of the Tenant Notice;

5.3.3 Authority. Such evidence as Seller or the Title Company may reasonably require as to the authority of the person or persons executing documents on behalf of Purchaser;

5.3.4 Closing Statement. An executed counterpart settlement statement setting forth the amount paid by or on behalf of or credited to Purchaser and Seller; and

5.3.5 Other Items. Such additional documents as shall be reasonably requested by the Title Company or required to consummate the transaction contemplated by this Agreement [, *including, if applicable, Broker's lien waivers*].

³² The delivery of those property items are commonly handled by parties themselves, sometimes with the assistance of brokers or property management companies. The job of the lawyers is to ensure open communications among parties and that the delivery takes place timely.

³³ The real property rights take on a number of dimensions, including the right to possession, right to profits, etc. When the property is occupied by tenants at the time of conveyance of record title, unless leases are legally and properly terminated prior to closing, buyer's acquisition of the property title will be subject to the existing tenant's right to possession.

³⁴ To ensure that the escrow agent has sufficient time to verify the closing documents and closing funds and to send deed for recording on the closing date, which is important to buyer, and to wire purchase price to seller, which is important to seller, it is important that each party delivers their closing deliverables to the closing agent early enough on the closing date or even the date prior to the closing date. The timing of wiring funds can become a special timing problem, especially if there is a lender to be satisfied as well as the buyer before funds are advanced. Banks can only wire funds up to a certain time of day, and in high price transactions, especially, the party responsible for the funds does not like to have them floating around overnight. So, more often than the parties would prefer, closing a transaction can come down to a last minute "nailbiter" over the timing of wiring funds.

5.4 Credits and Prorations. All income and expenses in connection with the operation of the Property shall be apportioned, as of 11:59 p.m. (local time) on the day prior to the Closing Date³⁵. Prorated and credited items shall include, without limitation, the following:

5.4.1 Taxes. General, special, ad valorem, personal property, and other property taxes and assessments imposed by any governmental authority and any association assessments, fees and dues (collectively, the “**Taxes**”) for the then-current calendar year should be prorated. If the Closing Date occurs prior to the receipt by Seller of all tax bills for the calendar year, Purchaser and Seller will prorate Taxes for such calendar year based on the previous year³⁶ and a post-closing “true-up” shall take place once all tax bills for the calendar year are received³⁷. Purchaser will pay all increases in Taxes due to the change in ownership or use of the Property, and the same will not be prorated³⁸.

5.4.2 Rent.

(a) All rent and other payments made to Seller under the Leases shall be prorated to the extent actually collected³⁹. Subject to Section 5.4.2(d), after Closing Purchaser will pay to Seller upon receipt all rent applicable to periods prior to Closing; provided that all

³⁵ All of the proration items are commonly prorated effective as of the same time and in many instances, that same proration effective time is last minute of the day prior to the closing date. Thus, the closing date typically is treated as the buyer's first day of ownership. However, if seller has expectation that buyer will not be able to deliver the closing funds in time to enable seller to receive the purchase price on the closing date, seller may require rents be prorated as of 11:59 p.m. on the closing date, as opposed to the date prior to the Closing Date, in which case, unless the parties negotiate otherwise, seller will need to be responsible for taxes and utilities applicable to the Closing Date.

³⁶ Some tax authorities give discounts to tax payers if real property taxes are paid prior to the payment deadline. Therefore, it is important that buyer and seller negotiate and specify, in the event that the current year tax is unavailable at the time of the closing, whether the amount of the prior year's gross real estate tax or the amount based on the most available discount will be used in prorating the current year's taxes. Depending on the size of the deal, the differences between the gross tax amount and the deepest discounted tax amount could be significant.

³⁷ The post-closing true-up provisions may be written in a variety of ways depending on the parties' business objectives. Many clients do not like to deal with lingering issues once a closing is complete; therefore, the contract may provide that the proration calculated at the closing will be the final proration and no adjustment will take place even the current year taxes turn out to be different than last year's taxes. On the other extreme, some clients may wish to be absolutely accurate on the proration and will be willing to do a complete true-up once the current year tax bill has been received. In the middle of those two approaches is that some clients will do a true-up if the variation between the current year actual taxes and the estimated taxes are greater than a percentage, for instance, 5%.

³⁸ In many jurisdictions, change of ownership triggers a reassessment of the property value by the local property appraiser's office. Depending on the market trend, a reassessment may result in increase or decrease of the property value, thereby increasing or decreasing real property taxes. Therefore, while seller may require purchaser to pay all increases in taxes due to the change in ownership or use of the property, buyer may also want to provide that buyer will solely benefit from any decrease in taxes due to property ownership or use change without prorating such tax decreases. A careful purchase should be advised in advance if there will be a possible upward assessment after closing, as this could affect proper calculation of the purchase price and also affect tenants' responsibility for any pass-throughs of property taxes under their leases.

³⁹ From seller's standpoint, it is important that rents be prorated based on the actual amounts that have been received, i.e., on a cash basis. If rents are prorated on an accrual basis, it will mean that buyer will be receiving the economic benefits of rents that have never been collected by seller and that seller will essentially be responsible for the delinquent rents.

rent collected by Purchaser after Closing will be applied first to unpaid rent accruing after Closing and then to unpaid rent accruing prior to Closing⁴⁰;

(b) Where Leases contain tenant obligations for taxes, common area expenses, operating expenses or other additional charges (collectively, “**Expense Reimbursements**”), Seller and Purchaser will use commercially reasonable efforts to reconcile the Expense Reimbursements no later than April of the year following the Closing and if, as a result of the reconciliation, (i) amounts are owed to Seller, then Purchaser will pay the amounts to Seller within thirty (30) days after the reconciliation, or (ii) amounts are owed to tenants under Leases (which were also tenants during Seller’s period of ownership), then Seller will pay the amounts to those tenants within thirty (30) days after the reconciliation;

(c) Purchaser must pay all leasing commissions, finder’s fees and allowances under Leases which are: (i) set forth on Exhibit D, (ii) attributable to Lease extensions, renewals or expansions which commence after the Effective Date, or (iii) attributable to any new Lease or modification entered into after the Effective Date⁴¹. After Closing, Seller has no obligation for any leasing commission or tenant allowance.

(d) Notwithstanding the foregoing of this Section 5.4.2, (i) if a tenant directs for a payment to be applied to an obligation of such tenant to Seller, then the payment will be applied to Seller’s obligation, and (ii) Seller is entitled to take any action (including legal action) against any tenant so long as the same does not seek a Lease termination or eviction, and Purchaser shall use good faith efforts to cooperate and support Seller’s efforts.

5.4.3 Tenant Security Deposits; Prepaid Rent. Purchaser shall receive a credit for all non-applied security and other refundable deposits made by any tenants under the Leases (the “**Security Deposits**”) and all prepaid rents⁴², and Seller will retain the same at Closing.

⁴⁰ Whether buyer must turn over to seller rents that are collected after closing but applicable to pre-closing periods is subject to parties’ negotiation and bargaining powers. Of course, before making a decision on how to negotiate this point, it will be prudent to first determine the extent of the pre-closing delinquent rents. If the delinquency is very minor, seller may want to give up on the requirement for buyer to pay seller any rents collected post-closing yet applicable to pre-closing periods in exchange for some more significant business points. Additionally, it generally is burdensome to police buyer after the closing as to the rents collection and their accounting and application; therefore, to entice buyer to turn over pre-closing rents that are received post-closing, the purchase agreement often allows the rents collected after closing to be applied first to post-closing period and then to pre-closing period, thereby ensuring that buyer essentially have priority interest over seller in the rents collected after closing.

⁴¹ Conceivably, buyers may object to paying any leasing commissions, finder’s fees and lease that are attributable to lease extensions, renewals or expansions or new leases which commence between the Effective Date and the Closing Date because the title to the property does not convey until the Closing Date and seller generally still gets the rents that are applicable to the period between the Effective Date and the Closing Date. Buyer may want to negotiate to be responsible only for leasing commissions, finder’s fees and lease allowances that are attributable to the period commencing on the Closing Date.

⁴² Following the closing, buyer generally likes to use its own bank account to manage the funds related to the property, as opposed to taking over seller’s existing bank account for the property. As a result, frequently, seller will keep the actual funds in its account at the closing and give a credit to the buyer in the amount of those funds the legal rights to which are transferred to buyer. It can be a subject of negotiation as to the extent of those funds that will be credited to buyer. In some situations, particularly, a seller who has acquired the property through foreclosure or deed in lieu and has not been managing the property for an extended period of time may want to specify that the

5.4.4 Utilities. All utility bills for the Property shall be prorated. In the event Seller has not received utility bills through the Closing Date, utilities shall be prorated based on the most recent bills and a post-closing “true-up” shall take place within ninety (90) days of Closing⁴³. Purchaser shall pay to Seller all utility deposits paid by Seller with respect to the Property.

5.4.5 Service Contracts. All payments required under the Service Contracts shall be prorated⁴⁴.

5.4.6 Additional Items. Any other operating expenses or other items pertaining to the Property which are customarily prorated between a purchaser and a seller in comparable commercial transactions in the area in which the Property is located shall be prorated according to local custom.

5.5 Closing Costs [*change to reflect local custom*]

5.5.1 Seller shall pay (a) the fees of any counsel representing it in connection with this transaction, and (b) one-half (½) of any escrow fee charged by Escrow Agent to hold the Earnest Money. Purchaser shall pay all other Closing costs, including (t) any and all transfer tax, documentary stamp tax or similar taxes imposed on account of the recordation of the Deed or the transfer of the Property, (u) the fees of any counsel representing Purchaser in connection with this transaction, (v) one-half (½) of any escrow fees charged by the Escrow Agent, (w) recording fees, (x) the premium for the Title Policy and Title Commitment costs⁴⁵, (y) the cost of Purchaser’s inspections of the Property, and (z) any costs associated with updating the survey delivered to Purchaser by Seller. Except as otherwise provided in this Agreement, all other costs

credit applies only to security deposits that are actually in the possession of seller because some security deposits that were received at one point could have been misapplied or misused by prior owners and the foreclosure or deed-in-lieu seller does not want to be held accountable for those funds that do not exist anymore.

⁴³ Parties generally require a final meter reading the day prior to the closing to determine the proration of utility obligations between the parties. Again, as in the case of a true-up for tax liabilities post-closing, the parties may not wish to have to deal with any true-up issues following the closing, so they may choose to finalize the proration as of the closing provided the variance between the proration basis and the actual bill is minor. Alternatively, the parties may decide that the seller will close and pay off its utility accounts, and the buyer will open new accounts as of the Closing Date. This will avoid proration issues.

⁴⁴ This provision requires the proration of payments under the service contracts, which presumes that those service contracts can be and will be assigned by seller to buyer at the closing. Therefore, the first question to ask is whether a service contract can be assigned under the terms of the contract and whether the buyer wishes to take over the contract or prefers to deal with a new vendor or even have a new contract with the existing vendor. If the latter, it has to be determined if the existing service contract provides for the right by the seller to terminate the contract.

⁴⁵ Other than broker’s commissions and attorneys’ fees, the transfer taxes (in some states, it is called documentary stamp taxes), if they exist, and the premium for the title policy usually constitute two single most expensive items of closing costs. Some states do not have transfer taxes and the rates of such taxes in other states vary. The National Conference of State Legislature’s website (<http://www.ncsl.org/default.aspx?tabid=12661>) provides a good summary of each state’s real estate transfer taxes. Of course, local counsel needs to be consulted to verify the information. In allocating the costs of transfer tax and title insurance premium, local practice needs to be consulted to determine what is customary. Additionally, it is ultimately a business decision for the clients to negotiate and agree on. Counsel should provide the amounts of the transfer tax and the title premium based on the purchase price to aid the client’s decision-making.

and expenses incident to this transaction and the closing thereof will be paid by the party incurring such costs.

5.5.2 [Insert provisions on state and local transfer taxes, including who pays (which may be a matter of applicable law or custom), and whether the customary responsibility can be shifted by negotiation] Seller and Purchaser shall each execute (and acknowledge if required) and deliver to the [Title Company] [applicable governmental authority] such transfer tax returns and other appropriate instruments relating to such transfer taxes.

5.6 Conditions to Closing. Seller's and Purchaser's obligations to consummate the transactions contemplated by this Agreement are conditioned upon fulfillment of the following conditions, each of which may be waived by the party whose obligation to close is conditioned on the fulfillment of such condition:

5.6.1 Representations and Warranties. All of the representations and warranties of the other party shall be true and correct in all material respects, subject to permitted changes in facts or circumstances pursuant to this Agreement, both as of the date of this Agreement and as of the Closing Date.⁴⁶

5.6.2 Conditions Precedent. All other conditions precedent to each party's obligation to consummate the transactions contemplated by this Agreement shall have been satisfied on or before the date of Closing.⁴⁷

Should any of the foregoing conditions benefiting a party have not been satisfied by the Closing Date and so long as that party is not in default under this Agreement, such party may either (i) terminate this Agreement by written notice to the other party or (ii) extend the Closing Date by

⁴⁶ It is important to specify the time as of which the representations and warranties remain true and correct. As the representations and warranties are made in the purchase agreement, without specification, the default will be that the reps and warranties must be true and correct when they are made, which is the date of the purchase agreement. However, numerous changes could take place between the date of the contract and the date of closing, for instances, a company could have been administratively dissolved, buyer or seller could have declared bankruptcy, etc.; therefore, it is extremely important to clearly state that the representations and warranties will remain true and correct as of the closing date. In some instances, such as in the case of environmental representations, parties may even negotiate to have the representations and warranties survive the closing date for a certain period of time.

⁴⁷ In addition to the mutual conditions precedent to closing that are covered by this form provision, in some deals, buyer also has a financing contingency period, in which buyer can terminate the contract if the required financing has not been obtained. Of course, sellers generally do not like this provision; however, in some business deals, if a buyer with a financing contingency is the only buyer interested in the property or if the buyer with a financing contingency is willing to pay more for the property than a cash buyer, seller may be willing to take the buyer with a financing contingency. In drafting the financing contingency provision, a few considerations are important: (a) to hold the buyer accountable, the provision should require that the buyer apply for financing and provide evidence of such applications to seller within a certain number of days after the contract date, (b) by the same token, the financing contingency provisions should require the buyer to pursue financing diligently and using good faith, unless you represent buyer, and (c) it should be specified as to whether the contingency ends on the date that the buyer obtains a financing commitment from a qualified lender or on the date that the buyer actually receives funding, the difference between the two being that buyer or lender may fail to close the loan even after a loan commitment has been issued. As an alternative to having a separate financing contingency, the parties may simply agree on an inspection period that is long enough to accommodate a reasonable opportunity for the buyer to obtain financing.

up to ten (10) business days to allow the other party to satisfy the condition. Upon such termination, Escrow Agent shall refund the Earnest Money to Purchaser and the parties shall have no further rights, duties or obligations under this Agreement, other than those which are expressly provided in this Agreement to survive the termination of this Agreement; provided, however, that if any of the foregoing conditions has not been satisfied due to a default by Purchaser or Seller, then Purchaser's and Seller's respective rights, remedies and obligation shall be determined in accordance with Article 7.

ARTICLE 6

REPRESENTATIONS, WARRANTIES AND COVENANTS^{48,49}

6.1 Representations and Warranties of Seller. Seller represents and warrants the following statements are true on the date of this Agreement and shall be true and correct on the Closing Date.⁵⁰

⁴⁸ There are two primary purposes of representations and warranties in a purchase and sale agreement: (i) to provide information about the parties and the property and to assist the parties, primarily the purchaser, in its due diligence review of the transaction and (ii) to allocate liability between the seller and the purchaser. Contract representations and warranties can be a powerful mechanism for obtaining information, as the knowledge that such a provision will be contained in a signed agreement (and the potential for after closing liability for incorrect statements) is a strong incentive for a party's counsel to check the accuracy of information the other party requests for inclusion. Although the scope of the representations and warranties to be given to a purchaser can be negotiated, this section of the contract will allocate the due diligence function between the purchaser's own investigation of the seller and the property's physical and financial condition, on the one hand, and information to be provided by the seller for these purposes, on the other hand. To minimize seller's liability, a seller will attempt to limit the information it provides, thus requiring the purchaser to take the risk as to such matters being incorrect or make the purchaser undertake inspections by its engineers, consultants and professionals. A purchaser would want a seller to represent as much information as possible to minimize this work and to have a potential claim if the statements are not correct. A fair agreement will contain representations as to matters within the knowledge of the parties and assist the other party with its own investigations. For example, if the seller makes a representation that the only leases in the property are those identified in the agreement, the purchaser will be able to analyze the tenancies at the property by reviewing those leases, and the risk that additional, unknown or undisclosed leases exist will fall on the seller.

Representations and warranties have other consequences to the parties. While the representations and warranties must be true and correct as of the execution of the agreement, many agreements will also make the continued accuracy of the representations and warranties on the closing date a condition to the parties' obligation to complete the transaction, and set forth what happens if the facts contained in a representation change between the date of the contract and the closing date. In addition, the parties might negotiate damages for breach of a representation or warranty.

⁴⁹ Since there will be a time period between the signing of the purchase and sale agreement and the closing of the transaction, purchase and sale agreements usually contain covenants stating what the parties must do, or cannot do, during that time period. Most covenants concern how the property will be operated during the time period, set forth the extent the seller can do things that will affect the property after it is purchased by the purchaser (such as whether and to what extent the seller can enter into new leases), and what actions require the purchaser's consent. Other covenants set forth obligations of the parties to provide information to each other, such as information on litigation and claims affecting the property and obligations of the seller to give the purchaser copies of notices received from governmental authorities concerning the property, such as notices of violations of law or of environmental claims.

⁵⁰ The fact that representations and warranties made at the time an agreement is signed will have to be updated to the closing date addresses the concern that facts may change during the period between signing and closing. For example, a representation that no litigation has been instituted or that no condemnation proceeding is threatened cannot be restated at closing if in the interim such an event has occurred. Accordingly, the parties will have to negotiate what happens in the event of a change in facts. Section 6.1.3 below, for example, sets forth what happens

6.1.1 Authority. Seller is duly organized and validly exists as _____ under the laws of the State of _____, and is qualified to do business in the state in which the Property is located. Seller has the right and authority to enter into this Agreement and to transfer the Property pursuant to this Agreement. The person signing this Agreement on behalf of Seller is authorized to do so. This Agreement has been duly authorized, executed and delivered by Seller, is a valid and binding obligation of Seller and is enforceable against Seller in accordance with its terms.⁵¹

6.1.2 Pending Actions. There is no agreement to which Seller is a party or, to Seller's knowledge⁵², that is binding on Seller which is in conflict with this Agreement. To Seller's knowledge, there is no action or proceeding pending or threatened against Seller or relating to the Property, which challenges or impairs Seller's ability to execute or perform its obligations under this Agreement.⁵³

6.1.3 Leases and Rent Roll. A true, correct and complete list of the Leases is set forth in the rent roll attached as Exhibit C (the "**Rent Roll**"). To Seller's knowledge, as of the Effective Date there are no existing material defaults by any tenants under the Leases. Notwithstanding anything to the contrary contained in this Agreement, Seller does not represent or warrant that any particular Lease will be in force or effect at Closing or that the tenants under the Leases will have performed their obligations thereunder. The termination of any Lease prior to Closing by reason of the tenant's default or for any other reason not constituting a default by Seller under this Agreement shall not affect the obligations of Purchaser under this Agreement in any manner or entitle Purchaser to an abatement of or credit against the Purchase Price or give rise to any other claim on the part of Purchaser.⁵⁴

if there are changes concerning the leases at the property. Major changes may permit a party to terminate the agreement.

⁵¹ The major benefit of a representation as to the seller's good standing as an entity and its authorization is to cause seller's counsel to check these matters and correct any problems that might result in the transaction being void or voidable due to seller's legal standing.

⁵² Certain representations, such as the lack of pending actions, are frequently made subject to seller's knowledge. A seller will so qualify a representation because it does not want to assume liability for matters about which it does not know. For example, if a seller makes the no pending actions representation subject to seller's knowledge, purchaser assumes the risk that pending actions exist of which seller is unaware. Had seller's representation been unqualified, this risk would have fallen to seller.

⁵³ Some, but not all, litigation affecting real property may be disclosed by a title search, but a representation of no litigation (or describing any actual litigation) is needed to advise the parties of important matters such as a party's ability to perform. Often, pending litigation is given without a knowledge qualifier, since the seller should have received notice of all pending matters impacting the seller's interest in the property.

⁵⁴ The representation concerning leases is one of the most important in the agreement. It is critical for a purchaser to have a representation as to which leases exist, and that there are no others, in order to evaluate the economics of the property. In purchase and sale transactions, the purchaser normally has the responsibility to review the leases and make its own determination as to their value and the legal effect of lease provisions, but the purchaser must know what to evaluate. Similarly, the issue of whether tenants are in default under their leases is a fact known only to the seller, and hence should be contained in the representation. Another lease issue often represented is whether tenants are current in rent payments or are in arrears. If the representations are insufficient, tenant estoppels and tenant interviews can sometimes fill the information gaps.

6.1.4 Condemnation. To Seller's knowledge, no condemnation proceedings are pending against the Property, nor has any written notice from a governmental authority threatening condemnation been received.⁵⁵

6.1.5 Service Contracts. To Seller's knowledge, a list of material supply, service, equipment rental and other contracts related to the operation of the Property (the "**Service Contracts**") is attached as Exhibit G. To Seller's knowledge, as of the Effective Date there are no existing material defaults by any vendors under the Service Contracts.

6.1.6 FIRPTA. Seller is not a "foreign person" within the meaning of Section 1445(f)(3) of the Internal Revenue Code of 1986.⁵⁶

6.1.7 Bankruptcy. Seller has not filed for itself any petition under Federal bankruptcy law or any Federal or state insolvency laws.

6.1.8 Environmental. To Seller's knowledge, Seller has not caused the Property to be in violation of, and Seller has received no written notice from a governmental authority with jurisdiction over the Property that the Property is in violation of, any Environmental Law. For purposes hereof, (i) "Environmental Law" means any Federal, state, local or administrative agency law, rule, regulation, ordinance or order relating to Hazardous Materials (as defined below), including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 9601 et. seq.) and the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. Section 6901 et. seq.); and (ii) "Hazardous Material" means any substance, chemical, waste or other material listed as "hazardous" or "toxic" under any Environmental Law, including, without limitation, petroleum and petroleum byproducts⁵⁷.

⁵⁵ Condemnation is the process by which a governmental entity exercises the power of eminent domain to take property from a private citizen or business entity. For a purchaser, the pendency or threat of condemnation is usually a sufficient reason not to proceed with the transaction at all, and a purchaser would want assurances of no condemnation early in the process. For a more detailed discussion of condemnation, see footnote 85.

⁵⁶ This is a reference to the Foreign Investment in Real Property Tax Act, an American tax statute that provides for withholding of a portion of the sales proceeds to cover the seller's potential tax liability where the seller is a foreign person, as defined in the Act. The representation (together with a certificate delivered at the closing) will permit the purchaser to close without this withholding, and if the seller cannot make this representation, the contract would have to provide for the tax withholding required under this statute.

⁵⁷ The environmental representation is often the most negotiated provision in the representations and warranties section, given the increased costs and liabilities associated with owning contaminated property. The key is for the parties to allocate the responsibility for ascertaining environmental conditions between a seller's disclosure and the purchaser's own due diligence. The main problem for a seller is that knowledge of environmental conditions is never complete and if a condition turns up later, a seller who made a representation might be sued over a matter it is alleged to have known or should have known about. The main problem for a purchaser is that environmental due diligence is time consuming and costly. In any case, if the purchaser is seeking mortgage financing for the purchase, prospective lenders usually require environmental due diligence. It probably is reasonable for a purchaser to request a representation as to whether there have been notices from governmental authorities or prior claims by third parties concerning environmental conditions because this information is easy to disclose and, if a notice or claim was received, the representation puts the purchaser on notice that somebody has claimed the property has an environmental problem. It probably is not reasonable to ask a seller for a representation that a property has no environmental conditions or complies with environmental laws, at least without some qualification as to the seller's

6.2 Knowledge Defined. References to the “**knowledge**” of a party shall refer only to the current and actual knowledge, without investigation or inquiry, on the Effective Date of Seller’s Designated Representatives and Purchaser’s Designated Representatives (as hereinafter defined), as applicable. The term “**Seller’s Designated Representatives**” shall refer to the following persons: (i) _____ and (ii) _____. The term “**Purchaser’s Designated Representatives**” shall refer to the following persons: (i) _____ and (ii) _____. In no event shall either party have any personal claim against the other parties’ Designated Representatives as a result of the reference thereto in this Article 6.⁵⁸

6.3 Seller’s Covenants. Seller covenants with Purchaser, from the Effective Date until the Closing or earlier termination of this Agreement, as follows:

6.3.1 Operation of Property. Seller shall operate and maintain the Property in a manner generally consistent with the manner in which Seller has operated and maintained the Property prior to the Effective Date, ordinary wear and tear, casualty and condemnation excepted.⁵⁹

6.3.2 Provide Copies of Notices. Seller shall furnish Purchaser with a copy of all notices received by Seller from any governmental authority or other party of any alleged violation of any law, statute, ordinance, regulation or order of any governmental or public authority relating to the Property within five (5) business days following Seller’s receipt thereof.

6.3.3 Execution of New Contracts. After the Inspection Period, Seller shall not, without Purchaser’s prior written consent in each instance, materially amend or terminate any of the Service Contracts, Leases. After the [Inspection Period] [Effective Date], Seller shall not, without Purchaser’s prior written consent in each instance, enter into (i) any contract or agreement that will be an obligation affecting the Property or binding on Purchaser after the Closing and which is not terminable upon 90 days notice or less, or (ii) any new lease [for more than _____ square feet of space]. Each such new service contract or lease entered into by Seller

actual knowledge. In any case, negotiations on the environmental representation are useful in identifying key information, such as the existence of environmental studies that may have previously been performed. Additionally, negotiations on the environmental representations go hand in hand with negotiations on the scope of purchaser’s inspection, and particularly so where seller desires to limit the scope of the purchaser’s physical or invasive testing of the property.

⁵⁸ Since representations and warranties, if incorrect, may result in claims for liability, parties often limit representations to its knowledge to the knowledge of specific people (usually key personnel participating in the negotiation) who can be questioned as to a representation’s correctness. A party can go further, limiting its knowledge to the specific person’s “actual knowledge” or “best knowledge and belief,” in either case either with or without due inquiry. Such persons generally will not know if other employees may know of problems. A purchaser trying to obtain as much information as possible will want the representations to be to the knowledge, with due inquiry, of as many people as possible, so that inquiry could be made of them.

⁵⁹ The purchaser’s economic analysis of the transaction, and the price it is willing to pay, is based on the condition of the property at the time the agreement is signed, so it is important to a purchaser to insure that there be no adverse change in condition between signing the agreement and closing.

shall constitute a “**Service Contract**” or “**Leases**”, respectively, for purposes of this Agreement.⁶⁰

6.3.4 Tenant Estoppel Certificates.

(a) Tenant Estoppel. Seller will use reasonable efforts to obtain estoppel certificates in the form attached as Exhibit H from (i) the tenants listed on Exhibit H-1 (the “**Major Tenants**”) and (ii) tenants of the Property, which, when taken with the Major Tenants, collectively lease a minimum of [70%] of the gross leased areas of the Property (the “**Estoppel Threshold**”); provided, however, that Purchaser will also accept, in lieu of the estoppel form set forth on Exhibit H, any other estoppel certificate which (x) is in the form of estoppel the tenant may deliver under its Lease, or (y) which confirms that the Lease is in full force and effect and states to the best of tenant’s knowledge that: (i) Seller is not in default under the Lease (or specifying the default claims, if any), (ii) the date through which rent has been paid, and (iii) the amount of the security deposit, if any.⁶¹

(b) Closing Condition. Should at or before Closing estoppel certificates have not been delivered under Section 6.3.4(a) or (b) for tenants who collectively achieve or exceed the Estoppel Threshold, then Purchaser may, by written notice to Seller, elect to terminate this Agreement; however, Seller may elect one time to extend the Closing Date by ten (10) days in order to deliver amended, replacement or satisfactory estoppel certificates. Should Seller elect to extend the Closing, then the Closing Date will be extended. If estoppel certificates satisfying the requests of this Section 6.3.4(c) are not delivered by the extended Closing Date, then Purchaser may terminate this Agreement and receive a refund of the Earnest Money.⁶²

6.3.5 SNDAs. Seller will use reasonable efforts, but shall not be required to expend any funds, to obtain a SNDA from each tenant either on the form attached as Exhibit I or

⁶⁰ While the purchaser’s due diligence period is in effect and the purchaser is not obligated to proceed, a seller will not want to be limited in its operation of the property since the transaction may not proceed. Once the contract is a binding obligation of the purchaser, it is the purchaser, not the seller, that has the major interest in the property and the purchaser will want to restrict actions that would affect the operation or value of the property after it becomes the owner.

⁶¹ It is customary in U.S. purchase and sale transactions, as well as mortgage transactions, for the prospective purchaser or lender to request certificates from tenants in which the tenants confirm key lease information, such as which documents constitute the lease and whether the tenant has claims against the landlord. Such certificates are called “estoppel certificates” because a tenant who delivers one is deemed to be “estopped” from challenging the contents of the certificate (i.e., not able to claim against the purchaser or lender that the information it provided is not correct). It is rare to obtain certificates from 100% of the tenants in a multi-tenant property, so the parties must negotiate a percentage that is required and whether there are any major tenants from whom certificates must be obtained. Since leases often have a provision governing the tenant’s obligation to provide certificates, a seller cannot be obligated to get from the tenant more information than the tenant is required to give.

⁶² Termination is often, but not always, a remedy for the purchaser if a sufficient number or percentage of tenant estoppel certificates is not obtained. Alternately, the contract could provide for the seller to provide seller estoppels for a certain (usually relatively small) percentage for the tenants in the event that the requisite number of tenant estoppels could not be obtained. In a seller estoppel, it is the seller, as landlord, rather than the tenant, who confirms the items the tenant would have confirmed had it given a tenant estoppel.

in the form required by the terms of each Lease. For the avoidance of doubt, it will not be a condition to closing that Seller have obtained or delivered the SNDAs at or prior to Closing.⁶³

6.4 Purchaser's Representations and Warranties. Purchaser represents and warrants to Seller that the following statements are true and correct on the date of this Agreement and shall be true and correct on the Closing Date:⁶⁴

6.4.1 Purchaser's Authority. Purchaser is duly organized and validly exists as _____ under the laws of the State of _____, and is qualified to do business in the state in which the Property is located. Purchaser has the right and authority to enter into this Agreement. The person signing this Agreement on behalf of Purchaser is authorized to do so. The execution and delivery of this Agreement or any other document in connection with the transactions contemplated by this Agreement will not violate any provision of Purchaser's organizational documents or of any regulations or laws to or by which Purchaser is bound. This Agreement has been duly authorized, executed and delivered by Purchaser, is a valid and binding obligation of Purchaser and is enforceable against Purchaser in accordance with its terms. Seller has obtained all consents and permissions required under any covenant, agreement, encumbrance, law or regulation by which Seller or the Property is bound.

6.4.2 Conflicts and Pending Actions. There is no contract to which Purchaser is a party or that is binding on Purchaser which is in conflict with this Agreement. To Purchaser's knowledge, there is no action or proceeding pending or threatened against Purchaser which challenges or impairs Purchaser's ability to execute or perform its obligations under this Agreement.

6.4.3 Financial Status. Purchaser has adequate financial resources to purchase the Property [or is pursuing financing for the purchase of the Property]. Purchaser is solvent, has not made an assignment for the benefit of creditors and has not filed any bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings, nor has any such proceeding been instituted by or against Purchaser.

6.4.4 ERISA. Purchaser neither is nor is acting on behalf of an "employee benefit plan" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, a "plan" within the meaning of Section 4975 of the Internal Revenue

⁶³ This is a reference to an agreement, usually referred to as a "Subordination, Non-Disturbance and Attornment Agreement" that governs the relationship between a tenant and the owner's lender (here, the purchaser's mortgage lender) in the event the lender acquires the property in a foreclosure or similar proceeding. Such agreements are technical and are beyond the scope of this annotation. Suffice it to say that if such agreements are important for the purchaser's mortgage financing in connection with the purchase, they must be requested from tenants before closing and the agreement should specify whether the seller is required to seek them for the purchaser's benefit and what happens if they are not obtained (here, the purchaser's obligation to close is not affected).

⁶⁴ Since the purchaser was not involved with the property and is bringing only its ability to close and pay the purchase price to the transaction, the purchaser's representations are usually far more limited than the seller's. The representations on the purchaser entity, authorization, conflicts and pending actions are similar to the analogous representations made by the seller.

Code of 1986, as amended or an entity deemed to hold “plan assets” within the meaning of 29 C.F.R. § 2510.3101 of any such employee benefit plan or plans.⁶⁵

6.4.5 Compliance Representations and Warranties. As of the date of this Agreement and as of the Closing Date, Purchaser represents and warrants as follows:

(a) Purchaser’s funds are derived from legitimate business activities that do not violate any applicable law and are from lawful and permissible sources.

(b) Purchaser is not a person with whom Seller is prohibited from engaging in this transaction due to any United States government embargos, sanctions, or terrorism or money laundering laws, including, without limitation, due to Purchaser or any party that has ownership in or control over Purchaser (each, a “**Purchaser Party**”) being (1) subject to United States government embargos or sanctions, (2) in violation of terrorism or money laundering laws, or (3) listed on a published United States government list (e.g., Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control or other lists of similar import).⁶⁶

6.4.6 Survival of Representations and Warranties. The representations and warranties of Seller and Purchaser set forth in Sections 6.1 and 6.4, respectively, survive Closing for _____ (__) months (the “**Limitation Period**”).^{67,68} Seller’s liability for breach of any representation or warranty with respect to the Property is limited to claims in excess of an aggregate \$_____ and Seller is liable only to the extent that such aggregate exceeds such figure. Seller’s aggregate liability for claims arising out of such representations and warranties

⁶⁵ This is a technical representation as to whether funds for the transaction are coming from an employee benefit plan regulated under U.S. law. The inability of the purchaser to make this representation may require the parties to insert additional provisions in the agreement relating to compliance with U.S. law in this area.

⁶⁶ United States anti-terrorism and money laundering laws prohibit a seller from accepting money from a purchaser who is “tainted” under these laws. The representations in these sections may be helpful to a seller evaluating whether it can do business with the purchaser in question, but additional due diligence, including checking the list of “Specially Designated Nationals” maintained by the Office of Foreign Assets Control of the U.S. Treasury Department, is recommended.

⁶⁷ The possibility of representations of the parties continuing to have legal effect after the closing of title may seem counter-intuitive, as the closing is supposed to result in finality to the parties to a purchase and sale transaction. Most often, such survival periods exist, though a seller will try to negotiate for no survival of representations after closing both because the seller is the party making most of the representations and because the seller will have no interest in the property after the closing. Purchasers attempt to negotiate survival in order to have some claim against the seller in case information on which it relied turns out to be inaccurate and the inaccuracy is discovered later. The best example is a lease that is first discovered after the closing, which violates a representation listing the property’s leases. Such a situation might justify survival because the purchaser may actually suffer a loss resulting from bad information obtained from the seller. It is harder to justify survival of representations that have no legal effect after the closing; for example, the seller’s authority to convey is a matter covered by a title insurance policy, so the need for survival of a representation concerning the seller’s authority would not be needed after the policy is issued. And to the extent representations are understood as a means to assist a purchaser with its due diligence, once an issue is identified and the purchaser has the opportunity to do whatever investigation it desires, they have served their purpose once the closing occurs.

⁶⁸ If representations or warranties survive the closing, they usually will be limited in duration. Survival periods of six to twelve months are most common. Survival periods can vary for different items.

must not exceed \$_____.⁶⁹ Purchaser shall provide written notice to Seller prior to the expiration of the Limitation Period of any alleged breach of such covenants, indemnities, warranties or representations and shall allow Seller thirty (30) days within which to cure such breach, or, if such breach cannot reasonably be cured within thirty days, an additional reasonable time period, so long as such cure has been commenced within such thirty days and is being diligently pursued. If Seller fails to cure such breach after written notice and within such cure period, Purchaser's sole remedy shall be an action at law for actual damages as a consequence thereof, which must be commenced, if at all, within the Limitation Period; provided, however, that if within the Limitation Period Purchaser gives Seller written notice of such a breach and Seller notifies Purchaser of Seller's commencement of a cure, commences to cure and thereafter terminates such cure effort, Purchaser shall have an additional thirty (30) days from the date Purchaser learns of such termination within which to commence an action at law for damages as a consequence of Seller's failure to cure. The Limitation Period referred to herein shall apply to known as well as unknown breaches of such warranties or representations. Purchaser's waiver and release set forth in Section 4.5 shall apply fully to liabilities under such covenants, indemnities, representations and warranties and is hereby incorporated by this reference. Purchaser specifically acknowledges that such termination of liability represents a material element of the consideration to Seller.

Notwithstanding anything to the contrary, no claim for a Seller breach of a representation or warranty is actionable if prior to Closing Purchaser has knowledge of the breach, or of the condition, state of facts or other matters relating to the breach (the "**Exception Matters**"). Should Purchaser obtain knowledge of an Exception Matter before the end of the Inspection Period, then Purchaser's failure to terminate the Agreement under Section 4.6 is deemed a Purchaser waiver of the breach of that representation or warranty. Should Purchaser first obtain knowledge of an Exception Matter after the end of the Inspection Period and Purchaser closes, then Closing is deemed a Purchaser waiver of the breach of that representation or warranty.⁷⁰

ARTICLE 7

DEFAULT AND REMEDIES⁷¹

7.1 Default by Purchaser. If the sale of the Property under this Agreement does not occur because of Purchaser's default under this Agreement,⁷² Seller may terminate this

⁶⁹ Liability for breaches of representations and warranties is usually limited to a negotiated amount. Similarly, many agreements provide that no action can be commenced if the amount of damage for a breach is minimal. A contract can provide, for example, that the breaches must have caused at least \$25,000 in damages to be actionable. A contract including such a limitation should also provide for whether the breaching party's liability covers the initial \$25,000 in damages or only those damages over and above the initial \$25,000.

⁷⁰ The intent of this clause is to prevent a purchaser from recovering damages for inaccurate representations where the purchaser knew of the problem. In this agreement, since breach of a representation is a basis for terminating the agreement before the closing, the purchaser is deemed to have waived any objection if it knew of the inaccuracy and proceeded to closing anyway.

⁷¹ Most purchase agreements will include a section defining the remedies available to each party, in the event of a default by the other party. Depending on the terms that are negotiated, this section can limit the maximum exposure of a defaulting party and provide some predictability as to the outcome following a default.

Agreement and receive the Earnest Money as liquidated damages (and not as a penalty) for the breach,⁷³ it being agreed between the parties that the actual damages to Seller in the event of Purchaser breach are impractical to ascertain and the amount of the Earnest Money is a reasonable estimate.⁷⁴

7.2 Default by Seller. If the sale of the Property under this Agreement does not occur because of Seller's default under this Agreement, then Purchaser's sole remedy⁷⁵ is to elect one of the following: (a) to terminate this Agreement, in which event Escrow Agent will return the Earnest Money to Purchaser,⁷⁶ or (b) to bring a suit for specific performance,⁷⁷ provided that

⁷² A purchaser will want to limit the seller's ability to retain the deposit to the circumstance where the closing fails to occur due solely to the purchaser's default in failing to complete the closing of the transaction. The seller, on the other hand, will want to make this as broad as possible, so that it can terminate the agreement and retain the deposit in the event of any purchaser default under the agreement, regardless of whether or not the purchaser default relates to the closing of the transaction. This provision is entirely negotiable, but typically the parties agree on a result closer to the purchaser's ideal position, unless the seller has a lot of leverage.

⁷³ Typically in the U.S., damages awarded for a breach of contract are based on the actual economic losses suffered by the non-breaching party. In some cases, the amount of economic loss is readily ascertainable. In other cases, it can be difficult or impossible to determine the extent of the losses caused by the breach. In those cases, the parties can agree, in advance, on an amount that will be paid (a "liquidated amount") by the breaching party in the event of a breach. In the context of a sale of real property, damages are most often liquidated for a breach by the purchaser, and the liquidated amount is frequently (though not necessarily) the same amount as the deposit (or down payment) made by the purchaser. In the U.S., liquidated damages are a common remedy for a breach by a purchaser under a purchase agreement for the sale of real property – if included, the stated amount of damages will be the seller's sole remedy in the event of a purchaser breach. Note, however, that most agreements make clear that retention of the deposit as liquidated damages for a purchaser's breach in failing to close, does not preclude the seller from enforcing indemnity or other separate obligations in the agreement for things such as purchaser's entry onto and inspection of the property, or claims for brokerage commissions arising out of the purchaser's actions.

⁷⁴ Liquidated damages provisions are typically enforceable in the U.S., provided the amount specified is reasonable rather than punitive. Individual states have statutes or case law governing liquidated damages and it is important to understand the applicable state's statutes or case law in order to maximize the likelihood that the provision will be enforceable. For example, in California, the Civil Code provides that a provision for liquidated damages for a default by a purchaser in a real property purchase agreement (i) is valid unless the party challenging the provision establishes that the provision was unreasonable under circumstances existing at the time the contract was made, (ii) must be separately initialed by the parties to the contract, and (iii) must be in 10-point bold type or 8-point red contrasting print, if it is included as part of a pre-printed form contract.

⁷⁵ Just as purchasers desire predictability as to their potential liability under the purchase agreement, sellers also desire to limit their liability in the event of a breach under the purchase agreement. This provision will typically give one or more options from which the purchaser must select a single remedy.

⁷⁶ This is an ideal remedy from a seller's perspective – the seller returns the deposit and has no other liability to the purchaser for its breach of the purchase agreement. However, purchasers typically reject this as a sole remedy, as the purchaser will likely have incurred due diligence and other costs, as well as possibly having foregone other opportunities. This remedy provides no incentive to the seller to stay in contract with the purchaser, in the event another purchaser willing to pay more comes along after the purchase agreement is executed. Typically a purchaser will want the seller also to reimburse it for its due diligence costs (the seller will often try to cap these at a stated amount) or will request a liquidated damages amount for a seller default that mirrors the purchaser's liquidated damages amount.

⁷⁷ Specific performance is a court order requiring a party to perform a specific act, usually what is agreed to in a contract. In the context of a sale of real property, specific performance is usually used to complete a previously agreed upon transaction. In the case of a seller breach, an order of specific performance would require the seller to convey the property to the purchaser, in accordance with the terms of the purchase agreement. Each state has its

Purchaser is entitled to this remedy only if Purchaser files the suit within ninety (90) days of Seller's default,⁷⁸ and further provided that Purchaser shall have no right to bring a suit for specific performance unless Purchaser (i) was not in default under this Agreement,⁷⁹ and (ii) tendered performance on its part.⁸⁰ Purchaser hereby waives any other rights or remedies in respect of any such default.⁸¹ This Agreement confers no present right, title or interest in the Property to Purchaser⁸² and Purchaser agrees not to, and waives its right to, file a lis pendens or other similar notice against the Property except in connection with, and after, the filing of a suit for specific performance.⁸³

own statutes or case law governing specific performance, but a common theme is that the remedy of specific performance will be denied where a money judgment would adequately compensate the plaintiff for the loss. In California, for example, the Civil Code creates a presumption that the breach of an agreement to transfer commercial property cannot be adequately relieved by monetary compensation (because each parcel of land is considered unique). Although many sellers object to specific performance as a remedy, it is a quite common remedy and is seen as fair by many practitioners, as it gives both parties the benefit of what they bargained for in the purchase agreement.

⁷⁸ A time limit is not always imposed on the exercise of this remedy and, if one is imposed, it is negotiable. The seller wants a definite time, after which it knows it will not be faced with a lawsuit for specific performance and after which it can sell the property without fear of the purchaser recording a "lis pendens" against the property. (A "lis pendens" is a recorded notice that there is a pending lawsuit that affects title to real property or a claim of ownership in the real property. A lis pendens secures the plaintiff's claim on the property, so that a subsequent sale by the seller to someone other than the plaintiff (purchaser) will not diminish plaintiff's rights to the property, in the event the plaintiff prevails in its case. Once a lis pendens is recorded against a piece of property, a subsequent purchaser of that property takes title subject to the outcome of the pending lawsuit.) The purchaser will want this period to be as long as possible, to give it flexibility and to ensure that its rights to specific performance are not inadvertently lost due to a failure to take action quickly enough.

⁷⁹ It is not uncommon in the U.S. for a real property purchase agreement to impose conditions on purchaser's right to bring an action for specific performance. The first condition (that the purchaser must not be in default) is typical and is hard to object to, as a purchaser. Many purchasers will try to limit this condition to "material" defaults. If the purchaser has committed a material (or major) default under the purchase agreement, there is very little justification for a court to enforce the purchase agreement – however, enforcement would be more equitable if the purchaser's default is immaterial to the transaction.

⁸⁰ Although the elements of a specific performance cause of action can vary from state to state, "tender of performance" is likely to be an element in most states, except to the extent the breaching party's default excuses performance by the non-breaching party. It is important for a purchaser to confirm with local counsel that it has done everything necessary to obtain an order for specific performance in the event of a seller default. Demonstrating that the purchaser was "ready, willing, and able" to perform at the time of the seller breach and at the time the order for specific performance is granted may suffice as tender of performance. It may not be necessary for the purchaser to actually deposit the purchase price and all closing documents, in order to show purchaser's "tender of performance," since the seller's breach of the purchase agreement could excuse the purchaser's performance.

⁸¹ Because the purchase agreement states that termination or specific performance are the purchaser's "sole" remedies, this type of waiver is not really necessary. However, many sellers like the added comfort of having the purchaser expressly waive its right to other remedies.

⁸² Lis pendens laws vary from state to state, but the common theme is that the filer of the lis pendens (or notice of pending action) must have some type of claim in or to the real property. For that reason, this language attempts to make clear that the purchase agreement does not confer any rights in or to the property on the purchaser. (Also see footnote 78 above for an explanation of "lis pendens.")

⁸³ Sellers are very sensitive to allowing anyone to record a lis pendens against their property – first of all, because it is harder to sell the property (subsequent purchasers are wary of spending time and money investigating a property

ARTICLE 8 RISK OF LOSS⁸⁴

8.1 Condemnation.⁸⁵ If, prior to Closing, a governmental authority initiates action to take the Property or a portion thereof by eminent domain proceedings, Purchaser may either (a) terminate this Agreement without further liability to Purchaser,⁸⁶ upon which the Escrow Agent will return the Earnest Money to Purchaser and neither party shall have any obligation to the other under this Agreement, except as expressly provided herein or (b) continue to Closing.⁸⁷ Should Purchaser elect under clause (b), then Purchaser shall have the right to consult with Seller regarding the eminent domain proceedings and at Closing Purchaser will be assigned the award of the condemning authority.⁸⁸

and negotiating a purchase agreement, if another party may have a prior and valid claim in or to the property); and secondly because it costs the seller time and money to have the lis pendens removed. Purchasers must also be careful not to file a lis pendens when they are not entitled to, because they may subject themselves to penalties. In California, for example, a purchaser who wrongfully records a lis pendens may be liable for the seller's attorneys' fees, under the applicable state statutes.

⁸⁴ Unless the purchase agreement otherwise addresses risk of loss, most states have laws that govern casualty loss or condemnation events during the contract period. For example, in many states the Uniform Vendor and Purchaser Risk Act would control. That act provides generally that, if all or a material part of the property is destroyed or taken by power of eminent domain, the seller cannot force the purchaser to perform under the purchase agreement and the purchaser is entitled to recover any amounts already paid to the seller.

⁸⁵ In the U.S., as in many other countries, governments (local, state and federal) have the power of "eminent domain," which allows them to seize private property for public use, without the owner's consent but with monetary compensation. The term "condemnation" is used to describe the formal exercise of eminent domain powers to transfer title to real property to the government. If not addressed in the purchase agreement, the effects of condemnation on the parties' obligations under the agreement are likely to be decided by applicable state law (e.g. in many states, the Uniform Vendor and Purchaser Risk Act would control). However, sophisticated parties typically negotiate condemnation provisions detailing the parties' rights in the event a condemnation action is commenced (or sometimes just threatened) prior to closing, instead of relying on state law to govern.

⁸⁶ This is a good provision for a purchaser – an unqualified right to elect to terminate the agreement if any action to take the property or a portion thereof is initiated. This gives the purchaser flexibility to determine whether or not the condemnation of any part of the property could affect purchaser's intended use of the property or whether the condemnation affects the price it is willing to pay. The provision would be even more purchaser-friendly if it allowed the purchaser to terminate in the event seller or purchaser became aware of a threat of condemnation (i.e., a condemnation action would not have to actually be initiated in order to permit purchaser to terminate). Often the seller will try to limit a purchaser's discretion by inserting a materiality qualifier on the purchaser's right to terminate the agreement. For example, the purchaser could be permitted to terminate only where the condemnation will affect a material portion of the property or will significantly reduce the parking or access to the property, or will give any major tenant a right to terminate its lease.

⁸⁷ The purchaser should always be given the right to elect to proceed with closing, in the event of a condemnation. If, for example, only a portion of the property or an access easement across the property is taken, or the condemnation is for the purpose of street widening, the purchaser may determine that it can still use the property for its intended purpose and that the price it has agreed to pay is still appropriate.

⁸⁸ Since the power of eminent domain is exercised by a "condemnation action," the purchaser should have the right to participate in or, at least, be consulted regarding, the proceedings. As noted in footnote 85, when property is taken by power of eminent domain, the owner is entitled to compensation for the value of the taken property, which is determined as part of the condemnation proceedings. Because the purchase price was presumably negotiated without taking into account the condemnation, any condemnation proceeds (also called an "award") relating to the portion of the property taken should belong to the purchaser, assuming the purchaser does not exercise a termination

8.2 Casualty.⁸⁹ Except as provided in Article 4, Seller assumes all risks and liability for damage to or injury occurring to the Property by fire, storm, accident, or any other casualty or cause until Closing.⁹⁰ If, between the Effective Date and the Closing Date, the Property suffers Material Damage,⁹¹ then Seller shall promptly notify Purchaser. Purchaser may elect, by written notice delivered to Seller within fifteen (15) days after receipt of such notice, either to (a) terminate this Agreement upon which Escrow Agent will return the Earnest Money to the Purchaser, and neither party shall have any further obligation to the other except as may be expressly provided herein, or (b) continue to Closing and award any insurance proceeds resulting from the Material Damage to Purchaser (but only to the extent that the proceeds do not exceed the Purchase Price and provided that Seller shall be entitled to retain any business interruption insurance proceeds that are applicable to the period prior to the Closing Date).⁹² The Closing Date may be extended as necessary to permit Purchaser and Seller the full fifteen (15) days.⁹³ “**Material Damage**” means damage which may be cause for the termination of a Lease or costing in Seller’s Judgment [\$ _____] or more to repair. If Purchaser does not terminate this Agreement in the case of Material Damage, Seller shall assign to Purchaser at the Closing its right to recover under any insurance policies covering such damage (but only to the extent that the proceeds do not exceed the Purchase Price and provided that Seller shall be entitled to retain any business interruption insurance proceeds that are applicable to the period prior to the Closing Date) and shall pay Purchaser at the Closing the amount of the deductible or

right in connection with the condemnation. If the seller handles the condemnation proceedings, it will frequently insist that its costs and expenses of handling those proceedings be paid to seller out of the award, with the balance of the award to be paid to the purchaser.

⁸⁹ It is customary for purchase agreements to include provisions dealing with casualty events. Most jurisdictions have laws setting forth the effect of a casualty on a purchase agreement; however, as with condemnation, most purchasers and sellers prefer to specifically negotiate provisions to address this eventuality.

⁹⁰ Although negotiable, it is customary for risk of loss to remain with the seller until the closing occurs.

⁹¹ Because the seller’s and the purchaser’s interests are diametrically opposed on this point (a seller will want the purchaser to continue to be obligated to close, notwithstanding a casualty, and a purchaser will want to be able to evaluate whether to terminate the purchase agreement or proceed to closing following a casualty), it is common for the parties to agree on a materiality threshold. If the cost to repair the casualty damage falls below the threshold, the purchaser would be obligated to proceed to close (with an assignment of the insurance proceeds, and possible a credit for any deductible); if the cost to repair the casualty meets or exceeds the agreed threshold, the purchaser will have a right to elect whether to proceed to closing or to terminate the agreement. Other provisions of the agreement should require that seller maintain some level of casualty insurance during the contract period.

⁹² See footnote 91. If the purchaser elects or is obligated to close following a casualty event, it is customary for the purchaser to receive a credit for the insurance proceeds paid to the seller in connection with the casualty, or to get an assignment of the right to those proceeds at closing (if not already paid by the insurance company). Because the purchaser does not usually have details about the seller’s insurance coverage, it is also wise for a purchaser to ask for a credit for any deductible under the applicable insurance policy, to ensure that it receives adequate amounts to repair the casualty damage. In any event, the purchaser will want, and should ask for, the right to participate in the negotiation of any insurance settlement, since it will be the beneficiary of that settlement. It is also common for the seller to be reimbursed out of the insurance proceeds for the costs incurred by it, if any, in making the claim and negotiating with the insurance company. It is appropriate for the seller to retain the proceeds of its business interruption insurance that are applicable to the period prior to the closing, since such proceeds compensate the seller for a loss suffered by it.

⁹³ In order to implement the provisions of this section, it is necessary for the parties to determine the cost to repair the damage. If the casualty occurs too close to the scheduled closing date, there might not be sufficient time. This type of provision is intended to address that concern.

other self-insured retention, if any.⁹⁴ If between the Effective Date and the Closing Date, the Property suffers damage which is not Material Damage, Seller shall, at Seller's option, either (i) repair such damage at its expense, to the reasonable approval of Purchaser,⁹⁵ prior to the Closing (and if such repair cannot reasonably be completed prior to the Closing, Seller shall have the right to extend the Closing Date until such repairs are completed), or (ii) convey the Property to Purchaser without making such repairs and assign to Purchaser all insurance proceeds payable on account of such damage (but only to the extent that the proceeds do not exceed the Purchase Price and provided that Seller shall be entitled to retain any business interruption insurance proceeds that are applicable to the period prior to the Closing Date).⁹⁶

ARTICLE 9 ESCROW AGENT

9.1 Investment of Earnest Money. Escrow Agent shall invest the Earnest Money in an interest bearing account at a commercial bank whose deposits are insured by the Federal Deposit Insurance Corporation. Escrow Agent shall notify Seller, no later than one (1) business day after Escrow Agent's receipt thereof, that Escrow Agent has received the Earnest Money in immediately available funds, and is holding the same in accordance with the terms of this Agreement. However, Escrow Agent shall invest the Earnest Money only in such accounts as will allow Escrow Agent to disburse the Earnest Money upon no more than one (1) business day's notice.⁹⁷

⁹⁴ In the U.S., most insurance policies have a "deductible," which is the amount of the damage that the insured must bear itself, before it can recover insurance proceeds. The amount of the deductible can vary widely –therefore, to ensure that the purchaser receives adequate amounts to repair the casualty damage, the seller should be asked to give the purchaser a credit equal to the applicable deductible.

⁹⁵ Many purchasers would prefer not to have the seller perform the repairs, unless the repair work must be completed immediately for some reason (for example, if leases require that repairs be completed within a certain period of time or if the damage creates a risk of injury to persons or property). If the seller is going to perform the repairs, the purchaser will want the right to approve the contractor, the materials and other matters regarding the repair, since it will have to live with whatever work is done. Many purchasers are concerned that the seller does not have any incentive to make sure the work performed is of high quality, since it is not retaining the property.

⁹⁶ It is also a good idea for the purchase agreement to include provisions to deal with an uninsured casualty, in case the seller will not agree to carry appropriate levels of insurance, or if it elects not to carry or cannot obtain certain types of insurance (e.g., earthquake insurance or terrorism insurance, which can be quite costly or perhaps not available). In the case of an uninsured casualty, the seller may want to pass the risk of loss to the purchaser when the purchase agreement is executed (it may be possible that the purchaser can obtain its own insurance at that point, as it then has an insurable interest in the property). However, most purchasers will not agree to such a provision, since they do not control the property and may not even elect to proceed to close following the inspection period. Although negotiable, a good compromise for uninsured casualty would be for the seller to give the purchaser a credit at closing for the cost to repair the uninsured casualty, with an option of the seller to terminate if that cost exceeds some stated amount. As with the materiality threshold, the purchaser should also have a right to terminate the purchase agreement in the event of an uninsured casualty, if the cost to repair exceeds some stated amount (since in this case, the purchaser did not bargain for a major construction project and may prefer not to proceed under the purchase agreement).

⁹⁷ One of the key roles for the escrow agent in a purchase and sale transaction is to appropriately handle the earnest money deposit made by the buyer, which, as noted elsewhere, constitutes a critical part of the seller's protection against a buyer default prior to completion of the transaction. Typically, as in this case, the escrow agent will be the

9.2 Payment at Closing. If the Closing takes place under this Agreement, Escrow Agent shall deliver the Earnest Money to, or upon the instructions of, Seller on the Closing Date.⁹⁸

9.3 Payment on Demand. In the event that Purchaser or Seller claims the Earnest Money pursuant to the provisions of this Agreement, such party claiming the Earnest Money shall deliver written notice of such claim to the Escrow Agent and to the other such party (i.e., Purchaser or Seller, whichever did not claim the Earnest Money pursuant to such notice) and, unless such other party within ten (10) days thereafter notifies Escrow Agent of any objection to such requested disbursement of the Earnest Money, Escrow Agent shall disburse the Earnest Money to the party demanding the same and shall thereupon be released and discharged from any further duty or obligation hereunder. Notwithstanding the foregoing, if Purchaser delivers a written request to Escrow Agent and Seller for the return of the Earnest Money at any time on or before the Inspection Period Termination Date in connection with a termination of this Agreement by Purchaser pursuant to Section 4.6, then Escrow Agent shall promptly refund the Earnest Money to Purchaser without the necessity of Seller's consent or notice to Seller.⁹⁹

9.4 Exculpation of Escrow Agent. It is agreed that the duties of Escrow Agent are herein specifically provided and are purely ministerial in nature, and that Escrow Agent shall incur no liability whatsoever except for its willful misconduct or negligence, so long as Escrow Agent is acting in good faith. Seller and Purchaser do each hereby release Escrow Agent from any liability for any error of judgment or for any act done or omitted to be done by Escrow Agent in the good faith performance of its duties hereunder and do each hereby indemnify Escrow Agent against, and agree to hold, save, and defend Escrow Agent harmless from, any

title insurance company that is also taking care of title examination and issuance of title insurance policies. The escrow agent is responsible to both buyer and seller to handle and properly dispose of the deposit in accordance with the terms of the purchase agreement and any supplementary instructions given by the buyer and seller. If the earnest money is a significant sum, and especially if the period between deposit of the earnest money and the contemplated closing is fairly lengthy, then the buyer, in particular, will want to have the money deposited in an interest bearing account. The purchase agreement should be drafted to make it clear if the parties agree that the interest will become part of the deposit, or if it always belongs to the buyer, even if the principal part of the deposit is paid over to the seller in the event of the buyer's default.

⁹⁸ Since the escrow agent will be responsible for receiving and paying to the various applicable parties the funds needed for closing, the escrow agent is responsible for disbursing the earnest money to the seller when the transaction closes. This payment, of course, will be credited to the buyer against its overall payment obligations. Occasionally, for particular bookkeeping purposes, a buyer will prefer to have the earnest money returned at closing and instead pay the full purchase price separately. Often there are supplementary closing escrow instructions from the parties, and if a lender is involved as well, from the lender, to orchestrate the flow of funds and when they can be released for payment in coordination with the final agreement of the parties to consummate the transaction.

⁹⁹ This very important paragraph deals with what happens to the earnest money in the event the transaction does not go smoothly and there is a claim by one or the other party of rights to receive the earnest money. This paragraph is a simple version of a provision that could be made more elaborate, and one deficiency in the provision as drafted is that it does not provide for what the escrow agent is to do if there is an objection from the other party as to a claim with respect to disposition of the earnest money made by the first party. It is fair to say that escrow agent's typically will not want to take any responsibility for adjudicating the merits of the competing claims, and many purchase agreements will provide that in the event of such a dispute, the escrow agent has the right to open an interpleader action in the applicable court, deposit the money with the court, and leave it to the buyer and seller to fight it out in the judicial forum.

costs, liabilities, and expenses incurred by Escrow Agent in serving as Escrow Agent hereunder and in faithfully discharging its duties and obligations hereunder.¹⁰⁰

9.5 Interest. All interest and other income earned on the Earnest Money deposited with Escrow Agent hereunder shall be reported for income tax purposes as earnings of Purchaser. Purchaser's taxpayer identification number is _____.¹⁰¹

9.6 Execution by Escrow Agent. Escrow Agent has executed this Agreement solely for the purpose of acknowledging and agreeing to the provisions of this Article 9. Escrow Agent's consent to any modification or amendment of this Agreement other than this Article 9 shall not be required.¹⁰²

ARTICLE 10 MISCELLANEOUS

10.1 Assignment. Purchaser may not assign its rights under this Agreement without first obtaining Seller's written approval, which approval may be given or withheld in Seller's discretion, [except that at Closing Purchaser may assign its rights under this Agreement without obtaining the Seller's written approval if such assignment is to an entity controlling, controlled by, or under common control with Purchaser, in which instance Purchaser shall provide Seller with notice of such assignment; provided, however, that Purchaser shall not be released of Purchaser's obligations hereunder.]¹⁰³

¹⁰⁰ The escrow agent is paid a fairly small to nominal fee for these escrow services (a title company expects to benefit from the title insurance premiums, and the escrow services are typically subsumed within the economics of the premium payments—though sometimes a fairly modest fee is charged. As such, the escrow agent expects to be protected against any personal claims with respect to its actions as escrow agent unless its behavior is fairly outrageous.

¹⁰¹ This has to do with compliance with federal income tax obligations.

¹⁰² As noted, the escrow agent's role in the transaction is limited, and it must be made clear that, although it is convenient to set forth the escrow terms in the purchase agreement, the escrow agent is only a limited party to the agreement. Some title companies or other entities acting as escrow agent will have their own required terms for holding the escrow and, as a related matter, acting as the closing agent for intake and disbursement of funds at closing, and there may be a separate agreement, or the escrow agent may request modification of these terms.

¹⁰³ To isolate liabilities associated with a piece of real estate and to shield related entities and the parent entity from the liability of a particular piece of real estate, each piece of real estate or sometimes a group of related real estate are usually owned by a special purpose entity ("SPE"). In addition to the liability shield purposes, banks often require its borrowers to own real estate in a separate SPE, among other reasons, to reach a quicker and cleaner resolution in bankruptcy when the borrower or a parent or other affiliate of the borrower declares bankruptcy. In transactions that will be financed by various forms of securitized mortgage financing, it is generally a lender requirement that the property be owned by an SPE, and a long list of fairly standard, specific SPE terms (in the SPE's organizational documents) will be required. For those reasons, buyers sometimes form an SPE to enter into a contract with the seller. Other times, if an SPE is not timely formed or if an additional investor will invest in the deal only after a purchase contract has been signed, then the buyer will use an existing entity to sign the contract and preserve the right to assign the contract to a different SPE. Depending on what buyer has in mind for the eventual title holder of the property, the assignment provision could be drafted on more strict or loose terms. Sellers may want to preserve the right to approve any and all assignments in its sole discretion. Buyers may want to have the

10.2 Brokers. [_____] is responsible for the payment of any and all brokerage fees and commissions in connection with the transactions contemplated by this Agreement. Each party represents to the other that the representing party has incurred no liability for any finder's fee or a brokerage commission arising from or relating to the transactions contemplated by this Agreement other than _____'s agreement for a commission with _____. Each of Seller and Purchaser indemnifies, defends and holds harmless the other party from and against any and all liability, cost, damage or expense on account of any brokerage commission or finder's fee it has agreement to pay. This indemnification survives the termination of this Agreement.¹⁰⁴

10.3 Exchange of Properties.

(a) Exchange. Subject to the provisions of Section 10.3(b), Seller agrees to cooperate with Purchaser in the event that Purchaser desires to effect a tax deferred exchange of "like kind" property in accordance with Section 1031 of the Internal Revenue Code. However, Seller shall under no circumstances be required to take or hold title to any property designated by Purchaser as exchange property (herein called the "Exchange Property") or any other property.

(b) Purchaser Not Liable. Notwithstanding anything in this Agreement to the contrary: (i) all amounts necessary for earnest money and any other payments required under any other contract which may be involved in such "like-kind" exchange (herein called the "Other Contract") shall be paid by Purchaser, and Seller shall have no obligation to expend any of its funds for earnest money or otherwise in connection with the Other Contract, unless simultaneously therewith Purchaser makes a deposit with Seller in the amount of said earnest money or other expense; (ii) Seller shall have no obligation to conduct any examination of title to the Exchange Property or to otherwise expend funds or incur expenses in connection with the Other Contract or the transaction contemplated thereby; (iii) Seller shall not be required to incur any liability whatsoever with respect to the payment of any loan, indebtedness or obligation secured by or in any way relating to the Exchange Property or the Other Contract; and (iv) the Other Contract shall specifically provide that the only remedy available to the Purchaser of the Exchange Property for failure to close and consummate the purchase of the Exchange Property and/or for breach of the Other Contract shall be retention by such Purchaser of the earnest money deposited in connection with the Other Contract as liquidated damages.¹⁰⁵

permitted assignment be as broad to automatically permit any assignee that buyers choose. The provisions provided in this form contract appear to be a good middle ground that buyers and sellers often can reach.

¹⁰⁴At least in some states, brokers are authorized by law to file liens on the applicable real property if broker's commissions are not paid. Therefore, it is important that the purchase contract specifies who are the brokers, who is responsible for paying each of the brokers, and how much is the commission percentage. There generally are four scenarios with brokers: neither seller nor buyer has any broker; seller has its own broker and buyer has no broker, in which case seller generally pays the broker from the sale proceeds; buyer has its own broker and seller has no broker, in which case buyer could pay the broker as an additional buyer closing cost or buyer could require seller to pay the commission out of the sale proceeds; or seller and buyer each have its own broker, in which case each party could pay for its own broker or buyer's broker may become a cooperating broker with and sharing a part of commissions from seller's broker. In any event, it is important to include mutual indemnity in the contract for any unpaid commissions that a party is supposed to have paid.

¹⁰⁵ In a 1031 exchange transaction, gain or loss that should be realized at the consummation of the property sales transaction will not be realized, but will be deferred; therefore, no tax payment will be immediately due on account

10.4 Notices. Any notice required under this Agreement must be in writing and delivered by hand or overnight courier (such as United Parcel Service or Federal Express), sent by facsimile or mailed by United States registered or certified mail, return receipt requested, postage prepaid and addressed to each party at its address as set forth below. Notice is considered given on the date of hand or courier delivery, confirmed facsimile transmission, deposit with such overnight courier for next business day delivery, or deposit in the United States mail. The parties' respective addresses for notice purposes are as follows:

If to Purchaser: _____

Attention: _____
Telephone: _____
Facsimile: _____

If to Seller:¹⁰⁶ _____

Attention: _____
Telephone: _____
Facsimile: _____

If to Escrow Agent/
Title Company: _____

Attention: _____
Telephone: _____
Facsimile: _____

10.5 General Provisions. Whenever used, the singular number shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

of the sales transaction. 1031 refers to the United State Internal Revenue Code, 26 U.S.C. 1031. In some deals, parties may want to take advantage of the tax benefits presented in a 1031 exchange transaction and these provision provide a good sample of how those provisions should look like.

¹⁰⁶ Frequently, in addition to buyer's and seller's contact information, their respective counsel's contact information is also included in the notice section as "with a copy to." By copying attorneys on communications, attorneys can have first-hand knowledge of the issues in the matter and can take timely action to address them. This form does not provide for any electronic form of notice other than facsimile. Given the realities of contemporary communications habits, it is likely to become more and more common for some type of email notice, perhaps with confirmation, to be allowed as a form of notice.

10.6 Governing Law. This Agreement is governed by the laws of the state in which the Property is located. All actions or claims arising out of or in connection with this Agreement or any other actions or claims between the parties hereto shall be brought only in state court in the county in which the Property is located.¹⁰⁷

10.7 Counterparts. This Agreement may be executed in counterparts, and all such executed counterparts shall constitute the same agreement.

10.8 Time. Time is of the essence; however, if the date for performance of any action under this Agreement shall fall on a Saturday, Sunday or legal holiday, such action shall, and may, be performed on the next succeeding business day which is not a Saturday, Sunday or legal holiday.¹⁰⁸

10.9 Captions. The section headings appearing in this Agreement are for convenience of reference only and are not intended to limit or define the text of any section or subsection.

10.10 Exhibits and Schedules. The following schedules or exhibits attached hereto shall be deemed to be an integral part of this Agreement:

- Exhibit A - Legal Description of the Land
- Exhibit B - Leases
- Exhibit C - Rent Roll
- Exhibit D - Form of Deed
- Exhibit E - Form of Bill of Sale & Assignment
- Exhibit F - FIRPTA
- Exhibit G - Service Contract
- Exhibit H - Tenant Estoppel Certificate
- Exhibit I - SNDA

10.11 Entire Agreement. This Agreement, including Exhibits, contain the entire agreement between the parties pertaining to the subject matter hereof and fully supersede all

¹⁰⁷ In real estate transactions, the governing law frequently is the state law for the state where the property is located. Generally, real estate law derives from common law; therefore, a majority of the body of law applicable to real estate is a matter of state law, with some exceptions such as Interstate Land Sales Act. Because real estate itself establishes a strong tie to the local jurisdiction, it will be hard to argue that another state's law should apply. Separate from the issue of governing law is the issue of jurisdiction and venue. Sometimes as a compromise, parties will agree to use the court in a county and state but to adopt the law in a different state. This means that in transactions negotiated by attorneys who do not practice in the state where the property is located, it is certainly prudent, if not essential in all cases, to retain local counsel to review the relevant documents and identify any particular local practice requirements or concerns.

¹⁰⁸ Some of the dates referenced in the purchase contract are not specified dates, rather, they are dates that have to be calculated based on a related event. Therefore, it will be difficult to anticipate, at the time the contract was prepared, whether those contingent dates will fall on a weekend or legal holiday. Without the provision like 10.8, ambiguity will arise as to whether the performance date is indeed the actual weekend or holiday that the date has been calculated to be, or the immediately preceding business day or the immediately following business day. 10.8 will help avoid that type of ambiguity. Of course, the result of 10.8 is that whoever has the performance obligation will have one or two additional non-business days to complete the required performance obligations.

prior written or oral agreements and understandings between the parties pertaining to such subject matter and may not be amended except in writing, signed by both Seller and Purchaser.¹⁰⁹

10.12 Attorneys' Fees. Should either Seller or Purchaser file an action to enforce this Agreement, the prevailing party is entitled to recover, in addition to other remedies or damages, reasonable attorneys' fees incurred in the action.¹¹⁰

10.13 Survival. All provisions of this Agreement which are not fully performed as of Closing shall survive Closing; provided, however, that the representations and warranties of Seller contained in Section 6.1, and the representations and warranties of Purchaser contained in Section 6.5 shall survive Closing for a period of _____ (__) months.¹¹¹

10.14 No Recordation. None of this Agreement, any Memorandum of Agreement or any notice relating to the Agreement may be recorded in any public records.¹¹²

10.15 Merger. Except as expressly provided in this Agreement, all rights of Purchaser will merge into the deed and other instruments delivered by Seller at Closing, and will not survive Closing.

10.16 Jury Trial Waiver. THE PARTIES KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THEIR RIGHT TO A JURY TRIAL IN CONNECTION WITH THIS AGREEMENT, THE TRANSACTION CONTEMPLATED UNDER THE AGREEMENT

¹⁰⁹ Although this provision has essentially become a boiler-plate in virtually all contracts, its importance cannot be ignored. During the contract negotiation process, the two parties and their representatives, agents and counsel may have thrown in numerous discussion points and the deal points may have evolved considerably from the time when they were first discussed; therefore, to avoid ambiguity, it is important to point out that all prior written or oral agreements and understandings have been superseded by this contract and that this contract represents the entire agreement between the parties pertaining to the subject matter.

¹¹⁰ This attorneys' fee provision is written in a reciprocal way so whoever is the prevailing party in a lawsuit has the right to require reimbursement of attorneys' fees from the other party. Sometimes, the contract expressly provides that only one party has the right to seek attorneys' fees from the other party. For aggressive stand like that, beware that under some state law, if one party is entitled under the contract to seek attorneys' fees from the other party, then the second party will automatically have the right to seek attorneys' fees from the first party if the second party prevails in a lawsuit. Therefore, it is important to understand state law to avoid spending time negotiating unenforceable provisions.

¹¹¹ As discussed in prior annotations, it is important to specify the time as of which the representations and warranties remain true and correct. This particular provision provides for the survival of the reps and warranties after the closing. Because of the common law doctrine that the purchase contract will be merged into the deed when the property is conveyed, state law should be researched to determine if this particular provision, which provides for the survival of the reps and warranties after the closing, will be merged into, and thus erased by, the deed. If the merger doctrine applies despite the explicit survival language, parties may execute a separate post-closing agreement at the closing to document those obligations and representations that survive the closing.

¹¹² The execution of the purchase contract certainly provides a solid first step toward a property conveyance, it is not even close to consummating the transaction thanks to those contingencies in compliance with the contract, including the inspection period and, if available, the financing contingencies, and those contingencies in violation of the contract, including the parties' breach of obligations and representations and consequent right to terminate the contract and seek remedies by the non-breaching party. Any recorded instruments potentially cloud the title; therefore, particularly from seller's standpoint, an explicit provision prohibiting the recording of the contract or a memorandum thereof is a good idea.

OR ANY COURSE OF DEALINGS OR ACTIONS BY THE PARTIES RELATING TO THIS AGREEMENT. THIS WAIVER IS A MATERIAL INDUCEMENT FOR SELLER TO EXECUTE THIS AGREEMENT AND SURVIVES CLOSING UNDER OR TERMINATION OF THIS AGREEMENT.¹¹³

10.17 Limitation on Liability. No Member, partner, director, officer, shareholder, employee, advisor, agent, attorney, or manager in or of Seller (each, a “**Seller Party**”) has any personal liability, directly or indirectly, under this Agreement. Purchaser and Purchaser’s successors and assigns and all other interested parties are entitled only to, and shall only, look to Seller’s interest in the Property (and the proceeds thereof) for the payment of any claim or for any performance, and Purchaser waives all other rights relating thereto. These limitations are in addition to, and not in limitation of, any other Seller limitation of liability.¹¹⁴

10.18 State Specific Provisions. [ADD AS NECESSARY.]¹¹⁵

¹¹³ In the United States, trial can be conducted either with or without a jury. In business contracts, it is very common to include a jury waiver because of the rather forbidding costs associated with a jury trial, the prolonged time required by a jury trial, and some business people’s belief that jurors, who are mostly randomly selected lay people, may not have the experience and expertise to understand and resolve a complex business dispute. Jury trial waivers in commercial contracts are generally held valid as long as the waiver is explicit, those provisions are conspicuous (the reason why the language is frequently written in all capital letters), and are fairly negotiated between the parties as opposed being forced on by one party on the other party.

¹¹⁴ Evidently, this provision is in favor of seller. In an arms-length transaction, buyer may wish to delete this provision.

¹¹⁵ In the United States, in addition to federal law that applies to the entire country, each state has its own legislature and its own common law and statutory law. Therefore, it is critical to consult with local counsel to address state-specific issues in the contract. The use of a "State Specific Provisions" section would be especially appropriate in case the purchase agreement becomes a standard form used by a client (or a law firm) in numerous jurisdictions. Otherwise, it would be more typical to adapt the form as a whole.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the Effective Date.

SELLER:

_____, a _____

By: _____

Name: _____

Title: _____

[SIGNATURES CONTINUED ON THE FOLLOWING PAGES]

PURCHASER:

_____, a _____

By: _____

Name: _____

Title: _____

[SIGNATURES CONTINUED ON THE FOLLOWING PAGES]

Escrow Agent has executed this Agreement for the limited purposes set forth in this Agreement.

ESCROW AGENT/TITLE COMPANY:

_____, a _____

By: _____

Name: _____

Title: _____

PURCHASE AND SALE AGREEMENT OF REAL ESTATE¹

A Ltd., (*Kabushiki Kaisha*) (the “Seller”) and B Ltd., (*Kabushiki Kaisha*) (the “Purchaser”) enter into this agreement (the “Agreement”) as follows regarding purchase and sale of the real estate of the Seller consisting of the land (the “Land”) set forth in Annex 1 and the building (the “Building”) set forth in Annex 2 (the Land and the Building shall collectively be referred to as the “Property”).²

Section 1 (Agreement of Purchase and Sale)

Subject to the terms and conditions of this Agreement, the Seller agrees to sell and the Purchaser agrees to purchase the Property at the Closing Date as defined in Section 2.3 (the “Conveyance”).³

Section 2 (Purchase Price)

1 The total amount of the purchase price for the Property (the “Purchase Price”) shall be JPY ** (including the national consumption tax and the local consumption tax). The details are as follows:

Price of the Land: JPY []

Price of the Building: JPY []

The Amount Equal to the Consumption Tax and the Local Consumption Tax: JPY**⁴

2 Even if the actual structure and/or actual area of the Land and/or Building is different from the description of the Land and/or Building set forth in the registration or Annex 2, the Purchaser and the Seller shall not adjust the price of the Land and/or Building.⁵

¹ Prepared by Hirokazu Ina and Dan Matsuda, both of Jones Day, Tokyo, Japan.

² In Japan, a land and building are considered different real estate properties.

³ Under Japanese law, there is no statutory requirement to enter into a written contract for purchase of real estate. However, every parties enter into a written contract in purchase of commercial real estate.

⁴ Under Japanese law, a sale of land parcel is not subject to consumption tax but a sale of buildings is subject to consumption tax.

⁵ In Japan, the actual area of a land is sometimes different from the area registered in the registration of such land. If the difference is not significant based on a land survey conducted by either party, the parties usually agrees not to change or adjust the purchase price due to the difference of the area of the land as set forth in this Section 2.2. In case where the purchase price of a property is based on the actual area of the land, the purchase agreement sometimes has a provision for the purpose of adjustment of the purchase price as the following example:

“Both parties acknowledge that the price of the Land was calculated based on the actual area of the Land. Accordingly, if the actual area of the Land was proved to be different from what the both parties have

Section 3 (Payment of the Purchase Price)

1 The Purchaser shall advance the Seller JPY[] as deposit (the “Deposit”) on the execution date of this Agreement (the “Execution Date”) by electronic transfer of fund in yen to the bank account set forth below designated by the Seller.⁶

[Bank Account designated by the Seller]

Name of Bank: ** Bank ** Branch

Account Type: **

Account Number: **

Account Holder’s Name: **

2 The Purchaser shall pay the Seller the balance of Purchase Price stipulated in Section 2.1 (if Section 17(1) is applicable, revised amount of the Purchase Price in accordance with such provisions.) after deducting the Deposit set forth in Section 3.1 on [date] or the date each party separately agrees in writing as a closing date (the “Closing Date”). Each party also agree that the Purchaser may pay the balance after offsetting an outstanding Purchase Price against the Seller’s payable to the Purchaser in accordance with Section 8.⁷

3 Subject to the satisfaction of all of the conditions set forth in Section 4.1, the Purchaser shall pay the Seller the amount in accordance with Section 3.2 on the Closing Date by electronic transfer of fund on a yen basis to the bank account stipulated in Section 3.1 designated by the Seller.

(continued...)

relied on in calculating the amount set forth in Section 2.1 as a result of procedure in accordance with Section 11, the price of the Land shall be adjusted in proportion to changes in the area of Land at the time the Purchaser pays the outstanding amount of the Purchase Price in accordance with Section 3.2; provided, however, that in case the changes are less than one square meter, parties may not adjust the price of the Land.”

⁶ Under Japanese law, in case where a Deposit (tetsuke) has been made by a purchaser, the purchaser may terminate the purchase agreement in exchange for giving such Deposit to the seller as a termination payment, unless otherwise specifically agreed, until the seller starts to perform its any part of its obligation as seller, such as delivery of possession, etc . On the other hand, the seller also may terminate the purchase agreement in exchange for the payment of the same amount of the Deposit and returning such Deposit to the buyer, unless otherwise specifically agreed, until the buyer starts to perform any part of its obligation, such as processing a wire transfer of the purchase price, etc.

⁷ Typical amount of Deposit is about 5 to 20 per cent of the total purchase price. In case where the seller is a licensed real estate broker, the amount of Deposit shall not exceed 20% of the purchase price unless the purchase is also a licensed real estate broker.

Section 4 (Conditions Precedent to Payment of the Purchase Price)

1 The Purchaser's obligation to pay the Purchase Price under Section 3.2 shall be subject to the satisfaction of all of the conditions set forth in the following items unless ; provided, however, that the Purchaser may waive or allow for the failure of all or any part of such conditions and pay the Purchase Price at its sole discretion. In this case, the discretion by the Purchaser shall not be deemed as the Purchaser's waiver of any right to claim due to the breach of the representations and warranties of the Seller under Section 10.3 or the breach of the Seller's obligations or liabilities under this Agreement:

(1) By the Closing Date, the Seller has performed and be in compliance with all of the obligations required to be performed and complied with by the Seller under this Agreement.

(2) All of the representations and warranties made by the Seller set forth in Section 10.1 are true and correct.

(3) By the Closing Date, the Seller has delivered to the Purchaser all of the documents and items set forth in Annex 3

2 The Seller shall have satisfied the conditions set forth in Section 4.1 by the Closing Date.⁸

3 In the event that any of the conditions set forth in Section 4.1 has not been satisfied by the Closing Date, the Seller shall refund the Deposit to the Purchaser and the Purchaser is entitled to claim any damage resulting from or in relation to such dissatisfaction of any such condition precedent.

Section 5 (Date of Transfer of Ownership)

The ownership of the Property shall be transferred from the Seller to the Purchaser on the Closing Date in exchange for the Purchaser's payment and the Seller's acceptance of the balance of the Purchase Price set forth in Section 3.3.⁹

Section 6 (Delivery)

1 The Seller shall deliver the Property to the Purchaser at the Closing Date in exchange for payment of the balance of the Purchase Price set forth in Section 3.3.¹⁰

⁸ In Japan, conditions precedent is frequently not only conditions for the obligation of either party but also covenants by which the relevant party shall be required to fulfill such conditions.

⁹ Under general rules of Japanese Civil Code, the ownership will be transferred upon the execution of the agreement unless otherwise agreed. However, in case the execution date is different from the closing date, purchase agreements usually provide that the ownership will be transferred when the seller receive the purchase price.

2 The Seller shall manage the Property with the care of a good manager during the period of the Execution Date until the Closing Date.

Section 7 (Assignment of Lease Agreement)

1 Each party agrees that the Seller has entered into the lease agreements with regard to the Property listed in Annex 4 (the "Lease Agreement") as of the Execution Date and that the contractual position of the lessor of the Property shall be transferred from the Seller to the Purchaser along with the transfer of the ownership of the Property.¹¹

2 In the event that the terms and conditions of the Lease Agreement have been changed by the delivery of the Property, the Seller shall promptly inform such facts to the Purchaser as soon as practically possible. In this case, each party shall discuss in good faith how to deal with the situation.¹²

3 By the Closing Date, the Seller shall deliver the Purchaser the original or copies of lease agreements and all documents related to the Lease Agreement

4 The Seller shall neither terminate nor amend the Lease Agreement during the period of the Execution Date until the Closing Date; provided, however, that this clause shall not be applicable if the Purchaser gives prior written consent to such a termination or an amendment.

5 Each party agrees to cooperate in good faith with each other to make the notice of succession of the owner of the Building and the lessor of the Lease Agreement (the "Lessor Succession Notice") to the lessee of the Building under the Lease Agreement (the "Existing Lessee"). By the Closing Date, the Seller shall deliver the Lessor Succession Notice the Purchaser on the condition that the Purchaser may immediately deliver such Lessor Succession Notice to the Existing Lessee.

Section 8 (Assumption of Obligation to Refund Security Deposit)

(continued...)

¹⁰ In case of a delivery of commercial real estate leased to tenants, delivery of such property may be carried out by passing over keys or distributing a notice of change of the owner to tenants.

¹¹ Pursuant to case precedents, the lease hold shall be transferred without separate agreement or tenants' approval upon the ownership of lease real property is transferred. The purchaser may perfect such transfer of leasehold against lessees by registration of ownership of the purchaser and any approval of or notice to lessees is not required although parties of purchase agreement usually notify the change of ownership to lessees.

¹² Under ordinary lease agreements, especially for residence properties, lessees have a right to terminate with prior notice regardless of the expiration date set forth in the lease agreements. Therefore, there is a possibility that some tenants would terminate their lease agreements after the purchase agreement was executed.

- 1 The Seller shall pay the Purchaser the amount equal to the security deposit entrusted by the Existing Lessee under the Lease Agreement at the Closing Date. Each party agrees that the Seller delegates to the Purchaser the obligation to refund the security deposit under the Lease Agreement and the Purchaser assumes such obligation and becomes a sole obligor.
- 2 The amount of the Security Deposit to be delegated in accordance with Section 8.1 shall be fixed at the Closing date.
- 3 Each party agrees that they offset and settle the obligation of the Purchaser to pay the Purchase Price against corresponding amount of the obligation of the Seller to pay the amount equal to the security deposit set forth in Section 8.1 at the Closing Date.

Section 9 (Real Property Registration Procedures)

- 1 Each party agrees that the Purchaser or the third party designated by the Purchaser, as an attorney-in-fact to make filing for registration, and the Seller shall file for the registration of transfer of the ownership on the Property in exchange for the payment of the Purchase Price set forth in Section 3.3 at the Closing Date.¹³
- 2 The Seller shall deliver the documents to be executed by the Seller in order to complete the registration of transfer of the ownership to the Purchaser or the third party designated by the Purchaser (the “Registration Documents”) at the Closing Date. In addition, the Seller shall also cooperate with the Purchaser in the registration procedures to the extent that it is reasonably necessary to complete the registration.¹⁴

Section 10 (Representations and Warranties)

¹³ Ownership can be registered in the real estate register. Every real estate property, i.e., land parcel and building, is recorded in the real estate register in the district where the real estate property is located. Ownership, mortgage, pledge, possessory lien, preferential right, leasehold, and certain other rights can be recorded in the register upon filing of application by relevant parties. A person who is recorded as a person with priority right in the real estate register is generally able to defeat other persons appearing on the register with junior priority or not appearing on the register, and thus, holders of those rights usually apply for registration in a timely manner in order to protect their interests.

Although the real estate register is generally relied on for evidence of title in real estate transactions in Japan, it does not always reflect the true state of title because the registration of relevant rights is not mandatory. In addition, an incorrect entry could be made based on a fraudulent application. In practice, however, parties who plan to enter into a real estate transaction usually rely upon the register, as it is generally the best indication of the true owner of the real estate-related title or right, together with physical survey of the relevant property.]

¹⁴ The change of owner can be entered in the real estate register by joint filing of the seller and purchaser. The judicial scrivener’s assistance service in filing is available and most people use this service. In order to satisfy the requirement of joint filing the seller and purchaser usually appoint the same judicial scrivener and he/she files the application on behalf of the seller and purchaser.

- 1 The Seller represents and warrants to the Purchaser that the matters listed in Annex 6, except for the Exempted Matters listed in Annex 5, are true and correct as of the Execution Date and as of the Closing Date. The Seller, in the event that it is subsequently found that any of its representations or warranties are untrue or incorrect, shall immediately notify the Purchaser to that effect in writing.¹⁵
- 2 The Purchaser represents and warrants to the Seller that the matters listed in Annex 7 are true and correct as of the Execution Date and as of the Closing Date. The Purchaser, in the event that it is subsequently found that any of its representations or warranties are untrue or incorrect, shall immediately notify the Seller to that effect in writing.
- 3 Each party agrees that each party has entered into this Agreement in reliance on the representations and warranties made by the other party set forth in Section 10.1 or 10.2, as the case may be, and that each party shall indemnify for any and all losses, expenses and other damages incurred by the other party due to untrue or incorrect statement of the representations or warranties at the time when they are made by one party. Each party also agrees that in the event that one party cannot accomplish the purpose for which such party has entered into this Agreement due to the breach of representations or warranties by the other party, the Purchaser (in the case of breach of the representations or warranties by the Seller) or the Seller (in the case of breach of the representations or warranties by the Purchaser) may immediately terminate this Agreement.¹⁶

Section 11 (Demarcation of Boundary)

The Seller shall, at its own responsibility and expense, lay the border stone on the boundary between the Property and the adjacent premises, survey the Land, complete the survey map of boundary demarcation with the seal of the owner(s) of the adjacent premises (or the excerpt copy of the public assessment of boundary if the adjacent premises is owned by public authority) who admits that it observed and demarcated the boundary and deliver the boundary confirmation survey drawings to the Purchaser by the Closing Date.

Section 12 (Warranty against Defects)

- 1 If there is any kind of encumbrance, servitude or limitation, regardless of its nature or form, which prevents the Purchaser from enjoying full ownership of the Property, such as superficies, easement, pledge, mortgage, leasehold (except for the leasehold under the Lease Agreement), delinquency of taxes or public charges, occupancy by a third party, the Seller

¹⁵ Under Japanese law, legal nature of provisions of representations and warranties are still controversial issue. However, provisions of representations and warranties become common in various contracts, including sale and purchase agreement, share purchase agreement, lease agreement and so forth.

¹⁶ Under Japanese law, legal effect of a breach of representations and warranties are unclear since the legal nature of such provisions is not defined. For this reason, it is recommended that the effect of a breach of representations and warranties are clearly set forth in the agreement.

shall acquire and transfer complete ownership of the Property without any of these encumbrance, servitudes and limitations by the Closing Date at the Seller's own expense.

- 2 In the event that latent defects (including, but not limited to, obstructions under the ground, soil pollution, asbestos, PCB contamination, other environmental pollution and defect in title) are found in the Property, the Seller shall be liable for such defects only for two (2) years after the Seller becomes aware of such defects.¹⁷

Section 13 (Delivery of Required Documents)

In the event that the Purchaser or the Seller reasonably requires documents in the name of the other party such as applications, reports or notices in connection with this Agreement after the execution of this Agreement, the other party shall prepare and deliver such documents at any time without charging any fees and expenses.

Section 14 (Allocation of Profits and Costs)

- 1 The liabilities with regards to the taxes and public charges, or any other levying or imposition relating to the Property shall, regardless of the addressee on which such liabilities are charged, be divided into; (a) liabilities corresponding to the period ending on the day before the Closing Date (excluding that date, the "Preceding Period") and (b) those corresponding to the period from the Closing Date (including that date, the "Following Period"). The Seller shall be liable for the liabilities corresponding to the Preceding Period and the Purchaser shall be liable for the liabilities corresponding to the Following Period. For the purpose for calculating the allocation of taxes and public charges to be imposed in the year in which the Closing Date falls, the Preceding Period is deemed to start on January 1 of that year and the Following Period is deemed to end on December 31 of the same year.¹⁸
- 2 The profits arising from the Property shall also be divided into; (a) profits corresponding to the Preceding Period (excluding the said date) and (b) those corresponding to the Following Period (including the said date). The Seller shall be entitled to receive the profits corresponding to the Preceding Period and the Purchaser shall be entitled to receive the profits corresponding to the Following Period.

¹⁷ Under Japanese law, the expiration period of the seller's liability for latent defects is one year from when such defect is found unless otherwise agreed. In transaction between business/merchant parties, the buyer is required to check any latent defect when the property is delivered and the purchaser is required to give a notice to the seller immediately once the purchaser finds any defect, and the expiration period is six months. In addition, in case where a licensed real estate broker is a seller of transferred real estate, such seller's liability for defects shall survive at least two years from the delivery of the property and no special condition or covenant which is unfavorable to the purchaser shall be allowed unless such purchaser is also a licensed real estate broker.

¹⁸ Japanese tax authority charges real estate taxes to the registered owner of property as of January 1 of each year. For this reason, the parties should agree to how to split or share such taxes in a purchase agreement.

3 The settlement set forth in Section 14.1 and 14.2 shall be made at the Closing Date.

4 Except for Section 14.1 and 14.2, in the event that the amount of settlements, such as relating to liabilities for water, gas or electricity, has not been finally fixed, each party shall promptly fix and settle the said amount.

Section 15 (Liabilities for Expenses)

1 The Purchaser shall be liable for the expense involved in the application for the registration procedure for the transfer of title under Section 9.¹⁹

2 Each party shall be equally liable for the stamp duty and other out-of-pocket expenses necessary for the preparation of this Agreement..

Section 16 (Fixtures)

A gate, a wall or any and all the fixtures attached to the Property shall belong to the Purchaser on and after the transfer of possession of the Property at the Closing Date.

Section 17 (Risk of loss)

If, prior to the transfer of the title under Section 5, the Property lost its original form or was damaged due to natural disaster or other reasons not attributable to either the Seller or the Purchaser, the Seller shall be liable for any loss or damages resulting from the above in accordance with the followings:²⁰

(1) If any part of the Property was lost or damaged (excluding cases set forth in the next Item), the Purchaser may reduce the Purchase Price in proportion to the lost or damaged part of the Property, or the Purchaser may request the Seller to restore the Property at the Seller's own expenses and to transfer the possession.

(2) If all or substantially all part of the Property was lost or damaged, or that the Purchaser could not accomplish the purpose for which the Purchaser entered into this Agreement due to lost or damage of the Property, this Agreement shall be automatically terminated and the Seller shall return the Deposit to the Purchaser without delay with no interest; provided, however, that if the Purchaser may receive the insurance proceeds for lost

¹⁹ While the parties is required to apply for the registration of ownership transfer jointly, the Purchaser usually bears the costs and expenses for such registration.

²⁰ Under Japanese law, a purchaser will bear such risk of loss in a sale of specific properties, including real estate, unless otherwise agreed. In this sample agreement, the Seller shall bear such risk of loss and it is common practice in Japan.

or damaged of the Property in accordance with the consent between the parties, the Purchaser has the option to consider this Agreement not to be automatically terminated and to request the Seller to perform the Conveyance of the Property.

Section 18 (Termination)

- 1 Unless otherwise provided for herein, if the Seller or the Purchaser breaches this Agreement and such breach has not been cured within reasonable time period specified in the other party's notice identifying such breach and requesting to cure, the other party may terminate this Agreement.
- 2 If one of the following events occurred to either the Seller or Purchaser, the other party may immediately terminate this Agreement without notice referred to in Section 18.1:
 - (1) a check or a promissory note of one party is dishonored or one party is suspended for transaction with banks.
 - (2) one party filed a petition for commencing bankruptcy procedure, civil rehabilitation procedure, corporate reorganization procedure, special liquidation procedure or other similar proceedings (including procedures which shall be established or amended in the future, regardless of whether the venue is in Japan or out of Japan. Individually or collectively, hereinafter referred to as the "Insolvency Proceedings").
 - (3) a third party filed petitions for provisional attachment, provisional disposition, attachment, execution of security interest collection of delinquent tax or similar enforcement procedure or Insolvency Proceedings against the one party and such procedure has not been discharged or dismissed within thirty (30) days.
- 3 If this Agreement is terminated by the Purchaser in accordance with Section 18.1 or 18.2, the Seller shall return the money paid by the Purchaser immediately with no interest and the Seller shall also pay to the Purchaser the amount of 20% of the Purchase Price as the penalty.
- 4 In the event that this Agreement is terminated by the Seller in accordance with Section 18.1 or 18.2, the Purchaser shall pay to the Seller the amount of 20% of the Purchase Price as penalty; provided, however, that if the Seller has received any money from the Purchaser, it may be appropriated to the penalty at the Seller's discretion.²¹

Section 19 (Surviving Provisions after Termination of Agreement)

Even after this Agreement was cancelled or terminated due to any reason, unless otherwise provided for herein, such cancellation or termination would not affect the damages claim under

²¹ In case where a licensed real estate broker is a seller and a purchaser is not a licensed real estate broker in certain real estate sale, the amount of penalty shall not exceed 20% of the purchase price.

Sections 10.3, 18.3 and 18.4 having arose before such cancellation or termination, and Section 21 shall survive for 3 years, and Section 22 shall survive for 5 years, after such cancellation or termination, and Section 24 shall survive for unlimited time period.

Section 20 (Assignment)

The Seller shall not assign, transfer, pledge or dispose of, to a third party its rights and obligations under this Agreement without the Purchaser's prior written consent.

Section 21 (Confidentiality)

1 Each of the parties who has received Confidential Information (as defined in Section 21.2) from the other party (such other party, the "Disclosing Party") undertakes that it shall not (i) reveal to any other person such Confidential Information without the prior written consent of the Disclosing Party or (ii) use Confidential Information other than in connection with the performance of its obligations under this Agreement; it being agreed that all Confidential Information disclosed prior to the date of this Agreement shall be subject to the same confidentiality obligations under this Section 21; provided, that such undertaking shall not apply to:

- (a) disclosure of Confidential Information that is or has become generally available to the public other than as a result of disclosure by or at the direction of a party in violation of this Agreement;
- (b) disclosure of Confidential Information by a party to respective directors, officers, auditors, employees or agents of such party or its affiliates who need to know such Confidential Information in connection with the performance of any obligations under this Agreement; provided, however, that such directors, officers, auditors, employees or agents shall be informed of the confidential nature of the Confidential Information and shall be directed to treat such information confidentially and not use the information other than in connection with the performance of obligations under this Agreement;
- (c) disclosure of Confidential Information to the extent necessary or required under any applicable law or the rules of any stock exchange or in connection with any judicial process regarding any legal action, suit or proceeding arising out of or relating to this Agreement, after giving prior written notice to the other party to the extent practicable under the circumstances, and subject to having taken any reasonably available measures to protect confidentiality such as seeking a protective order in relation to such Confidential Information;
- (d) disclosure of Confidential Information that has been made available to a party by a person who, to the recipient's reasonable knowledge, is entitled to divulge such Confidential Information and who, to the recipient's reasonable knowledge, is not under any obligation of confidentiality in respect of such Confidential Information to any parties or any parties'

affiliates or Confidential Information which has been disclosed under a statement that expressly provides that such statement is not confidential;

(e) disclosure of information that is not based on or derived from Confidential Information and which is independently developed by or for a party;

(f) disclosure of Confidential Information by a party that such party can prove was already known to it before its receipt of such Confidential Information from the Disclosing Party; and

(g) disclosure of Confidential Information to the financier of a party which needs to get financed to pay the Purchase Price hereunder, or repay or redeem the existing debt.

2 The “Confidential Information” shall mean any information that one party has obtained from other party in relation to this Agreement and substance of this Agreement (including, but not limited to, information concerning the Property).

3 Each of the parties shall not and shall not cause each of its affiliates to, unless agreed with the other party upon consultation with it, publicly announce, through newspaper or otherwise, the substance of this Agreement (including any announcement through posting of information to the website, publication and broadcasting of advertisement and commercial message or otherwise in which the name of any of the parties is used); unless required by laws or the rules of any stock exchange applicable to such party or its affiliates.

4 The Seller and the Purchaser may not use the Confidential Information for any purposes other than the purpose of this Agreement.

5 The obligations under this Section 21 shall survive the termination of this Agreement.

[Section 22 (Non-petition and Limited Recourse)]

1 The Seller will have recourse, in respect of any obligation owed to by the Purchaser hereunder, only to the Property. Accordingly, the Seller shall have no claim or recourse against the Purchaser in respect of any amount which remains unsatisfied after the realization of the Property and any such unsatisfied amount shall be extinguished.

2 The Seller further agrees that it will not, directly or indirectly, file, participate in, or agree with, any Insolvency Proceedings against the Purchaser until one (1) year and one (1) day after the date on which the [bond issued/loan borrowed] by the Purchaser have been satisfied and discharged in full.]²²

²² If a buyer is a special purpose entity for a real estate investment project, same or similar provision is set forth in a purchase agreement.

Section 23 (Amendment)

Except as otherwise expressly provided in this Agreement, this Agreement may not be amended or otherwise modified, and no provision of this Agreement may be waived, unless such amendment, modification or waiver is in writing and signed by a duly authorized representative of each of the parties.²³

Section 24 (Governing Law and Jurisdiction)

This Agreement shall be governed by and construed in accordance with the laws of Japan. In the event any dispute arises between the parties in connection with this Agreement, the Seller and the Purchaser agree in advance that Tokyo District Courts shall have exclusive jurisdiction over such disputes in the first instance.

Section 25 (Notice)

All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed given if transmitted by facsimile, by e-mail, or mailed by registered or certified mail with postage prepaid and return receipt requested, or sent by commercial courier, courier fees prepaid, or delivered personally, to the other party at the following addresses:

If to the Seller, to:

[•]

If to the Purchaser, to:

[•]

or to such other address as the Seller or the Purchaser shall have specified in writing to the other party. All such notices or other communications shall be deemed to have been received: (i) on the date of personal delivery, if sent by personal delivery; (ii) on the date of facsimile

²³ While the same as or similar provision is common in a purchase agreement, an oral agreement to amend this Agreement would be still effective under Japanese law.

transmission (and machine confirmed receipt), if sent by facsimile transmission; (iii) on the third business day after being mailed by registered or certified mail, if sent by registered or certified mail; (iv) on the next business day after being sent via commercial overnight courier, if sent by commercial overnight courier; and (v) on the date sent, if sent via email after receipt of confirmation that such email has been electronically delivered to addressee.

Section 26 (Severability)

If any provision of this Agreement is held to be void or unenforceable by any court of competent jurisdiction or any governmental regulatory agency, such provision shall be considered by all Parties to be severed from this Agreement. All remaining provisions of this Agreement will be considered by both Parties to remain in full force and effect.

Section 27 (Language)

In the event of any inconsistency between the English version of this Agreement and any Japanese translation hereof, the English version of this Agreement shall prevail.

[End]

In witness whereof, one original of this Agreement have been prepared, and the parties have affixed their respective names and seals, the duplicate copy of the original to be held by the Seller and the original to be held by the Purchaser.

[month][day], [year] (Date of execution)

The Purchaser:

Address

Representative

The Seller:

Address

Representative

Annex 1 (Description of the Land)

(1)Location **

Parcel Number **

Land Category **

Parcel Area **m²

Annex 2 (Description of the Building)

(1)Location **

Building Number **

Type of Building **

Structure of Building **

Floor Area 1st floor: **m²

2nd floor: **m²

3rd floor: **m²

Annex 3 (List of Documents and Items to be Delivered by the Closing Date)

- (i) Certified copy of Real Estate Registration proving that the Seller owns the Property and there is not any kind of encumbrance or limitation which prevents the Purchaser from enjoying full ownership of the Property (except for the leasehold under the Lease Agreement), and registration identification of the Property (*tohki shikibetsu joho*)
- (ii) The Registration Documents as defined in Section 9.2
- (iii) Certified copies of Commercial Register of the Seller and certificate of registered seal impression of the representative of the Seller both of which are issued within one month before the Closing Date
- (iv) Certified copies of documents proving that the Seller has legally and validly performed all necessary procedures required by laws and by-laws in order for the Seller to execute and deliver all the documents in relation to the transactions contemplated in this Agreement and perform its obligations under such documents ²⁴
- (v) Photocopies of (a) construction confirmation notice, (b) certificate of inspection, (c) drawing for design and drawing for completed building, (d) construction contracts and the contracts concerning management of construction, (e) application, report and notices filed with or submitted to the competent authorities regarding the Property, (f) permission, license and notices concerning the Property issued by the competent authorities, and (g) any other material documents regarding the Property
- (vi) All keys to enter the Building
- (vii) Original of boundary confirmation of the Land (or excerpt copy of the public assessment of boundary, if public and private boundaries) prepared in accordance with Section 11, with adjacent land owner's seal
- (viii) Originals of Lease Agreement or any other documents prepared in respect of the Lease Agreement, and the "Lessor Succession Notice set forth in Section 7.5
- (ix) Any documents and items other than (i) through (viii) which is deemed to be necessary to preserve the Purchaser's right or to survey the Property at the Closing Date; provided, however, such documents or items are ones that are in possession of the Seller or available to the Seller with practical reasonable efforts by the Closing Date

²⁴ For instance, a copy of minutes of board of directors, written action of the director or minutes of shareholders' meeting should suffice.

Annex 4 (Description of Lease Agreements)

(1) Lessee: **

Room for rent: **

Area of Room: **

Period of lease: from ** to **

Rent: **

Security Deposit: **

Note: [existence or nonexistence of provisions for notice of termination, amendment or alteration to the Lease Agreement, or other related memorandum of understanding.]

(2) Lessee: **

Room for rent: **

Area of Room: **

Period of lease: from ** to **

Rent: **

Security Deposit: **

Note: [existence or nonexistence of provisions for notice of termination, amendment or alteration to the Lease Agreement, or other related memorandum of understanding.]

Annex 5 (Description of Exempted Matters)

Annex 6 (Representations and Warranties of the Seller)

(a) Seller is a joint stock company (*Kabushiki Kaisha*) duly and validly organized, lawfully and validly existing under the laws of Japan, and has ability and is qualified to do business in Japan.

(b) Seller has all requisite power and authority to execute, and to perform its obligations under this Agreement; and the execution of, and the performance of the Seller's obligations under this Agreement do not violate the Seller's articles of incorporation or other organizational documents nor any contract, agreement, judgments, decisions or orders to which the Seller is a party or which binds the Seller or the Seller's assets, nor any statute, instruction, rule, guideline, ordinances or other laws applicable to the Seller. Seller has completed all procedures required by law, its articles of incorporation and other organizational documents to execute and deliver, and to perform its obligations under this Agreement.

[(c) Seller has obtained currently valid license under Article 3, Paragraph 1 of the Residential Land and Building Dealing Business Act (Law No. 176 of 1952, as amended) and has complied in all respects with all statutes, instructions, rules, guidelines, ordinances or other binding laws applicable to its business and its articles of incorporation and other organizational documents.]²⁵

(d) This Agreement constitutes a legal, valid and binding obligation of the Seller, enforceable against the Seller in accordance with its terms.

(e) There is no pending or threatened litigation, adverse claim or action of any kind or nature that, if decided against the Seller, would have a material adverse affect on Seller's ability to perform its obligations under this Agreement; and, without limiting the foregoing, there are no legal or administrative proceedings of any nature pending against the Seller or any of its directors, officers, employees or agents in their capacity as directors, officers, employees or agents of the Seller.

(f) Seller does not need to obtain permit, approval or consent of, or notification to any governmental or other regulatory agency or authority or any other third party that has not yet been obtained in order to enter into and to perform its obligations under this Agreement.

(g) Seller has complied in all respects with the requirements of this Agreement, and laws, regulations and licensing requirements applicable to the transactions contemplated by this Agreement and has filed with the proper authorities all statements and reports required under all statutes, ordinances, regulations, rules and laws applicable to the Seller.

(h) The representative of Seller has all requisite power and authority to execute and deliver this Agreement and all the documents to be executed and delivered by the Seller in accordance with this Agreement.

(i) There is no filing by the Seller or any third parties for commencement of Insolvency Proceedings (as defined in Section 18.2 (2)); there are no events that constitute grounds for any

²⁵ In case where a licensed real estate broker is a party to the sale and purchase agreement, certain special requirement and restriction will be imposed pursuant to the Residential Land and Building Dealing Business Act.

of such Insolvency Proceedings, and there will be no such events occurring as a result of entering into this Agreement. Seller is not insolvent, unable to pay its liabilities generally when they become due and has not suspended payments and Seller will not become insolvent or unable to pay its liabilities generally or suspend payments as a result of entering into this Agreement.

[(j) Seller has the intention to truly sell the Property, and has no intention for providing the Property as collateral to secure the debts. Seller has not taken any procedure conflict with its intention of true sale of the Property.]

(k) Seller has not been in delinquent with respect to the taxes and other public charges and other impositions concerning the Property and the Seller and to the knowledge of the Seller there is no threat thereof.

(l) The Seller is the sole owner and the perfected title holder of the Property and the Seller has all power and authority to sell the Property. With respect to the Property, there is no statutory lien, right to retention, pledges, mortgage, right of redemption, option for repurchase, or any other security interest, superficies, servitudes, easement, leasehold (except for the Lease Agreement, as defined in Section 7.1), or any other use rights, or existence of any third-party possessor (whether or not based on the title), attachments, provisional attachments, provisional disposition, disposition for delinquent taxes and public charges and other impositions and expenses or any other legal or economic encumbrances that hinder or may hinder the Seller's exercise of clean title regardless of its name or form, and Seller owes no obligation to use, obtain profit from, or dispose of the Property for the benefit of any third party or to allow any third party to use, obtain profit from, or dispose of the Property (whether written or oral, perfected or not perfected, or regardless of manner and form), and the Seller will not owe such obligations as a result of entering into this Agreement or performing obligations under this Agreement.

(m) With respect to the Property, there is no judgment, decision, order or in-court settlement and there is no lawsuit, court proceeding, investigation or any other legal proceeding, alternative dispute resolution proceeding or administrative proceeding pending with a court or other dispute resolution institution or administrative agency and to the knowledge of the Seller there is no threat thereof. No petition for provisional disposition, provisional injunction, attachment, compulsory enforcement or foreclosure has been filed nor has been made, and to the knowledge of the Seller there is no threat thereof.

(n) Land does not contain a site for urban planning road or other urban facilities for which an urban planning decision has been made. Land is not subject to any land expropriation, land readjustment project, urban redevelopment project, expansion of road or any other similar procedure, and there is no future planning thereof.

(o) No business or activities have been conducted on the Property, such as discharge, storage, burying, treatment, produce or disposal of the hazardous substances, discharge, disposition or use of which are restricted under the Soil Contamination Countermeasures Act (Law No. 53 of 2002, as amended) or any other similar laws and regulations. Under the Soil Contamination Countermeasures Act, the Property has not been and is not currently designated as an area polluted by specific harmful substances, and to the knowledge of the Seller there is no threat thereof. The Seller has never received any notification to conduct a survey of the state of

pollution of the Property pursuant to the Soil Contamination Countermeasures Act, and to the knowledge of the Seller there is no threat thereof.

(p) With regard to any part of the Property, there is no excess of permissible amount of (i) prohibited hazardous substance (substances prohibited, restricted or regulated by other means with respect to the use thereof under Japanese law (including, without limitation, asbestos and PCB), or (ii) value impairment hazardous substance (substances for which it is reasonably anticipated that such substances would give rise to expenses, obligations or other restrictions in order to comply with applicable regulations under Japanese laws or to avoid liabilities under Japanese law concerning such substances in owning, using, managing, or making improvement (including, without limitation, renovation, repair, rebuilding or demolition) or transfer of the Property). The Seller has never received any notification that there is or may be any violation of environmental law with respect to the Property from government, official institutions, courts, or any other third parties.

(q) No part of the Property has been used by engaging in the discharge of industrial waste and special management industrial waste under Waste Disposal and Public Cleaning Act (Law No. 137 of 1970, as amended). Seller has not expressly released anyone from liability with regard to industrial waste of the Property, does not owe any contractual obligations or legal responsibilities with regard to such substance or claim, lawsuit or other proceeding, and has not assumed any liabilities regardless of whether contractual obligations or legal responsibilities.

(r) The boundary lines of the Land are as shown in the boundary confirmation survey drawings of the Land to be delivered to the Purchaser and the Seller has acquired all the drawing regarding the public assessment of boundary and boundary confirmations on which all landowners who own land adjacent to the Land have named and sealed. With respect to boundaries of the Land, there are no lawsuits, arbitration, mediation, or any other legal proceedings in which any independent third party has been involved to resolve or settle the disputes between the Seller and any owner or occupant of land adjacent to the Land, and there is no claim, objection, disagreement or complaint from any owner or occupant of the adjacent lands with respect to the boundaries of the Land, or execution of this Agreement or performance of provisions of this Agreement, and to the knowledge of the Seller there is no threat thereof. With respect to the Property, there is no illegal encroachment on the Property by buildings or structures that exist on land adjacent to the Property, and there is no illegal encroachment on the adjacent lands by the Property. With respect to the Property, there is no dispute or potential dispute or to the knowledge of the Seller threat thereof between the Seller and any owner or occupant of land or building adjacent to the Property in connection with neighboring dispute, such as blockage of sunlight, blockage of light, blockage of view, landslide, loss of or damage to structure, subsidence or decline, a sense of oppression, noise pollution, vibration, offensive odor, radio disturbance and other similar issues.

(s) All the sanctions, permits, notifications or any other procedures which should be made to government or official institutions as required for current possession or use of the Property have been duly and validly completed.

(t) There are no facts, events or latent defects that cause material adverse effects on the operation, management or value of the Land. Building was legally and properly built in

accordance with all applicable laws and regulations as well as with the construction industry's practice at the time of the construction, using the materials with reasonable quality and is strong in structure in light of its construction age and category of structure. There are no latent defects that may cause any material adverse effects on the operations of business by the Existing Lessee in foundation, roof, exterior walls, air-conditioning facilities, electric facilities, plumbing, elevators of the Building or any other material attached structure of the Building. Building has no latent defect that may become a problem with respect to its aseismic capacity

(u) Building was built according to the drawing of the Building. With respect to the Building, a valid construction confirmation notice has been issued by the government before its construction was started and a certificate of inspection certifying that the construction of the Building was in accordance with such construction confirmation notice has been issued by the government.

(v) With respect to the Property, Seller has not received any notice that the Property is or may be in violation of laws or regulations concerning land use, building standards, pollution control, fire defense and preservation of environment from any government or administrative agencies.

(w) With respect to the Property, to the knowledge of the Seller there is no fact that illegal organizations such as designated organized crime group or any other antisocial powers or the members thereof are concerned in or in connection with the Property, and to the knowledge of the Seller there is no fact that such organizations or members thereof are involve in illegal conducts such as illegally occupying the Property.

(x) The Existing Lessee of the Building is as set forth in Annex 4.

(y) There is no person among the Existing Lessee who is in delinquent in a payment under the Lease Agreement in three month or more, or who is in violation of any other obligations under the Lease Agreement. The Existing Lessee has not made any prepayments in excess of one month's rent. The rent receivables or any other right held by the Seller against the Existing Lessee under the Lease Agreement have not been transferred or disposed to any third party. The Seller has not approved of the creation of a pledge on, or transfer of, the right to claim return of security deposits under the Lease Agreement, and has not received any notification of the creation of a pledge on, or transfer of such right, or any notification of the attachment, provisional attachment or attachment for delinquent taxes. Any Existing Lessee has not suspended payments, and has neither filed nor had third party filed for any Insolvency Proceedings.

(z) Any Existing Lessee does not fall under any of the followings;²⁶

²⁶ Recently, Japanese clients, especially financial institutions, are very sensitive to any kind of connection or involvement of organized crime group or any other antisocial powers. Every financial institutions request to add anti-organized crime provisions similar to or more strict than this subsection (z).

- (i) Any person belonging to a group that is likely to encourage to collectively or habitually carry out violent tortious acts, or to the knowledge of the Seller any person making a deal therewith.
 - (ii) Any person belonging to a group that has received a punishment under the Act concerning Regulation for the Group Having Engaged in Indiscriminate Mass Killing (Law No. 147 of 1999, as amended), or to the knowledge of the Seller any person making a deal therewith, or any person belonging to any other similar group thereto, or to the knowledge of the Seller any person making a deal therewith.
 - (iii) Any person engaging in entertainment and amusement business defined in Section 2, Paragraph 1 of the Act on Control and Improvement of Amusement and Entertainment Business, etc. (Law No. 122 of 1948, as amended), or sex-related amusement special business defined in Section 2, Paragraph 5 of the same act, or to the knowledge of the Seller any person intending to use a room for rent, etc. for such business purpose.
 - (iv) Any person having engaged in, or suspected to have engaged in concealment or receipt of criminal proceeds, etc. provided in the Act for Punishment of Organized Crimes, Control of Crime Proceeds and Other Matters (Law No. 136 of 1999), or to the knowledge of the Seller any person making a deal therewith.
 - (v) Any person likely threatening or menacing a third party with behavior in a way that will disturb the third party's personal life or business, or to the knowledge of the Seller any person intending to use the Building for such purposes to threaten.
- (aa) There exists no judgment, decision, order or in-court settlement with respect to the Lease Agreement, which is not disclosed to the Purchaser. Further, with respect to the Lease Agreement, there are no lawsuits or any other legal proceedings, dispute resolution proceedings or administrative proceedings pending with a court or any other alternative dispute resolution agency or a government or official agency, which are not disclosed to the Purchaser.
- (bb) All of the Lease Agreement constitute legal, valid and binding obligation of the Existing Lessee, and enforceable in accordance with provisions thereof.
- (cc) With respect to the Lease Agreement, there is no agreement that is evidenced by the document which are not disclosed to the Purchaser.
- (dd) The amount of the security deposit owed by the Seller as a lessor under the Lease Agreement shall not exceed JPY [] in aggregate.
- (ee) Aside from the security deposit set forth in the preceding Item, regardless of its name such as security deposit, guarantee money or money deposit, no money has been paid and received that needs to be returned by the Seller with respect to the Lease Agreement.
- (ff) There is no unperformed obligation, event of default, cancellation, termination, and rescission outstanding under the Lease Agreement, and there is no dispute in relation to the validity of the Lease Agreement, which are not disclosed to the Purchaser.

(gg) All information which has been disclosed, provided or approved by the Seller shall in all material respects be true, accurate and complete as of the date of such information and the Seller is not aware of any material facts, information or circumstances that have not been disclosed to the Purchaser which would render any such information incorrect or misleading in any material respect when made or deemed to be repeated and there are no material omissions from any such information which has been provided by the Seller.

Annex 7 (Representations and Warranties of the Purchaser)

(a) Purchaser is a joint stock company (*Kabushiki Kaisha*) duly and validly organized, lawfully and validly existing under the laws of Japan, and has ability and is qualified to do business in Japan.

(b) Purchaser has all requisite power and authority to execute, and to perform its obligations under this Agreement; and the execution of, and the performance of the Purchaser's obligations under this Agreement do not violate the Purchaser's articles of incorporation or other organizational documents nor any contract, agreement, judgments, decisions or orders to which the Purchaser is a party or which binds the Purchaser or the Purchaser's assets, nor any statute, instruction, rule, guideline, ordinances or other laws applicable to the Purchaser. Purchaser has completed all procedures required by law, its articles of incorporation and other organizational documents to execute, and to perform its obligations under this Agreement.

(c) This Agreement constitutes a legal, valid and binding obligation of the Purchaser, enforceable against the Purchaser in accordance with its terms.

(d) There is no pending or threatened litigation, adverse claim or action of any kind or nature that, if decided against the Purchaser, would have a material adverse affect on Purchaser's ability to perform its obligations under this Agreement; and, without limiting the foregoing, there are no legal or administrative proceedings of any nature pending against the Purchaser or any of its directors, officers, employees or agents in their capacity as directors, officers, employees or agents of the Purchaser.

(e) Purchaser does not need to obtain permit, approval or consent of, or notification to any governmental or other regulatory agency or authority or any other third party that has not yet been obtained in order to enter into and to perform its obligations under this Agreement.

(f) Purchaser has complied in all respects with the requirements of this Agreement, and laws, regulations and licensing requirements applicable to the transactions contemplated by this Agreement and has filed with the proper authorities all statements and reports required under all statutes, ordinances, regulations, rules, by-laws and laws applicable to the Purchaser.

(g) The representative of Purchaser has all requisite power and authority to execute and deliver this Agreement and all the documents to be executed and delivered by the Purchaser in accordance with this Agreement.

(h) There is no filing by the Purchaser or any third parties for commencement of Insolvency Proceedings (as defined in Section 18.2 (2)); there are no events that constitute grounds for any of such Insolvency Proceedings, and there will be no such events occurring as a result of entering into this Agreement. Purchaser is not insolvent, unable to pay its liabilities generally when they become due and has not suspended payments and Purchaser will not become insolvent or unable to pay its liabilities generally or suspend payments as a result of entering into this Agreement.

[(i) Purchaser has the intention to truly purchase the Property.]

(j) The Purchaser acknowledges that the Purchase Price is an appropriate amount, and the Purchaser has no intention to prejudice the Purchaser's obligees.

Annex 8

Form of Lessor Succession Notice

Annex 9

Form of Notice to Purchaser for Assignment Approval



AUSTRIA PURCHASE AND SALE AGREEMENT

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Prepared by

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PURCHASE AND SALE AGREEMENT

between

[•]
("Seller")

and

[•]
("Buyer")

1. Property

1.1. The Seller is the registered owner of the property EZ [•] GB [•], district court [•], land No. [•] located in [•] ("Property"). The Property includes all buildings erected on said property and all appurtenances as in Exhibit 1. A plan of the Property is attached as Exhibit 2.

1.2. Land register extract as of the date of this agreement:

LAND REGISTER [•]
DISTRICT COURT [•]
Last entry [•]

ENTRY [•]
RETRIEVED ON [•]

***** A1 *****

PROPERTY No.	CLASSIFICATION	SIZE	ADDRESS
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]
[•]	[•]	[•]	[•]

***** A2 *****

1 [•]

***** B *****

1 OWNERSHIP: 1/1

[Name of owner]

[Address of owner]

d [•]

***** C *****

1 a [•] MORTGAGE NOTE

LIEN

[•]

Maximum amount: [•]



- 1.3. The Buyer assumes all obligations registered in the land register. These obligations do not reduce the selling price.
- 1.4. The Buyer is fully aware of all lease agreements and takes on all leases as listed in Exhibit 3 in accordance with Section 1120 of the ABGB (General Civil Code) and Section 2 of the MRG (Austrian Rent Act), thus in their entirety and also with regard to the terms of contract and cancellation periods. The Buyer is also fully aware of all other contracts as listed in Exhibit 4 and assumes all rights and obligations deriving from these contracts.
- 1.5. The Seller sells and transfers the Property to the Buyer, inclusive of all legal and actual appurtenances and all rights and obligations, in particular the building erected on the Property, subject to the terms and conditions contained in this agreement.

2. *Purchase Price and Escrow Agent*

- 2.1. The purchase price is EUR [●] (in words: [●]) exclusive of 20% VAT. The total purchase price amounts to EUR [●] ("**Purchase Price**"). The Seller shall exercise the option to treat this sale as not VAT exempt in accordance with section 6 subsection 2 of the Turnover Tax Act.
- 2.2. The first installment of EUR [●] must be transferred to the irrevocably appointed escrow agent [●] ("**Escrow Agent**"), escrow account no [●]. This first installment must be transferred in such a manner that it is at the full disposal of the Escrow Agent by [●] 12 a.m., so that the Escrow Agent can transfer the money to the Seller on the same day.
- 2.3. The remaining amount of EUR [●] must be transferred to the escrow account (as in section 2.2) in such a manner that it is at the full disposal of the Escrow Agent by [●] 12 a.m., so that the money can be transferred to the Seller on the same day. If the remaining amount is not credited to the escrow account by [●], 12 p.m., then the Seller has the right to withdraw from this agreement immediately. In that case, the first installment (as of section 2.2) shall be seen as a penalty for breach of contract; the Seller does not have to return the first installment to the Buyer. All other actions relating to the agreement shall be reversed.
- 2.4. The Buyer hereby confirms good receipt of an invoice enabling the Buyer to claim input tax deduction. The Buyer shall pay VAT in the amount of EUR [●] to the Seller seven working days prior to the date on which the VAT falls due vis-à-vis the tax authorities. The Buyer will deposit an irrevocable bank guarantee from a European bank in the amount of EUR [●] that is valid until [●] with the Escrow Agent as a surety. The Escrow Agent shall execute the bank guarantee if the money has not been credited to the account of the Seller on or before the due date.
- 2.5. Both, the land transfer tax and register charges in the amount of EUR [●] must be transferred by the Buyer to the account [●] on or before [●]. If the money is not transferred by that date, the Seller shall grant the Buyer a grace period of 5 (five) additional days and can rescind the agreement if he has still not received the money after the expiry of these 5 days. In that case, the first installment (as per section 2.2 of this agreement) is to be handled as a penalty for breach of con-



tract; the Seller does not have to return the first installment to the Buyer. All other actions relating to the agreement shall be reversed.

- 2.6. The Buyer shall pay an 8% interest rate of above the base lending rate of the European Central Bank for delayed payments.
- 2.7. The Escrow Agent is authorized and obliged:
 - a) after having received the money mentioned in section 2.5, to calculate the amount of the land transfer tax and registration charge and to transfer all taxes and charges to the tax office for charges and transaction tax in Vienna (*Finanzamt für Gebühren und Verkehrssteuern*);
 - b) after having received the entire Purchase Price (the net amount on the escrow account and the amounts mentioned in section 2.4 on the Seller's account), to register the property right in the land register;
 - c) to transfer the remaining Purchase Price (as set in section 2.3) to the Seller inclusive of all interest and net of capital gains tax and fees related to the escrow account. The transfer shall only be effected if and as soon as the Escrow Agent receives the decree regarding orders of priority for the intended sale (*Rangordnungsbeschluss für die beabsichtigte Veräußerung*) in the original, which allows for the registration of the Buyer's property right in the first rank;
- 2.8. The contracting parties will support the Escrow Agent in executing this agreement. This applies in particular to the handing-over of all necessary documents in the original and necessary declarations in their required form.

3. *Warranty and Liability*

- 3.1. The Buyer is aware of the location, borders, characteristics, conditions of the Property, in particular all circumstances which are apparent from the documents available in the data room. Furthermore, the Buyer confirms that it has thoroughly inspected the Property.
- 3.2. The Seller represents and warrants that the following statements are true as of the date of this agreement and on the Effective Date (as per section 4.1):
 - a) the Property will be transferred to the Buyer without any encumbrances – regardless of whether such encumbrances are registered in the land register or not.
 - b) no lease contracts, except for those listed in Exhibit 3, exist and in the last 12 months no claim exceeding the amount of EUR 10,000.00 was lodged against the Seller by a lessee that has not been settled in an satisfactory manner; the Seller has not disposed of any rights to lease payments; the Seller is to the best of its knowledge not aware of any grave breach of a lease contract by a lessee;



- c) a legally binding building permit is in place with regard to the Property and the building conforms to this building permit. All orders by the building inspectors regarding the Property have been complied with;
 - d) all existing documents relating to the property administration (lease contracts, etc.) will be handed over to the Buyer; documents currently located abroad will also be handed over abroad;
 - e) no employees of the Seller transfer to the Buyer as a result of this agreement (e.g., concierge, technical personnel, etc.). The Seller assumes all costs necessary to defend the Buyer against claims by employees of the Seller, including the Buyer's reasonable attorney's fees;
 - f) it is not involved in any legal dispute regarding the Property; no administrative proceedings or conciliatory proceedings with lessees are pending. To the best of its knowledge, no such proceedings are imminent;
 - g) no taxes or fees related to the Property are outstanding and that all other charges, taxes or other fees, which the Buyer could be obliged to pay, are paid;
 - h) to the best of its knowledge the land has not been contaminated during the use by the Seller;
 - i) the waste disposal and supply lines exist, as mentioned in Exhibit 5, and that the relevant connection fees have been paid;
 - j) to the best of its knowledge there are no material hidden defects;
 - k) to the best of its knowledge all essential documents, as mentioned in Exhibit 6, have been made available;
- 3.3. The Seller does not give any warranties or assume any liability in excess of the warranties listed in 3.2.
- 3.4. Any claim arising from a defect in the Property must be brought within two years of the reference date; regardless of the legal basis for any such claim (specifically claims for damages).
- 3.5. The Seller does not assume any liability for slight negligence. The burden of proof with regard to gross negligence of the Seller rests with the Buyer.
- 3.6. As of the handover, the Seller also transfers all warranty claims and claims for damages relating to the building of the Property. Therefore, any such claims can only be raised by the Buyer.



4. *Transfer of the Property*

- 4.1. The transfer of the Property shall be effected on [●] (“**Effective Date**”) by means of assignation by the property administration. The risks shall transfer on the same date. The physical transfer and transfer of all keys to the building will also take place on the Effective Date after a joint inspection of the Property. Insurance policies and all other documents related to the Property, including technical descriptions and property administration documents, will be transferred on the same day.
- 4.2. Both parties will jointly execute a transfer protocol.
- 4.3. The Seller bears responsibility to pay all running expenses related to the Property until the Effective Date, 12:00 p.m. Thereafter, these costs are borne by the Buyer.
- 4.4. The Property is insured according to the contract listed in Exhibit 7. The Seller will not cancel this insurance until the Buyer’s title has been duly registered with the land register. However, the Seller will fulfill its duty of disclosure under section 71 Insurance Contract Act (*Versicherungsvertragsgesetz*). The Buyer will be responsible for an adequate insurance from Effective Date. Until Effective Date, the Seller remains the beneficiary of the insurance for all indemnifications.
- 4.5. From the date of the signing of the agreement, Seller will administrate the Property in an ordinary course of business. Anything falling outside the ordinary course of business will require the Buyer’s prior written agreement.

5. *Public Approval of Land Transfer*

- 5.1. The Buyer hereby affirms in lieu of oath that it is a corporation with its registered seat in Austria, whose shareholders are natural persons of Austrian citizenship.

6. *Assent to Registration of the Conveyance (Aufsandungserklärung)*

- 6.1. The Seller hereby explicitly and irrevocably consents that, by reason of this agreement, the Buyer’s ownership in the entire Property is registered with the land register without the Buyer’s further knowledge and agreement being required.

7. *Miscellaneous*

- 7.1. Any changes and amendments to this agreement must be in writing. The same principle applies to material declarations within the scope of this agreement.



- 7.2. The contract parties hereby grant the Escrow Agent (as defined in 2.2) full authority to undertake possible amendments of and additions to this agreement, also in notarized form, but only to the extent necessary to register this agreement.
- 7.3. The Buyer shall pay the lump sum of EUR [●], plus VAT, for costs arising in connection with the setting-up of this agreement and registration-related costs incurred by the Escrow Agent. If these costs exceed the amount of EUR [●], they shall be borne by the Seller. Any public taxes and charges arising in connection with the setting-up of this agreement shall be borne by the Buyer. Each of the contract parties is responsible for its costs arising out of legal and tax consultation and/or representation.
- 7.4. If a provision of this agreement is or becomes illegal, invalid or unenforceable that shall not affect the validity or enforceability of any other provision of this; an illegal, invalid or unenforceable provision shall be replaced by a valid and enforceable provision that represents the intended economic purpose of this agreement.
- 7.5. As long as the contract parties have not communicated addresses different from the ones mentioned in this agreement, then any notification to these addresses shall be valid.
- 7.6. This agreement is subject exclusively to Austrian law. The rules of conflict of laws of Austrian international private law are not applicable.
- 7.7. All disputes arising out of or in connection with the present agreement will be subject to the exclusive jurisdiction of the Viennese Court for Commercial Matters.
- 7.8. All exhibits to this agreement form an integral part of the agreement.

Exhibits:

Exhibit 1	Appurtenances
Exhibit 2	Plan
Exhibit 3	List of leases
Exhibit 4	List of other contracts
Exhibit 5	Supply and waste disposal lines inclusive of charges
Exhibit 6	List of material documents
Exhibit 7	Insurance contract

Vienna, [●]

[●]

[●]



COMMENTS TO THE PURCHASE AND SALE AGREEMENT

Section 1.2 Land Register

The **Land Register** is a public and online accessible register maintained by the district courts of the district where the property is situated. It holds information on every plot of land in Austria. Applications to the land register are submitted electronically. Registration usually takes five to ten days.

The Land Register consists of the following sections:

- A1: General data** on the plot of land, such as address, surface area, and type of use.
- A2: Rights** (e.g., easements) registered in favor of the owner of the respective plot, such as the right to trespass the neighboring property; **restrictions under public law** (e.g., security zone near an airport).
- B: Owner(s)** of the property.
- C: Encumbrances** to the plot of land, such as mortgages, rights of first refusal, restriction of sale, tenancy rights, easements (e.g., the right of the neighbor to trespass on this particular plot).

The Land Register also contains a **Collection of Deeds**, which consists of all documents that served as the basis for the registration of a right in the Land Register (e.g., purchase agreement; mortgage agreements)

Lastly, the Land Register contains a **Cadastral Map** displaying the boundaries of all plots of land.

Rights in rem only come into existence after they have been registered in the Land Register. Entries into the **Land Register** are **binding**. A bona fide purchaser acquires ownership to a property even if the seller is wrongfully (e.g., fraudulently) registered in the land register as the owner. The true owner can in such an event only claim damages from the seller, but cannot raise a direct claim against the buyer. A purchaser will not be considered **bona fide**, if there are certain circumstances that could give rise to doubts as to the correctness of the land register status.

Section 1.4 – Assumption of Lease Agreements:

There are – broadly speaking – two types of lease agreements under Austrian law:



- (a) Certain rent Agreements are subject to the **Austrian Rent Act (MRG)**. Even commercial tenants enjoy a high degree of tenancy protection: Landlords can only terminate such agreements for good cause; in some cases, the operating costs are regulated by statute and the monthly rent payments must not exceed certain limits.

The sale of the property does not have any influence on these agreements, i.e., the purchaser assumes all rights and obligations arising out of these agreements (subject to certain exceptions regarding side agreements) as of the date of the purchase.

- (b) **Other agreements:** If the Austrian Rent Act does not apply, the purchaser (and the tenant) has a statutory right to terminate the lease agreement right by reason of the transfer of the property, even if the agreement itself does not provide for a right to terminate the agreement. This right to terminate the agreement will not apply if the lease agreement is registered with the Land Register.

There is no clear distinction between the two types of agreements. If you intend to terminate a lease agreement, we strongly recommend that you seek local advice.

Section 1.5 – Transfer of Ownership:

Under Austrian law, any building erected on the land is considered part of the land; rights and obligations relating to the land automatically extend to the building and all fixtures and appliances that form part of the building (e.g., electrical and sanitary installations). This is a mandatory rule. It does not include appliances that can be removed from the building without damaging the premises, e.g., an emergency power unit.

Exceptions apply in case of a building right (*Baurecht*), which must be registered in the Land Register and in case of buildings of temporary nature, so-called superstructures (*Superädifikat*) which can be registered with the Land Register. Note that superstructures can be solid buildings and the “temporary nature” can relate also to longer periods (e.g., 50 years).

Absent an agreement to the contrary, any inventory and movables “belong to the building” in the sense that serve the use of the building (e.g., fire extinguishers) or are designated by the owner to be used in the building (e.g., kitchen appliances and furniture).

Section 2.2 and 2.4 – Value Added Tax:

The sale of real property is generally exempt from VAT. The down side of this exemption is that the seller has to repay any input tax deductions with respect to the property. If the seller opts not to treat the sale as VAT exempt, then the seller does not have to repay the input tax deductions. In this case, the sale is subject to 20 % VAT. Commercial buyers can reclaim VAT, so this is generally not a cost factor. Paying



VAT, however, increases those taxes that are calculated on the basis of the purchase price, such as the land transfer tax (3.5 % of the purchase price) and registration fee (1.1 % of the purchase price) – see 3.5 below.

VAT must be paid on the 15th day of the 2nd month following the purchase, e.g., if the sale occurs on 2 April 2011, then VAT becomes due on 15 June 2011.

Section 2.2 – Earnest Money, Option Money, Contract Penalty:

Earnest money (*Angeld*): If a contracting party deposits the earnest money and does not perform the contract, it cannot claim the earnest money back. If the other party (the party receiving the earnest money) does not perform, the double earnest money has to be returned to the depositor.

Option money (*Reugeld*): Option money is not deposited, but merely pledged to be paid in case of rescission. The party pledging the money has the choice between performing the contract and rescinding it (thus having to pay the option money). The option money must also be paid when a party culpably fails to deliver (despite not rescinding the contract).

Contract Penalty (*Vertragsstrafe*): If the contract contains a penalty clause that expressly contemplates liquidated damages, the breaching party must pay this penalty. The penalty must be paid regardless of whether damages in fact occurred or not, and does not necessarily require culpable non-performance (subject to the parties' agreement).

Section 2.2 - Escrow

The purchase price is usually deposited into an escrow account held by a notary public or an attorney-at-law, and paid out to the Seller after the Buyer is registered in the Land Register.

There are two alternatives regarding the payment of the purchase price:

- a. The purchase price is generally deposited into the escrow account before the purchase agreement is executed by the seller;
- b. If the purchase price can – for any reason – not be deposited prior to signing, then the escrow agent is instructed not to file the application for the registration of the buyer with the land register until the purchase price is deposited into the escrow account. The seller usually has the right to rescind the purchase agreement if the purchase price is not deposited within a certain time frame.

The escrow agent is usually instructed to transfer the purchase price to the seller:

- a. after the buyer has been registered as the owner of the land in the Land Register; or



- b. after the escrow agent is in possession of all documents necessary for the registration of the seller, including (depending on the type of the transaction):
- i. the duly executed sale and purchase agreement;
 - ii. the tax clearance certificate (see below)
 - iii. a so-called ranking order (*Rangordnung der beabsichtigten Veräußerung*), which is a decree issued by the Land Register. The holder of the decree can request registration of the ownership in the same rank as the rank of the order;

Example: The Seller (S) sells the property to the Buyer (B) in February 2011, but B does not immediately apply for registration (e.g., because the purchase price has not been paid). The Land Register issues a ranking order in March 2011. S subsequently sells the property mala fide to a third party (X) who applies for registration of its ownership in April 2011. X is registered owner of the property. B can, however, request deletion of X as registered owner and apply for registration of B, because the ranking order was issued prior to the date on which X had applied for registration.

Escrow accounts are usually monitored by the respective Bar Association, which also provides insurance against misappropriation of funds by their members.

Section 2.5: Taxes and Fees – General Information

The acquisition of land in Austria is subject to:

- 3.5% land transfer tax
- 1.1% registration fee

The parties may decide on who is to pay these taxes. As a general rule, the tax liability is borne by the purchaser.

The land transfer tax can be avoided by structuring the transaction as a share deal. In this case, the land transfer tax is only triggered if one person holds all shares in the company owning the land. However, if the shares in the company holding the real estate are acquired through two different companies that are not in the same VAT group (for example, one buyer and an affiliated company) the tax is not triggered.



Section 3.1 – Inspection of the Property

Under Austrian law, a seller is not liable for apparent defects in the property, except in case of an express warranty or in the case of fraudulent intent. The rationale behind this rule is that apparent defects are usually reflected in the purchase price.

This concerns: (a) any encumbrances that are registered in the public register (except mortgages); and (b) any encumbrances that are clearly visible on the site (e.g., if there is a footpath leading across the site to a neighboring piece of land, then the buyer cannot make a warranty claim against the seller if the neighbor asserts the right of way). The buyer has to request information or conduct surveys if there are any indications for such apparent encumbrance (e.g., if there is a manhole cover clearly visible, then the buyer has to investigate whether a sewer pipe or other pipe lies beneath the surface).

Section 3.2 – Representations and Warranties:

Austrian law provides a set of non-mandatory warranty arrangements. Absent an agreement to the contrary, the seller warrants that:

- (i) All characteristics of the property that the buyer could reasonably expect.
- (ii) All features that are necessary for the agreed use. For example, with the sale of an office building, all legal and factual prerequisites for such use must be in place.
- (iii) All statements that have been publicly made by the seller, e.g., in property descriptions, exposés, etc.

This set of rules is non-mandatory and can be modified by the parties. When excluding the seller's warranty, it is essential to use explicit language in the contract, because limitation clauses are construed very narrowly by the Supreme Court. For example, in a case where the property was sold "as seen" and "therefore all warranty is excluded", the seller was nevertheless liable for hidden defects (which the buyer could not "have seen").

Unless otherwise agreed by the parties, the **warranty period** is two years for movables and three years for real property. The warranty period begins when the property is "handed over" to the purchaser. However, in case of default by the seller, the buyer can make the same claim in tort. The three year period for filing a tort claim starts to run only after the buyer has become aware of the defect.

Section 3.2.h – Environmental Warranties:

Liability in the case of contaminated properties is regulated by several laws, each of which deals with different types of contamination. The relevant provisions are to be found in particular in the *WRG* (Water Rights Law) and in the *AWG* (Waste Management Law). Both laws reflect the principle that it is the pri-



mary responsibility of the “obligor” (i.e., the actual polluter) and a only subsidiary responsibility of the property owner.

Both acts follow the “polluter pays” principle. In addition to the liability of the polluter, a property owner becomes liable if:

- the polluter cannot be held liable because, for example, the polluter cannot be identified or is unable to pay; and
- the owner consented to or at least tolerated the actions or omissions that led to the contamination or failed to take reasonable measures to prevent it.

The liability of the property owner passes to his or her legal successor (e.g., the acquirer of the contaminated property) if the contaminations were known to or should have been known to the acquirer when applying reasonable care.

Both the *WRG* and *AWG* nonetheless limit the liability of the property owner to contaminations that occurred before 1 July 1990. For “old contaminations” of this kind, the owner is only liable if the owner explicitly allowed the respective contamination and has benefited in the form of consideration for the use of his property.

Section 4.4 – Insurance:

Under Austrian law, the buyer automatically assumes the rights and obligations arising out of property insurance. The buyer has a statutory right to terminate any pre-existing property insurance within one month after the registration of its ownership with the Land Register. Exercising this termination right usually triggers a payment obligation, because insurance companies usually give significant discounts for long term agreements that have to be repaid in the event of early termination. The seller has the obligation to make these payments.

Section 5.1 - Land Transfer – Permits:

The acquisition of land generally requires a prior permission if the buyer is not an Austrian citizen or if the land is in a protected area (e.g., agricultural land; forest; natural preserves; non-tourist areas). EU nationals or nationals of the European Economic Area (EEA), as well as companies domiciled in an EU or EEA Member State are treated in the same way as Austrian citizens. Companies registered in Austria are deemed to be foreign if they are (ultimately) controlled by non-Austrians.

Without such prior approval, a non-Austrian buyer cannot register with the Land Register and, thus, cannot become the owner of the land. Heavy penalties apply and, inter alia, a purchase agreement that violates land transfer restrictions is null and void.



Land transfer regulations have led to a number of creative solutions by local attorneys that efficiently make use of a grey area in the respective regulation and in some cases go beyond the grey area.

Section 6.1 - Registration of the Conveyance:

The assent to registration of the conveyance (*Aufsandundungserklärung*) is required for the registration of the property with the Land Register. As the Land Register is very formalistic, it is common for all parties to the agreement to grant a power of attorney to the person applying for the registration of the agreement to sign on their behalf any amendments to the agreement that are necessary or useful for purposes of registration.

Contact

If you have any questions, please contact

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AGREEMENT OF PURCHASE AND SALE¹

[MUNICIPAL ADDRESS OF PROPERTY]

THIS AGREEMENT² is dated as of the ____ day of _____, 20__,

B E T W E E N:

[VENDOR]³

(the “Vendor”)

- and -

[PURCHASER]⁴

(the “Purchaser”)

WHEREAS the Vendor has agreed to sell, transfer and assign the Purchased Assets to the Purchaser and the Purchaser has agreed to purchase, acquire and assume the Purchased Assets from the Vendor on the terms and subject to the conditions of this Agreement;

NOW THEREFORE, for good and valuable consideration, the receipt and adequacy of which are acknowledged, the parties covenant and agree as follows:

¹ Prepared by John D. Hutmacher, Partner, Blake, Cassels & Graydon LLP, Toronto, Ontario, Canada, with acknowledgement of the gracious assistance of his Partner, Chris Huband, with the annotations.

² This template agreement of purchase and sale has been prepared predominantly from the vendor’s perspective and is in a form frequently used in the province of Ontario, Canada. With a few jurisdictional-specific adjustments, it can be adapted for use in most, if not all, provinces of Canada.

³ On the vendor’s side, there is often a difference between the entity registered as the owner of the property in the Land Registry Office and the entity that has beneficial ownership of the property. The registered owner of the property may be a bare trustee or nominee for the beneficial owner and has no economic or financial stake in the property. All of the economic and financial interests in the property reside with the beneficial owner. This situation may arise, for example, where the beneficial owner of the property is a limited partnership or a trust, neither of which can hold title to real property in its own name in most of the common law provinces of Canada; rather, title must be held in the name of an individual person or a corporation. A beneficial owner that is a limited partnership or a trust will designate a bare trustee or nominee corporation to hold title to the property as its agent. In all of these cases, it will usually be important for the purchaser to establish contractual relations with the beneficial owner(s) of the property rather than the bare trustee or nominee.

⁴ On the purchaser’s side, if the intended purchaser is a corporation or entity yet to be incorporated or formed, the shareholder or partner of the future corporation or entity should be a party to the agreement of purchase and sale. Both the *Business Corporations Act* (Ontario) and the *Canada Business Corporations Act* have simple rules for the adoption of pre-incorporation contracts by newly-formed corporations and such adoption should be expressly contemplated in the agreement of purchase and sale. If the intended purchaser at the time of closing is an investor client or affiliate of the purchaser named in the agreement, the assignment section of the agreement should be to permit the assignment to the investor client or affiliate without the consent of the vendor.

ARTICLE 1 **INTERPRETATION**

1.1 Definitions.⁵ In this Agreement, the following terms shall have the meaning set out below unless the context otherwise requires:

“Agreement” means this Agreement and the attached Schedules, as amended from time to time, and “Article”, “Section” and “Schedule” mean the specified article, section or schedule, as the case may be, of this Agreement.

“Assignment of Contracts” means an assignment by the Vendor and an assumption by the Purchaser of all of the right, title and interest of the Vendor in the Contracts and the benefit of all covenants, guarantees and indemnities thereunder, including an indemnity given by the Purchaser in favour of the Vendor with respect to Claims under the Contracts for matters occurring on or after the Closing Date and an indemnity given by the Vendor in favour of the Purchaser with respect to Claims under the Contracts for matters occurring prior to the Closing Date, with such assignment and assumption taking effect from the Closing Date.

“Assignment of Leases and Rents” means an assignment by the Vendor and an assumption by the Purchaser of all of the right, title and interest of the Vendor in the Leases and the benefit of all covenants, guarantees and indemnities thereunder, including an indemnity given by the Purchaser in favour of the Vendor with respect to Claims under the Leases for matters occurring on or after the Closing Date and an indemnity given by the Vendor in favour of the Purchaser with respect to Claims under the Leases for matters occurring prior to the Closing Date, with such assignment and assumption taking effect from the Closing Date.

“Building” means, collectively, the buildings, structures, erections, improvements and appurtenances located on, in or under the Lands and any fixtures owned by the Vendor located on, in or under the Lands.

“Business Day” means any day other than a Saturday, Sunday or statutory holiday in the Province of Ontario.

“Chattels” means the chattels, furniture, furnishings, equipment and machinery located on the Property owned by the Vendor and used solely in connection with the Property.

“Claim” means any claim, demand, action, cause of action, damage, loss, cost, liability or expense including, without limitation, reasonable professional fees and all costs incurred in investigating or pursuing any of the foregoing or any proceeding relating to any of the foregoing.

“Closing” means the closing and consummation of the transaction of purchase and sale contemplated by this Agreement including, without limitation, the satisfaction of the

⁵ It is helpful to include a separate section of the agreement dealing with definitions. The alternative is to define terms as they arise in the text throughout the agreement, but this makes the definitions difficult to find.

Purchase Price and the delivery of the Closing Documents in accordance with Section 6.1 on the Closing Date.

“Closing Date” means [•].⁶

“Closing Documents” means the agreements, instruments and other documents to be delivered by the Vendor to the Purchaser or the Purchaser’s Solicitors pursuant to Section 6.2 and the agreements, instruments and other documents to be delivered by the Purchaser to the Vendor or the Vendor’s Solicitors pursuant to Section 6.3.

“Contracts” means (i) the Warranties, (ii) all existing contracts and agreements with third parties entered into by the Vendor or by which the Vendor is bound in connection with the ownership, development, maintenance, repair, operation, cleaning, security, fire protection, servicing or any other aspect of the Property, and (iii) all existing contracts and agreements with third parties relating to any assets leased by the Vendor as lessee or by which the Vendor is bound as lessee and located on the Property, in each case as amended, extended, renewed or otherwise modified to the Closing Date, together with any such Warranties, contracts and agreements entered into during the Interim Period, in each case to the extent the same are assignable, but excluding Leases, Permitted Encumbrances and any property management contract or contracts with respect to the Property.⁷

“Deposit” means the sum or sums paid by the Purchaser pursuant to Sections 2.3(a) and 2.3(b).

“Due Diligence Date” means [•].⁸

⁶ The Closing Date is usually specified to be a certain number of days following satisfaction or waiver of the purchaser’s due diligence date conditions. This is often a period of 30 days or so following the due diligence date but sometimes shorter or longer depending upon the complexity of the transaction.

⁷ The definition of “Contracts” should include warranties (for example, under construction contracts), but exclude the vendor’s employment contracts with its employees and any property management contracts (as the purchaser will usually not wish to assume responsibility for the vendor’s employees and will wish to hire its own property manager). There are frequently issues arising with respect to the ability of the purchaser to select which contracts it wishes to assume. Generally speaking, contracts are personal to the vendor and will not automatically transfer to the purchaser upon the sale of the property.

⁸ In most commercial real estate transactions, it is usual for the purchaser to have a period within which to conduct a due diligence review of the property, including a review of its physical condition, financial performance and the contracts and leases associated with it. On or before the expiry of this due diligence period, the purchaser has the right to terminate the transaction without penalty. The “Due Diligence Date” definition establishes the end of the purchaser’s due diligence period. From the purchaser’s perspective, this period should commence only once the vendor’s due diligence documents are delivered and following the waiver of any vendor’s conditions. Sometimes a plugged date is used, which exposes the purchaser to the risk that materials necessary for the conduct of its due diligence are not delivered until after the period has commenced. The length of the period will depend upon the nature of the due diligence to be conducted, the complexity of the real property assets and the state of the vendor’s records and preparedness. It is usually useful to specify a *time* of expiry, including the time zone, as due diligence investigations often go down to the wire.

“Encumbrance” means any mortgage, lien, charge, encumbrance, restriction, security interest, conditional sale agreement, lease, restriction, covenant, easement, encroachment and any other similar claim or interest.

“Environmental Law” means any law, by-law, order, ordinance or regulation of any applicable federal, provincial or municipal government or governmental department, agency or regulatory authority or any court of competent jurisdiction relating to environmental matters and/or regulating the import, manufacture, storage, distribution, labelling, sale, use, handling, transport or disposal of Hazardous Substances including, without limitation, the *Environmental Protection Act* (Ontario).

“Hazardous Substances” means any contaminant, pollutant, dangerous substance, noxious substance, toxic substance, hazardous waste, flammable or explosive material, radioactive material, polychlorinated bi-phenyls, polychlorinated bi-phenyl waste, polychlorinated bi-phenyl related waste and any other substance or material now declared or defined to be regulated or controlled in or pursuant to the Environmental Law.

“Interim Period” means the period between the date on which the last of the parties has executed and delivered this Agreement and the Closing Date.

“Lands” means the lands municipally known as [insert municipal address], together with all easements, rights-of-way and interests appurtenant thereto, more particularly described in *Schedule A*.

“Leases” means all executed offers to lease, agreements to lease, leases, renewals of leases, tenancy agreements, rights of occupation, licenses or other occupancy agreements granted by or on behalf of the Vendor or its predecessors in title to possess or occupy space within the Property or any of them now or hereafter, together with all security, guarantees and indemnities of the Tenants’ obligations thereunder, in each case as amended, renewed or otherwise varied to the date hereof, together with any such executed offers to lease, agreements to lease, leases, renewals of leases, tenancy agreements, rights of occupation, licenses or other occupancy agreements entered into during the Interim Period; and **“Lease”** means any one of the Leases.⁹

“Notice” has the meaning set out in Section 7.3(1).

“Permitted Encumbrances” means those Encumbrances listed in *Schedule B*.¹⁰

⁹ Unless a single-tenant building situation, the list of Leases is not typically attached to the agreement of purchase and sale but the documents comprising the Leases are often listed in a Schedule to the Assignment of Leases.

¹⁰ The Schedule of Permitted Encumbrances deserves special attention. These are the title matters, including registered title encumbrances, that the purchaser is required to accept on closing and which the purchaser cannot require the vendor to delete from title prior to or at closing. Sometimes a list of general categories of encumbrances are added in addition to a list of specific registrations on title to the property. Unless it is contemplated that mortgages and security collateral thereto are to be assumed by the purchaser on closing, these types of items should not be permitted encumbrances.

“Person” means an individual, a partnership, a corporation, a trust, an unincorporated organization, a government or any department or agency thereof and the heirs, executors, administrators or other legal representatives of an individual.

“Property” means, collectively, the Lands and the Building.

“Property Documents” means:

- (a) a copy of the most recent survey of the Property in the possession of the Vendor, if any;
- (b) copies of the Leases;
- (c) copies of all “as built” plans, specifications and drawings for the Property, to the extent within the possession of the Vendor;
- (d) all documents pertaining to the environmental status of the Lands including, without limitation, audits, assessments, all permits and test reports (including soil and geotechnical tests), to the extent within the possession of the Vendor; and
- (e) copies of all Contracts and Warranties, if any.¹¹

“Purchase Price” has the meaning set out in Section 2.2, as adjusted pursuant to Section 2.5.

“Purchased Assets” means, collectively (a) the Lands, (b) the Building, (c) the Chattels, (d) the Vendor’s interest in the Leases, and (e) the Vendor’s interest in the Contracts (subject to Section 6.6), in each case together with all rents, income, benefits and other advantages to be derived therefrom.¹²

“Purchaser’s Solicitors” means such solicitor or firm of solicitors appointed by the Purchaser to act as legal counsel on its behalf in connection with the transaction contemplated in this Agreement and so designated from time to time by Notice to the Vendor and the Vendor’s Solicitors.

“Re-adjustment Agreement” has the meaning ascribed thereto in Section 2.6.

“Security Deposits” has the meaning ascribed thereto in Section 2.5(8).

¹¹ The list of Property Documents is typically subject to some negotiation. The scope of the list is often dictated by the nature of the property that is the subject of the transaction. For multi-tenant properties such as shopping malls or office buildings, the list can actually grow quite long as there will be several documents that the purchaser will wish for the vendor to deliver that relate to the tenancies, such as invoices for operating cost and realty tax recoveries sent to tenants, tenant reconciliations and possibly correspondence with tenants, although sometimes these items are only made available for inspection at the vendor’s property manager’s office rather than being delivered.

¹² The assets being acquired are usually not just the land and buildings, but also leases, contracts and chattels. Consider whether there are other assets (or liabilities) associated with the property, such as trade-marks, business names and other intellectual property assets, licenses to park on adjoining lands and railway sidings.

“**Tenants**” means all Persons having a right to occupy any rentable area of the Property pursuant to a Lease, and their successors and permitted assigns; and “**Tenant**” means any one of the Tenants.

“**Vendor’s Solicitors**” means Blake, Cassels & Graydon LLP.

“**Warranties**” means all warranties, guarantees or contractual obligations, if any, that entitle the Vendor to any rights against a contractor or supplier engaged in the construction or maintenance of the Property or any part of the Property.

1.2 Extended Meanings. Words importing the singular include the plural and vice versa. Words importing the masculine gender include the feminine and neuter genders. If there is more than one Person comprising the Vendor, the obligations of such Persons shall be joint and several and not several.

1.3 Headings. The division of this Agreement into Articles and Sections, the insertion of headings and the inclusion of a table of contents are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

1.4 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter of this Agreement and, except as stated in this Agreement and in the instruments and documents to be executed and delivered pursuant to this Agreement, contains all of the representations, undertakings and agreements of the parties. This Agreement supersedes all prior negotiations or agreements between the parties, whether written or verbal, with respect to the subject matter of this Agreement.

1.5 Currency. Unless otherwise expressly stated in this Agreement, all references to money shall refer to Canadian funds.

1.6 Severability. If any provision contained in this Agreement or its application to any Person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such provision to Persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected, and each provision of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.

1.7 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the applicable laws of Canada. References to statutes shall be deemed to be references to such statutes as they exist on the date of this Agreement, unless otherwise provided.

1.8 Time. Time shall be of the essence of this Agreement. Except as expressly set out in this Agreement, the computation of any period of time referred to in this Agreement shall exclude the first day and include the last day of such period. If the time limited for the performance or completion of any matter under this Agreement expires or falls on a day that is not a Business Day, the time so limited shall extend to the next following Business Day. The time limited for

performing or completing any matter under this Agreement may be extended or abridged by an agreement in writing by the parties or by their respective solicitors.

ARTICLE 2 **PURCHASE AND SALE**

2.1 Purchase and Sale. The Vendor hereby agrees to sell, transfer, assign, set over and convey the Purchased Assets to the Purchaser, and the Purchaser hereby agrees to purchase, acquire and assume the Purchased Assets from the Vendor, for the Purchase Price and on the terms and subject to the conditions contained in this Agreement.

2.2 Purchase Price. The purchase price (the “**Purchase Price**”) for the Purchased Assets shall be [\$.].

2.3 Payment of Purchase Price. Subject to adjustment in accordance with Section 2.5, the Purchase Price shall be paid to the Vendor as follows:¹³

- (a) as to the sum of [\$.], by certified cheque or bank draft payable to the Vendor’s Solicitors, in trust, within two Business Days following the date of execution and delivery of this Agreement by both parties;
- (b) as to the sum of [\$.], by certified cheque or bank draft payable to the Vendor’s Solicitors, in trust, within two Business Days after the Purchaser provides Notice to the Vendor that the condition set out in Section 4.2(a) has been satisfied or waived; and
- (c) as to the balance of the Purchase Price, by certified cheque or bank draft payable to the Vendor or as it may direct on the Closing Date.

2.4 Deposit. The Deposit shall be held by the Vendor’s Solicitors in trust as a deposit and invested in accordance with the following provisions pending the completion or other termination of this Agreement and to be credited on the Closing Date on account of the Purchase Price.¹⁴ The Deposit shall be invested by the Vendor’s Solicitors in an interest-bearing account

¹³ As the amount of the deposit for a commercial real estate transaction may be large, it is usually useful for the purchaser to allow for several days following the execution and delivery of the agreement before the deposit is due and payable. Deposits are typically paid by certified cheque, bank draft or wire transfer as these amounts are immediately credited and allow the vendor to know right away that the deposit funds have been paid. The purchase price can be satisfied in part by cash (paid partly in advance by deposit with the balance due on closing) and in part by the assumption of mortgage debt, subject in most cases to the approval of the mortgage lender. The purchase price can also be satisfied by the issuance of securities, by real or personal property transferred in exchange and by other less common arrangements. It is useful for the vendor to contemplate that the balance of the purchase price can be directed to be paid to parties other than the vendor on closing, such as real estate brokers, consultants, taxing authorities, mortgagees whose mortgages are being discharged, etc.

¹⁴ The deposit or deposits are usually held in trust in an interest-bearing account by the solicitors for the vendor, although the vendor’s real estate broker may handle the deposit on smaller deals. There may be only one deposit, commonly paid on or about the time that the agreement is executed and delivered, or two, with the second deposit paid on or about the time of the purchaser’s waiver of its due diligence conditions. If the purchaser requests

or term deposit or guaranteed investment certificate with a Schedule I Canadian chartered bank. Interest on the Deposit shall accrue to the benefit of the Purchaser from the respective dates on which the Deposit is received by the Vendor's Solicitors until the Closing Date or other termination of this Agreement. The interest on the Deposit accrued or accruing to the Closing Date shall be paid to the Purchaser by certified cheque or bank draft forthwith following the Closing Date. If this Agreement is not completed other than solely by reason of the default of the Purchaser, the Deposit, together with all accrued interest thereon, shall be returned to the Purchaser forthwith without deduction. If this Agreement is not completed solely by reason of the default of the Purchaser, the Vendor shall be entitled to receive and retain the Deposit, together with all accrued interest thereon, without prejudice to other rights or damages available to the Vendor at law or in equity.¹⁵

2.5 Adjustments.

(1) General. Adjustments shall be made as of the Closing Date¹⁶ for prepaid rents and any other amounts prepaid by Tenants under the Leases (and interest accrued thereon to the Tenants' credit, if any), security deposits paid by Tenants to the Vendor pursuant to the Leases (and interest accrued thereon to the Tenants' credit, if any), all rent-free periods under the Leases, realty taxes, local improvement rates and charges, water and assessment rates, deposit payments under Contracts to be assigned and assumed on Closing, utilities, fuel, licences

extensions of the due diligence period, it is common for vendors to require that more deposit funds be put at risk and, sometimes, that some or all of the deposits become non-refundable.

¹⁵ Several issues arise regarding the disposition of the deposit if the transaction does not proceed due to one or the other party's default. It is common to provide that, if the purchaser defaults, the vendor may retain the full amount of the deposit as liquidated damages. Depending upon the amount of the deposit and the loss suffered by the vendor as a result of the default, this may work strongly to the advantage of the vendor or may be woefully inadequate. From the purchaser's perspective, a liquidated damages clause enables the purchaser to effectively cap its exposure to damages in the event of a default, although it runs the risk that the amount of the forfeited deposit funds will far exceed the vendor's actual loss. If the retention of the deposit represents a windfall for the vendor, there may be an issue as to whether that windfall constitutes an enforceable penalty at law. Sometimes vendors negotiate for a cap on their own exposure to damages if there is a vendor default (as reciprocity for permitting the purchaser to have a liquidated damages clause), but the situations are not comparable, as the deposit funds represent a ready source of cash, whereas the purchaser would still be required to sue and collect damages from the vendor. If the transaction is terminated as a result of the purchaser not being satisfied with due diligence investigations, the deposit will usually be returned to the purchaser, together with accrued interest, and the parties will be released from their obligations under the agreement. There may be issues concerning certain obligations, such as confidentiality or the repair of damage caused by the purchaser in conducting tests, that will not be released in such circumstances.

¹⁶ Adjustments arise from the fact that the payment periods for property expenses will usually not coincide with the time of closing. Accordingly, adjustments are effected, usually by calculating each party's *pro rata* share of the applicable property expense based on its respective period of ownership. The adjustment date is usually the closing date, but not always. It is sometimes more convenient to calculate adjustments as of the first day of a calendar month or the first day of a calendar year, even though the actual closing date may not fall on that date. If this is the case, the purchaser or the vendor may be entitled to interest on the closing proceeds, depending upon which party gets the benefit of the different adjustment period.

necessary for the operation of the Property and all other items normally adjusted between a vendor and purchaser in respect of the sale of property similar to the Property.¹⁷

(2) Statement of Adjustments. A statement of adjustments shall be delivered to the Purchaser by the Vendor prior to the Closing Date and shall have annexed to it complete details of the calculations used by the Vendor to arrive at all debits and credits on the statement of adjustments.

(3) Day of Closing. The Purchaser shall receive all income and pay all expenses in respect of the Purchased Assets for the day of Closing itself.

(4) Tenant Recoveries. Operating and other costs recoverable from Tenants shall be adjusted as soon as possible after the Closing Date upon receipt of information from Tenants and in accordance with the requirements of the Leases. Such adjustment of operating and other costs recoverable from Tenants will be done on a *pro rata* basis between the Vendor and the Purchaser, with such proration to be based upon the number of days in each reporting period that are attributable to the ownership of the Property by the Vendor and the Purchaser, respectively, during such reporting periods. Unless the parties otherwise agree, each party shall adjust for its respective period of ownership with each Tenant for all operating and other costs recoverable, it being intended that the Vendor shall collect from each Tenant any under-collection and refund to each Tenant any over-collection for the period prior to the Closing Date and that the Purchaser shall be similarly responsible for the period from and after the Closing Date.¹⁸

(5) Insurance. Insurance premiums shall not be adjusted as of the Closing Date, but insurance shall remain the responsibility of the Vendor until the Closing Date, and thereafter the Purchaser shall be responsible for placing its own insurance.

(6) Commissions, Allowances and Inducements. The Vendor will be responsible for all outstanding real estate commissions, tenant allowances and tenant inducements payable with respect to all Leases and to the extent those have not been paid by the Vendor prior to the Closing Date, the Purchaser shall be credited with respect thereto on the statement of adjustments. If there is any unexpired rent-free or rent-reduced period allowed to any Tenant

¹⁷ Most of the items commonly adjusted for are straightforward, *i.e.*, rent, security deposits under leases and realty taxes are adjusted to ensure that each of the vendor and the purchaser have only received, or paid for, the portion of the particular item to which it is either entitled to or for which it is responsible.

¹⁸ One tricky area of adjustment involves recoveries from tenants under leases of operating costs and realty taxes. Landlords bill tenants on a monthly basis for these items, usually based on an estimated amount, with a reconciliation to occur at the end of the calendar year based on actual amounts incurred. Difficulties arise when a vendor has over-collected or under-collected any such amounts from tenants as of the closing date, meaning that the parties must agree on a mechanism to ensure that each party receives fair treatment – for the purchaser, this means that it is effectively put into the shoes of the vendor as landlord so that the purchaser is not left being required to refund amounts overpaid by tenants that were not adjusted in its favour at closing. One way to address this matter is for the vendor to conduct a reconciliation with tenants shortly after closing so that the purchaser begins with a clean slate.

under any Lease, the Purchaser shall be credited on the statement of adjustments with the rent that would have been payable had there not been such rent-free or rent-reduced period.¹⁹

(7) Arrears. The Vendor shall not be credited with arrears of rent and other charges owed by Tenants that are due and payable prior to the Closing Date. All amounts paid after the Closing Date by Tenants in arrears as of the Closing Date shall be applied first to current instalments of rent and other amounts owing under the Leases and the balance, if any, shall be applied to rent in arrears. Rental arrears shall remain the property of the Vendor and shall be collected by the Vendor for its own account, provided that the Vendor shall notify the Purchaser of such collection efforts, keep the Purchaser informed of all actions commenced and steps taken and shall not threaten termination, possession or distress.²⁰

(8) Security Deposits. The Vendor has delivered or caused to be delivered certain security deposits (collectively, the “**Security Deposits**”) to governmental authorities in connection with certain development-related obligations with respect to the Property. On the Closing Date, the Vendor shall receive a credit on the statement of adjustments in the amount of the Security Deposits that have not been released or returned to the Vendor prior to the Closing Date. The Vendor agrees to provide such reasonable direction or directions to governmental authorities as may be requested by such governmental authorities or the Purchaser to permit the release of the Security Deposits to the Purchaser after Closing.

(9) Letters of Credit. On the Closing Date, the Purchaser shall issue replacement letters of credit for the letters of credit with respect to the Property issued by the Vendor in favour of governmental authorities and shall use its reasonable commercial efforts to cause the Vendor’s letters of credit with respect to the Property to be released and returned to the Vendor. To the extent that the Purchaser is unable to cause such letters of credit to be released and returned to the Vendor, in lieu of issuing the replacement letters of credit referred to above, the Purchaser shall cause matching letters of credit to be provided to the Vendor, which matching

¹⁹ Tenant allowances, including free rent, inducements, lease takeovers, landlord work payments, etc. can be sizeable amounts. The purchaser has to watch out for any inducement payments, including free rent, with respect to existing leases which do not fall due until after the closing date. These should be the responsibility of the vendor, as the rent under the lease for which the inducements are payable has presumably been fully reflected in the pricing of the deal. Inducement payments for leases entered into during the interim period with the purchaser’s approval should be for the purchaser’s account.

²⁰ Tenant receivables are not commonly adjusted and remain the property of vendor. In this way, the vendor runs the risk of non-collection and has an incentive in the period before closing to work to reduce any arrears. It is not unknown, however, for the vendor to negotiate a provision whereby rents that are not more than 30 days in arrears will be adjusted. After closing, the purchaser will typically undertake to pay over any arrears that it collects, but usually only after payment of any current rent and other arrears owing to the purchaser. There are sometimes issues between the vendor and the purchaser regarding the steps that the vendor is permitted to take to collect its outstanding receivables. The purchaser will not wish to have its (new) tenants disturbed by collection activity and may seek to limit the vendor’s right to initiate certain types of collection activity, such as the issuance of a formal statement of claim.

letters of credit may be drawn upon by the Vendor if and to the extent that the Vendor's letters of credit are drawn upon.²¹

2.6 Re-adjustment. If the final cost or amount of an item which is to be adjusted (other than percentage rents and operating costs recoverable from Tenants in respect of the month in which the Closing Date occurs) cannot be determined as at the Closing Date, then an initial adjustment for such item shall be made as at the Closing Date, such amount to be estimated by the parties acting reasonably as of the Closing Date on the basis of the best evidence available on the Closing Date as to what the final cost or amount of such item will be. In each case, when such cost or amount is determined, the Vendor or Purchaser, as the case may be, shall, within 30 days of determination, provide a complete statement thereof to the other and within 30 days thereafter the parties shall make a final adjustment as of the Closing Date for the item in question. In the absence of agreement by the parties, the final cost or amount of an item shall be determined by auditors appointed jointly by the Vendor and the Purchaser, with the cost of such auditor's determination being shared equally between the parties. Within 120 days after the end of the calendar year in which the Closing Date occurs, the Vendor and the Purchaser shall adjust on a *pro rata* basis for taxes, utility charges and operating expenses for the calendar year in which the Closing Date occurs. The parties shall enter into a re-adjustment agreement (the "**Re-adjustment Agreement**") on the Closing Date in respect of those items specified to be re-adjusted in this Section 2.6 and for the re-adjustment of any errors, omissions or changes in the statement of adjustments delivered on the Closing Date. All re-adjustments shall be requested in a detailed manner on or before the first anniversary date after the Closing Date, after which time neither party shall have any right to request re-adjustments.²²

²¹ The vendor has an interest in requiring the purchaser to replace and effect the release and return of any vendor's letters of credit (or to adjust in favour of the vendor for cash security deposits posted with governmental authorities or third parties). Letters of credit or cash security may be posted with the municipality as security for any remaining outstanding obligations under municipal agreements. The purchaser may resist such a request on the basis that it should not be required to post security for obligations that were properly the vendor's to discharge in the period before closing. The vendor may counter with the argument that if the purchaser commits acts or omissions that jeopardize the return of the vendor's security, then steps must be taken to protect the vendor's posted security such as by way of an indemnity.

²² The agreement should contemplate the re-adjustment of any items omitted from or incorrectly calculated on the statement of adjustments and the re-adjustment of items such as tenant recoveries the final amount of which will not be determined until the fiscal year-end for the property accounts. It is usually desirable to establish a cut-off date for re-adjustments, often the one-year anniversary of the closing date or six months or so after the completion of final year-end financial statements.

ARTICLE 3
COVENANTS, REPRESENTATIONS AND WARRANTIES²³

3.1 Representations of the Vendor. The Vendor covenants, represents and warrants to and in favour of the Purchaser that as of the Closing Date:

- (a) Corporate Status. The Vendor is a corporation duly incorporated and subsisting under the laws of its incorporating jurisdiction and has the corporate power, authority, right and capacity to own its property and assets and to enter into, execute and deliver this Agreement and to carry out the transactions contemplated by this Agreement in the manner contemplated by this Agreement, and is not in arrears in filing any tax or other returns required to be filed by it;
- (b) Corporate Authorization. The transactions contemplated by this Agreement will by the Closing Date have been duly and validly authorized by all requisite corporate or other proceedings and will constitute legal, valid and binding obligations of the Vendor;²⁴
- (c) No Default under Other Agreements. Neither the execution of this Agreement nor its performance by the Vendor will result in a breach of any term or provision or constitute a default under:
 - (i) the constating documents or by-laws of the Vendor; or
 - (ii) any indenture, mortgage, deed of trust or any other agreement to which the Vendor is a party or by which it is bound;
- (d) No Litigation. There are no actions, suits or proceedings pending or, to the best of the knowledge of the Vendor, threatened against or affecting the Lands, or the

²³ Generally speaking, the extent to which representations and warranties are contained in an agreement of purchase and sale and the content of such representations and warranties is a question of risk allocation between the parties. The purchaser will look to the representations and warranties of the vendor to fill in gaps in its due diligence that it cannot otherwise discover for itself (although in practice the scope of the representations and warranties of the vendor will often exceed this). From its perspective, the vendor will look to minimize the representations and warranties that it gives on the basis that the purchaser has a due diligence period and ought to satisfy itself to the maximum extent possible. The vendor can sometimes limit its liability for the potential breach of representations and warranties by introducing appropriate qualifications, such as “reasonable”, “material”, in all material respects” or “to the best of the vendor’s knowledge”. Sometimes there is a specific definition of “to the best of the vendor’s knowledge” which limits that knowledge to named individuals. Of course, the utility of any representations and warranties is subject to (i) the length of the period of time during which claims can be made for any breach, and (ii) the quality of the covenant of the party giving the representations and warranties. The covenant issue must be considered by both parties as one of the key practical issues in negotiating representations and warranties. For example, the vendor may be willing to offer considerably more in the way of a complete package of representations and warranties if it is a limited purpose vehicle that will have no material assets following the completion of the transaction. If the purchaser knows or suspects this, it may be appropriate for there to be a holdback or other security posted to secure claims arising from a breach of the vendor’s representations and warranties.

²⁴ The corporate representations and warranties set out in Sections 3.1(a) and (b) of the agreement are usually fairly standard for a large transaction and, for the most part, non-controversial.

occupancy or use of the Property by the Vendor in law, which could affect the validity of this Agreement or any transactions provided for in this Agreement, the title to all or any part of the Lands, the conveyance of the Lands to the Purchaser, the right of the Purchaser from and after the Closing Date to own and occupy the Property, or any action taken or to be taken in connection with this Agreement;²⁵

- (e) No Restrictions. There are no registered or unregistered restrictions or covenants which run with the Lands which have not been complied with;
- (f) No Options. There are no options to purchase or rights of first refusal to purchase with respect to the Purchased Assets or any part thereof that have not expired or been waived;
- (g) No Indebtedness Constituting a Lien. The Vendor does not have any indebtedness to any Person that might by operation of law or otherwise constitute a lien, charge or encumbrance on all or any part of the Lands or which could affect the right of the Purchaser, from and after the Closing Date, to own and occupy the Property;
- (h) Residence. The Vendor is not a non-resident of Canada within the meaning of Section 116 of the *Income Tax Act* (Canada);²⁶
- (i) Leases. The Leases delivered as part of the Property Documents are the only agreements governing the relationship between the Vendor, as landlord, and each

²⁵ Although litigation is a matter personal to the vendor and does not run with the property, some litigation may indicate safety or other issues regarding the purchased assets or may restrict the vendor's ability to sell (for example, a dispute with a previous prospective purchaser). Furthermore, litigation with tenants may be indicative of problems with the building or existing management or both. Although litigation files can be searched in local court houses, it is common for the vendor to deliver some sort of representation and warranty concerning the absence of litigation.

²⁶ This is an important representation from the purchaser's perspective given the potential liability of the purchaser under sections 116(5) and 116(5.2) of the *Income Tax Act* (Canada). These sections provide that a purchaser of real property from a non-resident person is responsible for collecting and remitting to the Canada Revenue Agency a withholding tax on payments to such non-resident persons equal to 25% of the portion of such payments allocated to non-depreciable property such as land and 50% of the portion of such payments allocated to depreciable property such as buildings and chattels unless (i) after reasonable enquiry the purchaser had no reason to believe that the vendor was not resident in Canada, or (ii) a clearance certificate has been issued to the purchaser by the Canada Revenue Agency confirming payment of the applicable taxes. In practice, the reasonable enquiry undertaken by the purchaser is to obtain a certificate from the vendor on closing (and a representation and warranty in the agreement of purchase and sale so as to be able to anticipate its withholding tax obligations, if any, in advance) to the effect that the vendor is not a non-resident of Canada. Vendor corporations that are incorporated in Canada or any province of Canada are by definition not non-residents of Canada. However, the issue of non-residency is often more complicated than simply ascertaining the corporate status of the registered title-holder. As noted above, there can often be a difference between the registered ownership of the property and the beneficial ownership. If the property is held in the name of a bare trustee or nominee corporation, it may not be sufficient for the purchaser simply to confirm that the registered title-holder is a Canadian corporation. The representation with respect to the non-residency status of the vendor should go on to provide that the vendor is receiving the purchase price on closing for its own account and not as agent or trustee or nominee for any other person.

Tenant, as tenant, and true and complete copies of each of the Leases have been delivered as part of the Property Documents;²⁷

- (j) Contracts. The Contracts included as part of the Property Documents are the only contracts and agreements with third parties entered into by the Vendor or by which the Vendor is bound in connection with the ownership, development, maintenance, repair, operation, cleaning, security, fire protection, servicing or any other aspect of the Property;²⁸
- (k) No Work Orders. The Vendor has not received notice of any work orders, deficiency notices, notices of any violation or other similar communication from any municipal or governmental authority, board of insurance underwriters, regulatory authority or otherwise that is outstanding requiring or recommending that work or repairs in connection with the Lands or any part of the Lands is required;²⁹
- (l) Construction Liens. All amounts for labour and materials relating to construction of any services or utilities on the Lands have been fully paid and no one has a right to file a lien under the *Construction Lien Act* (Ontario) in respect of any such construction;³⁰

²⁷ Other than for development sites, the leases in place with respect to the property being acquired are usually the most important element of the property's value. In most commercial real estate transactions, it is usually a condition of closing that tenant estoppel certificates be obtained and delivered to the purchaser from some or all of the tenants, providing independent certification with respect to the status of the leases. Accordingly, any representations and warranties from the vendor with respect to the status of the leases should be viewed as a supplement to the tenant estoppel certificates. If tenant estoppel certificates are to be delivered on closing, the vendor should attempt to limit its representations and warranties with respect to the status of the leases strictly to matters that the purchaser would not be capable of determining for itself, either from a review of the property documents or from the delivery of tenant estoppel certificates. These matters would include (i) that copies of all of the leases have been delivered to the purchaser, (ii) that each lease (together with any amendments) constitutes the entire agreement with the tenant and that there are no side letters or arrangements, and possibly (iii) that the vendor has not waived any defaults of the tenant and the vendor is not itself in default. Most everything else can be investigated by the purchaser during its due diligence and/or can be adjusted on closing.

²⁸ For most commercial real estate assets, the contracts will relate mainly to the servicing and operation of the property (for example, garbage pick-up, security, pest control and elevator maintenance). The purchaser may wish to terminate some or all of these contracts, particularly if it already has its own favoured suppliers. Accordingly, the status of the contracts is a much less important issue than the status of the leases. However, contracts are much more likely than leases to have consent requirements for transfer. As a practical matter, if a contractor refuses to consent to the transfer of its contract to the purchaser, the vendor will simply terminate the contract.

²⁹ A purchaser may seek vendor representations and warranties covering many items that can be independently searched by the purchaser's solicitors (for example, realty taxes, access, zoning, work orders and other off-title search items) and many others can be independently searched or examined by the purchaser's consultants (for example, building condition, survey matters and environmental matters). As such, the vendor will usually seek to resist giving representations and warranties with respect to such matters but may provide a general representation and warranty such as this one.

³⁰ For construction liens, there is a statutory 45-day period within which liens can be filed following the publication of a certificate of substantial performance or the completion of the contract (whichever is earliest). Accordingly, to minimize the risk that a lien will be registered in the period following closing in respect of work contracted for by

- (m) No Expropriation. No part of the Lands has been expropriated and, to the best of the Vendor's knowledge, there are no existing or contemplated expropriation proceedings or other similar public or private proceedings affecting all or any part of the Lands; and
- (n) Claims re: Environmental Matters. The Vendor has not received any notice of any violation of, or any order or direction with respect to, any applicable Environmental Law relating to the Lands, and there are no injunctions, orders or judgments outstanding relating to environmental matters with respect to the Lands.

3.2 Representations of the Purchaser. The Purchaser covenants, represents and warrants to and in favour of the Vendor that, as of the date of this Agreement and as of the Closing Date:³¹

- (a) Status. The Purchaser is a corporation duly incorporated and subsisting under the laws of its incorporating jurisdiction and has the corporate power, authority, right and capacity to enter into this Agreement and to carry out the transaction contemplated by this Agreement in the manner contemplated by this Agreement; and
- (b) Authorization. The transaction contemplated by this Agreement has been duly and validly authorized by all requisite corporate proceedings.

3.3 Merger of Representations. The covenants, representations and warranties contained in Sections 3.1 and 3.1(a) shall survive the Closing Date and shall continue in full force and effect for the benefit of the Purchaser and the Vendor for a period of six months after the Closing Date so that a claim for any breach of any representation or warranty must be made on or before the date which is six months after the Closing Date.³²

the vendor prior to closing, there is usually a representation and warranty given by the vendor to the effect that there has been no work carried on at the property on behalf of the vendor. The *Construction Lien Act* (Ontario) distinguishes between work performed on behalf of the owner of a property and work performed for tenants (and provides for different lien rights in respect of each), so the vendor should be careful to represent only with respect to work contracted for or otherwise approved by the vendor. If work has been carried on at the property in the period before closing, it may be appropriate to provide for a holdback to ensure that the vendor's payment obligations have been satisfied and no lien has been registered.

³¹ There are often a limited number of purchaser's representations and warranties set out in an agreement of purchase and sale, mostly with respect to the corporate status of the purchaser. These should track the same language as the vendor's similar corporate representations except that, in the case of the purchaser, the authorization of the transaction contemplated by the agreement of purchase and sale, will likely still be subject to approval.

³² Under the *Limitations Act, 2002* (Ontario), subject to certain exceptions, there is a basic limitation period of two years for most claims which runs from the date that a person discovers or ought to have discovered the claim. Parties to a "business agreement" (defined as an agreement between parties none of which is a consumer as defined in the *Consumer Protection Act, 2002* (Ontario)) are able to contract out of the Act and to provide for limitation periods that are longer or shorter than the statutory period, subject to an ultimate limitation period of 15 years. From the vendor's perspective, if there are to be representations and warranties at all, the most desirable survival period is none – namely, that the representations merge on closing. This eliminates the warranty aspect of the representations and effectively makes the truth of the representations simply a condition of closing. From the purchaser's

3.4 As Is, Where Is. The Purchaser acknowledges and agrees that, except as provided in this Agreement: (i) there have been no representations and/or warranties by the Vendor whatsoever with respect to the Purchased Assets and that the Purchased Assets are being purchased on an “as is”, “where is” basis; and (ii) it shall rely entirely upon its own inspections and investigations with respect to the quality, quantity, value and title of the Purchased Assets. It is understood and agreed by the Purchaser that the Vendor has not warranted the suitability of the Purchased Assets for any development use or any other proposed use by the Purchaser. Save as otherwise provided in this Agreement, if Closing occurs, the Purchaser agrees that it shall not have any recourse to the Vendor as a result of the nature and condition of the Purchased Assets.³³

ARTICLE 4 CONDITIONS

4.1 Conditions of the Vendor. The Vendor’s obligation to carry out the transactions contemplated by this Agreement is subject to the fulfilment of each of the following conditions on or before the Closing Date or such other date as may be specified, which conditions are for the sole benefit of the Vendor.³⁴

- (a) Representations and Warranties. The covenants, representations and warranties set out in Section 3.1(a) shall be true and accurate with the same effect as if made on and as of the Closing Date;
- (b) Delivery of Documents. All documents or copies of documents required to be executed and delivered to the Vendor pursuant to this Agreement shall have been so executed and delivered; and
- (c) Performance of Terms, Conditions and Covenants. All of the terms, covenants and conditions of this Agreement to be complied with or performed by the

perspective, the most desirable survival period would be the maximum period permitted by the Act. In practice, the survival period for representations and warranties in an agreement of purchase and sale for commercial real estate is usually within the range of 6 months to two years. For practical purposes, the purchaser will usually require that the representations survive at least until after the financial statements for the year in which the closing occurs have been prepared and made available.

³³ The vendor may seek to include a statement in the agreement of purchase and sale that, except for the specific representations and warranties set out in the agreement of purchase and sale, the purchased assets are being acquired by the purchaser on an “as is, where is” basis. This has become practically standard over the past five to 10 years over what has continued to be characterized in most Canadian markets as a seller’s market (with relatively brief periods of exception). Sometimes, this “as is, where is” concept is expanded by including an acknowledgement of the purchaser that the title to the properties is subject to existing encumbrances, that the vendor makes no representations or warranties except as specifically set out in the agreement of purchase and sale and that the purchaser will assume and be responsible for (and sometimes indemnify the vendor against) all liabilities associated with the purchased assets from and after the closing date, including environmental liabilities.

³⁴ Compliance with the *Competition Act* (Canada) will be of interest to both parties in larger transactions and the transaction will be made conditional for both the vendor and the purchaser if the Act applies. The Act applies if (a) the parties to the agreement of purchase and sale, together with their affiliates (i) have assets in Canada that exceed \$400 million in aggregate value (book value), or (ii) have annual gross sales revenue in Canada that exceeds \$400 million, and (b) the aggregate value of the assets being acquired exceeds \$73 million (book value) (in 2011). There is a \$50,000 application fee payable if the Act applies.

Purchaser on or before the Closing Date shall have been complied with or performed in all material respects.

4.2 Conditions of the Purchaser. The Purchaser's obligation to carry out the transactions contemplated by this Agreement is subject to fulfilment of each of the following conditions on or before the Closing Date or such other date as may be specified, which conditions are for the sole benefit of the Purchaser:

- (a) Board Approval, Due Diligence and Financing. On or prior to 5:00 p.m. (Toronto time) on the Due Diligence Date:
 - (i) the Purchaser shall have received all necessary internal approvals with respect to the transactions contemplated by this Agreement;³⁵
 - (ii) the Purchaser shall have determined in its sole and absolute discretion to proceed with the transactions contemplated by this Agreement (and, without limiting the generality of the foregoing, the Purchaser shall be satisfied in its sole discretion with respect to all aspects of the Purchased Assets including, without limitation, the physical condition of the Property, title to the Lands, the Leases, the Contracts, the Permitted Encumbrances, the Permitted Financing, zoning, development potential, feasibility of development, development status of the Lands, availability of building permits for construction of improvements on the Lands, development approvals, and any other matters of interest to the Purchaser with respect to the Lands);³⁶ and
 - (iii) the Purchaser shall have entered into a binding commitment with a lender to finance the Purchaser's acquisition of the Purchased Assets on terms satisfactory to the Purchaser in its sole and absolute discretion;

³⁵ It is usually appropriate to have a purchaser's condition relating to the approval of the transaction by its board of directors or other applicable internal body. For convenience, the timing for this condition usually follows the same time frame as the due diligence condition.

³⁶ Generally speaking, most agreements of purchase and sale for commercial real estate provide for a due diligence period during which time the deal is conditional and can be terminated by the purchaser without penalty. The due diligence period is also often a convenient time period for addressing other conditional elements to the transaction, such as reviewing title, obtaining any necessary board of directors or other internal approvals and obtaining any necessary consents from third parties, such as mortgagees. From the purchaser's perspective, the scope of the matters that it is permitted to consider in exercising its discretion whether to proceed with the deal or not should be as broad as possible and, in making its decision, the purchaser should be entitled to act in its sole discretion, without any obligation to provide reasons. From the vendor's perspective, it may sometimes be appropriate to limit the scope of matters for which the purchaser may terminate the deal to a specific few. The timing for satisfaction of the purchaser's due diligence condition usually ranges between 20 and 60 days and will depend upon the nature of the due diligence to be conducted, the complexity of the real property assets and the state of the vendor's records and preparedness.

- (b) Representations and Warranties. The covenants, representations and warranties set out in Section 3.1 shall be true and accurate with the same effect as if made on and as of the Closing Date;
- (c) Delivery of Documents. All documents or copies of documents required to be executed and delivered to the Purchaser pursuant to this Agreement shall have been so executed and delivered;
- (d) Performance of Terms, Covenants and Conditions. All of the terms, covenants and conditions of this Agreement to be complied with or performed by the Vendor on or before the Closing Date shall have been complied with or performed in all material respects; and
- (e) Estoppel Certificates. On or prior to the Closing Date, the Vendor shall have delivered to the Purchaser tenant estoppel certificates for all of the Tenants of the Property in accordance with Section 5.7, which tenant estoppel certificates shall disclose information that does not differ from the information in respect of each Lease delivered to the Purchaser as part of the Property Documents and which shall be satisfactory to the Purchaser and its lender in their respective sole discretion.³⁷

4.3 Satisfaction of Conditions. Each party agrees to proceed in good faith and with promptness and diligence to attempt to satisfy those conditions in Sections 4.1 and 4.2 that are within its reasonable control. Upon reasonable request from time to time, each party shall advise the other party of its position on the satisfaction or waiver of each of such conditions.

³⁷ The leases are usually the most important element of the property's value and the delivery of tenant estoppel certificates is a critical element in independently establishing the good standing of the leases. In most commercial real estate transactions, it is a condition of closing that tenant estoppel certificates be obtained and delivered to the purchaser from some or all of the tenants. Typically, these are required to be delivered a few days before closing to allow for review by the purchaser and resolution of any issues. The estoppel certificates delivered should be (substantially) in a prescribed form attached to the agreement of purchase and sale (subject to factual additions) and should not disclose any information inconsistent with the marketing material and property documents delivered or made available to the purchaser. From the vendor's perspective, the vendor will wish the form of estoppel certificate to match the (usually more limited) estoppel language contained in its leases or to contemplate delivery only of the information actually required by its leases. In addition, the vendor will wish to lower the threshold of deliveries, perhaps just to major tenants, or to require only that a certain percentage of tenants (by number or by square footage) deliver estoppels. From a practical perspective, an issue may arise as to whether estoppels need to be sent just to the designated tenants from which estoppels are required or to all tenants. The vendor will not wish the condition regarding the delivery of estoppel certificates to be an absolute condition because whether tenants deliver or do not deliver estoppels is a matter beyond its control. Instead, the vendor will seek the ability to satisfy the condition regarding delivery of tenant estoppel certificates by delivering a back-up certificate of the vendor, to the extent that any estoppels are not delivered by the tenants themselves. In this back-up certificate, there will be issues regarding the extent to which the vendor is permitted to qualify its statements by including such limiting language as "to the best of the vendor's knowledge", "material" and "in all material respects". Any back-up certificate should survive closing in the same manner as the representations and warranties contained in the agreement of purchase and sale.

4.4 Waiver of Conditions.

(1) Due Diligence Date Condition for the Benefit of the Purchaser. If by the Due Diligence Date, the Purchaser has not given Notice to the Vendor that the condition contained in Section 4.2(a) has been satisfied or waived, such condition shall be deemed not to have been satisfied or waived, in which event this Agreement shall be null and void and of no further force or effect whatsoever, each party shall be released from all of its liabilities and obligations under this Agreement and the Deposit (or such portion of the Deposit as has been delivered), together with all interest accrued thereon, shall be returned to the Purchaser forthwith without deduction.³⁸

(2) Conditions for the Benefit of the Vendor. If any of the conditions set out in Section 4.1 are not satisfied or waived on or prior to the Closing Date, the Vendor may terminate this Agreement by Notice to the Purchaser given on or prior to the Closing Date, in which event this Agreement shall be null and void and of no further force or effect whatsoever, the Vendor shall be released from all of its liabilities and obligations under this Agreement and, unless the condition or conditions that have not been satisfied or waived were not satisfied as a result of the default of the Purchaser, the Purchaser shall also be released from all of its liabilities and obligations under this Agreement and the Deposit (or such portion of the Deposit as has been delivered), together with all interest accrued thereon, shall be returned to the Purchaser forthwith without deduction. However, the Vendor may waive compliance with any of the conditions set out in Section 4.1 in whole or in part if it sees fit to do so, without prejudice to its rights of termination in the event of non-fulfilment of any other condition contained in Section 4.1 in whole or in part.

(3) Closing Conditions for the Benefit of the Purchaser. If any of the conditions set out in Sections 4.2(a)(ii), 4.2(c), 4.2(d) and 4.2(e) are not satisfied or waived on or prior to the Closing Date or other date specified therefor, the Purchaser may terminate this Agreement by Notice to the Vendor given on or prior to the Closing Date or other date specified therefor, in which event this Agreement shall be null and void and of no further force or effect and the Purchaser shall be released from all of its liabilities and obligations under this Agreement and, unless the condition or conditions that have not been satisfied or waived were not satisfied as a result of the default of the Vendor, the Vendor shall also be released from all of its liabilities and obligations under this Agreement and the Deposit (or such portion of the Deposit as has been delivered), together with all interest accrued thereon, shall be returned to the Purchaser forthwith without deduction. However, the Purchaser may waive compliance with any of the conditions set out in Sections 4.2(a)(ii), 4.2(c), 4.2(d) and 4.2(e) in whole or in part if it sees fit to do so, without prejudice to its rights of termination in the event of non-fulfilment of any other condition contained in Sections 4.2(a)(ii), 4.2(c), 4.2(d) and 4.2(e) in whole or in part.³⁹

³⁸ As a drafting matter, there is a question of onus in connection with the non-satisfaction of the purchaser's due diligence conditions. Will the purchaser's failure to deliver notice of satisfaction of its due diligence conditions result in the transaction proceeding or being terminated? The purchaser will usually wish the drafting to provide for termination in these circumstances.

³⁹ If a condition is not satisfied and the transaction is terminated, there are sometimes issues regarding the extent to which it is appropriate for either or both parties to be released. If one of the parties has been at fault in the condition

(4) **Closing Conditions.** All conditions to be satisfied on Closing shall be deemed to be satisfied if Closing occurs.

4.5 Not Conditions Precedent. The conditions set out in Sections 4.1 and 4.2 are conditions to the obligations of the parties hereto and are not conditions precedent to the existence or enforceability of this Agreement.

4.6 Planning Act. This Agreement shall be effective to create an interest in the Lands only if the provisions of the *Planning Act* (Ontario) are complied with.

4.7 Title. On the Closing Date, title to the Lands shall be good and marketable and free and clear of all Encumbrances other than Permitted Encumbrances. The Purchaser shall have until the Due Diligence Date to investigate title to the Lands at its own cost and expense and to submit valid objections to title to the Vendor. If, on or prior to such date, any valid objection to title is made in writing to the Vendor, which the Vendor is unable or unwilling to remove and which the Purchaser will not waive, then this Agreement shall, notwithstanding any intermediate act or negotiations with respect to such objections, be null and void and the Deposit and interest earned thereon shall be returned to the Purchaser forthwith without deduction, and the Vendor shall have no further rights against the Purchaser in respect of the matters set out in this Agreement, whether arising under this Agreement or at law or in equity.⁴⁰

ARTICLE 5 **INTERIM PERIOD**

5.1 Delivery of Documents. The Vendor shall deliver the Property Documents to the Purchaser within 10 Business Days after the date of execution and delivery of this Agreement by both parties and from time to time as Property Documents shall come into the possession of the Vendor during the Interim Period.

failing to have been satisfied, it is likely not appropriate for that party to be released. Even if a release is appropriate, there may be certain obligations, particularly those of the purchaser with respect to the repair of damage caused during its investigations and confidentiality, from which it should not be released but remain responsible following termination.

⁴⁰ Good title is the basic condition of any agreement of purchase and sale with respect to real property. The purchaser has no obligation to close the transaction unless this condition has been satisfied, even if the condition is not clearly stated. For convenience, the title search period usually corresponds with the due diligence period, although it does not need to. In Canada, it is typical for real estate lawyers (rather than title insurance companies) to conduct title and off-title searches. The title search is self-explanatory and involves a review of a myriad of matters including registered title encumbrances, any available survey, adjoining lands searches, prior corporate owners and legal access. Off-title searches involve the sending of written enquiries to governmental authorities and departments with requests for the release of information in their files with respect to the property. From the purchaser's perspective, the purchaser will wish to have a broad range of matters (both title and non-title) that it can requisition compliance with (for example, title, encumbrances, priority issues arising under the *Personal Property Security Act* (Ontario), work orders, zoning and insurability). The vendor will wish to restrict the scope of searches and those matters that can be requisitioned, to the maximum extent possible. If it is expected that there may be significant work orders outstanding, it is sometimes desirable from the vendor's perspective to make the vendor responsible for the cost of remedying such work orders, but only up to a stated maximum amount. If the cost of remedying any work orders exceeds the cap, the purchaser would have the option of either terminating the transaction or assuming responsibility for the cost of remedying the work orders for amounts in excess of the cap.

5.2 Access by Purchaser. During the period prior to the Due Diligence Date, the Vendor shall allow the Purchaser, its representatives and advisors to have access to the Lands on reasonable prior notice to the Vendor and subject to the rights of Tenants to allow the Purchaser to carry out such non-invasive tests, environmental audits or assessments, surveys and inspections of the Lands as the Purchaser, its representatives or advisors may deem necessary. The Purchaser shall promptly repair at its sole cost and expense any damage to the Lands caused by such tests and inspections. The Purchaser hereby indemnifies the Vendor from any Claims arising from or relating to the access to the Lands granted in this Section 5.2 and, notwithstanding anything to the contrary in this Agreement, the Vendor shall have recourse to the Deposit to secure this indemnity. The Purchaser shall not be entitled to communicate with Tenants except on reasonable prior written notice to the Vendor and, at the Vendor's option, in the company of a representative of the Vendor.⁴¹

5.3 Approvals of the Purchaser. During the Interim Period, the Vendor shall not be entitled to enter into any new Lease, Contract or other agreement affecting the Property and shall not be entitled to agree to amend, terminate or surrender any existing Lease, Contract or other agreement affecting the Property (each, a **"Proposed Agreement"**) except as follows:

- (a) prior to the Due Diligence Date, the Vendor shall give written notice to the Purchaser of any Proposed Agreement, together with a copy of the Proposed Agreement and all information in the Vendor's possession that would be reasonably required for the Purchaser to be able to decide whether to grant its approval thereof. The Purchaser shall have a period of five Business Days following receipt of such written notice from the Vendor within which to determine whether to grant its approval, such approval not to be unreasonably withheld. If the Purchaser fails to give written notice to the Vendor of its approval or disapproval within such five Business Day period, the Purchaser shall be deemed to have approved the Proposed Agreement. In the case of actual or

⁴¹ In addition to reviewing the Property Documents, an essential element of the purchaser's due diligence is having access to the property for the purpose of conducting inspections and tests. The vendor will usually insist upon a certain amount of prior notice in order to prepare for the purchaser's visits and to minimize disruption to tenants. For this purpose, it may also wish to impose a limit on the number of site visits that the purchaser may make. Issues often arise as to whether the purchaser's access rights can be exercised only up to the due diligence date or thereafter for the entire interim period prior to closing. The vendor may wish to limit the purchaser's ability to conduct intrusive testing, such as soil tests, roof core samples or intrusive environmental testing, or inspections that require access to tenant premises (such as space measurement or building inspections). Some limits that the vendor may wish to impose include (i) no interference with tenants, (ii) only during specified periods of time or on weekends, (iii) only in the company of one or more vendor representatives, and (iv) a limit on the number of purchaser representatives. For office or industrial tenants, the vendor may wish to limit the purchaser's ability to communicate with such tenants in an effort to more closely monitor the information flow. For example, the vendor may wish to restrict tenant communications to a limited number of occasions, only with specified (large) tenants, and only in the company of one or more vendor representatives. It is possible that the purchaser may cause damage to the property in the course of exercising its access rights, especially if intrusive testing is undertaken. At a minimum, the agreement of purchase and sale should contain a covenant by the purchaser to repair any damage caused by it. Often, this is coupled with an indemnity. Issues can arise as to whether the indemnity should be limited to physical damage and any personal injury resulting from it, or extend also to consequential and economic damages. There may also be issues regarding proof of the purchaser's insurance coverage and the ability of the vendor to set off any damage claim against the deposit moneys.

deemed approval by the Purchaser of a Proposed Agreement pursuant to this Section 5.3(a), the Vendor shall be entitled to enter into such Proposed Agreement; and

- (b) from and after the Due Diligence Date, the Vendor shall give written notice to the Purchaser of any Proposed Agreement that the Vendor proposes to enter into, together with a copy of the Proposed Agreement and all information that would be reasonably required for the Purchaser to be able to decide whether to grant its approval thereof. The Purchaser shall have a period of five Business Days following receipt of such written notice from the Vendor within which to determine whether to grant its approval, which approval may be unreasonably or arbitrarily withheld. If the Purchaser fails to give written notice to the Vendor of its approval or disapproval within such five Business Day period, the Purchaser shall be deemed not to have approved of such Proposed Agreement. In the case of actual or deemed disapproval by the Purchaser of a Proposed Agreement pursuant to this Section 5.3(b), the Vendor shall not enter into such Proposed Agreement.⁴²

5.4 Governmental Authorities. During the Interim Period, at the request of the Purchaser, the Vendor shall promptly deliver to the Purchaser letters addressed to such governmental authorities as may be requested by the Purchaser or its solicitors authorizing each such authority to release to the Purchaser such information on compliance matters that the authority may have with respect to the Property. The Purchaser shall not request any inspections of the Property by or on behalf of governmental authorities.⁴³

5.5 Confidentiality. Except as may be required to perform its obligations in accordance with this Agreement, the Purchaser, its representatives and advisors shall keep in strict confidence, and shall not disclose, any information obtained with respect to the Purchased Assets pursuant to this Agreement until such time as the transaction contemplated by this Agreement is completed.

⁴² During the interim period between the date of the agreement of purchase and sale and closing, the purchaser will wish to have approval rights with respect to any new leases or contracts. There is often an issue regarding the period of time during which the purchaser will be entitled to have such approval rights. The vendor may argue that until the purchaser waives its due diligence conditions, it has not committed to purchase the property and should not be entitled to exercise approval rights. On the other hand, it would be practically foolish for the vendor to enter into new leases or contracts during the due diligence period without the approval of the purchaser. The purchaser's approval rights should extend not just to new leases or contracts, but also to any amendments, waivers, surrenders or terminations with respect to existing leases or contracts. If there are many leases, it may be appropriate to institute a threshold below which the purchaser's approval would not be required (for example, any amendment that does not reduce rent or the tenant's financial obligations, increase or decrease the area of the leased premises or increase or decrease the term). The vendor will be concerned to ensure that the purchaser's approval rights do not inhibit its ability to manage the property in an efficient manner. Accordingly, there will often be a time period stipulated within which the purchaser must grant or refuse to grant (with reasons) its approval. Often, if the purchaser does not respond within the stipulated time period, it will be deemed to have given its approval.

⁴³ Governmental authorizations are necessary for some off-title searches with governmental authorities (for example, those conducted with the local fire department and health department), where authorization from the owner is required. The purchaser will wish to ensure that the vendor does not have the right to request or require the governmental authority to conduct an inspection of the property. This could give rise to more problems than even the purchaser had anticipated and is usually not desirable for either party.

If the transaction contemplated by this Agreement is not completed for any reason, the Purchaser shall, upon the request of the Vendor, promptly return to the Vendor all documents delivered to the Purchaser pursuant to this Agreement. Notwithstanding the foregoing, the Purchaser may disclose any information obtained with respect to the Purchased Assets: (i) to its directors, shareholders, advisors, bankers and solicitors (provided such directors, shareholders, advisors, bankers and solicitors are also bound by the provisions of this Section 5.5); (ii) to the extent such information is in the public domain or is obtained from third parties other than the Vendor and its consultants; and (iii) if such disclosure is required by law.

5.6 Risk.⁴⁴

(1) General. The Property shall be at the risk of the Vendor until completion of the transaction contemplated by this Agreement. Until completion of this Agreement, the Vendor shall maintain insurance on the Property in such amounts as a careful and prudent owner of similar property and premises would maintain. All such insurance shall be held for the benefit of the parties, as their interests may appear. If any loss or damage to the Property or any part thereof occurs on or before the Closing Date, the Vendor shall promptly deliver a notice (the “**Notice of Loss**”) to the Purchaser specifying the nature and extent of the loss or damage.

(2) Damage Not Permitting Termination. If the extent of all losses and damage to the Property will not cost in excess of [\$•] to repair (as certified by a third party engineer selected by the Vendor) and provided that proceeds of insurance are available to pay for the full cost (less reasonable deductibles) of repairing such losses or damage, the Purchaser shall have no right to terminate this Agreement pursuant to this Section and the Purchaser shall complete this Agreement on the Closing Date, the Purchaser shall receive the insurance proceeds in respect of such losses or damage (including the proceeds of rental interruption insurance, but only in respect of the period from and after the Closing Date) and the Vendor shall release its interest in any such insurance proceeds (other than the proceeds of rental interruption insurance in respect of the period prior to the Closing Date). In addition, the Purchase Price shall be reduced by the amount of the deductible under the Vendor’s insurance coverage, if the Vendor has not already paid the deductible.

(3) Damage Permitting Termination. If the extent of all losses and damage to the Property will cost in excess of [\$•] to repair (as certified by a third party engineer selected by the Vendor), the Purchaser may, on or before the seventh Business Day following delivery of the Notice of Loss, at its option, by notice in writing to the Vendor elect to terminate this Agreement and the Deposit (or such portion of the Deposit as has been delivered) shall be returned to the Purchaser without interest. If the Vendor fails to deliver a Notice of Loss within sufficient time to enable the Purchaser to have five Business Days within which to respond prior to the Closing Date, the Closing Date shall be extended accordingly. If the Purchaser does not elect to

⁴⁴ Generally speaking, damage and destruction clauses will trigger different results depending upon the extent of the damage. If the damage is relatively small, the purchaser is usually required to complete the transaction, but will be entitled to receive the insurance proceeds (less the deductible, which is typically paid by the vendor). The purchaser may also have the option to have the purchase price reduced by the amount of money required to repair the damage. If the damage is large, the purchaser will have the right, at its option, to terminate the transaction. If the transaction involves multiple properties, the purchaser may have the option to drop the affected property from the deal.

terminate this Agreement, then the Purchaser shall complete this Agreement on the Closing Date, the Purchaser shall receive the insurance proceeds in respect of such losses or damage (including the proceeds of rental interruption insurance, but only in respect of the period from and after the Closing Date) and the Vendor shall release its interest in any such insurance proceeds (other than the proceeds of rental interruption insurance in respect of the period prior to the Closing Date). In addition, the Purchase Price shall be reduced by the amount of the deductible under the Vendor's insurance coverage, if the Vendor has not already paid the deductible.

5.7 Estoppel Certificates. The Vendor shall use reasonable commercial efforts to obtain and deliver to the Purchaser on or prior to the Closing Date tenant estoppel certificates from all of the Tenants of the Property in the form attached to this Agreement as *Schedule C* or in such form as may be required pursuant to the terms of the Lease of a particular Tenant (in each case subject only to such necessary amendments, modifications or additions thereto as may be required to reflect accurately the status of each Tenant's Lease).⁴⁵

ARTICLE 6

CLOSING ARRANGEMENTS

6.1 Closing Arrangements. The Vendor and the Purchaser acknowledge that the electronic registration system (hereinafter referred to as the "**Teraview Electronic Registration System**" or "**TERS**") is operative on a mandatory basis in the Land Titles Office where the Property is located and accordingly, the following provisions shall prevail, namely:⁴⁶

(1) The Purchaser's Solicitors and the Vendor's Solicitors shall each be obliged to be authorized TERS users and in good standing with the Law Society of Upper Canada, and they are hereby authorized by the parties hereto to enter into a document registration agreement in the form adopted by the Joint LSUC-CBAO Committee on Electronic Registration of Title Documents on March 29, 2004 or any successor version thereto (the "**Document Registration Agreement**" or "**DRA**"), together with the additional requirement that the registering solicitor shall also be obliged to provide the non-registering solicitor with a copy of the registration report

⁴⁵ This provision ties in with the condition regarding the delivery of tenant estoppel certificates, and sets out the vendor's covenant to obtain the tenant estoppel certificates. The vendor will wish to use only "reasonable commercial efforts", as it is already a condition to the closing of the transaction that the required tenant estoppel certificates be obtained. The form of tenant estoppel certificate is attached to the standard form of agreement of purchase and sale as Schedule C. This is a fairly common form of tenant estoppel certificate and, although it goes much farther than the requirements concerning the delivery of estoppels commonly set out in commercial leases, it is generally not objectionable to tenants. The estoppels should be dated no more than 30 days before the closing date, so as to allow the vendor time to get them in, but still allow for them to be reasonably current. It is often desirable from the purchaser's perspective to have an opportunity to review and approve the blank forms of tenant estoppel certificates before they are sent to the tenants for signing.

⁴⁶ In the Province of Ontario, most real property registrations are effected electronically from the comfort of lawyers' offices and it has become rare to have a physical closing where the parties with their lawyers meet to execute and exchange closing documentation. This means that a regime must be set out to govern the delivery of documentation and closing funds into escrow, as well as the release of that escrow arrangement once the registrations have occurred. In most Canadian provinces, a similar formal or less formal escrow arrangement to that described in this provision is part of the usual run-up to closing. For large closings, the closing proceeds (if in excess of \$25 million) must be sent to the vendor's solicitors by wire transfer rather than delivered by certified cheque so as to comply with anti-money laundering legislation.

printed by TERS upon the registration of the electronic documents, as evidence of the registration thereof, within one Business Day of the Closing Date. It is understood and agreed that the DRA shall outline or establish the procedures and timing for completing this transaction electronically, and shall be executed by both the Vendor's Solicitors and the Purchaser's Solicitors and exchanged by courier or facsimile transmission between said solicitors (such that each solicitor has a photocopy or telefaxed copy of the DRA duly executed by both solicitors) by no later than two Business Days before the Closing Date.

(2) The delivery and exchange of Closing Documents and the balance of the Purchase Price, and the release thereof to the Vendor and the Purchaser, as the case may be:

- (a) shall not occur contemporaneously with the registration of the transfer/deed of the Property and other documents, if any, to be registered electronically; and
- (b) shall be governed by the DRA, pursuant to which the solicitor receiving any Closing Documents, or the balance of the Purchase Price, will be required to hold same in escrow, and will not be entitled to release same except in strict accordance with the provisions of the DRA.

(3) Each of the parties hereto agrees that the delivery of any of the Closing Documents not intended or required to be registered on title to the Property shall, unless the parties otherwise agree, be by way of delivery of originally signed copies thereof on the Closing Date to the other party.

(4) Notwithstanding anything contained in this Agreement or in the DRA to the contrary, it is expressly understood and agreed by the parties hereto that an effective tender shall be deemed to have been validly made by either party (in this paragraph called the "**Tendering Party**") upon the other party (in this paragraph called the "**Receiving Party**") when the solicitor for the Tendering Party has:

- (a) delivered all applicable Closing Documents and/or the balance of the Purchase Price to the Receiving Party's solicitor in accordance with the provisions of this Agreement and the DRA;
- (b) advised the solicitor for the Receiving Party, in writing, that the Tendering Party is ready, willing and able to complete the transaction in accordance with the terms and provisions of this Agreement; and
- (c) has completed all steps required by TERS in order to complete this transaction that can be performed or undertaken by the Tendering Party's solicitor without the cooperation or participation of the Receiving Party's solicitor, and specifically when the Tendering Party's solicitor has electronically "signed" the transfer/deed and any other Closing Document, if any, to be registered electronically for completeness and granted "access" to the Receiving Party's solicitor (but without the Tendering Party's solicitor releasing same for registration by the Receiving Party's solicitor).

6.2 Documents of the Vendor. The Vendor shall deliver to the Purchaser the following documents and other items on the Closing Date or on such other date as may be specified:

- (a) Deed. Registrable duly executed transfer/deed in fee simple, transferring the Lands to the Purchaser;⁴⁷
- (b) Assignment of Leases. The Assignment of Leases and Rents, duly executed by the Vendor;⁴⁸
- (c) Notice and Direction to Tenants. Such notice or notices as the Purchaser may reasonably require to be given to Tenants under the Leases advising of the sale of the Property, together with directions relating to the payment of rent and other payments under the Leases, all in such form as the Purchaser may reasonably require;
- (d) Assignment of Contracts. The Assignment of Contracts, duly executed by the Vendor;
- (e) Notice and Direction under Contracts. Such notice or notices as the Purchaser may reasonably require to be given to other parties under the Contracts of the assignment and assumption of the Contracts;
- (f) Bill of Sale. A bill of sale for the Chattels;
- (g) Certificate of the Vendor. A certificate of the Vendor certifying that.⁴⁹

⁴⁷ This is the legal document by which title to the real property is transferred and recorded in the Land Registry Office. In Ontario, a transfer is a statutory form mandated by the *Land Registration Reform Act* (Ontario) which contains certain implied statutory covenants. Registration is now effected in most Ontario land registry districts by electronic means under the Teraview electronic registration system. For practical purposes, this means that the parties no longer execute and deliver the transfer themselves, but authorize their solicitors to sign and register the transfer electronically. Transfers can contain statements of the vendor and its solicitors and of the purchaser's solicitors which, pursuant to the provisions of the *Planning Act* (Ontario) have the effect of curing any previous contravention of the Act and eliminating the need to look behind the current transfer for *Planning Act* compliance. In the absence of special arrangements, transfers must contain a land transfer tax statement by the purchaser setting out the "value of the consideration" for land transfer tax purposes. Land transfer tax will be payable by the purchaser on closing at a rate equal to approximately 1.5% of the value of the consideration. Most provinces in Canada have a transfer tax or duty payable at closing at the time of registration of the transfer.

⁴⁸ This is the document that effects the assignment of the leases and rents. It usually contains mutual indemnities for matters arising during the parties' respective periods of ownership. Specific assignments of particular leases may be necessary to deal with specific requirements under those leases. Otherwise, to reduce paperwork, it is preferable to assign all of the leases under one instrument.

⁴⁹ This is also known as a "bringdown certificate" and reiterates the vendor's representations and warranties set out in the agreement of purchase and sale effective as of the closing date. This is the purchaser's evidence that the condition set out in Section 4.2(b) of the agreement of purchase and sale has been satisfied. Sometimes there will be changes to be noted. Technically, this puts the completion of the transaction in jeopardy unless the purchaser is willing to waive the condition set out in Section 4.2(b). It is also evidence of the purchaser's "reasonable enquiry" concerning the residency status of the vendor required under section 116 of the *Income Tax Act* (Canada).

- (i) the Vendor is not a non-resident within the meaning of Section 116 of the *Income Tax Act* (Canada); and
- (ii) the representations and warranties contained in Section 3.1 are true and accurate as of the Closing Date;
- (h) Estoppel Certificates. The estoppel certificates referred to in Section 5.7, to the extent received by the Vendor on or prior to Closing;
- (i) Discharges. Discharges in registrable form of all Encumbrances affecting title to the Property except for the Permitted Encumbrances; provided that if such discharges are not available on the Closing Date and are in respect of any charge/mortgage of land held by a Chartered Bank or Trust Company, the Purchaser agrees to accept the Vendor's Solicitors' personal undertaking to obtain, out of the Closing funds, a discharge in registrable form of such charge/mortgage and to register the same on title to the Lands within a reasonable period of time after completion, provided that on or before Closing, the Vendor shall provide to the Purchaser a mortgage statement prepared by the mortgagee setting out the amount required to obtain such discharge together with a direction executed by the Vendor directing payment to the mortgagee of the amount required to obtain the discharge out of the balance due on Closing;⁵⁰
- (j) Statement of Adjustments. The final statement of adjustments in accordance with Section 2.5(2);
- (k) Re-adjustment Agreement. The Re-adjustment Agreement, duly executed by the Vendor;
- (l) Keys. All keys and entry devices with respect to the Property and the combinations to any locks or vaults, if applicable;
- (m) Rent Cheques. To the extent not adjusted for pursuant to Section 2.5, all post-dated rent cheques for any rental period following Closing received from Tenants that are in the Vendor's possession or control, endorsed without recourse in favour of the Purchaser; and
- (n) Property Documents. Originals or, to the extent originals are not available, photocopies of the Property Documents.

⁵⁰ The covenant to discharge any non-Permitted Encumbrances of the standard form of agreement of purchase and sale may be too strong from the vendor's perspective, as it may not be possible to remove certain types of encumbrances. It is obviously most important that this covenant apply to any mortgages or other financial encumbrances that are not to be assumed by the purchaser as part of the transaction. In the case of institutional mortgages, the parties may wish to consider the inclusion of standard language enabling the vendor's solicitor to undertake to obtain a discharge of any institutional mortgage within a reasonable period following closing provided that (i) a mortgage statement is delivered to the purchaser by the mortgage lender setting out the amount required to discharge the mortgage and a per diem rate of interest, if applicable, and (ii) such amount is directed by the vendor to be paid directly to the mortgage lender from out of the closing proceeds.

6.3 Documents of the Purchaser. The Purchaser shall deliver to the Vendor the following documents on the Closing Date or such other date as may be specified:

- (a) Balance of the Purchase Price. A certified cheque or bank draft payable to the Vendor or as the Vendor may in writing direct in the amount of the balance of the Purchase Price determined in accordance with Section 2.3(c);
- (b) Assignment of Leases. The Assignment of Leases and Rents, duly executed by the Purchaser;
- (c) Assignment of Contracts. The Assignment of Contracts, duly executed by the Purchaser;
- (d) Letters of Credit. The replacement and/or matching letters of credit referred to in Section 2.5(9);
- (e) Re-adjustment Agreement. The Re-adjustment Agreement, duly executed by the Purchaser;
- (f) HST. The declaration and undertaking described in Section 6.5, duly executed by the Purchaser; and
- (g) Other. Such further documentation relating to the completion of this Agreement as the Vendor may reasonably require.

6.4 Single Transaction. Subject to Section 6.1, all documents and cheques shall be delivered in escrow at the place of Closing specified in Section 6.1 on the Closing Date pending registration of the documents referred to in Sections 6.2 and 6.3 as reasonably required by the solicitors for the parties. It is a condition of Closing that all matters of payment, execution and delivery of documents by each party to the other and the acceptance for registration of the appropriate documents in the appropriate offices of public record shall be deemed to be concurrent requirements and it is specifically agreed that nothing will be complete at the Closing until everything required as a condition precedent at the Closing has been paid, executed and delivered.

6.5 Taxes and Fees.

(1) General. The Purchaser shall be responsible for any land transfer tax, harmonized sales tax and registration fees payable in connection with registration of the deed or transfer referred to in Section 6.2(a). The Vendor shall be responsible for registration fees payable in connection with the registration of discharges of any Encumbrances or other claims or interests that are not Permitted Encumbrances. Each party shall pay its own legal fees with respect to this transaction.

(2) HST. With respect to the purchase by the Purchaser of the Lands, the Purchaser hereby represents and warrants to the Vendor that:⁵¹

- (a) it is or will on the Closing Date be registered for the purposes of the harmonized sales tax imposed under the *Excise Tax Act* (Canada);
- (b) it will remit directly to the Receiver General of Canada the harmonized sales tax payable and file the prescribed form pursuant to Section 228(4) of the *Excise Tax Act* (Canada) in connection with the purchase of the Lands described in this Agreement; and
- (c) the representations and warranties contained in this Section 6.5(2) shall survive the Closing and be embodied in a declaration and undertaking of the Purchaser to be delivered to the Vendor on Closing specifying the Purchaser's HST registration number.

6.6 Contracts. On or before the Due Diligence Date, the Purchaser shall advise the Vendor in writing regarding which of the Contracts the Purchaser wishes to assume on Closing. The Contracts that the Purchaser has advised the Vendor that it wishes to assume shall be assigned to the Purchaser on Closing pursuant to the Assignment of Contracts. All other Contracts shall be terminated by the Vendor on or before the Closing Date at the Vendor's sole cost and expense and the Vendor shall provide the Purchaser with evidence of such termination on Closing.⁵²

⁵¹ Under the *Excise Tax Act* (Canada), the vendor will be obligated to collect goods and services tax ("GST") or harmonized sales tax ("HST") (the tax that is applicable depends on the province; in Ontario, it is the HST at a rate of 13%) on the purchase price from the purchaser unless the purchaser produces evidence that it (or the principal for which it is acting, in the case of a nominee or agent purchaser) is a GST/HST registrant. This is the delivery by which the vendor is relieved of its obligation to collect HST on the purchase price. It is usually also coupled with an indemnity from the purchaser in favour of the vendor holding the vendor harmless from any losses or liabilities arising in connection with HST related to the transaction.

⁵² Contracts are personal to the vendor and will not automatically transfer to the purchaser upon the sale of the property. However, to avoid conflict with suppliers and with the vendor, it is useful to address the question of what will happen to the property contracts as a matter of practice. The purchaser may be quite willing to assume all of the property contracts to ensure that the property continues to be operated and maintained in the same manner after closing as it had been during the vendor's period of ownership. On the other hand, the purchaser may not wish to assume all or any of the contracts because it may have its own preferred suppliers and perhaps enjoy volume discounts. Accordingly, it is useful and common for the purchaser to have an opportunity to select which of the property contracts it wishes to assume. To allow the vendor a reasonable time period for terminating any contracts that the purchaser does not wish to assume, the purchaser's option should be exercised by no later than the expiry of the due diligence period. Although most service contracts are terminable on relatively short notice (often 30 days), some contracts are not terminable except with lengthy prior notice or in conjunction with a termination payment. The purchaser will wish to ensure that the vendor is responsible for all costs associated with the termination of property contracts, whether the termination is effected before or after closing. The purchaser will often require the vendor to produce evidence for closing of the termination of the service contracts that the vendor is responsible for terminating.

ARTICLE 7
MISCELLANEOUS

7.1 Tender. Any tender of documents or money may be made upon the party being tendered or upon its solicitors and money may be tendered by certified cheque or bank draft.

7.2 Relationship of the Parties. Nothing in this Agreement shall be construed so as to make the Purchaser a partner of the Vendor and nothing in this Agreement shall be construed so as to make the Purchaser an owner of the Lands for any purpose until the Closing Date.

7.3 Notices.

(1) Addresses for Notice. Any notice, request, consent, acceptance, waiver or other communication required or permitted to be given under this Agreement (a “**Notice**”) shall be in writing and shall be deemed to have been sufficiently given or served for all purposes on the date of delivery if it is delivered by a recognized courier service or sent by facsimile to the parties at the applicable address set forth below:

(a) in the case of the Vendor addressed to it at:

[insert address]

Attention: [•]
Facsimile: [•]

with a copy to:

[insert address]

Attention: [•]
Facsimile: [•]

(b) in the case of the Purchaser addressed to it at:

[insert address]

Attention: [•]
Facsimile: [•]

(2) Change of Address for Notice. By giving to the other party at least seven days’ Notice, any party may, at any time and from time to time, change its address for delivery or communication for the purposes of this Section 7.3.

7.4 Commissions. The Vendor agrees that it is the responsibility of the Vendor to pay all real estate commissions payable to [•] in respect of the purchase and sale of the Lands, and hereby agrees to indemnify the Purchaser in respect of all real estate commissions payable to [•] in connection with this Agreement. The Purchaser represents and warrants that it has not dealt

with any real estate agent or incurred any liability to any real estate agent in connection with the purchase and sale of the Lands.

7.5 Further Assurances. Each of the parties shall execute and deliver all such further documents and do such other things as the other party may reasonably request to give full effect to this Agreement.

7.6 Lawyers as Agents. Notices, approvals, waivers and other documents permitted, required or contemplated by this Agreement may be given or delivered by the parties or by their respective solicitors on their behalf.

7.7 Assignment. This Agreement and the benefit of all covenants contained herein and any documents delivered or interests created pursuant to the terms hereof may be assigned by the Vendor without the consent of the Purchaser. This Agreement and the benefit of all covenants contained herein and any documents delivered or interests created pursuant to the terms hereof shall not be assigned by the Purchaser without the consent of the Vendor, which consent may be unreasonably withheld.⁵³

7.8 Non-Merger. None of the provisions of this Agreement shall merge in the deed or transfer of the Lands or any other document delivered on the Closing Date and such provisions shall survive the Closing Date, subject to the provisions of Section 3.3.

7.9 Successors and Assigns. This Agreement shall enure to the benefit of and shall be binding upon the parties, shall be binding upon their respective successors and permitted assigns and shall enure to the benefit of and be enforceable only by such successors and permitted assigns that have succeeded or which have received such assignment in the manner permitted by this Agreement.

7.10 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall be deemed to constitute one and the same instrument. Counterparts may be executed either in original or faxed form and the parties adopt any signatures received by a receiving fax machine as original

⁵³ The vendor is usually concerned to restrict the ability of the purchaser to assign the purchaser's rights under the agreement of purchase and sale so as to ensure that the purchaser will not engage in further marketing of the property with a view to "flipping" it for a higher price and so as to preserve its relationship (including its comfort with the financial wherewithal) of the original purchaser. However, the vendor may be indifferent to any assignment by the purchaser if the original purchaser is not released from its obligations under the agreement of purchase and sale. From the purchaser's perspective, it may be desirable to attempt to preserve the ability to "flip" the property if the right opportunity comes along. More generally, it may be desirable to preserve the ability to assign to an affiliate or other non-arm's length party. Many purchasers of commercial real property are real estate advisory firms that enter into agreements of purchase and sale with a view to assigning the agreement to their investor clients once the requisite approvals of the investor clients have been obtained. If this is the case, the assignment clause must obviously be specifically tailored to accommodate such an arrangement. The original purchaser will seek to be released from liability under the agreement of purchase and sale at the time of any permitted assignment, provided that the assignee enters into an assumption agreement with the vendor. Failing this, the original purchaser will certainly seek to be released from liability under the agreement of purchase and sale once the transaction closes, so as not to remain responsible for post-closing obligations such as readjustments.

signatures of the parties; provided, however, that any party providing its signature in such manner shall promptly forward to the other party an original of the signed copy of this Agreement which was so faxed.

7.11 Offer. This Agreement shall be irrevocable by the Vendor until 5:00 p.m. (Toronto time) on _____, 20__ after which time, if not accepted, this Agreement shall be null and void and of no further force or effect.

IN WITNESS WHEREOF the parties have executed this Agreement.

Date of execution:
_____, 20__

[VENDOR]

By: _____

Name:

Title:

I have authority to bind the Corporation.

Date of execution:
_____, 20__

[PURCHASER]

By: _____

Name:

Title:

By: _____

Name:

Title:

I/We have authority to bind the Corporation.

SCHEDULE A

LANDS

[insert municipal address of Lands]

[insert legal description of Lands]

SCHEDULE B

PERMITTED ENCUMBRANCES

[to be inserted]

SCHEDULE C

ESTOPPEL CERTIFICATE

TO: [•] (the “**Purchaser**”) and [•] (the “**Lender**”) and their respective successors and assigns from time to time

AND TO: [Vendor]

RE: Lease (the “**Lease**”) dated [•], [•] between [•] (the “**Landlord**”) as landlord, and [•] (the “**Tenant**”), as lessee, of approximately [•] square feet of space (the “**Demised Premises**”) in [insert municipal address] (the “**Property**”)

The Tenant hereby certifies with the intent that you and your assigns and your lenders from time to time may rely on the information set out herein, and that the information contained herein shall be binding upon the Tenant, as follows:

1. The Tenant is the lessee as described in the Lease which has been validly executed and delivered by the Tenant, as lessee, and constitutes the only and entire agreement between the Tenant and the Landlord respecting the Demised Premises and there are no other agreements with respect to our tenancy except for:

2. The Lease is unmodified, in good standing, in full force and effect and represents a binding and enforceable agreement with respect to the Demised Premises between the Landlord and the Tenant.

3. There are no disputes or defaults relating to the Lease or the state of construction of the Demised Premises as of the date hereof on the part of the landlord or the Tenant.

4. The Lease has a term of _____ which commenced or will commence on _____ and which will expire on _____.

5. The Tenant is in possession of the Demised Premises and is paying basic rent in accordance with the following:

Basic Rent			
	Per Sq. Ft. Per Annum	Per Annum	Per Month
Year 1-5			
Year 6-10			
Year 11-15			

6. The Tenant is paying a monthly estimated additional rent amount on account of common area maintenance, realty taxes, operating costs and management fees of _____ per month.
7. The Tenant has not prepaid any rent, except as follows:

8. The Tenant has not paid any security deposit except the following:

9. The Tenant has no claim for any deduction, abatement or set-off of any rent or occupancy costs under the Lease.
10. The Tenant has not assigned the Lease or sublet any portion of the Demised Premises except as detailed below:

11. There is no unexpired rent-free or rent reduced period under the Lease except as follows:

12. There is no unpaid payment payable or unfulfilled obligation outstanding by the landlord to the Tenant pursuant to the Lease, including, without limitation, no tenant allowances, no tenant inducements, no incentives, no lease take-over obligations or other benefit packages except as follows:

13. The Demised Premises are being used for the purpose set out in the Lease. All improvements required to be made to the Demised Premises by the Landlord have been fully completed and are entirely satisfactory for use by the Tenant. The building in which the Demised Premises are located and all common areas, loading areas and parking areas have been completed and are entirely satisfactory to the Tenant.
14. The Tenant has no right of termination, option to purchase, right of first refusal or renewal right pursuant to the Lease, except as follows:

15. The Tenant has not received any notice that the Landlord has assigned the Lease or the rent payable under the Lease, except as follows:

DATED on _____, 2008.

[NAME OF TENANT]

Per: _____

I have authority to bind the Corporation.