

Current Issues in the Negotiation of Hotel Purchase Agreements -- 2007

From a chaos of forms and different approaches to purchase and sale agreements twenty years ago, documentation of hotel purchases and sales has reached a high degree of standardization. The changes which have arisen recently respond to new external issues, such as the Patriot Act and plant-closing notification requirements. The terms of the basic document have remained substantially constant.

A number of factors have contributed to this standardization:

- Hotel equity is now raised from investors who expect to invest through limited liability companies (LLCs) as their ownership vehicles. These companies are formed under the conventions of Special Purpose Entity (SPE) standards required for entities to borrow through securitized financing. This LLC ownership format eliminates many of the issues arising from a much wider range of ownership formats, some of which assumed that there would be recourse to a parent. The growing role of REITs in the industry has had a similar standardizing effect, because REIT purchasers apply a generally uniform method of underwriting and structuring their purchases.
- Both the LLC and REIT investor, as either seller or buyer, are not prepared to expose substantial additional assets to the risks of a transaction. The transaction must stand alone. Thus, the deal will be made on the strength of pre-closing diligence and accounting and legal verification, with post-closing indemnities limited in time and amount. The sale contract will have limited long term significance and becomes most important as a road map to a closing.
- Title insurers now offer broader coverage against UCC issues for certain non-real estate hotel assets. Personal property forms a larger portion of a hotel's assets in comparison to other real estate transactions. The availability of insurance has reduced the significance of the personal property title issues and the scope of contractual indemnities in hotel sales.

Documentation of sales has also been effected and standardized because hotels are now customarily sold through an informal auction process coordinated by a broker. The methods of sale generally follow those for corporate assets and operating businesses. Information is compiled on behalf of the seller prior to offering the hotel for sale, and may include extensive third party reports and confirmations. The information and draft sale documents are made available to pre-qualified potential buyers via a restricted website accessible through the internet. Parallel negotiations take place with multiple bidders, usually by the exchange of comments on a standard form contract, until a lead bidder is identified. This reduces the opportunity for prolonged one-on-one negotiation. The need to obtain bids which can be directly compared encourages the seller to offer a form of contract that will elicit few material revisions from bidders. On the side of the buyers, the need to be competitive to succeed in a bid discourages any but what the buyer perceives to be essential comments. A contract that is too heavily marked up may indicate a lower likelihood of the sale closing, and may cause the bid to be rejected. This reduces the contract negotiation process to a quick and substantive exchange, with a fairly high degree of restraint on each side unless bargaining power is very unequal.

This auction process is now supported by a large body of experts and consultants prepared to provide reports for use by the seller in the auction. These reports are designed to meet the needs of buyers and their lenders, can be reissued directly to them, and reduce the need for representations, warranties or indemnities by the seller. The pre-contract exchange of information has been nurtured by technology and the internet, so that it is not only possible but routine to conduct the sale of a \$100 million hotel asset via website data rooms and email, with the only direct human contact coming during site visits. While this allows the seller to maximize its price, it puts great pressure on the seller and its attorney to anticipate and provide in the initial draft contract and preparation of diligence materials for all of the issues likely to arise in a fast track auction. Extreme pro-seller or pro-buyer contract drafts are

increasingly rare, and are seen to hinder the transaction rather than to be evidence of appropriately vigorous representation.

Not every aspect of the sale documentation has remained unchanged. There is relatively greater focus on condition, operating and third party issues arising in purchase transactions. Franchise, management and labor arrangements now receive far more attention than they did 15 or 20 years ago. This results from the increased complexity and economic impact of these arrangements. These issues do not reshape the sale documents as much as they shift what is necessary to complete a transaction.

Issues relating specifically to the purely real estate aspects of hotel acquisition have changed most notably in regard to property condition and mold contamination. These cannot be fully addressed by insurance and may involve material future costs. As to condition, there is a renewed and major concern with the cost of capital refurbishment and "brand standard" upgrades dictated by management and franchise companies. With shorter replacement cycles becoming the norm, and intense brand competition fought by continuing upgrades and new services, what future investment will be required for such work is a material sale issue. Increased large-scale coastal and tropic development, aging properties with deferred maintenance, the long term effects of storm and casualty damage, and a series of high-dollar losses have drawn attention to what has been a substantial issue for hotel owners for many years -- mold has joined the litany of "hazardous" materials.

Legal compliance costs also remain a concern. The risks under the Americans with Disabilities Act ("ADA") are usually considered as arising in the consequence of failures to comply with regulations for physical alteration of premises. The hotel industry, however, may face its greater challenges in the regulation of hotel business operations under the ADA. These require that day to day operation of a hotel – that is, its reservation system, guest handling and other policies and procedures – conform to ADA regulation. After substantial litigations against landmark hotels and franchise groups, concern over ADA as a question of property condition has somewhat subsided. In a sale, the existing physical condition can be evaluated by an expert. Once that is done, the seller will not be held responsible for future actions taken against existing conditions or business practices. The buyer takes as is.

Other issues involving transition of employees have become more regulated and thus have received expanded attention in sale agreements. Continuity of employment has come under regulation through both federal WARN Act plant-closing regulations and an increasing number of state and local laws aimed at controlling employee and community disruption. ERISA and COBRA regulations continue to apply to hotel employees. A number of test cases and specific rulings have clarified how aspects of these laws apply to the somewhat unusual dual or joint employment structure prevalent in hotel operation. There, statutory law and regulation relating to employment may override or change the characterization of employer status for which the owner contracted with its operator. The entity named as the employer in the contract may not in fact be the employer in law for a particular purpose. Further, the laws may recharacterize a transaction for the purposes of a single statute. For example, a change of brand management company without a change of ownership may constitute an employment termination for purposes of allowing a 401k plan to rollover accounts, if the management company provides the ERISA benefits. But a complete change of ownership upon sale may not result in such a termination, if the same brand management continues in place. These issues are determined outside the sale contract.

The most difficult issues in many hotel sales continue to be only minimally visible in purchase agreements. These concern the relationship between a change of ownership and the obligations of franchise and/or management arrangements under which the hotel operates. A hotel sold subject to a pre-existing and long-term management and/or franchise arrangement is likely to sell at a material discount and receive less attention from the market, because the existing agreements impose costs and limitations on the buyer. In practice, the impact on value is such that the ability to transfer a hotel free and clear of third party obligations commands a material premium, and the premium seems to have increased in recent years as fewer unencumbered hotels come into the market. If a hotel is to be transferred subject to the obligations of such third-party arrangements, virtually all aspects of the contract, price and overall transaction are potentially affected. Pre-contract diligence must be expanded to cover the possible implications of these arrangements and the potential for carry-over liabilities and operating

practices that may affect value and marketability. Contract representations, warranties, and even the description of the conveyed property may be altered, taking into consideration the extent to which a franchisor or manager has or claims an interest in the property rights associated with a hotel or its operation. The contract process is further complicated by the fact that the franchisor or manager must be relied upon to provide operating information on which the parties to the sale both need to rely. A lender's willingness to lend to a buyer will be affected by whether the management company and franchisor are under an obligation to provide the assurances about the hotel operation that the lender is likely to need or request from them. In current industry conditions, the effect of these third party arrangements is often unclear, with contradictory claims by owners and operators as to the practical and legal effect of their arrangements on any sale. The claims may relate to other factors, such as the management company's potential interest in acquiring the hotel for itself or an affiliate at a cheap price, or the management company's view of the buyer as likely to retain or remove the management company at some future date.

The challenge for lawyers handling these transactions is to anticipate and either eliminate or provide for the future impact of these ambiguities and third party interests. No management agreement should be negotiated without an appreciation of the consequences of its terms to the owner in the context of sale. No sale process should be undertaken without a thorough evaluation of the third-party issues likely to arise.

Preparation for sale may need to include renegotiation of third party contracts to remove obstacles to sale. A particular problem is the need to plan the sale around, on the one hand, dates for the maturity or permitted prepayment of debt, and, on the other, dates for expiration or exercise of termination rights under the management and franchise agreements. A lender may routinely ask for the term of the management and franchise agreements to extend for some period past the loan maturity date. This is done so that the lender has the option of taking over upon a debt default with management and franchise in place. These staggered terms will interfere with a smooth sale. Without substantial efforts to coordinate the dates, the owner may be unable to sell the hotel free of the management agreement at or near the loan maturity, or when the loan can be prepaid at minimal cost. Thus, the financing, the management and the franchise may all need to be coordinated to make sale feasible.

**HOTEL PURCHASE AGREEMENT
BY AND BETWEEN**

and

DATED AS OF:

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HOTEL PURCHASE AGREEMENT

This **HOTEL PURCHASE AGREEMENT** (this "**Agreement**") is made as of _____, 19____ between _____, as _____, a _____¹ ("**Seller**") and _____, a _____ ("**Buyer**").

FOR GOOD AND VALUABLE CONSIDERATION, the receipt and adequacy of which are hereby acknowledged, Seller and Buyer agree as follows:

1. **Definitions.** For purposes of this Agreement, the following terms shall have the meanings given to them below.

"**Assignment and Assumption**" shall have the meaning given such term in Section 8.3(b).

"**Assignment of Lease**" shall have the meaning given such term in Section 8.3(a).

"**Assumed Liabilities**" shall have the meaning given such term in Section 2.4.

"**Booking**" means a contract or reservation for the use of guest rooms, banquet facilities or meeting rooms in the Hotel other than single or group reservations of less than [fifty (50)²] rooms on any single night.

"**Closing**" means the completion of the exchanges set forth in Section 8.

"**Closing Date**" means the date on which Closing occurs.

"**Closing Statement**" means the closing statement required pursuant to Section 8.3.

"**Consumables**" means all food and beverages in closed boxes; engineering, maintenance and housekeeping supplies, including soap and cleaning materials, fuel, and materials in closed boxes; stationery and printing items and supplies in closed boxes; and other supplies of all kinds in closed boxes, all of which are unused or held in reserve storage for future use in connection with the maintenance and operation of the Hotel. The term "Consumables" does not include, however, Operating Equipment, Fixtures and Tangible Personal Property or items of personal property owned by guests or employees or other persons furnishing food or services to the Hotel.

¹ While no entities are specified in this form, limited liability companies are the prevailing vehicles for hotel ownership. For financing and liability purposes, a bankruptcy remote and/or single purpose entity is preferred. Hotel purchasers must assume that the seller will be liquidated promptly after closing and any post-closing obligations will be brief and limited.

² This provision must be tailored to the specific business niche of the property. It is intended to establish the size and type of booking which might be material to value or future operations. For example, certain arrangements for bulk purchase of rooms may involve a discounting of rate or a collection of payments in advance of performance that would be material to future revenues. Such payments are rarely escrowed or segregated in accounts.

"Cutoff Time" means 12:01 a.m. on the Closing Date.

"Deposit" means the deposit made by Buyer pursuant to Section 2.3 as such deposit may be increased pursuant to Section 8.2.

"Employment Agreements" means all union, benefit and collective bargaining agreements affecting³ the Hotel or the Hotel Employees, including pension, profit sharing, employee benefit and similar plans, if any, and all written employment and consulting contracts with regard to any Hotel Employee.

"Excluded Permits" means those Permits which, under applicable law, are nontransferable and such other Permits to be designated as Excluded Permits on Schedule 3.3C.

"Financial Statements" mean the audited⁴ balance sheet and profit and loss statements for the Hotel as of _____, together with supporting documentation, all of which are included in the Offering Schedules.

"Fixtures and Tangible⁵ Personal Property" means all fixtures, furniture, furnishings, fittings, equipment, machinery, apparatus, appliances and other articles of personal property now located on the Land or in the Hotel as of the date of this Agreement and used or usable in connection with any present or future occupation or operation of all or any part of the Hotel. The term "Fixtures and Tangible Personal Property" does not include (i) Consumables, (ii) Operating Equipment, (iii) equipment leased by Seller and the interest of Seller in any equipment provided to the Hotel for use pursuant to Hotel Contracts but not owned or leased by Seller, or (iv) property owned or leased by Tenants and guests, employees or other persons furnishing goods or services to the Hotel.

"Governmental Authority" means any governmental or quasi-governmental agency, body or entity.

"Ground Lease" means the _____.

"Guest Ledger Receivables" means amounts, including, without limitation, room charges, accrued to the accounts of guests occupying rooms in the Hotel as of the Cutoff Time.

³ Agreements may fall within this class even though the seller is not named in the agreement. The question of the scope and nature of a current or future owner's obligation for labor, union and employment matters requires special attention by employment specialists. Parties to a transaction should remain alert to the legal reality that laws and regulations for the protection of employees and other that involve "public policy" may not be able to be waived or altered by contract. In general, hotels operate in a state of "joint employment" where owner and operator share some degree of legal responsibility for employee obligations, and can each be subject to liability for their breach regardless of any agreement between themselves.

⁴ Unaudited statements, which remain relatively common among hotel owners, will usually require additional representations and greater indemnification by the seller. Parties should also be aware that, notwithstanding the GAAP audit provisions in many management agreements, many hotel operators delivery substantially less reliable "special reports" or unaudited statements to owners. These cannot be assumed to have the affirmation disclosures and assurances of a GAAP audit report for, e.g., SEC purposes.

⁵ Most intangible property is included under Miscellaneous Hotel Assets.

"Hotel" means the _____ Hotel, located in _____.⁶

"Hotel Contracts" means all written contracts or agreements, such as franchise⁷, maintenance, service, or utility contracts which relate to the ownership, maintenance, construction or repair and/or operation of the Land and Improvement and which are not cancelable on 90 days' or shorter notice, except Bookings and Tenant Leases.

"Hotel Employees" means all employees of Seller (but not employees of _____ or any of its affiliates⁸) who currently work at the Hotel as of the date of the Agreement.

"Improvements" means the buildings, structures (surface and subsurface) and other improvements (including fixtures other than those owned by Tenants that constitute real property) located on the Land.

"Information" shall have the meaning given such term in Section 4.4.

"Insured Claims" shall have the meaning given such term in Section 3.3(b).

"Land" means leasehold interest in the land related to the Hotel owned of record or beneficially owned by Seller under the Ground Lease and more particularly described in **Exhibit A**.

"Liquor License" means the Permit issued to Seller by the Alcoholic Beverage Commission of the State of _____.⁹

⁶ An ambiguity often arises in the use of "hotel" or "property" to mean both the physical structure and the operating business. Management agreements routinely refer to the "Hotel" as if it were a legal entity or person, obscuring the precise nature of rights and liabilities of the Owner and manager. In general, the entire operating business and all its related assets are intended to be included in the concept of "Hotel" as sold under a purchase agreement. An item of personal property that is physically at the hotel building but not used in its operation may not be part of the Hotel, but an item used or stored off-site that has some essential relationship to the hotel should be included in the Hotel. Books, records and intangible rights must also be addressed.

⁷ If a franchise or management agreement exists, provision must be made for its termination or transfer and for the associated responsibilities for obtaining consents and for paying application or termination fees. Whether transfer or termination is required as a condition for closing must also be specified. Such operating contracts raise special issues and are usually treated separately from Hotel Contracts, although they may otherwise fall within the scope of that defined term. All franchise agreements and management agreements should be evaluated before the purchase contract is executed and not left to post-contract diligence.

⁸ Property operated by a manager who is an agent in common law or an independent contractor whose costs are reimbursed may nonetheless have an owner who is deemed an employer and controlling person for purposes of employer liability. Specifying the agent as "the employer" in the management agreement may not be effective to shift the liabilities of the owner/principal to another entity. Therefore, the distinction in this paragraph may require amendment according to law and practices in effect, and its limited effect should be recognized.

⁹ Liquor laws differ substantially by state and even city jurisdiction. The seller may not hold the license, but it can generally be assumed that a change of ownership will require some change in

(continued)

"Litigation" means action, suit, administration proceeding, investigation, condemnation or governmental enforcement proceeding relating to Seller, the Property or the operation of the Hotel.

"Management Agreement" means the agreement, if any, for post-closing operation of the Hotel by _____ or its affiliate which may be entered into pursuant to Section 9.6.¹⁰

"Miscellaneous Hotel Assets" means all contract rights, leases, concessions, trademarks, servicemarks, logos, names of hotel restaurants and other food and beverage outlets, technology and technical information, copyrights, warranties, plans, drawings and other items of intangible personal property relating to the ownership or operation of the Hotel and owned by Seller¹¹, excluding, however, (i) receivables, other than Guest Ledger Receivables, (ii) Hotel Contracts, (iii) Tenant Leases, (iv) Permits, (v) cash or other funds, whether in petty cash or house banks, or on deposit in bank accounts or in transit for deposit, (vi) refunds, rebates or other claims, or any interest thereon, for periods or events occurring prior to the Cutoff Time, (vii) utility and similar deposits, (viii) insurance or other prepaid items or (ix) books and records, except to the extent that Seller receives a credit on the Closing Statement for any such item.

"Offering Schedules" mean each Schedule attached to this Agreement and each supplemental or amended schedule or document provided to Buyer during its review of the Hotel's operations prior to or on the Closing Date.¹²

"Outside Accountants" shall have the meaning given such term in Section 8.3.

"Operating Equipment" means all china, glassware, linens and silverware used or held in reserve storage for future use in connection with the operation of the Hotel, which are on hand on the date hereof, subject to such depletion and restocking as shall be made in the normal course of business.

(continued from previous page . . .)

the license. In states such as California requiring the segregation of liquor-related assets, a parallel liquor sale agreement may be required.

¹⁰ This contract gives the buyer an option to continue the manager in place post-closing to allow a more gradual transition. This is possible only if the management agreement has previously provided for this, or the right is negotiated with the manager in the context of the specific transaction. Assumption of a pre-existing and partially performed management agreement is generally not desirable. This form provides for continued management by the same management company but provides for a clean start in the relationship by a novated agreement without assumed liabilities except as expressly set forth in the purchase contract. This is not an option that is always available.

¹¹ This is a pro-seller qualification because it allows the seller to avoid any representation as to whether the seller does in fact own the assets used in the Hotel. The language merely says, "Whatever I hold, I will convey." Obviously, the purchaser would seek that the seller represent that it owns and is conveying everything currently used in the operation of the hotel. Insisting on that representation may identify any known issues in ownership of assets, particularly where the seller has allowed the manager to assert some ownership of assets related to the hotel, such as books and records. The best practice may be to require clear statement that all assets required to be warranted and pledged to the new lender at closing will be conveyed in the sale. This may be particularly necessary as to assets that are not within a conventional title insurance policy.

¹² This wording allows the seller to update its schedules (and therefore its representations) throughout the diligence period. The buyer should prefer to receive definitive schedules at the outset and have a right of approval in regard to any changes.

"Permits" means all licenses (including the Liquor License) and permits granted by the Governmental Authority and owned by Seller or used in or relating to the ownership, occupancy or operation of the Hotel or any part thereof not subject to a Tenant Lease.

"Permitted Exceptions" means liens, encumbrances and other matters to which the title to the Real Property is subject and which are described or listed in the Title Report.¹³

"Personal Property" means all Property other than Real Property.

"Property" means (i) the Real Property, (ii) the Fixtures and Tangible Personal Property, (iii) the Operating Equipment, (iv) the Consumables, (v) the transferable right, title and interest, if any, of Seller in and to Hotel Contracts and the Tenant Leases, (vi) the Permits (other than Excluded Permits), (vii) the Bookings, (viii) the Transferable Insurance Policies and (ix) the Miscellaneous Hotel Assets.

"Purchase Price" shall have the meaning given such term in Section 2.2.

"Real Property" means the Land and the Improvements.

"Retained Liabilities" shall have the meaning given such term in Section 2.4(b).

"Scheduled Closing Date" means the date thirty (30) days after the date of this Agreement, or such a later date as determined pursuant to Section 8.1.

"Seller's Accountants" shall have the meaning given such term in Section 8.3.

"Seller's Conditions" shall have the meaning given such term in Section 9.1.

"Seller's knowledge," "known to Seller" and other like phrases shall mean the current actual knowledge of _____.

"Tenant Leases" means the interest of Seller in and to all leases, subleases and other occupancy agreements, whether or not of record, which provide for the use or occupancy of space or facilities on or relating to the Real Property and which are in force as of the date hereof. This term shall not include agreements providing for the occupancy by guests of Hotel rooms or for the occupancy or use of the banquet, meeting or convention facilities of the Hotel, which are Bookings.

"Tenant" means any person or entity entitled to occupy any portion of the Real Property under a Tenant Lease.

"Title Company" means _____.

"Title Policy" shall have the meaning given such term in Section 9.1.

"Title Report" means the report, report no. _____, dated _____, prepared by the Title Company describing the title to the Land and the _____.

¹³ In some cases, buyers may request affirmative insurance on special hotel-related issues that may not have been identified as exceptions. Such insurance might be requested, for example, for the subordination or non-tenant status of the management company and confirmation that the management company has no interest in the real property or in the real property records. Unwisely, some owners permitted the recordation of memoranda of these interests, a serious issue in marketability and financing.

liens, encumbrances and other matters relating to the Land, which report is included in the Offering Schedules.

"**Transferable Insurance Policies**" means insurance policies, if any¹⁴, which are transferable relating to the Property or operation of the Hotel, except for property insurance and casualty insurance policies.

2. **Agreements.**

2.1 Sale and Purchase. Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the Property for the Purchase Price, on the terms and subject to the conditions of this Agreement.

3. Purchase Price. The **Purchase Price** for the Property shall be _____ (\$_____).

3.1 **Deposit and Payment of Purchase Price.**

(a) Upon execution of this Agreement¹⁵, Buyer shall deposit the sum of _____ Dollars (\$_____) ("**Deposit**") in an interest bearing account maintained by counsel for Seller at _____ or such other financial institution selected by counsel for Seller, and which Deposit shall be held subject to the provisions of Section 9.3. If the Closing does not occur by reason of the default hereunder by Buyer and Seller is not in default hereunder, the parties shall proceed in accordance with Section 9.3(a).

(b) Buyer shall pay the balance of the Purchase Price in the amount of _____ (\$_____) in the form of immediately available funds at the Closing, plus or minus the adjustments and prorations called for herein.

3.2 **Assumption of Liabilities; Retained Liabilities.**

(a) Buyer shall assume at Closing and pay the following obligations ("**Assumed Liabilities**"): (i) Seller's obligations and liabilities¹⁶ with respect to the Property or operation of the Hotel which are disclosed to Buyer in the Offering Schedules; and (ii) any liabilities or obligations relating to the Property or operation of the Hotel arising from acts, omissions, occurrences or matters that take place after the Cutoff Time.

(b) Buyer shall have no liability or obligation for the following ("**Retained Liabilities**"): (i) federal, state and local income, franchise, sales, payroll or other taxes (other than real estate taxes, water and sewer charges, vault charges and assessments) which shall be prorated as of the Cutoff Time) of Seller or for which Seller is liable, including any interest and/or penalties thereon; (ii) any liability the

¹⁴ Very few policies are in fact transferable. It is generally not in the interest of the seller to assign a policy.

¹⁵ Substantial post-contract diligence is not generally allowed in large hotel transactions, which are conducted in a quasi-auction atmosphere with final round non-contingent bids with substantial deposits at risk. If a diligence period is allowed, the initial deposit is usually minimal and the bulk of the deposit is made at the expiration of the diligence period. This reflects the fact that an obligation to purchase, subject to a broad diligence review of the many variables in hotel valuation, is effectively an option.

¹⁶ This is quite pro-seller, and would be more favorable to the buyer if limited to post-closing obligations in regard to the agreements itemized in the schedules.

existence of which would constitute a breach of any of Seller's representations or warranties contained in Section 3; and (iii) any liability or obligation of Seller related to the Litigation described in Schedule 3.3B or if not on Schedule 3.3B which arises from acts, omissions, or occurrences that take place prior to the Cutoff Time, except for Litigation relating to Tenant Leases assumed by Buyer.

4. Representations and Warranties of Seller. As an inducement to Buyer to enter into this Agreement and to consummate the transactions contemplated herein, Seller represents and warrants to Buyer as follows:

4.1 Organization of Seller. [Insert representation appropriate to form of entity.]

4.2 Authority. [Insert representation appropriate to form of entity.]

4.3 List of Properties, Hotel Contracts and Personnel Data. To Seller's knowledge, the schedules described in the following paragraphs (a) through (i) list all items, if any, within the term or description of the corresponding paragraph and no other items within such term or description exist. True and complete copies of the documents referred to in paragraphs (a), (c), (d), (e), (f), (g), (h) and (i) are included in the Offering Schedules or have been furnished to or made available to Buyer:

(a) Tenant Leases. The Tenant Leases ("Schedule 3.3A").

(b) Litigation. A brief description of pending or threatened Litigation, other than matters with respect to which Seller is or believes itself to be fully insured against the total claim under comprehensive liability policies of insurance ("Insured Claims"). The description shall specify the damage or relief sought, the name of counsel for Seller in charge of such matter and the current status of such action ("Schedule 3.3B").

(c) Permits. The Permits ("Schedule 3.3C").

(d) Hotel Contracts. The Hotel Contracts ("Schedule 3.3D").

(e) Bookings. All Bookings related to the Hotel which pertain to any period after the Closing Date ("Schedule 3.3E").

(f) Hotel Employees. The Hotel Employees ("Schedule 3.3F").

(g) Insurance. Transferable Insurance Policies ("Schedule 3.3G").

(h) Employment Agreements. All Employment Agreements ("Schedule 3.3H").

4.4 Status of Title to Property. The Ground Lease is in full force and effect, neither Seller nor the lessor under the Ground Lease is in default thereunder, and no event has occurred which, merely by notice or the passage of time or both, would constitute a default under the Ground Lease.

4.5 Hotel Contracts. Except as described in Schedule 3.3D, Seller has received no written notice of any default with respect to any Hotel Contract and to Seller's knowledge, all the Hotel Contracts are in full force and effect, neither Seller nor the other parties thereto are in default thereunder, and no event has occurred which, merely by notice or the passage of time or both, would constitute such a default by Seller or such other parties to such Hotel Contracts. Except as noted on Schedule 3.3D, all of the Hotel Contracts may be terminated on no more than ninety (90) days' notice without termination penalty or other cost.

4.6 Permits. To Seller's knowledge, the Permits are in full force and effect except as set forth in the Offering Schedules, all the requirements and conditions of the Permits have been fully

complied with, and no event has occurred which, merely by notice or the passage of time or both, would render Seller or operation of the Hotel not in compliance with such requirements and conditions.

4.7 Litigation. Except as described in Schedule 3.3B and Insured Claims, to Seller's knowledge there is no pending or threatened Litigation which, if adversely determined, might (i) restrain the consummation of any of the transactions herein described, (ii) have a material adverse effect on the Property or any significant part thereof or operation of the Hotel following the Closing or (iii) result in a lien or encumbrance on all or part of the Property.

4.8 Tenant Leases. Except as described in Schedule 3.3A, to the knowledge of Seller, the Tenant Leases are in full force and effect, all rent due thereunder has been paid in full, no rent thereunder has been prepaid, and neither Seller nor the Tenants are in default thereunder, and no event has occurred which, merely by notice or the passage of time or both, would constitute such a default by Seller or the Tenants.

4.9 Taxes. To the knowledge of Seller, all business, occupation, sales, use and other similar taxes imposed with respect to the Hotel, or the operation thereof, which are due and payable by Seller have been paid in full or are current and Seller has not received any written notice that any such tax is overdue or has not been paid.

4.10 Sufficiency of Inventories. To Seller's knowledge, the quantities of Fixtures and Tangible Personal Property, Consumables and Operating Equipment in the Hotel, including provisions for reserve, are sufficient for the operation of the Hotel in accordance with the standard of operation heretofore maintained by Seller.

4.11 Foreign Person. Seller is not a foreign person for purposes of the withholding provisions of Section 1445 of the Internal Revenue Code of 1986.

4.12 Financial Statements. The Financial Statements are true and correct.

4.13 Real Property Reports; Defects. To Seller's knowledge, there are no material structural or mechanical defects in the Real Property except as disclosed to Buyer in the Offering Schedules. The foregoing representation shall not be applicable to any reports or studies or to any defects discovered or otherwise known to Buyer prior to the Closing.

4.14 Employment Contracts. There are no union contracts, labor agreements or Employee Benefit Plans as defined in Section 3(3) of the Employee Retirement Income and Security Act of 1974, as amended from time to time, or written employment contracts relating to the Hotel Employees other than the Employment Agreements. Except as described in Schedule 3.3H, Seller has not received or given any written notice of default under the terms of any Employment Agreements.

5. Representations and Warranties of Buyer. As an inducement to Seller to enter into this Agreement and to consummate the transactions contemplated herein, Buyer hereby represents and warrants to Seller¹⁷:

5.1 Organization of Buyer. [Insert representation appropriate to the form of entity.]

5.2 Authority. [Insert representation appropriate to the form of entity.]

5.3 Disclosures. No representation or warranty by Buyer herein contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements contained herein not misleading.

5.4 As-Is Purchase.¹⁸

(a) Buyer acknowledges, represents and warrants that, except as expressly provided in Section 3 above, (i) any information ("**Information**") supplied or made available by Seller, whether written or oral, or in the form of maps, surveys, plats, soil reports, engineering studies, environmental studies, inspection reports, plans, specifications, or any other information whatsoever, without exception, pertaining to the Property, any and all records, rent rolls, and other documents pertaining to the use and occupancy of the Property, income thereof, the cost and expenses of maintenance thereof, and any and all other matters concerning the condition, suitability, integrity, marketability, compliance with law, or other attributes or aspects of the Property, or a part thereof, is furnished to Buyer solely as a courtesy; (ii) THE INFORMATION IS PROVIDED, AND THE PROPERTY IS PURCHASED, ON AN AS-IS-WHERE-IS BASIS AND SELLER MAKES NO REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW OR OTHERWISE, INCLUDING, BUT IN NO WAY LIMITED TO, ANY WARRANTY OF CONDITION, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE AS TO THE INFORMATION OR THE PROPERTY; and (iii) no representations, whether written or oral, have been made by Seller, or its agents or employees in order to induce Buyer to enter into this Agreement. Without limiting the generality of the foregoing, Buyer acknowledges, warrants and represents to Seller that neither Seller nor its agents or employees have made any representations or statements, whether written or oral, to Buyer concerning the investment potential, operation or resale of the Property at any future date, at a profit or otherwise, nor has Seller or its agents or employees rendered any advice or expressed any opinion to Buyer regarding any tax consequences of ownership of the Property.

(b) Buyer acknowledges, represents and warrants that as of the Closing Date, Buyer will be familiar with the Property and will have made such independent investigations as Buyer deems

¹⁷ Additional representations by the buyer might relate to its net worth, ability to close, and its source of funding, although the quality of the buyer is often controlled by the requirements of a material deposit. The seller might also want to allow for some "reverse" diligence into the representations of the buyer. Reverse diligence is essential if any portion of the purchase is being paid other than in cash; e.g., in REIT interests. The increased involvement of special purpose entities with undisclosed ultimate ownership has heightened concern with tainted funding sources and the potential for forfeiture claims. Patriot Act money-laundering regulations address both the real estate industry and the hotel industry as special concerns.

¹⁸ This provision attacks directly the issues of post-closing liability. The limitations on the recourse allowed against the sellers, the limitations on the time in which to bring a claim, etc., are indirect means to the same end of reducing the exposure of the seller. Practices in regard to "as is" sales and waivers of implicit or explicit remedies differ by state and may be defined by statute in some jurisdictions. In general, hotel sales allow very little post-closing recourse for anything covered by certification by an accountant, manager, title insurer or other third party.

necessary or appropriate concerning the Property. If Buyer elects to proceed with the purchase of the Property, any objections which Buyer may have with respect to the Property shall be waived by Buyer. Except as expressly provided in Section 3 above, Seller makes no representations or warranties and specifically disclaims any representation, warranty, or guaranty, oral or written, past, present or future with respect to the physical condition or any other aspect of the Property, including, without limitation, the structural integrity of the Improvements, the manner, construction, condition, and state of repair or lack of repair of any of the Improvements, the conformity of the Improvements to any plans or specifications for the Property, including, but not limited to, any plans and specifications that may have been or which may be provided to Buyer, the conformity of the Property to past, current or future applicable zoning or building code requirements or the compliance with any other laws, rules, ordinances, or regulations of any government or other body, the financial earning capacity or history or expense history of the operation of the Property, the nature and extent of any right-of-way, lease, possession, lien encumbrance, license, reservation, condition, or otherwise, the existence of soil instability, past soil repairs, soil additions or conditions of soil fill, susceptibility to landslides, sufficiency of undershoring, sufficiency of drainage, whether the Property is located wholly or partially in a flood plain or a flood hazard boundary or similar area, the existence or non-existence of hazardous waste or other toxic materials of any kind (including, without limitation, asbestos) or any other matter affecting the stability or integrity of the Land and/or the Improvements.

(c) Seller shall not be responsible for any negligent misrepresentation or failure to investigate the Property on the part of Seller, any real estate broker or sales agent, or any other agent or employee of Seller or any third party.

(d) Except as expressly provided in Section 3, as part of Buyer's agreement to purchase and accept the Property AS-IS-WHERE-IS, and not as a limitation on such agreement, BUYER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES AND RELEASES ANY AND ALL ACTUAL OR POTENTIAL RIGHTS BUYER MIGHT HAVE REGARDING ANY FORM OF WARRANTY, EXPRESS OR IMPLIED, OF ANY KIND OR TYPE, RELATING TO THE PROPERTY AND THE INFORMATION. SUCH WAIVER AND RELEASE IS ABSOLUTE, UNCONDITIONAL, IRREVOCABLE, COMPLETE, TOTAL AND UNLIMITED IN ANY WAY. SUCH WAIVER AND RELEASE INCLUDES, BUT IS NOT LIMITED TO, A WAIVER AND RELEASE OF EXPRESS WARRANTIES, IMPLIED WARRANTIES, WARRANTIES OF FITNESS FOR A PARTICULAR USE, WARRANTIES OF MERCHANTABILITY, WARRANTIES OF HABITABILITY, STRICT LIABILITY RIGHTS AND CLAIMS OF EVERY KIND AND TYPE, INCLUDING, BUT NOT LIMITED, TO CLAIMS REGARDING DEFECTS WHICH WERE NOT OR ARE NOT DISCOVERABLE, PRODUCT LIABILITY CLAIMS, PRODUCT LIABILITY TYPE CLAIMS, ANY RIGHTS AND CLAIMS RELATING TO OR ATTRIBUTABLE TO ENVIRONMENTAL CONDITIONS, ALL OTHER EXTANT OR LATER CREATED OR CONCEIVED OF STRICT LIABILITY OR STRICT LIABILITY TYPE CLAIMS AND RIGHTS.

Seller's Initials

Buyer's Initials

6. **Action Prior to the Closing Date.** The parties covenant to take the following actions:

6.1 **Approvals and Consents.**

(a) The parties will use reasonable efforts to acquire all necessary approvals of Governmental Authorities and all necessary consents of all third parties¹⁹ to the end of expediting consummation of the transactions contemplated herein.

(b) Buyer shall promptly prepare or cause to be prepared and submit all filings and applications, and pay all fees and make all deposits required to consummate the Closing, on or before the Scheduled Closing Date, and diligently pursue the necessary procedures, in connection with the transactions contemplated by this Agreement, including, but not limited to, issuance of a liquor license and other matters, if any, relating to the operation of the Hotel. If Buyer is unable to obtain a liquor license on or before the Scheduled Closing Date, Buyer, by notice to Seller, shall be entitled to elect pursuant to Section 8.2 to postpone the Scheduled Closing Date for a number of days that Buyer reasonably deems necessary to obtain a liquor license; provided, however, that Buyer proceeds with due diligence to obtain such liquor license and the number of days shall not exceed sixty (60) days from the original Scheduled Closing Date.

6.2 Preserve Accuracy of Representations and Warranties. Each of the parties hereto shall refrain from taking any action which would render any representation and warranty contained in Sections 3 and 4 of this Agreement inaccurate as of the Closing Date. Seller promptly will notify Buyer of all Litigation that may be threatened, brought, asserted or commenced against Seller (a) involving the transactions called for by this Agreement or (b) which might have a material adverse effect on the Property or operation of the Hotel.

6.3 Maintain Seller and Hotel. Seller shall fully perform all of Seller's obligations under the Hotel Contracts, pay in full all business, occupation, sales, use and other similar taxes imposed with respect to the Property, the Hotel, or the operation thereof when such taxes become due and payable, maintain the Property in accordance with past practices²⁰, continue to meet the contractual obligations incurred in the ordinary course of business and pay all of Seller's obligations as they mature in the ordinary course of business, use reasonable efforts to maintain the present level of service at the Hotel, including the present level of staffing, and use reasonable efforts to preserve the good relations of the suppliers, customers and others related to the Property with whom Seller has business relations. Seller shall maintain an inventory of Consumables, Fixtures and Tangible Personal Property and Operating Equipment reasonably sufficient for the operation of the Hotel in the ordinary course of business and shall, generally in accordance with its past practices, resupply, substitute or replace any of such items as may be depleted in order that Buyer can continue to operate the Hotel generally in accordance with past practices.²¹ Seller will continue to operate and maintain the Hotel in accordance with present standards of operations. New Bookings shall be made only in the ordinary course of business, and only upon terms and conditions usual and customary in accordance with past business practices of Seller.²²

6.4 Make No Material Change in the Property. Prior to the Closing Date, Seller shall not without the written consent of Buyer, which consent shall not be unreasonably withheld or delayed; (a)

¹⁹ This should be expanded if consent to transfer or modification of franchise or management contracts or waiver of termination fees is a condition to closing. Such requirements would in almost every case be material conditions to closing.

²⁰ These may not be the same as acceptable practices or commercially reasonable practices.

²¹ Because inventory and working capital requirements are highly cyclical and can be significantly manipulated in the short term, the buyer may want to specify the levels to be delivered or available to the continuing manager at closing.

²² Defined booking parameters to be applied from contract to closing for all periods post-closing are increasingly common. The general movement is away from "reasonable commercial practice" and toward bright-line standards.

make any material change in the Property; (b) sell or otherwise dispose of any of the Real Property or enter into any new Tenant Leases; (c) enter into any contract, license, franchise or commitment relating to the Property other than in the ordinary course of business; (d) significantly alter or revise the accounting principles, procedures, methods or practices in place at the Hotel; (e) remove or permit to be removed from the Hotel any machinery, equipment, fixtures, vehicles or other similar personal property or parts thereof, except in the ordinary course of business; (f) materially change its credit policies; (g) transfer or otherwise dispose of any of the Property except Consumables in the ordinary course of business; or (h) settle or compromise any Litigation relating to Tenant Leases.

7. Information and Records Concerning the Property.

7.1 Buyer's Access to Information and Records Before Closing. Seller shall give Buyer, its employees, accountants and other representatives full access throughout the period prior to the Closing Date upon reasonable notice and during normal business hours to all of its properties, books, contracts, commitments, customers and records, and furnish to Buyer during such period all such information concerning the Property as Buyer may reasonably request. Buyer intends to prepare an inventory of the Fixtures and Tangible Personal Property, Consumables and Operating Equipment. Seller agrees to cause a representative of Seller to cooperate with Buyer in the preparation of the inventory. Buyer shall conduct its activities hereunder in a manner to minimize any disturbance to Seller or its employees and Hotel guests.

7.2 Access to Records After Closing. Seller agrees to preserve at Seller's business office until _____ all records pertaining to the operation of the Hotel in his hands which were not transferred to Buyer hereunder and relating to the Property or to the transactions contemplated herein. Similarly, Buyer agrees to preserve at the Hotel all employment records and sales records conveyed by Seller until _____. Where there is a legitimate purpose not injurious to the other party or if there is a tax audit, other governmental inquiry, or litigation or prospective litigation to which Seller or Buyer is, or may become, a party, making necessary Seller's access to such records of Buyer or making necessary Buyer's access to such records of Seller, each party, as the case may be, will allow representatives of the other party access to such records during regular business hours at such party's place of business for the sole purpose of obtaining information for use as aforesaid. Buyer agrees to indemnify, hold harmless and defend Seller at all times from and after the date of this Agreement, from and against any and all loss, damage, claim, cost and expense and any other liability whatsoever, including, without limitation, reasonable accountants' and attorneys' fees, charges and costs, incurred by Seller by reason of Buyer's failure to provide Seller with access to the records described above.

8. Closing Matters.

8.1 Closing. A pre-closing of the transactions contemplated herein shall take place at the offices of _____, one day prior to the Scheduled Closing Date and one day prior to the Closing Date, if different. At the Closing the actions specified in Sections 8.3 and 8.4 below shall be taken, all of which will be deemed taken simultaneously at the Closing and no one of which will be deemed completed until all have been completed and the Closing shall have occurred.

8.2 Adjournment of Closing. Notwithstanding anything to the contrary in Section 8.1, the Scheduled Closing Date may be postponed by either party by notice to the other party for a number of days set forth in the notice in order to satisfy a condition to Closing or for any other reason, provided, however, that the aggregate number of days of such adjournment by a party shall not exceed fifteen (15)

days from the original Scheduled Closing Date.²³ In the event that Buyer seeks to adjourn for a period or periods in aggregate exceeding such fifteen (15) days, Buyer shall not be entitled to such longer adjournment unless it deposits, as an addition to the Deposit, the total of _____ Dollars (\$_____) plus an amount equal to interest on the full Purchase Price at the rate of [eight percent (8%)] per annum for the period of the adjournment. The amount equal to interest shall be deemed an increase in, and not a credit against, the Purchase Price. In no event shall Buyer be entitled to adjourn the Closing to a date later than thirty (30) days after the original Scheduled Closing Date.

8.3 Seller's Deliveries.

(a) At Closing Seller shall deliver an assignment of lease in the form of **Exhibit B** assigning all of Seller's right, title and interest in and to the Land and the Improvements to Buyer, subject only to the Permitted Exceptions (the "**Assignment of Lease**") and such other instruments, documents or certificates as may be reasonably required by Title Company as a condition to the issuance of the Title Policy consistent with the terms of this Agreement.

(b) Seller shall deliver to Buyer (i) a bill of sale in the form of **Exhibit C** transferring and assigning to Buyer each and every item of Personal Property to be transferred hereunder; (ii) all Hotel Contracts, Tenant Leases, Bookings, Permits (other than Excluded Permits), Transferable Insurance Policies and other Miscellaneous Hotel Assets, together with an assignment and assumption in the form of **Exhibit D** conveying and transferring the same to Buyer (the "**Assignment and Assumption**"). Except for the Assignment and Assumption which will be delivered at Closing, delivery of any such documents shall be deemed made by Seller to Buyer if Seller leaves such documents at the Hotel in their customary place of storage or in the custody of Buyer's representatives.

8.4 Buyer's Deliveries. Buyer shall pay the balance of the Purchase Price, plus or minus the adjustments and prorations called for in this Agreement, and shall deliver such other instruments, documents or certificates as are required to be delivered by Buyer to Seller in accordance with any of the other provisions of this Agreement. Buyer shall assume the obligations under the Assignment of Lease and the Assignment and Assumption.

8.5 Form of Documents. All documents required to be delivered at or prior to the Closing in accordance with the provisions of this Agreement shall be in the form of the Exhibits attached hereto or if not attached, in a form reasonably acceptable to the receiving party.

9. Adjustments and Prorations - Closing Statement.

9.1 Adjustments and Prorations. The following matters and items pertaining to the Property shall be apportioned between the parties hereto or, where applicable, credited in total to a particular party, as of the Cutoff Time. Net credits in favor of Buyer shall be deducted from the balance of the Purchase Price at the Closing and net credits in favor of Seller shall be paid in cash at the Closing. Unless otherwise indicated below, Buyer shall receive a credit for any of the following items to the extent the same are accrued but unpaid as of the Cutoff Time (whether or not due, owing or delinquent as of the Cutoff Time), and Seller shall receive a credit to the extent any of the following items shall have been paid prior to the Closing Date to the extent the payment thereof relates to any period of time after the Cutoff Time.

²³ Terms of adjournment should take into account the costs and complexity of the accounting procedures needed to prepare the closing balance sheet. In some instances, it is easiest and cheapest to agree on a per diem adjustment rather than restart the procedures.

(a) Guest Ledger Receivables; Food and Beverage Receivables. Guest Ledger Receivables shall be prorated between Buyer and Seller. Seller shall receive a credit for all Guest Ledger Receivables for all room nights up to but not including the room night during which the Cutoff Time occurs, and Buyer shall be entitled to the amounts of Guest Ledger Receivables for the room nights after the Cutoff Time. Seller and Buyer shall each receive a credit equal to one-half of the amount of Guest Ledger Receivables for the full room night during which the Cutoff Time occurs. All restaurant and bar facilities will be closed as of the Cutoff Time and Seller shall receive the income from the same until the Cutoff Time.

(b) Taxes and Assessments. All non-delinquent ad valorem taxes, special or general assessments, real property taxes, hotel occupancy tax, water and sewer rents, rates and charges, vault charges, and any municipal permit fees. If the amount of any such item is not ascertainable on the Closing Date, the credit therefor shall be based on the most recent available bill and adjusted as necessary post-closing as contemplated in Section 8.3.

(c) Utility contracts. Telephone and telex contracts and contracts for the supply of heat, steam, electric power, gas, lighting and any other utility service, with Seller receiving a credit for all deposits, if any, made by Seller as security under any such public service contracts if the same are transferable and provided such deposits remain on deposit for the benefit of Buyer. Where possible, cutoff readings will be secured for all utilities as of the cutoff Time. To the extent they are not available, the cost of such utilities shall be apportioned between the parties on the basis of the latest actual (not estimated) bill for such service and adjusted as necessary post-closing as contemplated in Section 8.3.

(d) Hotel Contracts and Tenant Leases. Any amounts prepaid or payable under any Hotel Contracts or Tenant Leases. All amounts known to be due under Hotel Contracts with reference to periods prior to the Closing Date shall be paid by Seller or credited to Buyer as a reduction of the Purchase Price. Any additional amounts not known at the Closing will be part of the post-closing adjustments contemplated in Section 8.3.

(e) License Fees. Fees paid for Permits (except for Excluded Permits) in the current period.

(f) Other Hotel Matters.

(i) Buyer shall receive a credit for advance payments, if any, under Bookings to the extent the Bookings relate to a period after the Cutoff Time and have been incurred in accordance with the terms hereof.

(ii) Vending machine monies will be removed by Seller as of the Cutoff Time for the benefit of Seller.

(g) Petty Cash Funds and House Banks. Buyer shall purchase and Seller shall sell to Buyer (or receive a credit therefor) all petty cash funds and cash in house banks at 100% of face value at the Cutoff Time.

(h) Security Deposits. Buyer shall be entitled to a credit for all security and other deposits held by Seller as of the Cutoff Time with respect to Tenant Leases and Hotel Contracts.

(i) **Employee Salaries.** Salaries and benefits paid to the Hotel Employees.²⁴

(j) **Insurance Policies.** Premiums paid for the Transferable Insurance Policies.

(k) **Closing Expenses.** Seller shall pay _____ [insert as appropriate for jurisdiction]. Buyer shall pay _____ [insert as appropriate for jurisdiction].²⁵

(l) **Other.** Such other items as are provided for in this Agreement or as are normally prorated and adjusted in the sale of real property in _____ or of a hotel.²⁶

9.2 Receivables. Seller shall retain the receivables of the Hotel as of the Cutoff Time, other than Guest Ledger Receivables.²⁷ Buyer agrees that it shall promptly remit to Seller in accordance with written instructions from Seller any funds received by Buyer in payment of such accounts receivable arising prior to the Cutoff Time. With regard to any collection made from a person or entity who has accounts receivable arising both prior and subsequent to the Cutoff Time, such collection shall be applied as designated by the account debtor (and if designated as payment of an accounts receivable arising prior to the Cutoff Time, Buyer shall promptly remit such funds to Seller in accordance with the preceding sentence), but if there is no designation, then any such collection received shall be applied in chronological order starting with the oldest accounts receivable of such debtor.

9.3 Closing Statement. Seller shall cause its accounting staff ("**Seller's Accountants**") to make such inventories, examinations and audits of the Hotel, and of the books and records of the Hotel, as Seller's Accountants may deem necessary to make the adjustments and prorations required under this Section 8, or under any other provisions of this Agreement. Buyer or its designated representatives may be present at such inventories, examinations and audits of the Hotel. Based upon such audits and inventories, Seller's Accountants will prepare and deliver to the parties no later than two (2) days prior to the Closing a closing statement (the "**Closing Statement**"). The Closing Statement shall contain Seller's

²⁴ The best practice for both buyer and seller is usually for employees to be paid out all pre-closing accrued amounts. This facilitates the seller in winding up its accounts and making prompt distributions, and commences the final period of limitation for employee wage and benefit claims. The buyer is protected from any unfunded obligations, or obligations beyond what was disclosed in diligence. Nonetheless, transfer of employee liabilities to a new owner continues in some transactions, whether under the guise of being least disruptive to employees or to assist a buyer who wants to limit the cash amounts to be paid out at the closing.

²⁵ Among the expenses that may not be sufficiently anticipated are the taxes incident to transfer of personal property. Lawyers working outside their home jurisdiction may incorrectly assume that a bulk sale exception will be available, and will underestimate the portion of the Property that will be taxed as something other than real property. Allocation of purchase price among the items of Property and responsibility for the consequent taxes may become major issues.

²⁶ Inventories and other accounting procedures are added here in some forms of contract.

²⁷ In general, the seller will want to convey its accounts receivable to the buyer at face value unless the seller has on-going business with the account parties at another property. The buyer will not want to pay for them (and especially not for those that are long overdue or unusually large and less likely to be paid). But the buyer will not want to allow the seller to contact and alienate the seller's debtors who are also likely to become the buyer's current clients. Much debate may occur if there are substantial uncollected balances; but hotel receivables are usually minimal due to the use of credit cards and other, easily collected forms of charges. Any material aged A/R balance should be noted in diligence for further review as it may raise a question as to the accuracy of historic revenue and profit numbers on which the hotel was valued.

best estimate of the amounts of the items requiring the prorations and adjustments in this Agreement. The amounts set forth on the Closing Statement shall be the basis upon which the prorations and adjustments provided for herein shall be made at the Closing.

The Closing Statement shall be binding and conclusive on all parties hereto to the extent of the items covered by the Closing Statement, unless within thirty (30) days after receipt by Buyer of the Closing Statement, either Buyer or Seller notifies the other that it disputes such Closing Statement, and specifies in reasonable detail the items and reasons that it so disputes. The parties shall attempt to resolve such dispute. If such dispute is not resolved within forty-five (45) days after delivery of the original notice by Buyer or Seller, then the parties shall submit such dispute to _____ ("**Outside Accountants**"), and the determination of the Outside Accountants, which shall be made within a period of fifteen (15) days after such submittal by the parties, shall be conclusive. The fees and expenses of the Outside Accountants shall be paid equally by Buyer and Seller.

Within ninety (90) days following the Closing Date, Seller's Accountants shall deliver a final report to Buyer setting forth the final determination of all items to be included on the Closing Statement. In the event that, at any time within said 90-day period, either party discovers any items which should have been included in the Closing Statement but were omitted therefrom, such items shall be adjusted in the same manner as if their existence had been known at the time of the preparation of the Closing Statement. The foregoing limitation shall not apply to any item which, by its nature, cannot be finally determined within the period specified. However, no further adjustments shall be made beyond twelve (12) months after the Closing Date.

10. Covenants and Conditions to Obligations.

10.1 Conditions to Seller's Obligations. The obligation of Seller to close the transaction and deliver the documents and instruments required hereunder shall be subject to satisfaction in full of the following conditions ("**Seller's Conditions**") on or before the Closing Date:

(a) Buyer shall have performed on or before the Closing Date the obligations required to be performed by it on or before such Closing Date.

(b) Buyer shall have completed all the deliveries and actions required to be made by Buyer under section 8.4 and elsewhere in this Agreement.

(c) There shall be no material breach of any of Buyer's representations, warranties and covenants set forth in this Agreement.

(d) There shall not then be any pending or, to the knowledge of either Buyer or Seller, threatened litigation which, if determined adversely, would restrain the consummation of any of the transactions referred to herein, or declare illegal, invalid or nonbinding any of the covenants or obligations of the parties herein.

(e) Title Company shall be committed to issue to Buyer a policy of title insurance insuring title in the amount of the Purchase Price subject only to the Permitted Exceptions ("**Title Policy**").

(f) Buyer shall have produced evidence reasonably satisfactory to Seller of compliance with Hart-Scott-Rodino Act requirements or the non-applicability thereof to this transaction.²⁸

Seller's Conditions are solely for the benefit of Seller and may be waived only by Seller. Any such waiver or waivers shall be in writing and shall be delivered to Buyer. Seller shall not act or fail to act for the purpose of permitting or causing any of Seller's Conditions to fail. If any of Seller's Conditions is not satisfied or has not been so waived by notice to Buyer prior to the Scheduled Closing Date, Seller shall give written notice to Buyer describing the condition or conditions that have not been satisfied or waived and either Seller or Buyer by notice to the other party shall be entitled to postpone the Scheduled Closing Date as provided in Section 8.1 for the purpose of attempting to satisfy such condition or conditions. Nothing contained in this Agreement shall require Buyer or Seller to postpone the Scheduled Closing Date or to bring any suit or other proceeding or, except as otherwise expressly required by this Agreement, to pay any substantial sum, to satisfy any conditions to Closing.

10.2 Conditions to Buyer's Obligations. The obligations of Buyer to make payment of the Purchase Price and other sums provided for herein and to close the transactions contemplated hereby is subject to satisfaction in full of each of the following conditions ("**Buyer's Conditions**") on or before the Closing Date:

(a) The representations, warranties and agreements of Seller contained in Section 3 shall be true and accurate in all material respects on the Closing Date, as if made on such date.

(b) Seller shall have performed on or before the Closing Date the obligations required to be performed by it on or before the Closing Date.

(c) Seller shall have completed all the deliveries required to be made by Seller under Section 8.3 and elsewhere in this Agreement.

(d) Title Company shall be committed to issue the Title Policy to Buyer.

(e) The Management Agreement shall have been tendered for execution if requested by Buyer pursuant to Section 9.6.

(f) Buyer shall have received an affidavit to the effect that Seller is not a foreign person for purposes of the withholding provision of Section 1445 of the Internal Revenue Code of 1986 or, to the extent such withholding is required, instructions as to the required withholding.

(g) Buyer shall have received an estoppel certificate as specified in the Ground Lease of a date within thirty (30) days prior to the Closing.²⁹

Buyer's Conditions are solely for the benefit of Buyer and may be waived only by Buyer. Any such waiver or waivers shall be in writing and shall be delivered to Seller. Buyer shall not act or fail to act for the purpose of permitting or causing any of Buyer's Conditions to fail. If any of Buyer's Conditions is not satisfied or has not been so waived by Buyer prior to the Scheduled Closing Date, Buyer shall give

²⁸ Hart-Scott-Rodino Act regulations apply to asset sales with potential antitrust implications. They are notable for the high fees and time delays associated with filings. These now provide exemptions for the majority of hotel transfers that do not involve ski resorts or other mixed-use properties. The exemptions should be reviewed to confirm that filing is not required if the hotel has any substantial non-hotel operating elements or if a multi-property transaction is underway. Gaming facilities may also trigger review issues.

²⁹ Buyer may also want assurances on transfer of liquor licensing, third party approvals, etc.

written notice to Seller describing the condition which has not been satisfied or waived and either Buyer or Seller by notice to the other party shall be entitled to postpone the Scheduled Closing Date as provided in Section 8.1 for the purpose of attempting to obtain satisfaction of such condition or conditions. Nothing contained in this Agreement shall require Buyer or Seller to postpone the Scheduled Closing Date or to bring any suit or other proceedings or, except as otherwise expressly required by this Agreement, to pay any substantial sum to satisfy any of Buyer's Conditions.

10.3 Remedies. LIQUIDATED DAMAGES. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, IF THE SALE OF THE PROPERTY TO BUYER IS NOT CONSUMMATED BY REASON OF BUYER'S DEFAULT OF ITS OBLIGATION TO PURCHASE THE PROPERTY PURSUANT TO THE TERMS OF THIS AGREEMENT, SELLER SHALL BE ENTITLED TO RECEIVE AND RETAIN THE DEPOSIT AS SELLER'S SOLE AND EXCLUSIVE REMEDY. THE PARTIES AGREE THAT IT WOULD BE IMPRACTICABLE AND EXTREMELY DIFFICULT TO FIX THE ACTUAL DAMAGES SUFFERED BY SELLER AS A RESULT OF BUYER'S FAILURE TO COMPLETE THE PURCHASE OF THE PROPERTY PURSUANT TO THIS AGREEMENT, AND THAT UNDER THE CIRCUMSTANCES EXISTING AS OF THE DATE OF THIS AGREEMENT, THE LIQUIDATED DAMAGES PROVIDED FOR IN THIS SECTION REPRESENT A REASONABLE ESTIMATE OF THE DAMAGES WHICH SELLER WILL INCUR AS A RESULT OF SUCH FAILURE, PROVIDED, HOWEVER, THAT THIS PROVISION SHALL NOT WAIVE OR AFFECT SELLER'S RIGHTS AND BUYER'S OBLIGATIONS UNDER SECTION 10.1(b). NOTWITHSTANDING THE FOREGOING, IF BUYER INTERFERES WITH OR MAKES ANY ATTEMPT TO INTERFERE WITH SELLER RECOVERING THE DEPOSIT HELD BY THE ESCROW HOLDER, INCLUDING, WITHOUT LIMITATION, GIVING ANY NOTICE OF INSTRUCTIONS TO ESCROW HOLDER NOT TO DELIVER THE DEPOSIT TO SELLER, SELLER SHALL HAVE THE ELECTION TO NULLIFY THE TERMS AND PROVISIONS OF THIS SECTION 9.3(a) BY GIVING WRITTEN NOTICE TO BUYER, WHEREUPON THIS SECTION 9.3(a) SHALL BE DEEMED NULL AND VOID, AND SELLER SHALL HAVE ALL RIGHTS AND REMEDIES AGAINST BUYER PROVIDED AT LAW AND IN EQUITY, AND SELLER SHALL HAVE THE RIGHT TO REQUIRE THAT BUYER SPECIFICALLY PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT. THE PARTIES HAVE SET FORTH THEIR INITIALS BELOW TO INDICATE THEIR AGREEMENT WITH THE LIQUIDATED DAMAGE PROVISIONS CONTAINED IN THIS SECTION.

Seller's Initials

Buyer's Initials

(a) Buyer's Right To Return of Deposit. In the event the Closing fails to occur solely because of Seller's failure to perform Seller's obligations under this Agreement, Buyer shall have the right to request return of the Deposit by written notice sent to the counsel for Seller. Upon such request the counsel for Seller shall confirm that Seller has received notice and, in the event that Seller has not commenced action to restrain the return of the Deposit, the counsel for Seller shall return to Buyer the Deposit, together with all interest accrued thereon, and any documents and other monies deposited by Buyer, and Buyer shall have the right to exercise any and all remedies which Buyer may have against Seller, including without limitation, the right to require that Seller specifically perform its obligations under this Agreement.

10.4 Employee Obligations. Buyer shall employ after the Cutoff Time each of the Hotel Employees on substantially the same terms and conditions³⁰ as such Hotel Employees were employed by

³⁰ Best practices in regard to WARN Act and other plant-closing laws require that the buyer and seller document a basis for believing that no plant closings have occurred. Many agreements simply acknowledge that no notices are being given and provide for indemnification by one party

(continued)

Seller and assume all liabilities arising under the Employment Agreements after the Cutoff Time. Nothing in this provision shall be construed to limit Buyer's right to terminate, at Buyer's sole cost and expense, any Hotel Employees subsequent to the Cutoff Time, subject to the requirements of applicable law and Employment Agreements.

10.5 Damage or Destruction: Condemnation. In the event of any casualty loss, damage or destruction prior to the Closing, or any condemnation of all or a part of the Real Property, Seller and Buyer shall remain obligated under this Agreement and all proceeds of insurance or condemnation awards shall be assigned to Buyer at Closing.³¹

10.6 Management Option. At Buyer's option, upon notice from Buyer to Seller given not less than thirty (30) days prior to the Scheduled Closing Date, Seller shall cause _____ or its affiliate under common control to enter into an interim management agreement with Buyer in the form attached as Exhibit F. Such agreement in its completed form shall be the "Management Agreement."

10.7 Miscellaneous Covenants and Provisions of the Parties. In addition to each of the terms, covenants and conditions herein set forth, the parties hereby agree as follows:

(a) Brokerage. Seller will pay a brokerage commission to _____ upon and subject to the Closing of the sale of the Property pursuant to the terms of a separate agreement between Seller and such [exclusive] broker. Buyer hereby represents and warrants to Seller that Buyer has not dealt with any other broker or finder in connection with the transactions contemplated hereby, and Buyer hereby agrees to indemnify, defend and hold Seller harmless of and from any and all manner of claims, liabilities, loss, damage, attorneys' fees and expenses incurred by the indemnified party and arising out of, or resulting from, any claim by any such broker or finder if such representation and warranty herein contained is untrue or incorrect in any respect.

(b) Guest Baggage. Any baggage or other property of departed guests held by Seller may be left at the Hotel for a period not to exceed ninety (90) days following the Closing Date. After such period, all such baggage or property will, at the option of Seller, be removed by Seller or abandoned by Seller and Buyer shall dispose of such baggage in any manner deemed appropriate by Buyer. Seller hereby indemnifies Buyer against all claims, losses and liabilities in connection with the holding of such baggage or other property for such period and the disposal of same by Seller. Buyer hereby indemnifies Seller against all claims, losses and liabilities in connection with Buyer's disposal of such baggage. All baggage of guests who are still in the Hotel on the Closing Date which has been checked with or left in the care of Seller shall be inventoried, sealed and tagged jointly by Seller and Buyer immediately after the Closing. Buyer hereby indemnifies Seller against all claims, losses or liabilities with respect to such baggage arising out of the acts or omissions of Buyer after the Closing. Seller hereby indemnifies Buyer

(continued from previous page . . .)

or the other. Such provisions may be argued as an express recognition and agreement to provide the notice. Further, indemnification for an intentional violation of a public interest statute is likely to be unenforceable. The facts in most hotel sales are usually sufficient to protect the parties, and the parties should be encouraged to lay them out in the contract.

³¹ Transactions involving properties potentially affected by storm or other casualty losses will be addressed differently. Experience with hurricane losses have also led some lawyers to insert provisions that loss of infrastructure or "feeder" property such as highways, causeways and airports may be treated as a potentially terminating casualty loss. "Feeder" properties may also involve special insurance coverage and potential insurance recoveries, including business interruption recoveries.

against all claims, losses or liabilities with respect to such baggage arising out of the acts or omissions of Seller prior to the Closing.³²

(c) Safe Deposits. Immediately after the Closing, Seller shall send written notice to guests or tenants or other persons who have safe deposit boxes, advising of the sale of the Hotel to Buyer, and requesting verification or removal of the contents within five (5) days. The safe deposit boxes of guests or tenants not responding to said written notice shall be opened only in the presence of representatives of both Seller and Buyer. The contents of all boxes opened as aforesaid shall be listed at the time such boxes are opened, each such list shall be signed by or on behalf of Seller and Buyer, and Buyer shall not be liable or responsible for any items claimed to have been in said boxes unless such items are included in such list. Seller agrees to indemnify and hold harmless Buyer from and against any liability or responsibility for any items claimed to have been in said boxes but not included on such list, and Buyer agrees to indemnify and hold Seller harmless from and against any liability or responsibility for items claimed to have been in said boxes and included on such list.

(d) Insurance. Seller shall keep in full force all insurance policies, except for the Transferable Insurance Policies, relating to the Property or operation of the Hotel until 11:59 p.m. of the Closing Date.

11. Other Provisions.

11.1 Indemnification.

(a) Seller's Indemnification. Seller hereby agrees to indemnify, hold harmless and defend Buyer from and against any and all loss, damage, claim, cost and expense and any other liability whatsoever, including, without limitation, reasonable accountants' and attorneys' fees, charges and costs, incurred by Buyer by reason of (i) Seller's breach of any covenants of Seller contained in this Agreement which survive the Closing, and (ii), without limiting the generality of the foregoing, Seller's failure to duly perform and discharge Retained Liabilities or perform the obligations of Seller under the Assignment and Assumption, for one (1) year from and after the Closing. This indemnity shall terminate and be of no force and effect as of one (1) year after the Closing Date. The indemnification provided for in the Section 10.1(a) shall from and after the Closing be the sole remedy for any matters referred to herein.

(b) Buyer's Indemnification. Buyer hereby agrees to indemnify, hold harmless and defend Seller from and against any and all loss, damage, claim, cost and expense and any other liability whatsoever, including, without limitation, reasonable accountants' and attorneys' fees, charges, and costs incurred by Seller by reason of (i) Buyer's breach of any covenants of Buyer contained in this Agreement which survive the Closing and (ii), without limiting the generality of the foregoing, Buyer's failure to duly perform the obligations of Buyer under the Assignment and Assumption at all times from and after the Closing.

(c) Third Party Claims. If a claim by a third party is made against either of the indemnified parties, and if either of the indemnified parties intends to seek indemnity with respect thereto under this Section 10.1, such indemnified party shall promptly notify Buyer or Seller, as the case may be, of such claim. The indemnifying party shall have thirty (30) days after receipt of the above-mentioned notice to undertake, conduct and control, through counsel of its own choosing (subject to the consent of the indemnified party, such consent not to be unreasonably withheld or delayed) and at its expense, the settlement or defense therefor, and the indemnified party shall cooperate with it in connection therewith;

³²

A guest baggage clause is common in hotel contracts, as is a provision for safe deposit boxes as appears below. Neither may have much relevance to how hotels are operated in the current market.

provided that: (i) the indemnifying party shall not thereby permit to exist any lien, encumbrance or other adverse charge upon any asset of any indemnified party (ii) the indemnifying party shall permit the indemnified party to participate in such settlement or defense through counsel chosen by the indemnified party, provided that the fees and expenses of such counsel shall be borne by the indemnified party and (iii) the indemnifying party shall agree promptly to reimburse the indemnified party for the full amount of any loss resulting from such claim and all related expenses incurred by the indemnified party within the limits of this Section 10.1. So long as the indemnifying party is reasonably contesting any such claim in good faith, the indemnified party shall not pay or settle any such claim. Notwithstanding the foregoing, the indemnified party shall have the right to pay or settle any such claim, provided that in such event they shall waive any right to indemnity therefor by the indemnifying party. If the indemnifying party does not notify the indemnified party within thirty days after receipt of the indemnified party's notice of a claim of indemnity hereunder that it elects to undertake the defense thereof, the indemnified party shall have the right to contest, settle or compromise the claim in the exercise of its exclusive discretion at the expense of the indemnifying party.

(d) Survival.

(i) The covenants and agreements of Seller contained in Sections 6.2, 8 and 9.7 shall survive the Closing for [one (1)] year.

(ii) The covenants and agreements of Buyer contained in Sections 6.2, 8, 9.5 and 9.7 shall survive the Closing.

(e) Limitation of Liability. Notwithstanding anything to the contrary in this Agreement, Seller shall have no liability for any of Seller's post-closing obligations, including the indemnification obligations set forth in Section 10.1(c), unless the aggregate amount of the losses exceed \$_____ (in which event liability shall extend to amounts in excess of \$_____), provided, however in no event shall the such liability shall exceed _____ dollars (\$_____), in the aggregate for all such losses or liabilities. Seller shall establish at the Closing, including the indemnification obligations set forth in Section 10.1(c), a reserve of two million dollars (\$_____) to be retained by Seller from the proceeds of the Closing. Such reserve shall be held by Seller for the purpose of (i) post-Closing adjustments pursuant to Section 8.3 and (ii) payment of all indemnities and other amounts due under this Agreement, subject to Seller's maximum liability for any indemnities. Unless an action for indemnity is commenced within one (1) year from the Closing Date and thereafter diligently pursued, Seller shall have the right to distribute such reserve. After such distribution, Buyer shall have no further recourse against Seller.

12. Miscellaneous.

12.1 Notices. All notices, consents or waivers required or permitted in this Agreement shall be in writing and be deemed to have been duly given (a) when delivered to the recipient personally; (b) 72 hours after being mailed by registered or certified mail, return receipt requested, postage prepaid, addressed to the recipient as set forth below; or (c) upon electronically verified transmission by telecopier, whichever is earlier. A party may change its address for notice by such notice.

If to Seller: _____

Fax: _____

Attention: _____

With a copy to: _____

Fax: _____

Attention: _____

If to Buyer: _____

Fax: _____

Attention: _____

With a copy to: _____

Fax: _____

Attention: _____

12.2 Time. Time is of the essence of this Agreement with respect to the Scheduled Closing Date subject to any provisions provided for herein for extension thereof, and the notice periods set forth in Section 11.1, and for the termination of post-closing claim periods.

12.3 Entire Agreement. This Agreement, including the Exhibits, Offering Schedules and other documents referred to herein, contains the entire agreement between the parties pertaining to the subject matter hereof and fully supersedes all prior agreements and understandings between the parties pertaining to such subject matter. No change in or amendment to this Agreement shall be valid unless set forth in writing and signed by all of the parties after the execution of this Agreement.

12.4 Applicable Law. This Agreement shall be governed by and construed in accordance with the laws of _____ pertaining to contracts made and to be performed solely in the State of _____.

12.5 Counterparts. This Agreement may be executed in several counterparts, and all such executed counterparts shall constitute the same agreement. It shall be necessary to account for only one such counterpart in proving this Agreement.

12.6 Readings, Gender and Number. The section headings used in this Agreement are intended solely for convenience of reference and shall not amplify, limit, modify or otherwise be used in the interpretation of any provision of this Agreement. The masculine, feminine or neuter gender and the singular or plural number shall be deemed to include the others whenever the context so indicates or requires.

12.7 Binding Agreement; Assignment. The provisions of this Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the parties hereto. Neither Seller nor Buyer shall be permitted to assign all of its rights or obligations under this Agreement without the prior written consent of the other; provided, however, Buyer may assign its rights and obligations under this Agreement without the prior written consent of Seller to a wholly-owned subsidiary of or affiliated company wholly under "control" with Buyer, provided, further, that the subsidiary or the affiliated

company is duly organized, validly existing and in good standing under the law of the state of its incorporation and qualified to do business in the State of _____. For purposes hereof, "control" shall be deemed to mean ownership of not less than fifty percent (50%) of all of the legal and equitable interest in any other business entity. Such assignee shall become Buyer under this Agreement and, upon the written assumption by the new Buyer of all of the obligations of Buyer under this Agreement, the original Buyer shall be released therefrom.

12.8 Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall nonetheless remain in full force and effect.

12.9 Exhibits and Schedules. References in this Agreement to Exhibits mean the exhibits described in the List of Exhibits attached hereto, all of which are incorporated by reference into this Agreement. References in this Agreement to Schedules mean the schedules described in the List of Schedules attached hereto or included in the Offering Schedules, all of which are incorporated by reference into this Agreement.

13. Limitation on Recourse. [Consider if appropriate or required.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

SELLER:

_____,
a _____

BUYER:

_____,
a _____

LIST OF EXHIBITS
TO
HOTEL PURCHASE AGREEMENT

<u>Exhibit</u>	<u>Description</u>
A	Legal Description of the Land
B	Assignment of Ground Lease
C	Bill of Sale
D	Assignment and Assumption
E	Form of Management Agreement

LIST OF SCHEDULES
TO
HOTEL PURCHASE AGREEMENT

<u>Schedule</u>	<u>Description</u>
3.3A	Tenant Leases
3.3B	Litigation
3.3C	Permits
3.3D	Hotel Contracts
3.3E	Bookings
3.3F	Hotel Employees
3.3G	Transferable Insurance Policies
3.3H	Employment Agreements