ILLUSTRATIVE FORM OF **[**LOAN CLOSING**]** OPINION[[1]](#footnote-1)

[Closing Date]

[Name of Addressee]

Re: [*Describe the* ***[****financing****]*** *transaction* (the “Loan”)]

Ladies and Gentlemen:

 We have acted as [local][[2]](#footnote-2) counsel to \_\_\_\_\_\_\_\_\_\_, a South Carolina [corporation][limited liability company][[3]](#footnote-3) (the "Borrower")[[4]](#footnote-4) [and as [\_\_\_\_] counsel[[5]](#footnote-5) to \_\_\_\_\_\_\_\_\_, a South Carolina [corporation][limited liability company], as guarantor (the “Guarantor”)[[6]](#footnote-6)], in connection with the [Loan] made by \_\_\_\_\_\_\_\_\_ as lender (the “Lender”).

DOCUMENTS REVIEWED

 In connection with delivering this opinion, we have reviewed the following documents, all dated the date of this letter [unless otherwise noted]:[[7]](#footnote-7)

 1. The [Loan][Credit] Agreement between the Borrower and the Lender (the “Loan Agreement”);

 2. The Promissory Note made by the Borrower to the Lender in the original principal amount of $\_\_\_\_\_\_\_\_\_\_\_ (the “Note”);

 3. The Mortgage and Security Agreement by the Borrower to the Lender (the “Mortgage”);

 4. The Assignment of Leases and Rents made by the Borrower to the Lender (the “Assignment of Leases”);

 5. The Security Agreement made by [and between] the Borrower to the Lender (the “Security Agreement”);

 6. [The Guaranty made by the Guarantor to the Lender (the “Guaranty”);] and

 7. [*List any other material transaction documents*].

 The Loan Agreement, Note, Mortgage, Assignment of Leases, Security Agreement, and [*list any other material borrower documents*] are collectively referred to herein as the “[Loan] Documents.” [The Guaranty and [*list any other guarantor documents*] are referred to herein as the “Guaranty Documents.” The Loan Documents and the Guaranty Documents are collectively referred to herein as the “Transaction Documents.”][[8]](#footnote-8) [Terms not otherwise defined herein shall have the meaning ascribed to such term in the Loan Agreement.]

 [*For personal property secured transactions subject to the UCC*:] [We have also reviewed the UCC-1 Financing Statement (the “Financing Statement”) naming the Borrower as debtor and the Lender as secured party [filed][to be filed] in the South Carolina Secretary of State’s Office (the “State Filing Office”) [and the UCC-1 Financing Statement naming the Borrower as debtor and the Lender as secured party [filed][to be filed] as a fixture filing (the “Fixture Filing,” and together with the Financing Statement, the “Financing Statements”) in the \_\_\_\_\_\_\_\_\_\_ County (the “County”) [RMC][Register of Deeds][Clerk of Court] Office (the “County Recording Office”).][[9]](#footnote-9)

 We have examined and relied upon (1) the Borrower’s Articles of [Incorporation][Organization] filed with the South Carolina Secretary of State on \_\_\_\_\_\_\_\_ [, as amended by \_\_\_\_\_\_\_] (the “Articles”); (2) the [Bylaws][Operating Agreement] of the Borrower [adopted as of \_\_\_\_\_\_\_] (collectively with the Articles, the “Organizational Documents”); (3) the [authorizing resolutions][unanimous written consent] of the [board of directors][shareholders] of the Borrower as of \_\_\_\_\_\_;[[10]](#footnote-10) (4) the Certificate of Existence of the Borrower issued by the South Carolina Secretary of State dated \_\_\_\_\_\_\_ (the “Certificate of Existence”);[[11]](#footnote-11) (5) [the Certificate of Tax Compliance issued by the South Carolina Department of Revenue dated \_\_\_\_\_\_ (the “Tax Compliance Certificate”);][[12]](#footnote-12) and (6) [an officer’s / a secretary’s certificate dated as of \_\_\_\_\_\_]. [We have also relied on such other documents, records, and certificates of public officials, as we have deemed necessary or advisable for the purposes of this opinion.]

[*Include relevant organizational and authority documents for any guarantors, if applicable.*]

 As to certain matters of fact, we have relied upon statements and representations of the [officers, directors, managers, members,] and other representatives of the Borrower, [of the Guarantor] and of other public officials and agencies, which have not been independently established, verified or confirmed by us. In addition, as to certain matters of fact, we have relied upon the representations and warranties of the Borrower in the Loan Documents, [of the Guarantor in the Guaranty Documents,] and various other certificates, which have not been independently established, verified or confirmed by us.[[13]](#footnote-13)

 [Whenever the phrase "to our knowledge" or “known to us” is used herein, it refers to the actual, personal knowledge of the attorneys of this firm involved in the representation of the Borrower [and the Guarantor] in this transaction.][[14]](#footnote-14) [For purposes of this opinion, except for the documents specifically referenced herein as being reviewed by us, we have not made an independent review of any other agreements, contracts, instruments, writs, orders, judgments, or decrees that may have been executed by or that may now be binding upon the Borrower [or Guarantor] or that may affect the property of the Borrower [or Guarantor], nor have we undertaken to review any other files of the Borrower or Guarantor or to discuss any other matters with the Borrower [or Guarantor].][[15]](#footnote-15) [Further, because we have not undertaken any investigation to determine the existence of other documents or facts, unless expressly so stated herein, no inference as to any knowledge thereof should be implied from the fact of our representation of any party or otherwise.][[16]](#footnote-16)

COVERAGE

 The opinions set forth herein are limited to matters governed by the law of the State of South Carolina (sometimes referred to herein as the “State”), and no opinion is expressed herein as to the law of any other jurisdiction, [including, without limitation, [\_\_\_].[[17]](#footnote-17) [The opinions set forth herein assume that the law of the State would govern, notwithstanding any choice of law provision to the contrary, but no opinions are given regarding or with respect to any choice of law provision.][[18]](#footnote-18) All references herein to the “Code” shall mean the Code of Laws of South Carolina, 1976, as amended. All references to the “UCC” shall mean Title 36 of the Code, known as the Uniform Commercial Code in effect in the State as of the date hereof [, notwithstanding any provision of the Transaction Documents to the contrary.]

ASSUMPTIONS

 In rendering the opinions set forth below, we have assumed, without independent verification, among other things:[[19]](#footnote-19)

[*List of Standard General Assumptions*] [*Consider if implied or necessary*]

 (i) Each natural person executing any document is legally competent to do so;[[20]](#footnote-20)

 (ii) All signatures on the documents reviewed by us are genuine; [[21]](#footnote-21)

 (iii) All documents submitted to us as originals are authentic, all documents submitted to us as certified or photostatic copies conform to the original document, and all public records reviewed are accurate and complete;

 (\_\_) All documents fully state the agreement between the parties with respect to the matters they cover and have not been amended, modified or supplemented, and no other agreements, understandings or course of dealing by or between the parties modify, amend, supplement, terminate or rescind the agreements between the parties;

 (\_\_) The accuracy and completeness of all recitals, representations, warranties, descriptions of collateral, schedules and exhibits contained in the documents;

 (\_\_) With respect to the [Lender][*other parties*], that (a) the [Lender] is validly existing [and in good standing] under the laws of all applicable jurisdictions; (b) the Transaction Documents to which the [Lender] is a party have been duly authorized, executed and delivered by the Lender, are within its corporate power, and are its valid and binding obligations, enforceable against it; and (c) the [Lender] is in compliance with all applicable laws, rules and regulations governing the conduct of its business with respect to this transaction;

 (\_\_) [All conditions to the closing required by the Lender have been met to the satisfaction of the Lender or the time for performance has been extended or otherwise waived by the Lender;][[22]](#footnote-22)

 (\_\_) The Loan is made for a commercial or business purpose and is not for any personal, family, household or other consumer purpose or subject to any consumer transaction or consumer protection laws;

 (\_\_) There is no fraud, undue influence, duress, mutual mistake of fact, illegal or criminal activity (including, without limitation, the unauthorized practice of law)[[23]](#footnote-23) in connection with the execution and delivery of the Transaction Documents by any of the parties or in connection with the closing of the transactions contemplated by the Transaction Documents;

 (\_\_) [The parties to the Transaction Documents (a) will act in good faith and in a commercially reasonable manner in the exercise of any rights or enforcement of any remedies under the Transaction Documents; (b) will not engage in any conduct in the exercise of such rights or enforcement of such remedies that would constitute unfair dealing, commercially unreasonable or unconscionable conduct or result in a breach of the peace; and (c) will comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Transaction Documents;]

 (\_\_) With respect to the opinion expressed in paragraph [1], we have relied solely on the Certificate of Existence and have assumed that since the date of the issuance of the Certificate of Existence, the Borrower has not dissolved voluntarily or involuntarily.[[24]](#footnote-24) [*Include assumption for Guarantor organizations, if applicable*.]

 (\_\_) [The Guarantor’s entering into the Guaranty is necessary or convenient to carry out its business and affairs and furthers the corporate purposes of the Guarantor;][[25]](#footnote-25)

(\_\_) [The Guarantor receives a tangible benefit from the Loan to the Borrower;][[26]](#footnote-26)

 [*List of Certain Real Property and UCC Related Assumptions*]

 (\_\_) [The Borrower has title to the real property and related real property interests encumbered by the Mortgage;]

 (\_\_) [The Borrower has sufficient rights (as described in Section 9-203 of the UCC) in each item of personal property comprising the [collateral] in which a security interest is purported to be granted under the [Transaction Documents] and all real property and improvements and other collateral to be mortgaged, assigned, or pledged by Borrower under the Loan Documents is located in the County within the State];

 (\_\_) [The Lender has given “value” (as defined in Section 1-201(44) of the UCC);]

 (\_\_) [The names of the parties within the Transaction Documents are complete and correct, the addresses of all parties are complete and accurate, and the description of the [property] is accurate.]

[*List of Certain Property Related Assumptions for Local Counsel Opinions*]

 (\_\_) [The Mortgage, Assignment of Leases and Financing Statements will be duly filed, indexed and recorded among the appropriate official records, with all fees, charges and taxes having been paid];[[27]](#footnote-27)

 (\_\_) [All legal descriptions, schedules and exhibits have been properly prepared and attached to the appropriate documents as applicable, including, without limitation, legal descriptions, derivation clauses and tax map numbers of the land, as described and set forth in the Mortgage and more particularly in Exhibit A thereto, as well as other descriptions of collateral within the Loan Documents];[[28]](#footnote-28)

 (\_\_) [All Loan Documents that will be recorded shall be or have been properly witnessed by the witnesses thereto and properly acknowledged by a valid notary of the state in which each Loan Document is executed;][[29]](#footnote-29)

 (\_\_) [*List any other express assumptions that may be necessary for the particular transaction and opinions being rendered*.]

OPINION

 Based on and subject to the foregoing and such other qualifications, exceptions, limitations and assumptions set forth below, it is our opinion that:

 1. [Based solely on the Certificate of Existence,] the Borrower is validly existing as a [corporation][limited liability company] under the laws of the State as of such date.[[30]](#footnote-30)

 2. The Borrower has the [corporate] [limited liability company] power to execute and deliver the Loan Documents and to consummate the transactions contemplated thereby.[[31]](#footnote-31)

 3. The execution and delivery of the Loan Documents by the Borrower [and the performance by the Borrower of its obligations under the Loan Documents] and the consummation by the Borrower of the transactions contemplated thereby have been duly authorized by the Borrower.[[32]](#footnote-32)

 4. The Loan Documents have been duly executed and delivered by the Borrower. [[33]](#footnote-33)

 5. The Loan Documents constitute the valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with their terms.[[34]](#footnote-34)

 6. The execution and delivery of the Loan Documents by the Borrower and consummation by the Borrower of the transactions contemplated thereby[[35]](#footnote-35) do not (a) violate the Borrower's Organizational Documents [or (b) violate any statutory law or regulations of the State applicable to the Borrower in connection with the transaction] [or (c) violate any “Court Order” to which the Borrower is named as a party] [or (d) constitute a default under the “Listed Contracts” to which the Borrower is a party (excluding therefrom any financial covenants and similar provisions that require financial calculations and determinations).][[36]](#footnote-36) [*Include the relevant definitions for the specific court orders and other contracts, if applicable, by reference to a schedule or list identifying the court orders and contracts covered*.]

[*Add similar opinions for the Guarantor to the extent applicable*.]

 7. The interest to be charged in connection with the Loan, as stated in the Loan Documents, is not usurious under the law of the State [assuming that no fees, charges or other amounts will be paid directly or indirectly to the Lender or for its benefit, except as specified in the Loan Documents].[[37]](#footnote-37)

 8. [Except for recording of the Mortgage in the County Recording Office, filing the Financing Statements with the appropriate Filing Office,] [filings with the [Secretary of State] with respect to the Organizational Documents,] [and such other filings, consents or approvals as are specifically contemplated by the Transaction Documents,] no consents or approvals of, and no filings with, any governmental authority of the State are necessary for the execution and delivery of the Loan Documents by the Borrower and the consummation by the Borrower of the transactions contemplated thereby.] [[38]](#footnote-38)

**[***Mortgage Lien Opinion***]** [[39]](#footnote-39)

 9. [The Mortgage is in appropriate form for recordation in the County Recording Office.] The Mortgage is [in a form][[40]](#footnote-40) sufficient to create a valid lien on the portion of the property encumbered thereby which consists of real property interests under State law, located in the County where the Mortgage is being filed.

**[***Fixtures and Fixture Filing Opinions***]**

 10. The Mortgage is in form sufficient to create a security interest in the “fixtures” [(as such term is defined in Section 9-102(a)(41) of the UCC and under State law)] that are located on the real property encumbered by the Mortgage.

 11. [The Fixture Filing is in proper form for filing with the County Recording Office].[[41]](#footnote-41) Upon the filing of [the Mortgage] [and the Fixture Filing] in the County Recording Office, the security interests created by the Mortgage in the fixtures on the real property located in the County will be perfected under State law.

**[***Real Estate Mortgage Related Opinion***]** [[42]](#footnote-42)

 12. [No intangible tax, documentary stamp tax, mortgage, transfer or recording tax is required to be paid by the Borrower to any governmental agency of the State on account of the execution and delivery of the Mortgage or the creation of the indebtedness secured by the Mortgage in the State, except for nominal filing or recording fees.]

[*UCC Personal Property Opinions*] [[43]](#footnote-43)

 13. The Security Agreement is in form sufficient to create a security interest in those items and types of personal property described therein to the extent a security interest in such property may be created under Article 9 of the UCC.[[44]](#footnote-44)

 14.The Financing Statement is in proper form for filing with the State Filing Office.[[45]](#footnote-45) Upon the filing of the Financing Statement in the State Filing Office, the security interests created by the Security Agreement will be perfected in the property described in the Security Agreement to the extent that (a) such property is described in the Financing Statement and consists of the items and types of property subject to Article 9 of the UCC, and (b) a security interest in such property can be perfected by filing a financing statement in the State under the UCC (the “UCC Filing Collateral”).[[46]](#footnote-46)

QUALIFICATIONS

 The foregoing opinions are further limited by the following assumptions, limitations and qualifications:[[47]](#footnote-47)

 A. Enforceability of the Transaction Documents is subject to, and the rights of the parties under the Transaction Documents may be limited by, bankruptcy, insolvency, fraudulent conveyances, equitable subordination, reorganization, moratorium or other similar laws or governmental authority relating to or affecting creditor's rights or the collection of debtor's obligations generally.[[48]](#footnote-48)

 B. Enforceability of the Transaction Documents is subject to, and the rights of the parties under the Transaction Documents may be limited by, general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith, fair dealing, the availability of specific performance or injunctive relief, regardless of whether considered in a proceeding in equity or law.[[49]](#footnote-49) Enforcement of the Transaction Documents may also be subject to the discretion of the court before which any proceeding may be brought.[[50]](#footnote-50)

**[***Additional Possible Qualifications and Exceptions***]** [[51]](#footnote-51)

 \_\_\_. We express no opinion as to any tax, insolvency, consumer, privacy, labor and employment, pension and employee benefit, anti-terrorism, criminal, anti-trust, anti-tying, unfair trade practices and competition, intellectual property, letter of credit, securities or “blue sky” laws, rules or regulations of any jurisdiction or laws, rules or regulations governing and regulating financial or lending institutions.[[52]](#footnote-52) [We express no opinion as to compliance by any parties to the transaction with respect to any fiduciary duty or any regulatory requirements applicable to the subject transactions because of the nature of their business.] [[53]](#footnote-53)

 \_\_. We express no opinion regarding the effectiveness of any provision in the Transaction Documents whereby the Borrower [or the Guarantor] waives procedural, substantive, statutory or constitutional rights.

[*Alternative*:] We express no opinion regarding the effectiveness of any provision in the Transaction Documents whereby the Borrower [or the Guarantor] waives procedural, substantive, or constitutional rights, including, without limitation: (i) the waiver of the right of statutory or equitable redemption; (ii) the waiver of or limitations on damages, including liquidated, incidental, consequential, punitive and special damages;[[54]](#footnote-54) (iii) waivers of unmatured rights; (iv) the waiver of rights to notice; (v) releases or waivers of other legal or equitable rights; (vi) waivers of or limitations on rights to bring claims and counterclaims;[[55]](#footnote-55) (vii) waivers of or limitations on statutes of limitations or repose;[[56]](#footnote-56) (viii) the waiver of trial by jury; (ix) the waiver or other avoidance of the merger doctrine; (x) waivers or discharges of defenses; (xi) the waiver of an accounting for rent or sale proceeds; (xii) the waiver of set-off; (xiii) waivers subject to Section 9-602 of the UCC; (xiv) waiver of appraisal rights in foreclosure or otherwise and rights to a deficiency judgment when such appraisal rights are applicable.[[57]](#footnote-57)

 \_\_. We express no opinion as to the enforceability of any provision that states delay or omission of enforcement of rights and remedies will not constitute a waiver of such right or remedy to the extent that any such delay or omission is deemed a waiver of any right based on a course of dealing or course of performance by the parties.

 \_\_. We express no opinion regarding the enforceability of any provisions relating to disclaimers, indemnities or other liability assumptions or limitations with respect to governmental entities and State agencies, third parties or one’s own [gross] negligence, recklessness, or willful or unlawful misconduct.[[58]](#footnote-58)

 \_\_. We express no opinion regarding the enforceability of any provisions relating to (i) rights to attorneys’ fees (which may be subject to the discretion of the court); (ii) [the right to cure defaults with third parties;] (iii) [confidentiality agreements;] (iv) [covenants not to compete;] [[59]](#footnote-59) (v) [the consent to service of process in any particular manner;] (vi) [subrogation rights;] (vii) [submission to jurisdiction and venue;][[60]](#footnote-60) (viii) [submission to arbitration or mediation;][[61]](#footnote-61) and (ix) the exercise of self-help remedies; [and (x) choice of law.][[62]](#footnote-62)

 \_\_\_. We express no opinion as to any grant of a power of attorney in any Transaction Document or any provision that appoints the Lender or other parties as agent or attorney-in-fact or any provisions regarding future requirements to execute additional documentation not contemplated at the time of closing.[[63]](#footnote-63) [We further express no opinion as to any changes made to the Transaction Documents after the documents were executed and delivered or the effect of such changes on the enforceability of those documents.[[64]](#footnote-64)]

 \_\_\_. We express no opinion as to the enforceability of any provision whereby the Lender reserves the right to charge "default interest" or a higher rate of interest after default than the interest that would otherwise accrue under the Transaction Documents, or any other charge or fee, including any yield maintenance or capital adequacy provision or any other provision whereby the Lender reserves the right to charge a tax, premium or fee, however calculated, that would be deemed a penalty.[[65]](#footnote-65) Furthermore, we express no opinion as to the enforceability of any prepayment premium or fee triggered by condemnation, acceleration or events beyond a party’s control. [[66]](#footnote-66)

 \_\_\_. We express no opinion as to the right of the Lender to accelerate the due date of any indebtedness without notice or other overt action by the Lender or upon the occurrence of an immaterial breach (including a material breach of a non-material provision thereof) of any of the Transaction Documents or upon any filing under any applicable bankruptcy code [or solely in the event the Lender deems itself insecure or believes that its prospects for repayment are impaired.][[67]](#footnote-67) Furthermore, we express no opinion on provisions to the effect that the acceptance by the Lender of past due installments or other performance by the Borrower [or the Guarantor] shall not be deemed a waiver of the Lender's right to accelerate the indebtedness.[[68]](#footnote-68)

 \_\_\_. We express no opinion as to the enforceability of any provision of a guaranty providing for continued liability against the estate of a deceased or incompetent guarantor or obligor to the extent of advances made on the Loan after notice of a guarantor's death or incompetency.

 \_\_\_. We express no opinion as to the enforceability of any provision contained in the Transaction Documents that purports to prohibit oral agreements or amendments or provisions that otherwise limit the effect of a course of dealing or performance between the parties.[[69]](#footnote-69)

 \_\_\_. We express no opinion as to any other document that may be referred to or otherwise incorporated by reference into any Transaction Document. Furthermore, we express no opinion as to the enforceability of any provision relating to the construction of the documents to the extent such documents contain provisions that may be inconsistent.[[70]](#footnote-70)

 \_\_\_. We express no opinion as to the enforceability of any provisions that relate to severability where less than all of the contract may be unenforceable, to the extent that the unenforceable portion is an essential part of the agreed exchange, or to the extent that a court or other adjudicatory panel will not re-write the document to exclude the unenforceable provision.[[71]](#footnote-71)

 \_\_\_. We express no opinion as to whether representations can survive or be continuing. [[72]](#footnote-72)

 \_\_\_. We express no opinion as to whether any document is an instrument under seal. [[73]](#footnote-73)

 \_\_\_. We express no opinion regarding title to, the location of, or the priority of any security interest or lien in, on or against any property (whether real or personal, tangible or intangible).[[74]](#footnote-74)

**[***Certain Real Estate Mortgage Related Exceptions***]**

 \_\_\_. [As to matters of title to real property, it is our understanding that you are relying on the title insurance policy to be issued in connection with the Loan (the “Title Policy”) and all matters contained therein, including, without limitation, the priority of the Mortgage, and] we express no opinion as to matters of title or priority of any lien on real property.[[75]](#footnote-75) With respect to the location of the land and the legal description, it is our understanding that you are relying on the Title Policy and survey] prepared in connection with the Loan, and we express no opinion with respect to the location of such land.[[76]](#footnote-76)

 \_\_. We express no opinion as to whether any items of personal property are incorporated in or made a part of the real estate under the Mortgage.[[77]](#footnote-77) Whether any item of personal property constitutes a fixture or real property is a factual determination under certain rules of law and cannot be arbitrarily controlled by the intent of the parties.

 \_\_\_. We express no opinion as to the creation or validity of any lien against after-acquired real property.[[78]](#footnote-78)

 \_\_\_. [We express no opinion as to any future advances in excess of the maximum principal amount stated in the Mortgage, plus interest thereon, attorneys’ fees and court costs, as provided in Section 29-3-50 of the Code, [and the indebtedness secured by the Mortgage may be limited to such stated amount,] notwithstanding any provision to the contrary.[[79]](#footnote-79)]

 \_\_\_. [With respect to the Mortgage, we express no opinion as to the effect of any failure to include that the interest on the secured indebtedness may be deferred, accrued or capitalized.[[80]](#footnote-80)]

 \_\_\_. In the State, mortgaged real property may be sold only pursuant to judicial foreclosure proceedings.[[81]](#footnote-81) Further, the right to possession is by statute vested in the mortgagor until the completion of the foreclosure sale.[[82]](#footnote-82) Therefore, any provisions concerning a secured party’s rights to enter into possession of, operate, control or sell real property, either directly or through a receiver not appointed by a court and without the institution of judicial foreclosure proceedings, will be unenforceable. Rights of a mortgagee to enter into possession of the real property, to take control of and operate or sell real property, either directly or through a receiver, without benefit of judicial proceeding are not recognized in the State. A mortgagee may obtain the services of a receiver to manage such property only by court appointment of the receiver. In the State, the appointment of a receiver is generally discretionary with the court.[[83]](#footnote-83) Therefore, we express no opinion as to the enforceability of the remedies set forth in the Mortgage, Assignment of Leases or any other Loan Documents which are contrary to the provisions of the Code or the statutory requirements for appointment of a receiver, the collection of rents, and judicial foreclosure under State law. We express no opinion as to whether or not the Lender may be deemed a mortgagee-in-possession under certain circumstances.

 \_\_. Notwithstanding anything to the contrary in the Loan Documents, the Lender may be forced to initiate legal proceedings to effectuate its remedies. In addition, all remedies may be limited or modified by the doctrine of election of remedies.

 \_\_\_. We express no opinion as to whether the Assignment of Leases or any assignment of leases and rents contained in the Mortgage which permits the Borrower to collect rents and profits from the land described therein until the occurrence of an event of default is a present and absolute assignment.[[84]](#footnote-84)

 \_\_\_. Rights to condemnation proceeds and notices of condemnation proceedings are governed by the South Carolina Eminent Domain Procedure Act,[[85]](#footnote-85) and we express no opinion as to any provision contrary to such laws.

 \_\_\_. We express no opinion as to any provision in the Mortgage or any other document that requires any party to purchase casualty insurance on property in an amount in excess of the replacement cost of the buildings and appurtenances on the land.[[86]](#footnote-86) [Furthermore, we have not examined, and express no opinion as to the assignability of, policies of insurance required by the Mortgage.]

 \_\_\_. We express no opinion as to the condition or previous, present or future use of any property. Furthermore, we express no opinion as to the effect of or compliance with any federal, state or local law, rule or regulation relating to environment, health and safety, building and construction, [archaeology,] [historic preservation,] land use, land sales, [landlord-tenant relationships,] [horizontal property regimes,] [vacation time sharing,] [fair housing,] [property management,] [loan and mortgage brokers,] subdivision and zoning.[[87]](#footnote-87)

[*Certain UCC Specific Qualifications*]

\_\_\_. We express no opinion as to the perfection of any security interest in or against any property, except as specifically set forth in opinion paragraph(s) \_\_\_ above with respect to perfection of the UCC Financing Collateral by recording the Mortgage and Fixture Filing in the County Recording Office and filing the Financing Statement in the State Filing Office. Without limiting the foregoing, we express no opinion as to any security interest in any collateral (a) that is perfected upon attachment pursuant to Section 9-309 of the UCC; [(b) that is perfected by possession or delivery under Section 9-313 of the UCC;] [(c) that is perfected by control under Section 9-314 of the UCC;] [(d) that requires filing in the jurisdiction of [the debtor’s location] [the location of the goods as provided in Section 9-301 of the UCC] for perfection;] or (d) that is not subject to Article 9 of the UCC.[[88]](#footnote-88) [*Optional Additional Language*:] Without limiting the foregoing, we express no opinion as to the perfection of [or creation of] any security interest in collateral consisting of:[[89]](#footnote-89) (i) [trademarks, service marks, copyrights, patents or other intellectual property;][[90]](#footnote-90) (ii) [timber, oil, gas, minerals or other natural resources;] [[91]](#footnote-91) (iii) [consumer goods;](iv) [vehicles, airplanes, boats, vessels, or goods that are subject to a certificate of title;][[92]](#footnote-92) (v) [money, cash or cash equivalents;] (vi) [tax refunds;] (vii) [insurance or condemnation proceeds;] (viii) [instruments;] (ix) [letter-of-credit rights;] (x) [electronic] [chattel paper;][[93]](#footnote-93) (xi) [documents or goods covered by documents;] (xii) [commodity accounts and contracts;] [securities (certificated or uncertificated);] [securities accounts or security entitlements;][[94]](#footnote-94) (xiii) [commercial tort claims;][[95]](#footnote-95) (xiv) [deposit accounts;][[96]](#footnote-96) (xv) [equipment or goods that do not constitute fixtures;][[97]](#footnote-97) (xvi) [goods in possession of a bailee;] or (xvii) [proceeds to the extent that under certain circumstances described in Sections 9-315 and 9-322 of the UCC, the rights of a secured party to enforce a perfected security interest in proceeds of collateral may be limited.][[98]](#footnote-98) [A security interest may be subject to competing interests of others, and under certain circumstances interests of others may take free of a security interest pursuant to the UCC.]

 \_\_\_. [With respect to the Financing Statements, we note that: (i) the effectiveness of a financing statement under the UCC terminates five years after the filing unless a continuation statement is filed prior to such termination in accordance with Section 9-515 of the UCC, and (ii) Sections 9-507(c) and 9-508(b) of the UCC provide that if the debtor so changes its name, identity or corporate structure or a new debtor’s name is so different that a filed financing statement becomes seriously misleading under Section 9-506 of the UCC, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change unless an appropriate amendment under Section 9-507(c)(2) of the UCC or a new initial financing statement under Section 9-508(b)(2) of the UCC, as the case may be, is filed before the expiration of that period. For purposes of this opinion, we have assumed that the Borrower will remain the debtor and will not change its name, identity, jurisdiction of business organization or corporate structure during the term of the Loan and that the collateral will remain subject to the jurisdiction of the State.] [[99]](#footnote-99)

 \_\_\_. [We express no opinion as to any provision that purports (i) to create, with no further action on the part of the Borrower, a lien arising in the future in favor of the Lender attaching to assets in which no security interest is granted by the Loan Documents, or (ii) to limit the rights of third parties who obtain legitimate liens on such assets.]

 \_\_\_. Contrary to the provisions in the Transaction Documents regarding self-help remedies of the Lender, a secured party, upon default, has the right to proceed without judicial process to retake possession of secured personal property only if it can be done without breach of the peace in compliance with the requirements and remedies set forth under the UCC.

 \_\_\_. We express no opinion as to the negotiability of the Note or other instrument based on the limitations set forth in Sections 3-104(a) and 3-106 of the UCC.

 \_\_\_. The enforceability of the Transaction Documents may be limited by the rights of third parties to the extent that the consent of such third parties is necessary for the valid transfer of any collateral as security. Furthermore, we express no opinion as to any assignment of any lease, contract, warranty, permit or other document, including, without limitation, the assignment of any governmental permits, authorizations or approvals.[[100]](#footnote-100)

 \_\_\_. We express no opinion as to the enforceability of provisions restricting assignments pursuant to the limitations and restrictions contained in Sections 9-406 through 9-409 of the UCC.[[101]](#footnote-101)

[*Generic Qualification/Miscellaneous*]

 **[**Certain other provisions may be unenforceable, but such other provisions should not render the Transaction Documents invalid as a whole or preclude, subject to the economic consequences of any procedural delay that may result from such unenforceable provisions, (i) enforcement of the obligation to repay the principal and interest on the Loan through judicial means and (ii) judicial foreclosure of the Mortgage.**]** [*Alternative*:] **[**The enforceability of the Transaction Documents may be further limited in that certain other provisions may not be enforceable in accordance with their terms, but the inclusion of those other provisions, subject to the other qualifications and exceptions stated herein, should not materially interfere with the practical realization of the principal security intended to be provided thereby, except for the economic consequences of any procedural delay which may result from such unenforceable provisions and applicable law.**]**[[102]](#footnote-102)

The legal opinions expressed herein are an expression of professional judgment and not a guaranty of any result.

[This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law as published in 53 Business Lawyer 831 (May 1998).][[103]](#footnote-103)

 This opinion letter is delivered to you and is solely for your use in connection with the Loan.[[104]](#footnote-104) Without our prior written consent, it may not be used or relied upon by any other person, firm or entity or quoted for any other purpose.[[105]](#footnote-105) This opinion letter is given as of the date of this letter based upon existing facts and law. We are under no obligation, and do not undertake any obligation, to update or revise the opinions set forth herein for any reason including, without limitation, facts or laws subsequently becoming known to us that cause such opinions to be inaccurate or incomplete. [[106]](#footnote-106)

 Very truly yours,

 [Firm Name][[107]](#footnote-107)

1. This sample closing opinion to a third party (in this case, a financial institution as lender/creditor) is an illustrative form of opinion for the South Carolina Third-Party Legal Opinion Report (hereinafter *Report*) drafted by the Legal Opinion Ad Hoc Committee of the Corporate, Banking and Securities Law Section of the South Carolina Bar. This illustrative opinion is provided as a form for guidance in a typical (mortgage loan/secured financing) business transaction. When rendering a third-party opinion, consider and follow the guidelines and principles set forth in the Committee on Legal Opinions, ABA Section of Business Law, “Legal Opinion Principles,” 53 Bus. Law. 831 (1998) (hereinafter *ABA Principles*), and the Committee on Legal Opinions, ABA Section of Business Law, “Guidelines for the Preparation of Closing Opinions” (including the Legal Opinion Principles), 57 Bus. Law. 875 (2002) (hereinafter *ABA Guidelines*). Also, refer to and generally follow the TriBar Opinion Committee, “Third-Party Closing Opinions: A Report of the TriBar Opinion Committee,” 53 Bus. Law. 591 (1998) (hereinafter *1998 TriBar Report*) and subsequent TriBar Opinion Committee reports in preparing and negotiating legal opinions. For a comprehensive treatise, *see* Donald W. Glazer, Scott FitzGibbon & Steven O. Weise, Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting and Supporting Closing Opinions in Business Transactions (Aspen Law Publishers, 3d ed., & 2013 Cumulative Supp.) (hereinafter Glazer). The Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, “Third-Party Legal Opinions in Business Transactions,” Second Edition (2004) (hereinafter *NC Report*), reprinted at Appendix 38 of Glazer, and Supplement to Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, “Third-Party Legal Opinions in Business Transactions,” Second Edition (2004), reprinted at Appendix 38A of Glazer, has provided material guidance and support for the Report and this opinion. [↑](#footnote-ref-1)
2. Generally, you do not need to qualify the nature of your role as counsel, as you are giving the opinion in connection with the transaction as described. However, in some instances, where your involvement is limited to local counsel or counsel solely for a particular issue, you may want to specify the nature of your role as counsel to make clear that your role in, and knowledge of, the transaction is limited, and as such, the scope of the opinion is limited. In such instance, you may want to include a statement such as: “We are counsel to the Borrower in this transaction solely for the purpose of rendering this opinion, and we do not represent the Borrower generally.” (S*ee generally* Glazer § 2.5.3.) [↑](#footnote-ref-2)
3. You should consider issues specific to the type of business organization. *See* TriBar Opinion Committee, “Third-Party Closing Opinions: Limited Liability Companies,” 61 Bus. Law. 679 (2006), and “Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests,” 66 Bus. Law. 1065 (2011), for a detailed discussion of opinion considerations relative to alternative entities. [↑](#footnote-ref-3)
4. This party is your client; depending on the transaction, it might be the Borrower, Debtor, Company, or Seller, for example (The addressee is the third party recipient who is not your client.) It is understood that you are giving the opinion at the request of your client in order to close the transaction. (*See* South Carolina Rules of Professional Conduct, Rule 1.2.) However, you need to consider the ethical duties owed to your client when rendering opinions to third parties (such as the duty of confidentiality, conflicts of interest, consent of client to disclose information, competency in the area of law covered) and to third parties (such as truthfulness in disclosure to third parties). [↑](#footnote-ref-4)
5. Consider whether you are actually representing the guarantor or any other client-related third party in the transaction (*e.g.*, subsidiaries or principals). If you act as counsel to multiple parties in a transaction, you should address any possible conflicts of interest and obtain appropriate waivers, if necessary. If you are not representing any other client-related party but are asked to render opinions relating to such other parties (such as enforceability of a guaranty on behalf of a guarantor that is not your client but that is related to the borrower), revise the introductory sentence accordingly to reflect that you are not counsel to such party or to reflect the limited capacity in which you are rendering your opinion with respect to such party. [↑](#footnote-ref-5)
6. If any loan parties are individuals, limit the opinions accordingly. For example, you would not address “power” or “authorization” for an individual. Also, you should not opine as to the capacity of individuals. (*See* note 20 *infra*.) [↑](#footnote-ref-6)
7. Describe the relevant transaction documents covered by the opinion, including the exact name of the document, the parties to the document, and date of the document (if not the same as the date of the opinion letter). If you state “executed by” the parties, review the executed documents or photocopies (which is required for a “due execution” opinion). The documents listed here are merely examples of documents in a typical real estate secured transaction. Other types of collateral documents (such as pledges and control agreements) are discussed in the UCC Section of the Report. Ordinarily, you do not need to include, or opine as to, all of the documents executed in the transaction, but only the material transaction documents. [↑](#footnote-ref-7)
8. To the extent that there are no Guaranty Documents, references in the opinion should be to the Loan Documents alone. Transaction Documents as used elsewhere in the opinion may be replaced with Loan Documents where no Guaranty Documents are covered by the opinion. [↑](#footnote-ref-8)
9. For secured transactions subject to UCC Article 9 filing requirements, designate the financing statements separate from the definition of the Transaction Documents. Financing statements are notice filings for purposes of perfection under the UCC and are not executed by the debtor (filing is “authorized” by the debtor). As such, often the lead-in paragraph to the list of reviewed documents will not be appropriate for financing statements. Also, many of the opinions on the Transaction Documents are not applicable to financing statements (*e.g.*, financing statements do create enforceable obligations).

Confirm the correct county recording office (*e.g.*, Register of Deeds, Clerk of Court, or RMC). [↑](#footnote-ref-9)
10. While you do not have to list all of the organizational and authority documents you have reviewed to render the opinion, you should consider identifying the corporate organizational and authority documents you specifically reviewed that are necessary to render the requested opinions. You should review the authorizing documents to determine that they are in proper form, comply with the requirements of the organizational documents and applicable statutory law, and use proper terminology. Note the requirements for meetings, voting and unanimous written consents in lieu of meetings. You will also need to confirm the proper authority of parties executing documents and requirements. [↑](#footnote-ref-10)
11. A certificate of existence should be dated as close to closing as possible or practical. (Generally, title companies require a certificate of existence to be dated no more than 30 days prior to closing.) A certificate of existence does not address filing with State taxing authorities nor does it disclose other grounds that may exist for bringing dissolution proceedings. Therefore, absent a certificate of tax compliance, it is prudent to obtain the certificate of existence as close to closing as possible. In a business asset acquisition, the purchaser will likely insist on a certificate of tax compliance. *See* the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-11)
12. S.C. Code Ann. § 12-54-124. *See also* Revenue Ruling 04-02. *See* the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-12)
13. *See* 1998 TriBar Report § 2.6 at 618. However, you cannot rely on representations if they are conclusions of law or you have knowledge that they are not true. *See* Part II of this Report, “Opinion Due Diligence.” [↑](#footnote-ref-13)
14. If you are not qualifying any opinion to your knowledge, delete this sentence. *See* 1998 TriBar Report § 2.6.1 at 618-619. For other formulations of the knowledge qualifier, *see* Glazer § 4.4. *See also,* *Dean Foods Co. v. Pappathanasi*, 18 Mass L. Rep. 598 (Mass. Super. Dec. 3, 2004) (a comprehensive knowledge qualifier did not protect the firm where it was found that it had knowledge of an investigation and potential claim). You may want to name the individual attorneys involved in the representation of the Borrower in connection with the transaction. [↑](#footnote-ref-14)
15. Include this sentence if it is a true statement. Such qualification will not limit the opinion to the extent you have conducted certain due diligence and have actual knowledge. [↑](#footnote-ref-15)
16. Include this sentence if it is a true statement. Such qualification will not limit the opinion to the extent you have conducted certain due diligence or have actual knowledge. *See* opinion para. 6 and note 36 *infra*. [↑](#footnote-ref-16)
17. If any of the documents select as their governing law the law of a state other than South Carolina or if the party’s organizational jurisdiction is not South Carolina, you may wish to expressly exclude the laws of the relevant jurisdictions. To the extent laws of other jurisdictions may be implicated (such as business entities organized under the laws of a foreign jurisdiction or documents governed by the laws of another state), you may wish to expressly exclude such laws if you are not qualified to render such opinions, and in such case, you would not be rendering opinions with respect to such matters. This statement may need to be qualified “except as expressly set forth herein” to the extent you agree to perform any limited search or review to render a specific opinion. (However, in such limited case, consider the ethical requirements for competency and the other state’s unauthorized practice of law rules.)

In opinions other than state-specific local counsel opinions (where general or lead counsel could cover any applicable federal law), you may also need to cover federal law to the extent applicable.

Generally, you should not rely on opinions of other counsel to render the same opinion rendered by such other counsel. Instead, the requested opinions may be split and covered by separate counsel in multiple opinion letters delivered directly to the recipient. (*See* 1998 TriBar Report § 5.2 at 638 regarding “unbundling opinions.”)

For issues relating to opinions on Delaware entities, see the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-17)
18. Rather than giving a choice of law opinion, you can assume the law of the State would govern, notwithstanding any choice of law provisions to the contrary. This is an assumption that may be stated for opinion purposes notwithstanding facts to the contrary. The opinion should not, however, assume that the law of the State is the same as the law of the foreign jurisdiction chosen in the documents. *See* ABA Guidelines § 4.9. *See also* 1998 TriBar Report § 4.6 at 635, n. 98. *See* the “Real Estate Opinions” and “The Enforceability or Remedies Opinion” Sections of the Report for discussions of choice of law issues under state law. [↑](#footnote-ref-18)
19. *See* the “Assumptions” Section of the Report for a more detailed discussion on express and implied assumptions. Certain assumptions are implied whether specifically stated or not. Certain assumptions are general in nature and may apply to all transactions, and certain assumptions are applicable to specific types of transactions and should be expressly stated. Include only those additional assumptions that are necessary and applicable to the transaction and opinions expressed. Do not rely on an assumption you know to be false or misleading, except in cases where it is expressly permitted and acknowledged (such as a contrary assumption for choice of law). *See* Glazer § 4.3.3 for discussion of additional assumptions. The 1998 TriBar Report § 2.3(a) at 615 states that as a matter of customary practice, certain assumptions are implied and do not need to be expressly stated. [↑](#footnote-ref-19)
20. Do not give opinions as to capacity or competency of individuals. Capacity of individuals is assumed whether such assumption is expressly stated or not. A request for an opinion as to capacity or mental status of individuals is inappropriate, even when qualified by knowledge. A closing attorney is not expected or qualified to make a determination as to the mental capacity of an individual. (If the attorney has actual, confirmed knowledge of a party’s incapacity, he or she should not be delivering an opinion letter nor proceed with the transaction.) [↑](#footnote-ref-20)
21. Do not render an opinion on the genuineness of signatures, even as to clients. In limited circumstances, you may exclude from the assumption the signatures of your client to the extent you actually witnessed your client’s signatures on the documents and know the persons who signed on your client’s behalf. In such limited case, you may be able to exclude from the assumption the signatures of your client on the Transaction Documents. Otherwise, the recipient should request and rely on a notary acknowledgment if it is concerned about the signatures of the parties to the transaction documents. In any event, consider the requirements for witnessing documents under state law. [↑](#footnote-ref-21)
22. This assumption may not need to be expressly stated. You should not include an express confirmation that the closing conditions have been satisfied. Beware, however, of requests by the lender that you confirm satisfaction of closing conditions. [↑](#footnote-ref-22)
23. The unauthorized practice of law (UPL) assumption is included in opinions on multi-state transactions or transactions involving out-of-state parties to or counsel in the transaction. While such assumption may afford the opinion giver some protection as it relates to rendering the opinion to a third party, it will not protect the opinion giver from any ethical violations and disciplinary action as a result of any UPL if UPL is implicated in the closing. In South Carolina, UPL in connection with a mortgage loan closing can impact the enforceability of the remedies under the mortgage loan documents. *See* the “Ethical Considerations in Opinion Practice” and the “Real Estate Opinions” Sections of the Report for more detailed discussion on the ethical concerns and implications of UPL in rendering a local counsel mortgage enforceability opinion. [↑](#footnote-ref-23)
24. *See* S.C. Code Ann. §33-1-280 and the South Carolina Reporters’ Comments thereto. “Good standing” is not a statutorily defined term in the Code. Failure to file with the SC Department of Revenue, as well as other grounds for dissolution may exist of which the Secretary of State has not been notified. (*See* Comment 3 of the South Carolina Reporters’ Comments to S.C. Code Ann § 33-1-280.) *See* the related discussion in the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-24)
25. S.C. Code Ann. §33-3-102(7) permits a corporation to “make contracts and guarantees,” but such authorization is in the context of actions “necessary or convenient to carry out its business and affairs.” S.C. Code Ann. §33-3-102. [↑](#footnote-ref-25)
26. *See* discussion regarding subsidiary guarantors under the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-26)
27. Include this assumption regarding filing in local counsel opinions only if you are not the South Carolina counsel supervising the recording of documents. In such cases, the ethical considerations and disciplinary cases suggest that you need to confirm that South Carolina counsel is supervising the recording of the mortgage documents. *See* *In re: Calhoun*, 371 S.C. 403, 639 S.E.2d 679 (2007). You would still assume proper indexing and filing by the governmental filing office upon delivery for recording. [↑](#footnote-ref-27)
28. This assumption may be appropriate in a local counsel opinion limited to enforceability of the documents as forms and other general matters of local law, where another lawyer in the State is supervising title exams, preparing legal descriptions, recording documents and supervising the closing, and where another party prepared such schedules. [↑](#footnote-ref-28)
29. This assumption is appropriate for local counsel opinions where the documents are executed out of state or where only a “form of documents” opinion is rendered by local counsel. Otherwise, it may be necessary to confirm that the documents appear on their face to have been properly executed, witnessed and notarized. Documents in South Carolina must be witnessed in person. *See* the discussions in “Ethical Considerations in Opinion Practice” and in the “Real Estate Opinions” Sections of the Report relating to out of state closings, the unauthorized practice of law and other ethical considerations. [↑](#footnote-ref-29)
30. Reliance solely on the certificate of existence is generally assumed. If the opinion is being provided to an out-of-state recipient, include reference to reliance solely on the Certificate of Existence. “Good Standing” is not a statutorily defined term in the Code. (*See* note 24 *supra*.) Limit the status opinion to valid existence. Some recipients may request that you update the date of the Certificate of Existence to or as close to the date of closing as possible. Also, do not cover foreign qualification. *See* ABA Guidelines § 4.1; *see also* 1998 TriBar Report § 6.1.6 at 646-647. [↑](#footnote-ref-30)
31. For a discussion of the corporate power opinion, *see* Glazer Chapter Eight. Avoid using the phrase “power and authority” in this context. (*See* 1998 TriBar Report § 6.3 at 652, n. 138.) *See also* the discussion on power in the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-31)
32. Confirm that proper resolutions of the company authorizing the transaction and documents as contemplated have been obtained and conform to the organizational document requirements and applicable statutes. *See also* the discussion on authority in the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-32)
33. This opinion is usually not difficult to render. However, a “duly delivered” opinion generally means that the opinion giver, if not present at actual delivery, has confirmed and is satisfied with the procedures for delivery of the signed documents. Otherwise, delivery should be deleted from the opinion. *See also* the discussion on delivery in the “General Corporate Opinions” Section of the Report. [↑](#footnote-ref-33)
34. The enforceability opinion is rendered under State law. Confirm that the documents are governed by State law and are sufficient to constitute an enforceable contract under State law. If the documents are not governed by State law, see discussion on choice of law at note 18 *supra*. To the extent that certain provisions may not be enforceable (or are of questionable enforceability), duly note those exceptions. *See* the “Enforceability or Remedies Opinion” Section of the Report. [↑](#footnote-ref-34)
35. In this context, try to limit the opinion to consummation of the transaction rather than performance of the documents. For a discussion on consummation vs. performance, *see* Glazer §§ 13.2.3, 14.4, 15.5 and 16.3.7. [↑](#footnote-ref-35)
36. Parts (c) and (d) of this opinion should be delivered only if the due diligence necessary to properly render the opinion is justified for the transaction. This opinion, if given, should be limited to a defined set of contracts and/or court orders that are defined in a referenced document or set forth on separate schedules to the opinion as the “Court Orders” and/or “Listed Contracts.” Limiting the opinion to “knowledge” may not be sufficient. *See* 1998 TriBar Report § 6.5 at 654-661. For defaults under other agreements, violation of court orders, and creation of other liens, *see* Glazer §§ 13.2.2, 14.2 and 16.3. For formulations and definitions, *see* the Illustrative Form of Opinion attached as Part III to the NC Report. [↑](#footnote-ref-36)
37. S.C. Code Ann. § 37-10-106 allows for any rate of interest to be agreed upon by parties in a written contract for credit transactions that are not otherwise subject to the consumer protection provisions of the Code (*e.g*., business or commercial loans evidenced in writing). The assumption may be included in the list of assumptions or stated as part of the opinion. This opinion also assumes that any amounts to be charged are not deemed to be a penalty by the courts. *See* note 65 *infra*. [↑](#footnote-ref-37)
38. Filings with the Secretary of State may be necessary if charter documents are being amended. If a name change is made, filings in the local real estate records may be required as well. Consider what filings may be required, particularly if dealing with a regulated industry. The opinion is limited to filings and approvals of governmental entities solely for execution, delivery and closing, not future performance. The opinion should not address any filing requirements of the lender or other third parties. *See* Glazer Chapter Fifteen. [↑](#footnote-ref-38)
39. Consider and follow the Joint ACREL Attorneys’ Opinion Committee and ABA Section of Real Property, Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions, “Real Estate Opinion Letter Guidelines,” 38 Real Prop., Prob. & Tr. J., 241 (2003) (hereinafter *Real Estate Guidelines*), when rendering and receiving real estate related opinions (and in other financing transactions where applicable). [↑](#footnote-ref-39)
40. In local counsel opinions limited to the form of the mortgage only, insert the following: “when duly and properly executed, witnessed by two witnesses and probated or acknowledged before a notary public duly authorized to perform notarial acts for the jurisdiction where such instrument is executed, with the official seal affixed, and with all appropriate exhibits properly attached thereto (including an appropriate legal description with the derivation and tax map number).” Otherwise, these requirements must be confirmed; and as part of your ethical considerations, the attorney disciplinary cases suggest that you must confirm the supervision of these requirements by a South Carolina licensed attorney. [↑](#footnote-ref-40)
41. This opinion is stated when a separate fixture financing statement is filed. Confirm that the financing statement is properly completed for a real estate fixture filing. If relying on the Mortgage being filed as a fixture filing, confirm compliance with § 9-502(c) of the UCC, and consider any local law customs or requirements. Depending on the type of collateral, some of these security interest opinions for real and personal property interests may be combined, but you need to consider the distinctions between the perfection requirements for real and personal property interests. [↑](#footnote-ref-41)
42. This opinion should only be requested and given in a local counsel opinion. [↑](#footnote-ref-42)
43. *See* the Special Report by the TriBar Opinion Committee: “U.C.C. Security Interest Opinions – Revised Article 9,” 58 Bus. Law. 1449 (2003), for consideration in rendering UCC Security Interest Opinions. For additional UCC collateral opinions, including pledged investment and control collateral, *see* the Illustrative Form of UCC Opinion included in Part III of the NC Report. *See also* the “UCC Opinion” Section of the Report. [↑](#footnote-ref-43)
44. *See* the “UCC Opinion” Section of the Report regarding creation and attachment opinions under Article 9 of the UCC. [↑](#footnote-ref-44)
45. Confirm that the Financing Statement is properly completed and meets the requirements for filing under Article 9 of the UCC, including the exact name of the debtor and a proper collateral description. *See* the “UCC Opinion” Section of the Report with respect to the form of Financing Statement. [↑](#footnote-ref-45)
46. This opinion addresses central filings with the Secretary of State. It does not address local filings at the county level under § 9-501(a)(1) of the UCC (*e.g.*, as-extracted collateral, timber to be cut, and fixture filings for goods that are or are to become fixtures). The opinion preparer will need to determine if any of the collateral requires local filing. The term “Filing Collateral” is used to distinguish between the types of collateral that may be perfected by filing and other types of Article 9 collateral that may be covered in the Security Agreement but which may not be perfected by filing (*e.g*., deposit accounts). *See* the “UCC Opinion” Section of the Report for other types of Article 9 perfection opinions. [↑](#footnote-ref-46)
47. List only the applicable qualifications and exceptions to the opinion letter. A list of some of the possible qualifications is provided; however, the list provided is not exhaustive and may not be applicable in every transaction. The opinion should include those qualifications that are relevant to the opinion under the circumstances based on the type of transaction and the specific documents covered by the opinion letter. The insolvency and equitable principles exceptions are standard enforceability qualifications. However, if the enforceability opinion is not rendered, the enforceability exceptions are not applicable and should be excluded. [↑](#footnote-ref-47)
48. The “bankruptcy exception” is discussed in the 1998 TriBar Report § 3.3.4 at 625 and in Glazer § 9.10. [↑](#footnote-ref-48)
49. The “equitable principles limitation” is discussed in the 1998 TriBar Report §§ 3.3.1 – 3.3.3 at 622-624 and in Glazer § 9.9. [↑](#footnote-ref-49)
50. As the trier of fact, a trial judge has broad discretion. [↑](#footnote-ref-50)
51. *See also* the Special Report by the TriBar Opinion Committee: “The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,” 59 Bus. Law. 1483 (2004), for consideration when including additional qualifications. Include qualifications that are relevant to the transaction, documents and opinions covered. [↑](#footnote-ref-51)
52. *See* the ABA Principles Article II. In certain circumstances if you are rendering a special or supplemental opinion as to a specific area of law customarily deemed excluded by a closing opinion, you would limit this exception accordingly. [↑](#footnote-ref-52)
53. Such exception may be applicable for regulated entities. Such laws include regulatory matters for which special expertise may be necessary (such as telecommunications and public utility law). [↑](#footnote-ref-53)
54. *See* § 1-106(a) of the UCC. [↑](#footnote-ref-54)
55. *See* *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002). [↑](#footnote-ref-55)
56. *See* S.C. Code Ann. § 15-3-140. [↑](#footnote-ref-56)
57. Based on the strict requirements and limitations set forth in S.C. Code Ann. § 29-3-680 for a statutory waiver of appraisal rights, consider, and confirm timely and full compliance with, all of the requisite requirements of the statute. An opinion would not cover such waiver based on the notice requirements. *See* the “Real Estate Opinions” Section of the Report. [↑](#footnote-ref-57)
58. A state agency generally cannot indemnify another party. *See* South Carolina Attorney General’s Opinion at 2004 S.C. AG Lexis 192 (Sept. 29, 2004). Furthermore, a party generally cannot be indemnified for its own sole or gross negligence. *See* S.C. Code Ann. § 32-2-10 with respect to hold harmless clauses in construction contracts. [↑](#footnote-ref-58)
59. Assuming such covenant is contained in the documents, given the strict limitations on enforcement and fact-specific nature of the determination of enforceability, it is not practical and would be difficult to render an opinion as to the enforceability of such covenants. *See Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.,* 387 S.C. 583, 694 S.E.2d 15 (2010). [↑](#footnote-ref-59)
60. *See* S.C. Code Ann. § 15-7-120 Forum selection clauses are closely scrutinized by courts and must be reasonable. *See* *Republic Leasing Co., Inc. v. Haywood*, 329 S.C. 562, 495 S.E.2d 804 (Ct. App. 1998), *vacated on other grounds*, 335 S.C. 207, 516 S.E.2d 441 (1999), for discussion on enforceability of forum selection clauses. [↑](#footnote-ref-60)
61. *See* S.C. Code Ann. § 15-48-10 with respect to arbitration under State law. [↑](#footnote-ref-61)
62. To the extent other jurisdictions are implicated in the transaction, exclude enforceability of choice of law provisions. *See* note 18 *supra*. [↑](#footnote-ref-62)
63. A power of attorney would need to comply with applicable laws for enforcement. Certain “further assurances” type language may not be enforceable. [↑](#footnote-ref-63)
64. Only applicable to the extent there are blanks in the documents that are to be filled in by a third party or post-closing. [↑](#footnote-ref-64)
65. A penalty provision will not be enforceable. *See* *Tate v. LeMaster*, 231 S.C. 429, 99 S.E.2d 39 (1957); *Kirkland Distrib. Co. of Columbia, S.C. v. United States*, 276 F.2d 138 (4th Cir. 1960); *South Carolina Dep’t of Health and Envtl. Control v. Kennedy*, 289 S.C. 73, 344 S.E.2d 859 (Ct. App. 1986). [↑](#footnote-ref-65)
66. For enforceability of certain prepayment fees, *see* *River East Plaza, L.L.C. v. The Variable Annuity Life Ins. Co.*, 498 F.3d 719 (7th Cir. 2007). *See also* *In re Worldwide Wholesale Lumber, Inc.,* No. 06-01499-JW,2007 Bankr. LEXIS 1564 (Bankr. D.S.C. Feb. 12, 2007), denying a creditor’s request for a prepayment penalty. [↑](#footnote-ref-66)
67. *See* S.C. Code Ann*.* § 36-1-208 requiring good faith. *See* *also* the South Carolina Reporter’s Comments to § 3-109(1)(c) of the UCC. [↑](#footnote-ref-67)
68. Prior to notice of acceleration, payment of any amount in default may reinstate the Loan. [↑](#footnote-ref-68)
69. Agreements can be modified by course of dealing, course of performance and subsequent oral agreements (absent statute of frauds). *See Evatt v. Campbell,* 234 S.C. 1,106 S.E.2d 447 (1959); *see also* *Sanchez v. Tilley*, 289 S.C. 449, 330 S.E.2d 319 (Ct. App. 1985) and *Lee v. Thermal Engineering Corp.,* 352 S.C. 81, 572 S.E.2d 298 (Ct. App. 2002). [↑](#footnote-ref-69)
70. Other documents incorporated by reference are not covered by the enforceability opinion. Often boilerplate provisions may have different language and multiple documents may state that they control. [↑](#footnote-ref-70)
71. If a material provision (essential to the contract) is unenforceable, the court may not be willing to sever (or “blue pencil”) the unenforceable term. *See Poynter Investments* at note 59 *supra.* [↑](#footnote-ref-71)
72. Consider this exception for provisions that state representations are continuing and survive closing. Survival provisions are often included in an acquisition agreement to allow representations to survive closing for a limited purpose (*i.e*., to prevent merger and to permit a claim for breach after closing). Enforceability of survival language has been the subject of debate in certain circumstances and, as such, should be excluded from the enforceability opinion. (*See, e.g., Western Filter Corp. v. Argan, Inc*., 540 F.3d 947 (9th Cir. 2008).) Consider also the distinctions among representations, warranties and covenants. Survival should not be confused with ongoing obligations that require affirmative covenants. A representation is made at a particular point in time. It can be reaffirmed at a future date (such as at the time of a future advance) but may not be deemed to be a continuing and ongoing obligation absent a separate covenant. A representation that is false when made can constitute a default. [↑](#footnote-ref-72)
73. *See* S.C. Code Ann*.* § 15-3-520 relating to statutes of limitation. *See also* *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005) for requirements for documents executed under seal. [↑](#footnote-ref-73)
74. Do not give opinions to third parties as to title to real property, as that is more appropriately covered by title insurance (opinions are not a substitute for insurance and law firms are not insurance companies), and do not give opinions as to title to personal property, as it is impossible to confirm title to personalty because title to personal property does not have to be documented. Also, do not give opinions as to priority of liens or security interests. It is practically impossible to cover all possible qualifications and exceptions necessary for a priority opinion. Due to the limited protection afforded by a properly qualified “Filing Priority Opinion” (and the ability of the recipient to make the same determination by reviewing the UCC search), even such limited priority opinions are not advised. *See* Special Report by the TriBar Opinion Committee: “U.C.C. Security Interest Opinions – Revised Article 9,” 58 Bus. Law. 1449, 1478-1479 (2003), §§5.2(a) and (b), n. 160-166. *See also* Glazer § 12.1 n. 4; §12.8 for a more detailed discussion of priority opinions; and Glazer § 12.9 noting traps for the unwary even in carefully prepared “filing priority” opinions relying only on search reports. Over time, even filing priority opinions have become increasingly rare. Be careful to avoid inadvertent priority opinions. [↑](#footnote-ref-74)
75. Do not give opinions to third parties as to the status of title to real property. Real estate title and mortgage liens are covered by title insurance. A lawyer should not be put in the position of insuring title by virtue of an opinion. *See* the discussion in the “Real Estate Opinions” Section of the Report. [↑](#footnote-ref-75)
76. Location of property is beyond the professional ability of a lawyer and scope of an opinion. [↑](#footnote-ref-76)
77. Determination of whether personal property is a fixture and deemed part of the real estate is a matter of law and based on the nature and facts of the specific property. The analysis required for that determination is difficult, and ultimately the determination is subject to the discretion of the court. Merely stating personal property is part of the mortgaged real property does not make such property a fixture (however, intent is a factor). [↑](#footnote-ref-77)
78. To include additional real property under the Mortgage, a new mortgage must be granted by the mortgagor or the mortgage must be properly amended to include the additional property for valid consideration and duly recorded in the County Recording Office, and any provision in the Mortgage to the contrary is unenforceable. [↑](#footnote-ref-78)
79. This exception may be appropriate in an opinion rendered to an out-of-state recipient. Make certain an amount is expressly stated (and not simply by reference to a note or another document) if future advances are covered. [↑](#footnote-ref-79)
80. Include only if the applicable phrase is not stated in the Mortgage. *See* S.C. Code Ann. § 29-3-50. [↑](#footnote-ref-80)
81. Non-judicial foreclosure of a real estate mortgage lien is not recognized in the State (except as expressly permitted by statute for certain timeshare interests). [↑](#footnote-ref-81)
82. The Act of 1791, now codified as S.C. Code Ann. § 29-3-10, provides that the right of possession remains in the property owner granting the mortgage and not the mortgage holder, as follows:

No mortgagee shall be entitled to maintain any possessory action for the real estate mortgage, even after the time allotted for the payment of the money secured by the mortgage has elapsed, but the mortgagor shall be deemed the owner of the land and the mortgagee as owner of the money lent or due, and the mortgagee shall be entitled to recover satisfaction for such money out of the land by foreclosure and sale according to law.

S.C. Code Ann. § 29-3-10. [↑](#footnote-ref-82)
83. *See generally* S.C. Code Ann. § 15-65-10 et seq. *But see also* S.C. Code Ann. § 6-17-200. [↑](#footnote-ref-83)
84. Under § 29-3-100 of the Code, any assignment that permits an assignor to collect rents and profits is enforceable only as a collateral assignment and such enforcement is subject to S.C. Code Ann. § 29-3-100(C). [↑](#footnote-ref-84)
85. *See* S.C. Code Ann. § 28-2-10 *et seq*. [↑](#footnote-ref-85)
86. *See* S.C. Code Ann. § 29-3-70. [↑](#footnote-ref-86)
87. The recipient should rely on the title insurance policy and any environmental site assessment, building permit, and/or zoning letter obtained in connection with the transaction. Do not render zoning opinions (a zoning endorsement to the title policy may be obtained if necessary), and do not simply rely on a zoning letter to render such opinion. *See* the Real Estate Guidelines §§ 4.3.a and 1.5.b. *See also* Title VI of the Report, “Real Estate Opinions.” [↑](#footnote-ref-87)
88. The security interest opinion is limited to Article 9 collateral.

Delete references to specific types of collateral if those types of collateral are expressly covered in the opinion (*e.g*., if giving a perfection by control opinion). *See* Title VII of the Report, “The ‘UCC Opinion’ – Article 9 Secured Transactions,” for opinions as to UCC “non-filing” collateral. [↑](#footnote-ref-88)
89. Do not include types of collateral to the extent expressly covered by the opinion or to the extent not included in the loan documents. Many of the types of collateral listed here may be covered in the “UCC Filing Collateral” opinion being subject to permissive filing under § 9-312(a) of the UCC (*e.g.,* chattel paper, negotiable documents, instruments and investment property); however, they may be subject to other provisions which you may need to consider in rendering the opinion. Many of the exceptions are based on priority issues and may not be necessary for “filing only” perfection opinions. However, it may avoid any concerns with the manner of perfection. [↑](#footnote-ref-89)
90. Security interests in copyrights are perfected under federal law by filing with the US Copyright Office, while security interest in patents and trademarks can be perfected by filing a financing statement at the state level under the UCC. Absolute transfers of patents and trademarks by assignment are filed with the US Patent and Trademark Office, but such federal filings should not be confused with UCC perfection filings. [↑](#footnote-ref-90)
91. *See* §§ 9-301(3) and (4) of the UCC for governing law and §§ 9-501(a)(1)(A) and 9-502(b) of the UCC for local filing requirements. [↑](#footnote-ref-91)
92. *See* § 9-303 of the UCC for governing law and § 9-311(2) of the UCC regarding perfection pursuant to state statutes for certificate of title collateral (Chapter 19 of Title 56 of the Code with respect to motor vehicles; and Chapter 23 of Title 50 of the Code with respect to watercraft and outboard motors). However, note the distinction in § 9-316 of the UCC when such collateral is held as inventory by a seller of such goods. [↑](#footnote-ref-92)
93. *See* §§ 9-105 and 9-208 of the UCC regarding control of electronic chattel paper. [↑](#footnote-ref-93)
94. All of these types of collateral are “investment property” under § 9-102(a)(49) of the UCC and *may* be perfected by filing under § 9-312(a) of the UCC. However, there are other considerations for certain collateral subject to permissible filing for perfection. [↑](#footnote-ref-94)
95. Commercial tort claims must be specifically identified as provided in § 9-108(e)(1) of the UCC. [↑](#footnote-ref-95)
96. *See* § 9-304 of the UCC for governing law and §§ 9-104 and 9-208 of the UCC re: control of deposit accounts. [↑](#footnote-ref-96)
97. Include this exception only if the security interest opinion is limited to fixtures in the State. [↑](#footnote-ref-97)
98. You may want to limit proceeds to “identifiable” proceeds. [↑](#footnote-ref-98)
99. As this qualification speaks to future requirements, which are not covered (the opinion letter speaks as of its date), it may not be necessary. However, you may want to include it if you will be required to deliver a bring-down filing perfection opinion or have concerns about your client’s responsibilities for maintaining perfection in the documents. [↑](#footnote-ref-99)
100. Certain governmental permits and licenses may not be transferable (*e.g*., liquor licenses). [↑](#footnote-ref-100)
101. The anti-anti-assignment provisions of the UCC (§§ 9-406 through 9-409) generally restrict the enforcement of prohibitions against assignments; however, not all payment rights are subject to the UCC provisions. [↑](#footnote-ref-101)
102. Such qualification is typically included in complex leasing and financing transactions and real estate mortgage opinions. The first option is preferable in mortgage loan transactions. *See* discussion at Glazer § 9.11 for a discussion on the “Practical Realization” or “generic qualification” and alternative formulations. *See also* 1998 TriBar Report § 3.4 at 626-627. *See also* Title VI of the Report, “Real Estate Opinions.” [↑](#footnote-ref-102)
103. Donald W. Glazer and Stanley Keller, “A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles,” 61 Bus. Law. 389 at 397 (2005), note 24. [↑](#footnote-ref-103)
104. *See* Title I of the Report, “General Opinion Concepts and Format,” for discussion of reliance and additional language that may be considered in limited circumstances where reliance by certain assignees could be permitted if required and appropriate for the transaction. [↑](#footnote-ref-104)
105. *See* Title I of the Report, “General Opinion Concepts and Format,” for limited exceptions where copies could be provided to certain governmental or regulatory authorities or rating agencies for limited purposes associated with the transaction and necessary for the parties to the transaction. [↑](#footnote-ref-105)
106. The opinion letter speaks only as of its date. [↑](#footnote-ref-106)
107. *See* ABA Committee on Legal Opinions, “Law Office Opinion Practices,” 60 Bus. Law. 327 (2004). Although an opinion letter can be signed by the individual attorney in his or her capacity as a member of the firm, opinion letters by a law firm are typically signed in the name of the firm. Opinion letters of inside counsel are signed in the name of the individual attorney and not in his or her capacity as an officer or employee of the company. [↑](#footnote-ref-107)