Every transaction presents its own issues with respect to what is expected and required in connection with the review of underlying documents. Every attorney who conducts such a review should be sure to have the necessary background and understand the framework for the assignment.

1. Introduction

Whether structured as a traditional purchase of real property, a loan, an option, an acquisition of ownership interests, a joint venture, a sale-leaseback or otherwise, one of the more important steps in evaluating the merits of a major commercial real estate investment is performing the legal due diligence to understand the legal risks associated with the real estate. A key part of this due diligence is analyzing the existing documentation (the “underlying documents”) relating to the real estate, which may include, for example, one or more of the following documents:

- Title and survey documents;
- REA and CC&R documents;
- Commercial tenant (space) leases;
- Hotel and other property management agreements;
- Continuing ground leases;¹ and

¹ The discussion of ground leases in this Article is limited to ground leases where the tenant’s interest (rather than the landlord’s interest) is
• Continuing loan documents.

This Article is intended to provide a basic guide for a review of such underlying documents by a junior attorney or legal assistant. To be clear, this Article is intended to address only a part of the legal due diligence review process, namely the review of certain existing documentation. With one exception (for survey matters), this documentation is limited to contractual arrangements and documents that create or encumber interests in real property. This Article does not address environmental due diligence (e.g., environmental reports) or land use matters (e.g., certificates of occupancy and compliance with zoning and other governmental regulations), although there may be some overlap.2

General contextual guidance is given in part 2; potential documentation to be generated is identified in part 3; procedural guidelines are discussed in part 4; and some sample forms (which include some substantive pointers) are addressed in part 5. For simplicity, it will be assumed that the investment is structured as a purchase of the real estate (e.g., a fee or leasehold).

2. The Big Picture

In any transaction, it is important to understand the context. Without seeing the big picture, it is difficult to focus on what matters and avoid spending time on what doesn’t. What is the deal? How is it similar to other deals your firm has done? How is it different? Remember, no two deals are the same. The information worth gathering includes the following:

2.1 The Players. Who is involved?

• Most importantly, who is the client? Is the client sophisticated? Institutional? What is the client’s overall tolerance for risk? Does the client have special tax, regulatory or other concerns generally? For example, a REIT3 or tax-exempt entity4 may have special requirements regarding the nature of the income generated by the property. Another example is insurance companies. Kelly Galligan of AIG Global Real Estate points out that insurance companies are highly regulated on a state-by-state basis, and some state regulations may prohibit investment in particular asset types (e.g., parking lots and hotels).

• Who else is on the due diligence team—both inside and outside of your firm? For example, if some underlying title documents are land use-related, would it be more efficient for local land use counsel to review those documents? As another example, the client might be working with a partner and the due diligence might be a joint effort. If so, to what extent does the client want to rely on the due diligence performed by its partner and to what extent are the interests of the partners aligned? If the other partner is putting up almost no equity but is getting a substantial share of the profits, it may have a much higher risk tolerance than a client being acquired.

2 For example, some of the title documents may involve environmental or land use matters (e.g., in the Commonwealth of Virginia, one may encounter so-called “proffers” voluntarily recorded by a property owner in connection with a zoning reclassification, and in any state, one may encounter a condominium declaration, which may require consideration of the local law governing condominium regimes).

3 “REIT” stands for “real estate investment trust.” For some preliminary background on REITs, go to the NAREIT website at reit.com and look for “The Basics of REITs”, which may currently be found under “What is a REIT?”.

4 See, e.g., Carla Neeley Freitag, Unrelated Business Income Tax, Bloomberg BNA Portfolio 462.
who has substantial equity to lose.\footnote{As observed by John Mallinson of AIG Global Real Estate, another question to ask in a joint venture transaction is who is paying the bill. If the legal costs of your due diligence constitute pursuit costs to be shared, is there a common understanding of the scope of the due diligence? Does the counterparty have credit to back up its obligation to bear its share of the costs? \textit{See also} footnote 8.} If anyone outside your firm is involved (whether a potential partner of the client or otherwise), are there any confidentiality concerns? For example, if a confidentiality agreement with the seller has been signed, is there any restriction on sharing information with others?

- What other parties are involved and how does their involvement affect the due diligence process? Who is the seller and how is it making underlying documents available? Is there a lender and does it have any requirements that might be relevant? For example, the form of any estoppels\footnote{For a discussion of estoppels, see 3.4 below.} you are asked to prepare may also need to satisfy the estoppel requirements of a lender. Are there other owners (because, for example, the acquisition is limited to a ground leasehold estate, air rights, some but not all condominium units, or a portion but not all of an office park, retail center or mixed-use project)? What information must be gathered regarding the interests of these other owners and what requirements will they impose?

2.2 **Timing, Status and Material Terms of the Acquisition.** What is the status of the acquisition? Is the property under contract? If not, does the client have exclusivity? Is this a bid transaction? If so, the client will be much less inclined to incur the time and expense of a thorough underlying document review when there is a significant chance that it will not be the successful bidder. When is the deadline for title objections and who will be interfacing with the title company and the seller? Is the existing survey out of date? If so, does the client want it updated, is there time to get it updated, and who is expected to get it updated? What is the expected time frame for other due diligence and closing (and are there any special circumstances driving the timing)? Will the acquisition be financed (and if so, will existing financing be assumed or new financing be obtained or both)? Are there any other contingencies? What is the price?

2.3 **The Property and the Project.** How long has the seller owned the property and what has it done with it? If, for example, the seller is a lender that recently foreclosed on the property, the client may be much more reliant on due diligence because it is not likely to get as much information (or representations and warranties) from the seller as it would otherwise. What is the type, condition and location of the property involved, and what does the client intend to do with it? For example, the client’s concerns associated with acquiring unimproved rural land to be developed (e.g., access, utilities and building restrictions) may be far different than those associated with an established, improved and operating urban property (e.g., existing leases and operating contracts). And the redevelopment of a property may present yet another set of issues. For example, if the client is intending to redevelop an office building or shopping center to bring in new tenants, it may not want to spend the time or money to do a thorough review of the current leases; it may merely want to confirm expiration dates and termination rights.

2.4 **The Assignment.** Above all else, it is essential to get the client’s perspective. The general goal of most clients is well summarized by Matt Koritz of Equity Office:
What are the client’s expectations with respect to the work product, the legal budget and the timing?

3. Documents To Be Generated.

To the extent desired by the client, the following documents may be generated as part of the underlying document review process:

3.1 Missing Documents List. A list of missing, illegible, undated and unexecuted documents (including missing pages and exhibits) and (where documents should have been recorded or filed) unrecorded and unfiled documents, which may be updated from time to time. The missing documents list is discussed further in 4.3.3 and 5.1 below.

3.2 Issue List. A list of issues identifying required consents and other problems, together with a description of action recommended to deal with the problems, which may be updated from time to time. The issue list is discussed further in 4.4 and 5.2 below.

3.3 Abstracts. An abstract of certain underlying documents. Abstracts may be particularly useful in deals (e.g., large portfolio acquisitions) involving numerous people who need to share information regarding the underlying documents. Indeed, it is often not practical or cost-effective for each person who needs this information to read the underlying documents independently. Some clients will make ongoing use of abstracts even after the acquisition. As explained by Matt Koritz of Equity Office:

If the client acquires the property subject to the abstracted agreements, this will allow the client to utilize the abstracts during its period of ownership and perhaps as a guide to a future buyer of the property when the client sells.

3.4 Estoppels. An estoppel for certain major documents (e.g., REAs, leases or loan docu-

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7 See 4.5.2, 4.5.3 and 5.3 for further discussion of abstracts.

8 If multiple law firms are involved (e.g., in connection with an acquisition by a partnership where different partners have their own counsel), consider entering into a common defense agreement with the goal of keeping the abstracts privileged vis-à-vis other parties (e.g., a seller). Jeffrey N. Brown and Paul M. Torres, The Use of Common-Interest Agreements in Commercial Real Estate Transactions, 6 Bloomberg BNA Real Estate Law & Industry Report 337 (May 14, 2013).

9 See 5.3.1 regarding the importance of a strengthened disclaimer if abstracts are shared with third parties.

10 An “estoppel” or “estoppel certificate” may be defined as “[a] signed statement by a party (such as a tenant or mortgagee) certifying for another’s benefit that certain facts are correct, as that a lease exists, that there are no defaults, and that rent is paid to a certain date. A party’s delivery of this statement estops that party from later claiming a different state of facts.” Black’s Law Dictionary 669 (10th ed. 2014). For more on estoppels in the leasing context, see Brian D. Huben, Tenant Estoppel Certificates: Purposes and Interpretations, 26 Shopping Center Legal Update 7 (Fall/Winter 2006); Andy Jacobson, Estoppel Certificates: A Review Checklist from a Tenant’s Perspective, 30 Prac. Real Est. Law. 3 (May 2014).

11 “REA” is an acronym for reciprocal easement agreement.
ments) (a) to confirm facts that cannot be gleaned from the documents themselves (e.g., the current amount of payments that vary over time, the current amounts owed, the existence of defaults or the absence of amendments), (b) to confirm the intended meaning of ambiguous provisions, (c) to obtain required consents or approvals, (d) to obtain another party’s agreement to modify or amend the document (to the extent an amendment cannot be obtained in time for the closing and the client is willing to rely on an estoppel at that point), and (e) sometimes to verify independently representations of the seller. When acquiring rental income-producing properties (e.g., existing office, retail and industrial buildings), tenant estoppels are particularly important and routinely obtained from the larger and most of the smaller tenants. As observed by Kelly Galligan of AIG Global Real Estate:

Tenant estoppels are a crucial step in confirming the underwriting assumptions (e.g., that the rent is in the amount assumed and it is not currently subject to an offset or counterclaim) made to support the investment decision to acquire the property.

In some transactions, it may not be practical to get all or certain estoppels one might want. With the exception of tenant estoppels, sellers are reluctant to agree to an estoppel closing condition (unless the condition is tied to the estoppel delivery requirement in the underlying documents and the seller has extension rights). Not having such a closing condition (or representations from the seller in lieu of the estoppels) may create additional time pressure if the client wants this information prior to the expiration of its due diligence period. But sometimes the seller may not allow the buyer to approach third parties to obtain estoppels prior to the expiration of the due diligence period (when the buyer’s deposit has gone “hard”). There should be a clear understanding with the client as to when and what estoppels will be sought before any are prepared.

3.5 Amendments. Drafts of amendments that the client intends to seek. For example, in the context of an acquisition of real estate subject to a continuing loan, if it is discovered that the loan secures property in addition to the property being acquired, then a formal recorded amendment (or release) releasing the additional property may be required. More generally, if changes to a continuing loan are required, an estoppel is unlikely to be adequate and a formal recorded amendment (or memorandum of amendment) may be required (to bind any subsequent holder of the loan). As another example, in the context of the acquisition of a lessee’s interest under a ground lease, if it is discovered that the leasehold mortgagee protections are less than those customarily required in the current leasehold lending market, then an amendment to the ground lease may be required. Again, an estoppel may not be adequate and a

12 In a purchase of real estate (as opposed to ownership interests) subject to a continuing mortgage loan, there is usually a loan assumption, and any estoppel the mortgage lender would provide is likely to be a part of the loan assumption documents. A discussion of loan assumption agreements is beyond the scope of this Article. See John R. Cauble, Jr., Negotiating the Loan Assumption Agreement: A Roadmap for Sellers and Buyers, 17 Real Est. Fin. J. 141 (Spring 2002).

13 See 4.5.3A and 5.4 for further discussion of estoppels.

14 A modification that is almost always required in connection with a continuing loan is a technical amendment to reflect new owners and any new guarantor (especially the permitted transfers, which must usually be tailored to reflect change in the parties involved). In a real estate purchase, amendments to continuing mortgage loan documents would typically be addressed in a loan assumption agreement (which would be, or a memo of which would be, recorded). See footnote 12.

15 Id.
recorded amendment (or memorandum of amendment) may be required to bind subsequent owners of the land.

3.6 **Other Documentation.** Any other documentation recommended on the issue list that the client intends to seek. For example, if the underlying document review reveals a blanket easement, then a containment letter may be required (under which the easement holder agrees to limit its easement rights to a specified area, normally the specific area then being used). As another example, if the underlying documents include a right of first refusal or right of first offer, then a waiver of that right (or the documentation to trigger that right) may be required.

However, it is important to remember that this is merely a guide, and the various items described above will not always be required or desired by a client. As indicated above, the scope of the work required for any particular transaction will depend upon the facts, including the pricing, the timing, the nature and complexity of the transaction and the real estate, and the personalities involved.

4. **Procedural Guidelines**

Time constraints, often coupled with the nature of the deal (e.g., an acquisition of a large portfolio of assets), may necessitate getting numerous people involved in the underlying document review. This, of course, makes the process more time-consuming. In particular, it may result in certain inefficiencies that would not exist if all the work were done by one person (over a much longer period of time) because there is always certain information that must be shared. To minimize these inefficiencies, it may be helpful to have a common understanding of the procedures that will be followed in conducting the underlying document review. There is not one set of procedures that is best suited to meet the needs and desires of every client for every deal. Although some clients may simply defer to the judgment of its counsel, other clients may want to establish, or provide input on, the steps that should be taken. General suggestions are provided below.

4.1 **Document Requests.** The initial step is to obtain the underlying documents. It is becoming more and more common for sellers of large commercial properties to make the underlying documents available through an online data website, especially in bid transactions where multiple parties are bidding for the property. However, these data sites tend to be a work in progress, adding missing or new documents on an ongoing basis. For those deals that don’t involve a data site, and often even for those that do, it may be necessary to make requests to the owner (or its counsel, broker or title company) to get documents on a timely basis. The title company should be able to provide a title report and documents of record, but many off-record documents may be needed too, including tenant leases, service agreements, supplemental agreements to shopping center REAs, and promissory notes secured by continuing mortgages or deeds of trust shown on the title report. All the relevant underlying documents should generally be obtained well in advance to allow for a review of the documents prior to the time the client has money at risk. It may be worth checking to see if the purchase agreement provides for a cutoff for posting new materials to avoid what could otherwise be a nightmare last-minute review. As stated by two commentators:

[T]he PSA should state that the seller cannot post new material in the data room within a specific period of time (for example, three business days) before the end of the study period. This standstill period thus affords buyers the opportunity to review all of the
materials in the data room before the end of the study period without being forced to make last-minute judgments based on newly posted materials.\textsuperscript{16}

4.2 **Organization.** Wouldn’t it be nice if all the underlying documents were delivered or made available in a single package, already organized and indexed? On occasion, there may be a binder from a recent financing or other transaction, but the process is rarely that simple. Generally, the documents are downloaded from a data site or received from the seller, its counsel or broker, or the title company in separate installments over time.

4.2.1 **Overview.** First, you should quickly scan the documents as they are obtained to get a rough sense of what they are.

4.2.2 **Index.** Second, you should put the documents in a logical order for review and make a list or index that can be updated over time. There is no magic formula to establish the order of the documentation. Some deals are multi-phase or multi-property projects, which are logically reviewed on a phase-by-phase or property-by-property basis. Often there is no apparent order to the documentation other than a chronological one. Generally, however, it is helpful to break the documents into categories (e.g., title documents, leases, management agreements, and loan documents), and then break up each category into chronological order.

4.3 **Screening Inventory.** Once the documents have been organized and indexed, there are still a few items to check before you begin your analysis.

4.3.1 **Identification of Irrelevant Documents and Provisions.** Commencing with the first category of documents (e.g., title/survey documents), be on the lookout for termination agreements and amended and restated documents in an effort to avoid reviewing a document that is no longer relevant. Similarly, when you see one or more amendments, start with the most recent one and mark the provisions in the original document or prior amendments that have been changed or superseded. Also, spot-check recitals and legal descriptions to make sure that the documents do not relate to property different from the property you are to be analyzing. It may be, for example, that the financing documents being reviewed relate to a blanket loan covering more than one parcel of land and the client is purchasing only one of the parcels, but the documents sent to you are the blanket loan binders which contain documents for all parcels.

4.3.2 **Prioritization.** If time is a factor, it is important to prioritize the documents based on the client’s needs so that the more important documents are reviewed first.

4.3.3 **Identification of Missing Items.** Rarely, if ever, do you get a complete and legible set of all the documents you need. It is therefore very important that you make a list of missing items, as suggested in 3.1 above. As each document is reviewed, you should:

\textsuperscript{16} Kevin L. Shepherd and Frederick L. Klein, *Uh Oh! Does My Purchase and Sale Agreement Cover These Points?*, 28 Prob. & Prop. 24, 26 (Mar./Apr. 2014).
A. Check to make sure that it is an executed and dated copy (and, if it is a document to be recorded or filed, such as a deed of trust or mortgage or a UCC financing statement, check to see if it is a recorded or filed copy).

B. Determine whether the copy is sufficiently legible. While, due to the press of time, you may be forced to review an unclear copy, you should promptly request a more legible copy so that ultimately you will have clear copies in your files.

C. Check to make sure none of the pages or exhibits are missing.

D. Make a note of any referenced document you do not have. For example, in your review of continuing loan documents, you may find a reference to a collateral assignment of a particular contract (e.g., an REA) that you have not received.

It is also advisable to check the purchase agreement because it may have helpful lists (e.g., a rent roll,17 a schedule of documents to be delivered or assigned, or a list of certain documents, such as continuing loan documents, that the seller represents is complete).

The list of illegible, unexecuted, undated and missing documents, pages and exhibits is the first item that should be prepared in connection with the underlying document review and should be delivered to the appropriate parties in writing to ensure that you get all the missing items.

4.4 Identification of Issues. As issues (e.g., required consents) are discovered, it is often helpful to identify them in a separate list, as suggested in 3.2 above. The issue list should be promptly updated when new issues are discovered. As noted later, important issues should be discussed sooner than later. After each issue, it may be helpful to note on the issue list what action has been recommended to deal with the issue. The issue list will provide a useful checklist to all concerned.

4.5 General Pointers

4.5.1 Time. Each deal has its own deadlines and, consequently, there is no general rule for the amount of time that should be taken to complete an underlying document review. However, keep in mind that:

A. Important problems should be clearly communicated early in the process. Do not assume that it is sufficient to include a description of these problems in your abstract and issue list. Others may be delayed in reading your work and, on occasion, may not read or understand the relevant portions of your work. Even if your written work eventually communicates the important problems, it may be too late. Waiting may result in a loss of valuable time that may be needed to cure the problems and, in some cases, to make a decision as to whether to go forward with the deal. If you spot an important issue, let the supervising attorney know by phone, or stop by and discuss it with him or her.

17 A rent roll may be a useful way to identify the tenants. But it may not be a reliable way to identify all the lease documents unless it lists the date of each lease (as opposed to the commencement date) and the date of each amendment. For example, there may be amendments that are consistent with the rent roll, but which contain other important provisions that are not reflected in the rent roll, and there may be no way to determine from the rent roll alone that such amendments exist.
B. There should be open lines of communication. Don’t waste a significant amount of time on particular provisions or even entire documents you do not understand. The supervising attorney should be there to help get you started and should be available periodically to answer questions. It is, of course, helpful to make a list of questions to avoid piecemeal questioning which upsets the continuity of the supervising attorney’s work; however, if you need help to avoid wasting a significant amount of time on a problem you do not understand, do not hesitate to ask. You should view every deal as an opportunity to learn.

4.5.2 Length. There is no fixed rule as to length, but you must try to balance the tension between being concise, on the one hand, and not missing something important, on the other hand. This is rarely an easy task. As to abstracts, consider the following tips, subject to the specific requirements of the client involved:

A. You should generally try to keep the abstract down to no more than 10% of the document being summarized.

B. If in doubt as to whether a particular provision should be included in your abstract, mark the provisions in the documents you are reviewing so that you can go over the provisions later with the supervising attorney. At that time, you and the supervising attorney can together decide whether or not to add it to the abstract. Sometimes it may be easiest simply to include the relevant heading and paragraph or section or page reference18 so the reader knows where to find the provision and can request a summary if he or she chooses.

C. In the authors’ experience, most clients who request abstracts want them to be concise, with a particular focus on the business terms and other key areas that are typically relevant. The comments of Marie Lewis of BioMed Realty are representative:

Abstracts [with entries] that are overly long are not helpful. Not only do they take too long to read, but . . . most of the people reading these abstracts at our company are not lawyers. Therefore, the provisions . . . need to be interpreted into plain English and written as simply as possible in a manner that everyone can understand . . . (All too often, we receive an abstract that merely copies the [document] language. When this happens, it makes me think that the person who prepared the abstracts was either being lazy or doesn’t have the skill to interpret the [document].

4.5.3 Presentation. You should follow an organized format, such as those outlined in part 5 below, recognizing that there is no perfect or prescribed form that will work for every deal. In particular:

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18 Sometimes section/paragraph numbers are missing or hard to locate quickly in a lengthy document. In that event, page numbers (or both page numbers and section/paragraph references) may be appropriate.
A. In the case of an abstract or estoppel form, if the applicable agreement is comprised of several documents (e.g., an original agreement and one or more amendments), identify each of the documents.

B. Each time a provision is summarized in an abstract, there should be a paragraph or section or page reference so that the client or supervising attorney will be able to find the relevant provision for further detail.

C. You should not use operative language (e.g., “shall” or “hereby agrees”) in an abstract. The abstract is not an agreement, but a description of an agreement. Consequently, you should use descriptive language (e.g., “A is obligated to do X” rather than “A shall do X” or “A hereby agrees to do X”).

5. Forms

Like the procedural guidelines, there is not one set of forms that will suit the needs and desires of every client. Some clients have preferred forms, which of course should be used (with appropriate inquiries from counsel if the forms seem inadequate), but many clients will defer to their counsel for suggestions. Some sample, but not necessarily model, forms are described below.

5.1 Missing Documents List. The missing documents list should be relatively easy to prepare. In some deals, it may amount to nothing more than a quick email to the title company or the seller’s counsel. In other deals, particularly deals involving voluminous documentation, it may be more complicated. A judgment call must be made as to how much information is required to identify what is missing. The answer will vary from deal to deal. It is sometimes helpful, for example, to organize the missing documents list in accordance with the types of documents involved. A sample excerpt from a missing documents list might be as follows:

“A. Title/Survey Documents.

1. Party Wall Agreement. The party wall agreement referred to in Section 23 of the Deed of Trust.

“B. Continuing Loan Documents.

1. Assignment of Rents. The assignment of rents recorded in the official records of Los Angeles County, California at Page 1243 of Book 489. [Note: We do have a copy of this document; however, our copy is illegible.]”

5.2 Issue List. The issue list should include a concise description of any matter which requires further discussion or further action. As with the missing documents list, it is sometimes helpful to organize the issues according to the types of documents involved. Otherwise, the form of the issue list is relatively straightforward. A sample excerpt from an issue list might be as follows:

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19 Id.
“A. Title/Survey Documents.

1. **Easements.** None of the easements are shown on the survey. See exceptions 4, 5, 9 and 12 of the Title Report. The easement identified as exception 12 may not be locatable.

   **Recommended Action:** Update survey to show easements; and if any are not locatable, obtain containment letters.

“B. **Continuing Loan Documents.**

1. **Consent.** The lender’s consent is required for both the transfer and the subordinate purchase money financing contemplated in this transaction. See §§ 23 and 25 of the Deed of Trust.

   **Recommended Action:** Seek the lender’s consent as part of the estoppel to be requested.”

5.3 **Abstract.** Each abstract should be in outline form and should include (1) a disclaimer and (2) article, section or paragraph (or page) references, as applicable.

5.3.1 **Sample Disclaimer.** To avoid inappropriate reliance on an underlying document abstract, it is good practice to add a disclaimer similar to the following at the top or bottom of the first page of the abstract:

This abstract is an outline of certain provisions in the referenced document(s). While intended to facilitate an understanding of those provisions, it is not a substitute for the document(s), and reference should be made to the document(s) [itself/themselves] to ensure a proper level of detail and accuracy.

If an abstract is to be shared with one or more third parties (e.g., after the acquisition), consider strengthening the disclaimer to make expressly clear that the client is not making any representations or warranties and the reader should independently confirm the terms of the abstracted document.

5.3.2 **Sample Abstracts.** Sample outlines of document abstracts for each of the following types of documents (assuming, where indicated, that the client is acquiring the interest of the party identified in parentheses) are set forth below:

<table>
<thead>
<tr>
<th>Type of Documents</th>
<th>Appendix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title and Survey (Owner)</td>
<td>A-1</td>
</tr>
<tr>
<td>REAs (Developer/Owner)</td>
<td>A-2</td>
</tr>
<tr>
<td>Commercial Leases (Landlord)</td>
<td>A-3</td>
</tr>
<tr>
<td>Hotel Management Agreements (Owner)</td>
<td>A-4</td>
</tr>
</tbody>
</table>

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20 Id.


<table>
<thead>
<tr>
<th>Type of Documents</th>
<th>Appendix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Continuing Ground Leases (Tenant)</td>
<td>A-5</td>
</tr>
<tr>
<td>Continuing Loan Documents (Borrower)</td>
<td>A-6</td>
</tr>
</tbody>
</table>

### 5.4 Sample Estoppels

Sample estoppel forms for each of the following types of documents (assuming, where indicated, that the client is acquiring the interest of the party identified in parentheses) are set forth at the pages indicated below:

<table>
<thead>
<tr>
<th>Type of Documents</th>
<th>Appendix</th>
</tr>
</thead>
<tbody>
<tr>
<td>REAs (Developer/Owner)</td>
<td>B-1</td>
</tr>
<tr>
<td>Commercial Leases (Landlord)</td>
<td>B-2</td>
</tr>
<tr>
<td>Hotel Management Agreements (Owner)</td>
<td>B-3</td>
</tr>
<tr>
<td>Continuing Ground Leases (Tenant)</td>
<td>B-4</td>
</tr>
<tr>
<td>Continuing Loan Documents (Borrower)</td>
<td>B-5</td>
</tr>
</tbody>
</table>

In any given transaction, it may be appropriate to delete or simplify a number of provisions in the forms you use or to add provisions to address deal-specific problems. It is also important to determine who will be requiring and relying on estoppels (e.g., lenders or equity providers, or both) and what estoppel requirements they may impose. In any case, the form of the estoppel will be subject to the comments of the party from whom it is requested and the estoppel requirements (which may include a prescribed form), if any, set forth in the relevant underlying document.

# 6. Conclusion

Every transaction presents its own issues with respect to what is expected and required in connection with the review of underlying documents. As a junior attorney or legal assistant assigned the task of conducting such a review, you should make sure you have the necessary background and understand the framework for the assignment. There are a number of questions to be asked. Who is involved and what is the nature of the property and the deal? What is your role and what are the expectations of the client and the supervising attorney? In particular, what work product are you expected to produce and what is the deadline for completion of the work? With this information in hand, this Article may assist you in organizing, completing and presenting your work.

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21 See footnote 12.
Appendix A-1

Abstract of Title and Survey Matters

Below is a sample abstract for the review of title and survey matters. Before undertaking your first review of title and survey matters, you should have some familiarity with the typical provisions and problems with these matters. The following articles may be helpful:


**ABSTRACT OF TITLE AND SURVEY MATTERS**

[NAME OF PROJECT]

[City, State]

(the “Property”)

This abstract is an outline of certain provisions in the referenced title and survey documents. While intended to facilitate an understanding of those provisions, it is not a substitute for the actual documents or the survey, and reference should be made to the documents and survey themselves to ensure a proper level of detail and accuracy.

**Current Title Commitment:**

Title Commitment Issued by:

Title Company Contact Information:

Title Commitment No. and Effective Date:

Name of Proposed Insured:

Amount of Commitment:

Title Vested in (State Interest):

Name of Fee Owner: ____________________

State of Formation of Fee Owner: ____________

Fee Ownership?

Ground Lease?

Lease?

Easement?
Type of Policy Jacket:

**Important Schedule B-1 Requirements:**
- Does the Title Company require evidence of authority from Buyer? From Seller?
- Final Survey?
- Title Affidavit regarding mechanics’ liens and parties in possession or any indemnity agreement regarding mechanics liens for construction disbursements?
- Does the Title Company require a GAP Affidavit?
- Payoff Letter?
- Discharge documents (Mortgage Release, Terminations, etc.)?

**Title Exceptions:**
- [List (a) book & page number, (b) type of exception, (c) whether the exception is plotted on the survey or a blanket easement, (d) whether improvements encroach on easement areas, building setbacks or boundary lines, (e) whether the exception poses a material adverse effect on the property, and (f) anything else of importance including, but not limited to, limitations on use of Property or payment of fees.]¹

**Other Related Items for Review:**
- Tax report in title commitment shows taxes paid through ___________ and taxes delinquent for ____________.

**Comments to Title Commitment (List Changes/Requests That Must Be Communicated to Title Company):**
- Review Vesting Deed
- Request 2006 ALTA jacket if not already provided.
- Request the following endorsements:
  - Comprehensive
  - Extended Coverage
  - Encroachment
  - Same-As Survey (existing survey)
  - Access
  - Tax Parcel

¹ Note: Comments within brackets are intended as guidance and should be deleted in the work product.
Contiguity (if more than one parcel)

Utilities Facilities

Location

Mechanics’ Liens

3.1 Zoning, with Parking and Loading if Applicable

Subdivision

Arbitration Deletion

Fairway

**Survey:**

**Title:**

**Job Number of Survey:**

**Name of Surveyor:**

**Survey Company:**

**Contact Information:**

**Date Prepared/Signed:**

**Date of Report/Certificate:**

**Does the Survey Reference the Correct Commitment?:**

**Certified to:**

Owner:

Title Company:

Lender:

Other:

**List Material Differences from ALTA Certification:**

**Access:**

Is access available?

If so, is it a public way? (Are all accesses labeled public or private?)
Are the curb cuts and driveways marked?

Does the survey show the directional flow of traffic?

Is access dependent on an adjoining tract?

If so, is there an appropriate easement benefiting this parcel?

Does the survey include a vicinity map showing the location of the Property in reference to adjoining or nearby streets?

**Easements, Etc.:**

Does the survey reflect all locatable easements, streets, setback lines, encroachments, etc., shown on current Title Policy by title exception number (volume and page shown, described by metes and bounds where applicable, widths of easements given) or observed (Note those observed but not shown on Title Policy)?

Does the survey indicate which easements are not plottable?

Acreage?

Platted/Unplatted?

Are the appurtenant easements properly shown?

Does the survey reference and/or plot an easement not disclosed by the Commitment?

**Flood Plain and Water:**

Is property in a flood plain? If so, is the flood plain area adequately depicted? [If more than one zone, must graphically show the areas impacted by each zone.]

Are any visible water courses or wetlands on or adjacent to the Property shown on the Survey?

**Parcels:**

Is the property divided into different parcels? If so, are the parcels contiguous? Are the parcel areas clearly shown? If the parcels are contiguous, does the surveyor state they are contiguous and that there are no gaps or gores?

**Parking:**

Number of regular spaces shown: _____________

Number of handicap spaces shown: _____________

Number of regular spaces required: ______________

Number of handicap spaces required: ______________
Encroachments: Does the survey identify any problems on the property (e.g., encroachments, easements under buildings, easements impermissibly encroaching on other easements, etc.)?

Utilities: Does the survey show the following utilities at the lot line in a public way or connection to the building(s)? Are they identified as above ground or underground?

- **Electricity** (shown on survey or easement)
- **Telephone** (shown on survey or easement)
- **Water** (shown on survey or easement)
- **Gas** (shown on survey or easement)
- **Sanitary Sewer** (shown on survey or easement)
- **Storm Sewer** (shown on survey or easement)
- **Fire Prevention** (shown on survey or easement)
- **Television Cable** (shown on survey or easement)
- **Other** (shown on survey or easement)

Legal Description: Does the legal description match the following documents? Can you trace the legal on the survey? Are the measurements clear?

- **Vesting Deed**
- **Title Commitment**
- **Survey – Drawing and listed legal**
- **Purchase Agreement**

Improvements: Does the survey indicate the height, or number of stories for each building?

Does the survey indicate the square footage of the exterior footprint of all buildings, or gross floor area of all buildings at ground level?

Is the applicable address noted on the survey?

Zoning: Does the survey note the zoning classification with name of governing district or zoning authority, permitted uses with the classification and statement on any grandfathered nonconforming use permitted? Does
the surveyor list the source of its information?

Does the survey note and show the setback? Were there any violations noted?

Does the survey provide the total Land Area of the site in square feet and acres?

Does the survey indicate bulk/density requirements, and is the Property in compliance with such requirements?

Table A Items: Does the survey include the following Table A Items: 1, 2, 3, 4, 6(b), 7(a), (b)(1) and (c), 8, 9, 11(a), 13, 14, 16, 17, 18, 20(a), 21 (professional liability) and 22 (graphically depict setback lines)? Should any others be requested? Does the lender require any additional items?

* * *

Appendix A-2

Abstract of REA Documents

Below is an outline for the review of REA documents where the client is acquiring the developer’s interest in an existing shopping center. (The form should be modified for non-shopping center REAs or CC&Rs.) Before undertaking your review, you should be familiar with the typical provisions and problems with REA documents. The following articles may be helpful:

- ABA Real Estate Financing Committee, *Reviewing a Shopping Center REA*, 18 Real Prop. Prob. & Tr. J. 651 (Winter 1983) (hereinafter referred to as the “REA Article”)
- John J. Lawlor, David A. Lapins, and Jane Snoddy Smith, *Legal Considerations Confronting the Shopping Center Industry*, Shopping Centers and Other Retail Properties 73, 88 (John R. White and Kevin D. Gray eds. 1996)
ABSTRACT OF REA DOCUMENTS

[NAME OF PROJECT]
[City, State]
(the “Property”)

This abstract is an outline of certain provisions in the referenced REA documents. While intended to facilitate an understanding of those provisions, it is not a substitute for the REA documents, and reference should be made to the REA documents themselves to ensure a proper level of detail and accuracy.

Basic Information:

Date of REA: __________________________

Parties: __________________________

REA Documents: __________________________

See list attached.

Principal Business Terms:

Term: [Identify the commencement and end of the term and any conditions precedent or subsequent to effectiveness. Terms are typically in the range of 50 to 75 years or perpetual. If the balance of the term is too short (e.g., not sufficient to cover the projected periods of ownership of the client and one subsequent purchaser or any anticipated financing), you may need to consider whether the developer parcel is independently viable without the benefit of the REA; the survival of certain easements, especially utility easements and easements providing access to contiguous roadways, granted under the REA may be particularly important here.]

Opening Date: [The opening date is important because other dates (e.g., the end of the term) may be defined in relation to the opening date (e.g., as “the date that is 60 years after the opening date”), and the opening date often signals the commencement of important obligations, such as operating covenants. It will frequently not be possible to determine from the REA documents the exact opening date. Consider confirming the exact opening date (or dates, if there are different opening dates for different majors) by estoppel.]

Operating Covenants: [For each party, any operating covenants should be carefully identified. These provisions may be among the more important
provisions in the REA documents, not only to developers but also to their lenders. Your description should include the duration of the covenant, the type of facility required to be operated, any required standard, or hours, of operation, and any applicable conditions. For example, there might be a 10- to 15-year covenant to operate a department store under a certain name, followed by a five- to ten-year (or longer) covenant to operate a retail facility under any name. Common issues that are presented by the operating covenant provisions are as follows: (1) having little (e.g., less than the client’s projected period of ownership) or no time remaining in the term of the named operating covenant; (2) having no retail operating covenant following the named operating covenant or having a retail operating covenant that will expire too early (e.g., prior to the projected periods of ownership of the client and one subsequent purchaser); (3) having a named operating covenant that provides too much flexibility either in the choice of the name or in the standard of operation; (4) having excessively broad conditions to the operating covenant of a major (e.g., that the developer not be in default (although a condition relating to certain specified material defaults may be acceptable), a stringent leasing requirement (e.g., shopping center must be leased at a certain percentage or else major can terminate), a requirement that one or more other majors comply with their operating covenants, or any requirement that does not provide an adequate cure period in the event of noncompliance); (5) having insufficient or no conditions or exceptions to the developer’s operating covenant (e.g., without requiring the continued operation as department stores of a certain number of majors or without a force majeure exception); and (6) as noted below, not having provisions reinstating or extending the operating covenants of the majors as a condition to the developer’s obligation to restore after damage from casualty or condemnation. In connection with issue (4) above, it should be noted that some lenders have refused to finance due to excessively broad conditions to a major’s operating covenants. If, for example, the failure of one major to operate allows each other major to terminate its operating covenant, the “domino effect” could be devastating. Some lenders may insist that the operating covenants of the majors must be entirely independent.]

Allocation of Economic Responsibilities: [All provisions regarding the payment or contribution of shopping center costs made by one party to the REA to, or on behalf of, another party to the REA should be summarized. These provisions are typically found in the supplemental agreements (which are usually not of record and must be
requested) and usually include the matters set forth in the subheadings below. Some of the issues typically found in this area are as follows: (1) in older REAs, the amounts of the payments may have become disproportionately small in relation to the actual costs involved (there being no provision for an increase in the payments to reflect inflation); (2) formulas for sharing costs based on square footage may be defective, resulting in an over-allocation of costs to one or more parties, or there may be confusion as to whether land square footage or building square footage is contemplated; any formula for cost sharing should be reviewed carefully in the context of a mixed-use project since non-retail users may use certain common areas more or less intensively than retail users; the costs of maintaining office lobbies should in almost all situations be allocated exclusively to the office owner(s); (3) the definitions of the costs involved are sometimes too broad or too narrow and may now include or exclude costs that are either inconsistent with the original expectations of the parties or that are sufficiently unusual to be brought to the attention of the client; and (4) payments may be “capped” or otherwise artificially limited, and contributions for capital expenditures may be excluded.]

**General Allocation of Costs:**
[Initially, you should verify whether each party is responsible for all costs and expenses related to its property. To the extent it is not, it should be noted. Usually, the majors will be responsible for all costs and expenses associated with their property, other than maintenance of the common areas. As to maintenance of the common areas, the obligation to maintain is normally imposed upon the developer and each major shares in that cost on some basis which should be noted as indicated below.]

**[Major] Contribution Toward Common Area Costs:**
[The nature of the costs and the areas affected within the shopping center should be carefully examined. For example, does a reference to “common area costs” include the common areas of the majors and does it include the cost of HVAC, and other enclosed mall costs (e.g., Muzak), insurance (e.g., fire, earthquake and liability), and taxes? Are there any provisions under which the contributions may change? Can a management fee be passed through? If so, is there any limitation?]

**[Major] Merchants’ Association Dues:**
[Describe whether majors are required to make payments to any merchants’ association or pay any promotional fee.]
Majors’ Payments: [Describe other payments required of majors.]

Developer’s Payments: [Sometimes the developer is required to make contributions toward the construction costs of a major or to pay for other costs and expenses (e.g., taxes) not attributable to the developer’s property. To the extent these obligations are outstanding or ongoing or may occur in the future, they should be identified.]

Use Restrictions: [Unusual use restrictions for the property or shopping center or any part of them should be identified. This is particularly important if the buyer intends to add a non-retail use to the property. Are there any no-build areas? Are there restrictions on signage?]

Parking Requirements: [Consider identifying the parking requirements for the property of each party to the REA. The number of parking spaces on each such property or parking ratios per square foot should be identified in a surveyor’s certificate to confirm compliance with these parking requirements, or, if more stringent, local governmental requirements. Do the parking requirements relate to each parcel or the project in the aggregate? If expansion is contemplated, have additional parking areas been set aside? Are parking structures permitted? If so, are there restrictions upon their location? Is size of space designated?]

Initial Construction Obligations Remaining: [A substantial portion of the REA documents may be devoted to initial construction and lease-up obligations. While these provisions are not to be ignored, they need not be summarized in the context of a completed and operating shopping center, except for obligations that may remain unfulfilled. In an existing shopping center, consider confirming by estoppel that the initial construction obligations (which you assume to have been satisfied) have in fact been satisfied. Frequently, initial construction obligations are coupled with a lease-up requirement as a condition to the obligation of the majors to open for business. In addition to confirming the opening date and the satisfaction of initial construction obligations, it is useful to have the estoppels confirm the satisfaction of all conditions to the occurrence of the opening date. A discussion of appropriate construction obligations is set forth in part II of the REA Article.]

Site Plan: [Is site plan available? Match survey? Current? etc.]

Alteration and Expansion: [Consider including a brief description of the rights and limitations imposed with respect to alterations and expansions.
Of particular interest are approval rights granted to other parties, and any rights to engage in future development and the conditions (e.g., parking requirements and building areas) to such future development. These provisions may be especially significant where additional majors or other expansion is contemplated (e.g., in a one-anchor or two-anchor mall) or when the expansion will include non-retail uses.

**Common Area Use and Easements and Utility Easements or Licenses:**

[It is usually very difficult to evaluate the adequacy of the easements granted in the REA documents without the assistance of a surveyor or engineer. It may be worth noting this fact in your memo and suggesting that evidence of such adequacy be obtained through representations and warranties and surveyor’s and engineer’s certificates. In any case, a quick review of the easement provisions may be appropriate to determine whether clearly required easements are in fact set forth. For a helpful checklist, see part III of the REA Article. In addition, be on the lookout for easements that grant rights to persons (e.g., tenants and customers) who are not parties to the REA; such provisions may necessitate that any future amendment of the easements be executed by such parties. Finally, be sure that the client’s title insurance policy includes, as a separate parcel under Schedule A, the easements, rights and benefits appurtenant to the developer parcel that are granted under the REA documents.]

**Maintenance Obligations:**

[Consider specifying whether each party is responsible for the maintenance obligations with respect to its own property. In that connection, consider identifying any rights that any party may have to maintain another party’s property, the events that trigger such rights and the conditions under which such rights may be terminated. For example, the developer normally has the right and the obligation to maintain the common areas on each party’s property; however, on some occasions, a major (or several majors acting together) may have the right to take over the developer’s maintenance obligations; in addition, each major may have the right to take over maintenance of its own property under certain conditions. The division of maintenance obligations may result in varying levels of maintenance throughout the center and an overall increase in costs (because of the economics of sale).]

**Insurance (Generally):**

[Common issues that arise in this area are as follows: (1) in older REAs, the coverage amounts are usually inadequate; (2) when separate policies are maintained by each party to the REA (as opposed to a single policy for the entire shopping center), care must be exercised to ensure that the entire shopping center is...
covered; (3) although the actual insurance being maintained may be satisfactory to the client, the provisions themselves may not conform and the parties may be entitled to obtain inadequate insurance in the future (and for this reason, an insurance expert of the client should review the insurance provisions of the REA documents in addition to the actual insurance policies and the requirements of any lender); (4) a waiver of subrogation may be missing; and (5) where the developer does not have an insurance policy covering liability with respect to portions of the mall not owned by the developer, the developer should be indemnified by the other owners so that it will indirectly obtain such coverage.]

**Liability Insurance:**
[For clients who are interested, consider identifying who is obligated to maintain the insurance, the required amount of the insurance and whether other parties are additional insureds.]

**Casualty Insurance:**
[For clients who are interested, consider identifying who is obligated to maintain the insurance and the amount of insurance.]

**Other Insurance:**
[Is other insurance appropriate (e.g., flood insurance) and, if so, is it required? Is earthquake insurance required? If so, does the requirement take into account availability or premium costs?]

**Casualty:**
[For each party, consider identifying the restoration period. Some of the more common issues found in casualty provisions are as follows: (1) the period during which each major’s restoration is required is frequently shorter than the term of the REA and may have little time remaining, and the period during which the developer’s restoration is required is frequently longer than the period for any major; (2) there may be no razing and cleanup obligation following the restoration period; (3) there may be no reinstatement or extension (or inadequate reinstatement or extension) of the operating covenants in the event the developer restores the property; (4) there may be overly stringent reconstruction obligations (e.g., requiring reconstruction regardless of (a) the availability of insurance proceeds or (b) reconstruction by the majors, or granting excessive approval rights and controls).]

**Condemnation:**
[Consider generally identifying the termination rights, reconstruction obligations and any unusual award allocation provisions. In addition to the issues mentioned for casualty provisions, be on the lookout for REAs that do not permit the developer to provide alternative parking to preclude termination of the REA (where the majors have the right to terminate in the
Underlying Document Review

Financing:

| Subordination of Existing Financing: | [Determine whether any existing financing is subordinate to the REA.] |
| Right to Finance: | [For each party, consider addressing whether there is a right to finance its property within the shopping center.] |
| Mortgagee Protection: | [You should address whether there are adequate mortgagee protection provisions (e.g., a right to notice and an opportunity to cure and a right to approve all amendments). See part VIIF of the REA Article.] |

Assignment:

| Mention, as to each party, whether it has a right to assign its interest under the REA, and any restrictions (e.g., approvals) on such right. If additional majors are contemplated, you should identify restrictions on the ability to sell a pad to a new major. The right of a major to make a partial sale should also be noted. |

Notice/Cure:

| Consider identifying whether there is an obligation to provide notice and an opportunity to cure in the event of default. Mention whether opportunity to cure has a firm end date, or continues so long as the defaulting party commences cure and diligently pursues same to completion. |

Remedies:

| Self-help Remedies: | [Consider identifying whether there is a general self-help remedy.] |
| Termination Rights: | [Consider identifying all termination rights. In addition, if there are no termination rights due to default, mention whether there is a specific statement in the REA to the effect that there will be no right to terminate in the event of a default.] |
| Limitations of Liability: | [Consider identifying any exculpations, releases or other limitations of liability contained in the REA documents. For example, consider mentioning whether there are release provisions effective upon assignment, or provisions limiting the liability of each party to its term of ownership or to its interest in the property.] |

Out Parcels:

| Your analysis of out parcel provisions will depend upon whether the client is acquiring the out parcels. If the out parcels are to be acquired, then the focus should be on whether the |

event a portion of the parking area is condemned).]
provisions unduly restrict the development, operation, sale or financing of the out parcels. On the other hand, if the out parcels are not to be acquired, then the focus should be on whether the provisions include sufficient controls over the out parcels to ensure that they are compatible with and do not interfere with the shopping center (e.g., by way of parking, drainage, access and architectural requirements).

**Estoppel Certificates:**
[Consider identifying the existence or absence of provisions requiring the delivery of estoppel certificates and any time requirements for such delivery.]

**Standard for Approvals or Consents:**
[Consider identifying the existence or absence of provisions regarding the standard of approvals or consents (e.g., a general prohibition against the unreasonable withholding of approval).]

**Other Provisions:**
[The headings set forth above are merely intended as a checklist for those provisions that are normally worthy of note. The unique facts of each deal will dictate what should be discussed. For example, in a one- or two-anchor mall where additional majors are contemplated, it may be important to discuss the existence or absence of provisions directly discussing the contemplated expansion (e.g., the sale of a pad to a new major, the construction of its store, and the assumption by the new major and the release of the developer of the obligations relating to the new major’s property). In any case, the entire REA must be reviewed carefully for the existence or absence of provisions which may be relevant or problematic. Even seemingly insignificant provisions can be important (e.g., inadequate definitions or the absence of a non-merger provision). The REA obligations imposed upon the developer must also be considered in light of the developer’s obligations under other documents (e.g., loan documents and ground leases) and any potentially adverse conflicts or inconsistencies should be noted.]

**LIST OF REA DOCUMENTS**

[In most shopping center transactions, there are multiple REA documents. In addition to the REA among the developer and any major department store that owns (rather than leases) its building and pad, there are usually separate supplemental agreements with each of these “majors” because, among other matters, (a) the majors do not want their financial obligations (e.g., mall expense contributions and merchant association dues) to be public knowledge (as a result of being set forth in a document recorded in the public records); and (b) the developer generally prefers to negotiate these economic terms with the majors individually. In addition to supplemental agreements, there are frequently amendments to the REA and, if a major does not own its own building and pad (but leases its store or pad from the developer), then, if the owner
of the land underlying the major’s store (and not the major) is a party to the REA, often the lease with the major will contain the obligations of the major that would otherwise be found in the REA or a supplemental agreement. None of these documents is adequately understood in isolation. Because they are intended to jointly establish contractual parameters through which the parties will coordinate the use and operation of their respective properties and businesses within a single harmonious shopping center, it is desirable to review these documents simultaneously. Keep in mind that with several agreements involved, it is especially important to have appropriate section references to the relevant agreements.

[Each of the REA documents should be listed, noting the caption, date, parties (with full names, the type of entity involved and the state of its formation) and recording information in the case of recorded documents.]

1. Reciprocal Easement Agreement (Item 9). Agreement captioned “RECIPROCAL EASEMENT AGREEMENT”, dated __________, 20__, among ____________, ____________, ____________ and ____________, as recorded in the official records of __________ County, __________ in Book __________ at Page __.

2. First Amendment to Reciprocal Easement Agreement (Item 10). Agreement captioned “FIRST AMENDMENT TO RECIPROCAL EASEMENT AGREEMENT”, dated __________, 20__, among ____________, ____________, ____________ and ____________, as recorded in the official records of __________ County, __________ in Book __________ at Page __.


5. [Name of Major] Supplemental Agreement (Item 13). Agreement captioned “SUPPLEMENTAL AGREEMENT”, dated __________, 20__, between ____________ and ____________.

* * *

Appendix A-3

Abstract of Commercial Lease Documents

Below is an outline for the review of commercial lease documents where the client is acquiring the property subject to the commercial lease documents. Before undertaking the review, you should be familiar with the typical provisions and problems with commercial lease documents. The following articles and books may be helpful:
ABSTRACT OF COMMERCIAL LEASE DOCUMENTS

[NAME OF PROJECT]

[City, State]

(the “Property”)

This abstract is an outline of certain provisions in the referenced lease documents. While intended to facilitate an understanding of those provisions, it is not a substitute for the lease documents, and reference should be made to the lease documents themselves to ensure a proper level of detail and accuracy.

Basic Information:

Date of Lease: ________________________
Rent Commencement Date: ________________________
Lease Expiration Date: ________________________
Parties: ________________________ (“Tenant”)
________________________ (“Landlord”)
________________________ (“Guarantor”)

Lease Documents: See list attached.

Principal Business Terms:

Premises: [Describe the premises (e.g., by suite number and square footage). How is rentable area measured? Are there any rights or obligations to expand, reduce or move the premises in the future (including expansion options, rights of first refusal or rights of first offer, reduction options, options to renew as to a portion of the space, termination options, and relocation rights)? Are parking spaces included in the premises, or are they separate?] [Name of Document, Section __]
Term: [Describe the term (and any defined “commencement date” or “lease year”), as well as any rights, options or obligations to extend or shorten the term without cause (including any renewal options or early termination rights). Note deadline to exercise renewal options] [Name of Document, Section ____] Note if Commencement Date is dependent upon substantial completion. How is substantial completion defined? What about Landlord/Tenant delays?

Rent: [Be sure to describe the rental provisions for any renewal terms or expansion space, as well as the terms of any abatement periods and rent adjustments. Note any advance rent.] [Name of Document, Section ____]

Base Rent and Adjustments: [Are there late charges or delinquent interest or both?] [Name of Document, Section ____]

Percentage Rent (if any): [If there is percentage rent, describe the revenues upon which the percentage is applied, although you may want to find out whether the client wants a detailed breakdown of how percentage rents are calculated. Are credit sales, off-premises sales (Internet, telephone and mail orders or orders taken at premises but filled at another store), service charges (e.g., gift wrapping or repairs), machine charges (e.g., telephone), interest charges and the like included? Is there a gross-up for a lease year when the tenant goes dark for a portion of the year? What is the break-point? Is it natural? Will it change when the base rent changes (e.g., upon renewal)? Is the tenant required to provide detailed backup (e.g., audited statements)? Does the landlord have audit rights? If so, who pays for the audit? When and for how long is the tenant required to maintain its books and records?] [Name of Document, Section ____]
Tenant Reimbursements: [Describe how the formula for calculating the tenant’s share of reimbursements is calculated. Is it based on leasable or occupied space? If the former, is there a gross-up of expenses for vacancies? What expenses are passed through to the tenant? Is there a cap on management fees? Is the lease completely net? If not, is there a base year or an expense stop (and what is it)? If there is a base year in a new building, is there a gross-up for vacancies? Does the base year or expense stop change for a renewal term or expansion space? Is there a gross-up for expenses that one or more tenants elect to incur directly? Are there any inappropriate omissions or exclusions from the expenses that are passed through? Are replacements and capital expenditures included? Because it may affect prorations in a purchase agreement, in states where taxes are paid in arrears, do tenant reimbursements cover the taxes that accrue during the lease term or those that are payable during the lease term? Do tenant reimbursements cover the increases in taxes due to a change in ownership? How are tenant reimbursements paid? With monthly estimates and annual adjustments? Does the tenant have audit rights? If so, who pays for the audit? Is there a dispute resolution mechanism? Is the tenant obligated to pay amounts in dispute?] [Name of Document, Section __]

Other Charges Payable to Landlord (e.g., Parking, Advertising/Marketing Fund): [Name of Document, Section __]

Rent Adjustments (e.g., CPI Increases): [Name of Document, Section __]

Security Deposit: [Describe the amount and form (e.g., cash or letter of credit) of any security deposit. Is there an obligation to credit the tenant with interest? Are there any unusual rights or obligations relating to the deposit?] [Name of Document, Section __]

Use/Operating Covenant: [Generally describe the permitted uses and any prohibited uses. Are they specific and restrictive or general and permissive? If there is percentage rent and more than one use is permitted, will the specified percentage change if the use changes? In a retail lease, describe the operating covenant or note its absence. Does the tenant have the right to go dark? If so, are there recapture rights? Is there an exclusive or noncompete covenant?] [Name of Document, Section __]

Services: [Mention any excessive service obligations (e.g., HVAC beyond working hours). Who pays? Is there a surcharge for overhead or profit? Are there any unusual maintenance obligations?] [Name of Document, Section __]

Other Landlord Expenses: [Mention any unusual landlord expenses not covered in the discussion of services.] [Name of Document, Section __]
**Assignment and Subletting:** [Mention rights and restrictions on subleasing and assignment. Must the landlord be reasonable? Will local law imply such a standard? Does the landlord have recapture rights, if the tenant wants to assign or sublease? If the tenant has subleasing rights, is it allowed to charge lower rent than the landlord? Does the client have any tax issues (e.g., REIT or UBTI) if there is sublease profit? If so, describe mechanism and whether it is shared (and, if so, is it calculated before or after subleasing costs)? If subleasing costs are taken into account, are the leasing costs of the landlord for this lease also taken into account, so that you are comparing apples to apples?] [Name of Document, Section __]

**Signage?** [Are there any signage rights? If so, describe scope and any additional cost.]

**Mortgagee Protection:** [Is the lease automatically subordinated to any financing or ground lease? Is the tenant obligated to sign any documents necessary to confirm such subordination? Is nondisturbance required? Are there any mortgagee notice and cure rights?] [Name of Document, Section __]

**Termination Rights:** [Generally describe the termination rights of the tenant. The tenant’s termination rights are typically found in the provisions regarding the delivery of its space, condemnation and casualty and failure to provide required services. Note that many clients will not want you to take the time to detail the mechanics of the casualty and condemnation provisions.] [Name of Document, Section __]

**Build-out:** [Generally describe the landlord’s and tenant’s respective obligations with respect to the build-out of the tenant’s space (and, in the case of a new building, completion of the building). Is there a tenant improvement allowance? Consider asking the client whether to pass over these provisions for tenants who are occupying the space and getting comfort via estoppel, although you should keep in mind that the client may not receive estoppels for all of the tenants.] [Name of Document, Section __]

**Exculpation:** [Mention whether or not each party is exculpated.] [Name of Document, Section __]

**Additional Comments:** [Mention any other points worthy of note. For example:]  
**Covenant of Quiet Enjoyment:** [Has the covenant of quiet enjoyment been omitted? If so, the implied covenant of quiet enjoyment may be more onerous than the type of covenant of quiet enjoyment (i.e., a special warranty conditioned upon compliance with, and subject to, the terms of the lease) that a knowledgeable landlord would draft.] [Name of Document, Section __]
Landlord Remedies: [Are there adequate remedies? Is abandonment or vacancy an independent default (or can a tenant move out and pay rent without breaching the lease)? This may be relevant in a very competitive market where other landlords are willing to take over lease obligations in order to steal tenants. Point out that you are not familiar with local law (if the relevant state is not one in which you are licensed). For example, the accord and satisfaction law may not be favorable for the creditor as in California (so that non-waiver provisions may take on increased significance). Must a tenant payment be characterized as rent in order to trigger the applicable unlawful detainer or eviction proceedings? Are the notice/cure periods too generous? Is there a holdover remedy?] [Name of Document, Section ___]

Tenant Remedies: [Does the tenant have any express remedies? Has the tenant expressly waived any right of offset or consequential, indirect or punitive damages? Has the tenant been given any express offset rights (e.g., when the landlord fails to provide services for a certain period of time)? Is landlord’s liability limited to its interest in the property?] [Name of Document, Section ___]

Preemptive Purchase or Lease Rights: [Does the tenant have any rights to purchase the property or lease other space (e.g., a right of first refusal, a right of first offer or an option)? If so, what is the process and how is the price determined? Are those rights assignable or personal to Tenant?] [Name of Document, Section ___]

Hazardous Materials: [Does the landlord have any stated exposure with respect to hazardous materials? What are tenant’s obligations with respect to hazardous materials?] [Name of Document, Section ___]

Discretion of Landlord: [Has the landlord given up discretion over matters that could affect the value of the space (e.g., alterations)? Is there a general reasonableness clause?] [Name of Document, Section ___]

Personal Rights: [Are any of the tenant’s rights personal or dependent on the tenant occupying a certain number of square feet?] [Name of Document, Section ___]

Estoppels: [Are estoppels required? If so, is there a required time for delivery? Is a form attached or does the lease otherwise limit the scope of the estoppel?] [Name of Document, Section ___]

Guaranty: [Are there any limitations on the guaranty? Are there any financial covenants (e.g., net worth or liquidity)? Did the guarantor acknowledge each of the amendments?] [Name of Document, Section ___]
Client-Specific Concerns: [In the event the client is a REIT or has UBTI concerns, have their specific issues been addressed? For example, if the client is a REIT, are there any non-customary services being provided to the tenant? Or, if the client has UBTI concerns, is any of the rent attributable to personal property? Does the client need (or want) to avoid leasing to certain tenants (whether due to ERISA, regulatory or other concerns)?] [Name of Document, Section __]

LIST OF LEASE DOCUMENTS

[Each of the lease documents should be listed, noting the caption, date, parties (in each case, with a full name, the type of entity involved and the state of its formation) and recording information in the case of recorded documents.]

1. **Lease.** Lease captioned “___________________________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant.

2. **Lease Guaranty.** Guaranty captioned “___________________________”, dated ________, 20__, by _______________, guarantor, in favor of _______________, as landlord.

3. **Work Letter.** Letter captioned “___________________________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant, regarding the build-out of the tenant's space.

4. **Commencement Date Letter.** Letter from _______________, as landlord, to _______________, as tenant, dated __________, 20__, agreed to by _______________, as tenant, on __________, 20__, confirming the commencement date of the lease.

5. **Memorandum of Lease.** Memorandum captioned “___________________________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant, as recorded in the official records of __________ County, __________ in Book ________ at Page ___.

6. **Subordination/Nondisturbance Agreement.** Agreement captioned “_________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant, and _______________, as [ground lessor/lender], as recorded in the official records of __________ County, __________ in Book _________ at Page ___.

7. **Letter re [________________].** Letter with respect to [Waiver of ___________/ Notice of ____________], dated ____________, 20__, by tenant to landlord.

* * *
Appendix A-4

Abstract of Hotel Management Documents

Below is an outline for the review of hotel management agreements, where the client is acquiring the owner’s interest in the hotel. Before undertaking your review, you should be familiar with the typical provisions and problems with hotel management agreements. The following articles may be helpful:

- Raymond S. Iwamoto, *My Hotel Deserves a Brand—But What if I Want to Terminate the Brand?*, 30 Prac. Real Est. Law. 30 (May 2014)

**ABSTRACT OF HOTEL MANAGEMENT DOCUMENTS**

[NAME OF PROJECT]
[City, State]

(the “Property”)

This abstract is an outline of certain provisions in the referenced hotel management documents. While intended to facilitate an understanding of those provisions, it is not a substitute for the hotel management documents, and reference should be made to the hotel management documents themselves to ensure a proper level of detail and accuracy.
Basic Information:

Date of HMA: __________________________

Parties: __________________________ (“Manager”)
________________________ (“Owner”)

Management Documents: See list attached.

Principal Business Terms:

Fees: [In describing fees, it is extremely important that you carefully examine the definitions involved. For example, if a management fee is 3% of annual gross revenues, are gross revenues calculated on a cash or accrual basis? Do gross revenues exclude: (1) proceeds of sale, financing, insurance (other than business interruption insurance proceeds) and condemnation; (2) if Owner is a partnership, contributions to the partnership; (3) taxes collected from patrons; (4) interest and other income from securities or other properties held for investment; (5) rebates and discounts; (6) tips, gratuities and service charges collected by Owners; (7) retail rental revenues; (8) bad debts; and (9) executive or senior employee charges (e.g., for meals)?]

[If it is not clear from your description of the fees, there should be a separate description of any priorities in the use or distribution of cash flow. For example, there may be priorities with respect to the base fee, reimbursable expenses, other fees, a priority level to Owner, a deferred priority level to Owner (which may include an interest factor), an incentive management fee, a deferred incentive management fee (which may include an interest factor), loans from Owner and loans from Manager.]

Base Fee: [Describe base annual management fee, which will be a fixed dollar amount or, more typically, a percentage of annual gross revenues, or some combination of the two. The timing of the payment should be discussed as well as the definition and calculation of the payment.]

Incentive Fee: [Describe any incentive fee, including the timing and calculation of payment. For example, if the incentive fee is a percentage of net cash flow, is net cash flow calculated after debt service from all loans (including refinancings and the full amount of all loans) and after capital expenditures (or, if capital expenditures are not included as a debit, are reserve requirements debited)? Are any other expenses (e.g., casualty insurance premiums) not deducted]
from income in determining the fee? Are all other fees payable deducted from income in determining the fee? What happens if the cash flow is not sufficient to pay an earned fee?

**Termination Fee:**
[Describe any fees payable due to a termination of the agreement (e.g., in connection with a sale of the hotel or in connection with a right of Owner to terminate without cause).]

**Reimbursable Expenses:**
[State to what extent Manager is entitled to reimbursement for its expenses, such as advertising, public relations, accounting, central reservations, computing and employee salaries and benefits. State how these expenses are allocated among Manager’s various hotels. For example, are central reservation expenses allocated on the basis of the number of rooms in each hotel or the actual number of reservations for each hotel?]

**Other Fees:**
[Describe any other fees, including fees for special services such as the procurement of supplies and furniture and the performance of interior design services.]

**Term/Performance Test:**
[Describe the term and whether Manager is subject to any performance tests. Include a very brief description of each party’s termination rights.]

**Capital Expenditures/Reserves:**
[Describe provisions relevant to capital expenditures. In particular, is there a capital expenditure program, how is it established, and what are the party’s respective approval rights over it? Is there a capital reserve and what are the funding requirements, if any? Is there a cap on the aggregate amount which is retained in the reserve at any particular time? Who has control over disbursements from the reserve?]

**Insurance Coverage:**

<table>
<thead>
<tr>
<th>Coverage Required To Be Maintained at Owner’s Expense:</th>
<th>List the coverages required to be paid for by Owner. In particular, state the required liability and umbrella coverage.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Owner’s Rights to Establish Source of Coverage:</td>
<td>Describe Owner’s rights to determine the insurance carrier (particularly for liability insurance and workers’ compensation). Does Owner have nothing more than approval rights (and, if so, are they restricted by reasonableness standards or other limitations)? Can Owner procure alternative insurance if it obtains a lesser premium? Is Manager permitted to be self-insured?</td>
</tr>
</tbody>
</table>
Senior and Key Personnel: [Describe whether Owner has any right to approve the employment, transfer or termination of Manager’s key personnel.]

Owner’s Approval of Operating Plans and Budgets:

| Requirement of Approval: | [Describe to what extent Owner’s approval is required for a proposed budget or any amendment to a proposed or approved budget. Is Owner entitled to exercise its sole discretion in approving or disapproving a budget or amendment or is there some limitation, such as an obligation to be reasonable or to act in good faith? State whether Manager must obtain Owner’s approval as to a change of any line item (or specific category) within the budget or whether Manager is allowed a certain margin of error (e.g., 5% or some dollar amount) or is allowed to offset an overage in one category by a savings in another. Does Owner have any express obligation to maintain a certain standard of hotel (e.g., to match a brand)?] |
| Mechanics of Approval: | [Describe any mechanics provided for obtaining Owner’s approval. For example, is there a deemed approval or disapproval if Owner fails to respond within a particular period of time after submissions of a proposed budget or amendment? Is Owner entitled to require additional documentation and information prior to making its decisions?] |
| Dispute Resolution: | [Is there a dispute resolution mechanism in the event Owner and Manager cannot agree on a budget or an amendment?] |

Restrictions on Transfers (e.g., Assignments and Hypothecations):

| Restrictions on Owner: | [Describe any restrictions on the sale or financing or other transfer of the property or any interest in Owner and any restrictions on the assignment or collateral assignment of the management agreement by Owner.] |
| Restrictions on Manager: | [Describe any restrictions on the sale or financing or other transfer of the management agreement or any interest in Manager.] |
Insurance and Condemnation – Restoration/Proceeds:

[Describe Owner’s obligation to restore in the event of casualty or condemnation and mention any relevant termination rights. Also, state whether Manager is entitled to any of the proceeds of insurance or condemnation.]

Notice/Cure:

[State to what extent Owner, in the case of Manager defaults, and Manager, in the case of Owner defaults, is required to provide notice and an opportunity to cure (or a grace period without notice) prior to exercising its remedies under the REA.]

Continued Management in the Event of Sale or Financing:

[Describe whether Manager has any right to continue management after a sale or financing.]

Reporting/Financial Statements:

By Owner:

[Describe whether and when financial statements are required by Owner and whether they are required to be certified by an independent CPA.]

By Manager:

[Describe timing and substance of any reporting requirements and whether and when financial statements are required to be supplied by Manager and whether they are required to be certified by an independent CPA.]

Exculpation:

[State whether there is an exculpation and, if so, describe it.]

Branding/Intellectual Property/Guest Records:

[Are there any branding requirements? Is there a separate franchise agreement? Describe whether there are any specific provisions related to the ownership of any intellectual property or guest records.]

Subordination/Estoppel Requirements:

[Describe Manager’s obligation to subordinate its rights under the Management Agreement in connection with any financing. Is Manager required to provide an estoppel to potential purchasers or a lender? If so, is there a required time for delivery? Is a form attached or does the lease otherwise limit the scope of the estoppel?]

Additional Terms:

[Add any other provisions which are worthy of note (e.g., does Manager have a noncompete or a radius restriction; does Manager own the liquor license?).]
LIST OF HOTEL MANAGEMENT DOCUMENTS

[Each of the hotel management documents should be listed, noting the caption, date, parties (with full names, the type of entity involved and the state of its formation) and recording information in the case of recorded documents.]

1. Hotel Management Agreement (Item 14). Agreement captioned “_______________”, dated __________, 20__, between _______________, as owner, and _______________, as manager.

2. First Amendment to Hotel Management Agreement (Item 15). Agreement captioned “_______________”, dated __________, 20__, between _______________, as owner, and _______________, as manager.

* * *

Appendix A-5

Abstract of Ground Lease Documents

Below is a sample abstract for the review of ground lease documents where the client is acquiring the ground lessee’s interest in the property subject to the ground lease. Occasionally, when there is an existing ground lease, it will be eliminated as part of the closing (e.g., the seller may own both the fee and the leasehold and may collapse the structure immediately before the transfer to the buyer, or both the leasehold and the fee may be transferred to the buyer and the buyer may collapse the structure immediately after the transfer). In such event, the review of the ground lease may be much more limited, with a focus on what may survive the termination that is not being released as part of the purchase. Before undertaking your first ground lease review, you should be familiar with the typical provisions and problems with ground lease documents. To that end, the following books and articles may be helpful:

- Robert J. Shansky, Ground Leases 2014 – An Update, Am. C. Real Est. Law. (Spring 2014) (seminar article)
- Jerome D. Whalen, Commercial Ground Leases (Practising Law Institute, 2d ed. 2013)
- Form of Ground Lease and Commentary on Form of Ground Lease (2009) (Committee on Real Property Law, New York City Bar Association), available at www.nybar.org/media-aamp-publications/realestate-forms
Unlike loan documents, ground lease documents are typically few in number. There are, of course, the ground lease itself and a recorded memo of the ground lease. If the ground lease has been in place for a substantial period of time, there are often amendments as well. There may also be ancillary documents, such as documentation associated with a prior fair market value rental determination. All these documents should, of course, be reviewed together.

**ABSTRACT OF GROUND LEASE DOCUMENTS**

[NAME OF PROJECT]
[City, State]

(the “**Property**”)

This abstract is an outline of certain provisions in the referenced ground lease documents. While intended to facilitate an understanding of those provisions, it is not a substitute for the ground lease documents, and reference should be made to the ground lease documents themselves to ensure a proper level of detail and accuracy.

**Basic Information:**

- **Date of Ground Lease:** ____________________________
- **Tenant:** ____________________________ (“**Tenant**”)
- **Landlord:** ____________________________ (“**Landlord**”)
- **Other Parties:** ____________________________ [e.g., Guarantor?]
- **Ground Lease Documents:** See list attached.

**Principal Business Terms:**

- **Premises:**
  [Generally describe the premises. Do the premises cover only the land or both the land and the improvements? Are there any rights or obligations to expand or limit the premises in the future?]

- **Term:**
  [Describe the term as well as any rights or obligations to extend or shorten the term without cause.]

- **Rent:**
  [List the rent, including any additional rent, with particular focus on any fair market value rental adjustments.]

- **Landlord Expenses:**
  [Generally describe any expenses which are to be paid by the landlord. For example, is the landlord obligated to pay the taxes allocable to the land or any insurance?]
<table>
<thead>
<tr>
<th>Assignment and Subletting:</th>
<th>[Mention rights and restrictions on subleasing and assignment, including any restrictions on direct or indirect changes in the ownership of tenant.]&lt;sup&gt;1&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financing; Mortgagee Protection:</td>
<td>[Mention rights and restrictions on financing, including any restrictions on amount of leverage or maximum loan-to-value ratios. Are fee mortgages permitted (i.e., is the landlord permitted to encumber the land or the building)? Is the landlord obligated to subject its fee interest in the premises to a mortgage securing the tenant’s financing (or is only leasehold financing permitted)? If the tenant’s lender does not have recourse to the fee, are the leasehold mortgagee protection provisions adequate? Please see Stein’s article referenced above with respect to “middle ground” protections that should be included.]</td>
</tr>
<tr>
<td>Construction:</td>
<td>[Discuss any outstanding construction obligations. If initial construction obligations are stated but appear to have been satisfied, such satisfaction should be confirmed by estoppel. Scope of restrictions on future construction should be discussed based on client’s intentions concerning the property.]</td>
</tr>
<tr>
<td>Use:</td>
<td>[Mention any unusual use restrictions.]</td>
</tr>
<tr>
<td>Termination Rights:</td>
<td>[Generally mention the respective termination rights of the parties. The landlord’s termination rights are typically found in the provisions regarding defaults and remedies, casualty and condemnation and construction.]</td>
</tr>
<tr>
<td>Rights to Acquire:</td>
<td>[Does the tenant have a right to purchase the landlord’s interest in the land and improvements? Does the landlord have an option to acquire the tenant’s interest in the improvements? Does either party have a right of first offer or other preemptive right in connection with the sale by the other of its interest?]</td>
</tr>
<tr>
<td>Exculpation:</td>
<td>[Mention whether either party is exculpated. The absence of an exculpation in favor of the tenant is important if, for example, the tenant has certain costly obligations (e.g., an absolute obligation to restore casualty damage).]</td>
</tr>
<tr>
<td>Notice/Cure:</td>
<td>[State to what extent the landlord is required to provide notice and an opportunity to cure (or a grace period without notice) prior to exercising its remedies under the lease.]</td>
</tr>
<tr>
<td>Insurance and Condemnation Proceeds:</td>
<td>[State how the proceeds are distributed and whether they are required to be used for restoration.]</td>
</tr>
</tbody>
</table>

---

<sup>1</sup> While not necessarily an item to be included in the abstract for a ground lease, if the landlord has consent rights with respect to subleasing, is there evidence that all consents have been obtained for the existing subleases?
Estoppels: [Is landlord required to provide an estoppel to the tenant and its lender? If so, is there a required time for delivery? Is a form attached or does the lease otherwise limit the scope of the estoppel?]

Additional Comments: [Mention any other points worthy of note.]

LIST OF GROUND LEASE DOCUMENTS

[Each of the ground lease documents should be listed, noting the caption, date, parties (in each case, with the full name, the type of entity involved and the state of its formation) and recording information in the case of recorded documents.]

1. **Ground Lease.** Lease captioned “________________________________________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant.

2. **First Amendment to Ground Lease.** Amendment captioned “_________________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant.

3. **Memorandum of Ground Lease.** Memorandum captioned “___________________”, dated ________, 20__, between _______________, as landlord, and _______________, as tenant, as recorded in the official records of __________ County, __________ in Book ________ at Page __.

* * *

Appendix A-6

Abstract of Loan Documents

Below is a sample abstract for the review of loan documents where the client is acquiring the borrower’s interest in the property subject to the loan documents and the loan is fully funded. In most real estate acquisitions, the existing financing is satisfied at closing and there is no need for an abstract of the loan documents. In that event, only select provisions of the loan documents may be relevant (e.g., the prepayment or defeasance provisions) and any problems should simply be noted on the issues list. Before undertaking your first review of loan documents, you should have some familiarity with the typical provisions and problems with loan documents. The following articles may be helpful:

· Dennis B. Arnold & Randy P. Orlik, *Springing Guaranties, ‘Separateness’ Covenants and Special Purpose/Bankruptcy Remote Entities in the CMBS Universe*, Financial Lawyers Conference (Beverly Hills Hilton Hotel, Feb. 6, 2014)

There are typically several loan documents associated with any given loan. These include loan commitments, promissory notes, loan agreements, deeds of trusts or mortgages (which may go by other names in certain states, such as deeds to secure debt in Georgia), assignments of leases or rents (or both), assignments of contracts, subordination agreements, nondisturbance agreements, cash management agreements, security agreements, and financing statements. These documents are best understood as a whole and should be reviewed together.

ABSTRACT OF LOAN DOCUMENTS

(NAME OF PROJECT)

[City, State]

(the “Property”)

This abstract is an outline of certain provisions in the referenced loan documents. While intended to facilitate an understanding of those provisions, it is not a substitute for the loan documents, and reference should be made to the loan documents themselves to ensure a proper level of detail and accuracy.
Basic Information:

Date of Loan Documents: _______________________

Borrower: ________________________ (“Borrower”)

Guarantor(s): ________________________ (“Guarantor(s)”)

Lender(s): ________________________ (“Lender(s)”)

Loan Documents: See list attached.

Economic Terms:

Amount:

Interest Rate:

Default Rate: [Does it apply only to the delinquent amount?]

Late Charge: [Does it apply only to the delinquent amount? Is the amount due at maturity excluded?]

Maturity Date (and Call Rights):

Amortization Schedule:

Monthly Payments:

Prepayment: [Mention prepayment lockout periods, prepayment fees, defeasance requirements and other similar matters.]

Impounds: [Mention (1) whether impounds are required for taxes and insurance; (2) whether they are conditioned upon a request by the lender, a default, or other matter; (3) whether there is a separate waiver letter; and (4) whether the borrower is entitled to interest.]

Financial Covenants: [Mention debt service coverage, loan-to-value and other similar tests.]

Cash Management: [Mention hard vs. soft lockbox; waterfall.]

Release Prices: [If applicable.]
Security:

[Mention security instruments (e.g., mortgages, deeds of trust, assignments of rents or leases, personal property security agreements, pledges of equity interests and guaranties) and whether the property covered by any security instrument is more or less than the property under consideration.]

Obligations Secured by Security Agreements (Dragnets and Cross-Defaults):

[Mention whether the obligations secured include any unspecified or future obligations, including any obligations to repay unspecified or future indebtedness, or any obligations to comply with documents other than those identified on the list attached.]

Restrictions on Sale or Financing (Due-on-Sale or Encumbrance):

[Mention whether there are any restrictions on sale or financing (of the property itself or of ownership interests in the borrower or any other person) or changes in management, including any requirement to obtain the lender’s consent or any right of the lender to accelerate by reason of such event.]

Exculpation:

[Mention (1) whether there is an exculpation; (2) whether the exculpation covers less than all obligations under the loan (e.g., some exculpations only cover the obligation to repay the loan or some portion of the loan and do not cover non-monetary obligations); (3) what are the carve-outs for springing recourse and whether any are problematic (e.g., (a) involuntary transfers, (b) consents to involuntary bankruptcy, or (c) SPE covenant violations that are not limited to substantive consolidation or do not exclude violations arising from insufficient property revenues); and (4) whether there are problematic damage carve-outs (e.g., (a) matters that are not limited to willful acts of Borrower, other than environmental matters, (b) failure to pay taxes or insurance, or take other action, with no exception for failures resulting from insufficient property revenues, or (c) waste that is not limited to active, intentional waste).]

Notice/Cure:

[State to what extent the lender is required to provide notice and an opportunity to cure (or a grace period without notice) prior to exercising its remedies under the loan documents.]

Insurance and Condemnation Proceeds:

[Mention (1) whether the lender has the option to apply any portion of the proceeds against the principal balance of the loan (or, alternatively, whether the lender is obligated to release the proceeds for restoration); (2) whether the borrower has the right to repay the loan without penalty in the event of such application to allow for refinancing; (3) whether the application of proceeds triggers a prepayment penalty; and (4) whether, in the event of such application, there is an adjustment in the monthly payments to preserve the amortization schedule.]
Restrictions on Leasing: [Mention whether there are restrictions on leasing in the loan documents (e.g., any requirement that the lender consent to the execution, amendment or termination of leases).]

Financial Statements: [Mention whether and when financial statements are required and whether they are required to be audited or certified by an independent CPA.]

Bankruptcy, Dissolution or Death: [Mention whether bankruptcy, dissolution or death with respect to any party other than the then-current owner could result in a default or acceleration right. The memo should also state whether the borrower has the right to find a substitute guarantor in the event of the bankruptcy, dissolution or death of a guarantor.]

Additional Terms: [Add any other provisions worthy of note.]

LIST OF LOAN DOCUMENTS

[Each of the loan documents should be listed, noting the caption, date, parties (with full names, the type of entity involved and the state of its formation) and recording or filing information in the case of recorded or filed documents. The list of loan documents may be very long. Some of the more typical loan documents are identified below.]

1. Promissory Note. Note captioned “_______________”, dated ________, 20___, in the face amount of $_______________, between _______________, as payor, and _______________, as payee.

2. Deed of Trust. Deed captioned “_______________”, dated ________, 20___, from _______________, as trustor, to _______________, as trustee, for the benefit of _______________, as beneficiary, as recorded on __________, 20__, in Volume __, Page __ of the Official Records of __________ County, __________.

3. Assignment of Leases. Assignment captioned “_______________”, dated ________, 20___, from _______________, as assignor, to _______________, as assignee, as recorded on __________, 20__, in Volume __, Page __ of the Official Records of __________ County, __________.

4. UCC Financing Statement. Statement captioned “_______________”, between _______________, as debtor, and _______________, as secured party, covering _______________, as collateral, as filed with _______________ on __________, 20___.

* * *
Appendix B-1

REA Certificate

____________, 20__

________________________
________________________
________________________

Re: [NAME OF SHOPPING CENTER]
[CITY, STATE] (the “Property”)

Gentlemen:

Please refer to the reciprocal easement agreement (the “REA”) described in Exhibit “A” hereto. The undersigned understands (i) that ________________________, a __________________, or an affiliate of ____________________ (herein called “Purchaser”) may be acquiring the Property from ______________ (“Owner”), and (ii) that Purchaser, Purchaser’s lender (the “Lender”) and their respective successors and assigns are relying upon this certificate in connection with such acquisition (the “Acquisition”) and any related financing.

With such understanding, the undersigned hereby represents, warrants, confirms and agrees, on behalf of itself and its successors and assigns, for the benefit of Purchaser, Lender and their respective successors and assigns, that:

1. The REA is presently in full force and effect and, except as set forth in Exhibit “A” hereto, has not been amended, and there are no other agreements between Owner (or its predecessors) and the undersigned (or its predecessors) related to the property subject to the REA.

2. To the best knowledge of the undersigned, there is no default under the REA, nor does any state of facts exist which, with the passage of time or the giving of notice, or both, would ripen into any such default, and the undersigned has no offset, charge, lien, claim, termination right, or defense which currently exists (or with the passage of time or the giving of notice, or both, will exist) under the REA.

3. All the construction obligations (other than those pertaining to the restoration of future casualty damage) under the REA have been performed.

4. All items of an inducement nature required to be furnished under the REA have been furnished to the satisfaction of the undersigned.
5. All conditions to the obligation of the undersigned to remain open to observe and perform its operating covenant have been satisfied and are satisfied; and, to the best knowledge of the undersigned, no state of facts exists which would, with the passage of time or the giving of notice, or both, excuse the undersigned from such obligation.

6. The undersigned has not assigned or transferred any of its rights or obligations under the REA.

7. The Acquisition does not violate or constitute a default under the REA, and the undersigned hereby consents thereto.

8. The address(es) for notices or other communications to be sent to the undersigned is as set forth in the REA, or as may otherwise be specifically stated in Exhibit “A” hereto.

9. From and after the date we receive notice from you of the Acquisition, copies of all notices given to the tenant under the Lease Documents shall be given to Purchaser at:

______________________________
______________________________
______________________________
Attention: _____________________

[Include Lender’s contact information, if Lender is entitled to notice as well.

and to Lender at:

______________________________
______________________________
______________________________
Attention: _____________________]

10. The information set forth on Exhibit “A” hereto is true and correct. [E.g., COMMENCEMENT OR DURATION OF OPERATING COVENANTS, TERMINATION OF REVERSIONARY RIGHTS, RELEASE OF GUARANTIES, OR STATEMENT OF AMOUNTS DUE.]

11. The undersigned and the person or persons executing this certificate on behalf of the undersigned have the power and authority to render this certificate.

Very truly yours,

____________________________________,
a ________________________________

By: ______________________________
Its: ______________________________
Appendix B-2

Certificate of Tenant

____________, 20__

________________________________________
________________________________________
________________________________________
________________________________________

Re: [Name of Property]
[City, State]______

Gentlemen:

Please refer to the documents (the “ Lease Documents”) described in part I of Exhibit “A” hereto (including the “Lease” therein described). The undersigned understands (i) that __________________________, a __________________________ (“Purchaser”), may be acquiring ___________________________________________ (the “Property”); (ii) that Purchaser may be acquiring the landlord’s interest in the Lease Documents; and (iii) that Purchaser, Purchaser’s lender (the “Lender”) and their respective successors and assigns are relying upon this certificate in connection with such acquisition and any related financing.

With such understanding, the undersigned hereby represents and agrees, on behalf of itself and its successors and assigns, for the benefit of Purchaser and its successors and assigns, that:

1. As of the date hereof, the undersigned is the tenant under the Lease.

2. The Lease Documents are in full force and effect and, except as set forth in part IC of Exhibit “A” hereto, have not been assigned, subleased, supplemented, modified or amended, and there do not exist any other agreements concerning the space rented under the Lease, whether oral or written, between the landlord (or its predecessors or successors) and the undersigned (or its predecessors).

3. Except as set forth in part II of Exhibit “A” hereto, there is no default under the Lease Documents, nor does any state of facts exist which, with the passage of time or the giving of notice, or both, would ripen into any such default, and, except as set forth in part III of Exhibit “A”, the undersigned has no offset, credit, rent abatement, charge, lien, claim, termination right or defense which currently exists (or with the passage of time or the giving of notice, or both, will exist) under the Lease Documents.

4. The term of the Lease has commenced and any applicable rent is presently accruing under the Lease.

5. The undersigned is in (and has accepted) possession and occupancy of all of the premises covered by the Lease; all obligations of the landlord required to be performed to date under the Lease Documents have been performed; and, without limitation, any improvements required under the Lease
Documents to be constructed by the landlord (or its predecessors or successors) or any affiliate thereof have been completed to the full satisfaction of the undersigned and are open for the use of the undersigned and its [customers,] employees and invitees.

6. All of the matters set forth in Exhibit “A” hereto are true and correct as of the date hereof and, without limitation on the foregoing, there is no prepaid rent except as set forth in part III thereof.

7. The address or addresses for notices and other communications to be sent to the undersigned is as set forth in the Lease, or as may otherwise be specifically stated in Exhibit “A” hereto.

8. From and after the date we receive notice from you of the Acquisition, copies of all notices given to the tenant under the Lease Documents shall be given to Purchaser at:

________________________________________
________________________________________
________________________________________
Attention: ____________________________

[Include Lender’s contact information, if Lender is entitled to notice as well.

and to Lender at:

________________________________________
________________________________________
________________________________________
Attention: ____________________________]

9. The undersigned and the person or persons executing this certificate on behalf of the undersigned have the power and authority to render this certificate.

Very truly yours,

[INSERT NAME OF TENANT],
a ________________________________

By: ________________________________
Its: ________________________________

[NOTE: If there is a guaranty of the Lease, an affirmation of the guarantor must be executed and delivered by the guarantor.]
AFFIRMATION OF GUARANTOR

The undersigned, as guarantor under that certain guaranty (the “Guaranty”) dated __________, 20__, from ____________________________________ to ___________________________________ (“Guarantor”), hereby represents and agrees, on behalf of itself and its successors and assigns, for the benefit of Purchaser, Lender and their respective successors and assigns, that: (1) the foregoing certificate is true and correct; (2) the Guaranty is in full force and effect and has not been assigned, supplemented, modified, waived or amended and there do not exist any other agreements concerning the Property, whether oral or written, between the landlord and the undersigned; and (3) upon acquisition of the Property by Purchaser, the Guaranty will be enforceable by Purchaser and its successors and assigns against the undersigned and its successors and assigns in accordance with its terms.

_____________________________________,
a ________________________________

By: ________________________________
Name: ______________________________
Title: ______________________________

Exhibit “A” to Appendix B-2

I. DESCRIPTION OF LEASE DOCUMENTS AND OTHER AGREEMENTS:

A. Date of Lease ______________________________

B. Parties
   (1) Landlord ______________________________
   (2) Tenant _______________________________

C. Amendments, Assignments, Subleases and Other Leases or Agreements __________________________

D. Commencement Date __________________________

E. Expiration of Initial Term __________________________

F. Options to Renew ______________________________

G. Security Deposit ______________________________

H. [Current Annual Base Rent] _______________________

I. [Percentage rent is __% of sales in excess of $____________]
J. [Percentage Rent for lease year ending ______]
K. [Pro Rata Share of CAM]
L. [Tenant Reimbursements for lease year ending ______]
M. [Merchant’s Association Dues for lease year ending ______]
N. Other Information ________________________________________________

II. DEFAULTS: ______________________________________________________

III. OTHER MATTERS:
______________________________________________________________

______________________________________________________________

Appendix B-3

Hotel Management Agreement Certificate

______________, 20__

______________________________________________________________

______________________________________________________________

Re: [NAME OF HOTEL]
[CITY, STATE] (the “Property”)

Gentlemen:

The undersigned is the holder of all right, title and interest of the hotel manager under the documents (the “Management Documents”) described in part I of Exhibit “A” hereto (including the “Hotel Management Documents” therein described). The undersigned understands (i) that ____________, a ____________ (herein called “Purchaser”) may be acquiring the Property from ____________ (“Owner”), and (ii) that Purchaser, Purchaser’s lender (the “Lender”) and their respective successors and assigns are relying upon this certificate in connection with such acquisition (the “Acquisition”) and any related financing.
With such understanding, the undersigned hereby represents, warrants, confirms and agrees, on behalf of itself and its successors and assigns, for the benefit of Purchaser and its respective successors and assigns, that:

1. The Management Documents are presently in full force and effect and, except as set forth in part I of Exhibit “A” hereto, have not been amended, and there are no other agreements between Owner (or its predecessors) and the undersigned (or its predecessors) related to the property subject to the Management Documents.

2. To the best knowledge of the undersigned, there is no default under the Management Documents, nor does any state of facts exist which, with the passage of time or the giving of notice, or both, would ripen into any such default, and the undersigned has no offset, charge, lien, claim, termination right, or defense which currently exists (or with the passage of time or the giving of notice, or both, will exist) under the Management Documents.

3. There are no amounts due or owing to the undersigned under or in connection with the Management Documents, except as set forth in part II of Exhibit “A” hereto.

4. The amounts of all fees, reimbursements and other compensation (including any participating or incentive fees), and the calculation thereof, earned by the undersigned pursuant to the Management Documents for the most recent calendar year and for that portion of the current calendar year indicated in part III of Exhibit “A” hereto, are as set forth in part III of Exhibit “A” hereto.

5. The current amount of the FF&E Reserve is as set forth in part IV of Exhibit “A” hereto.

6. The undersigned has not assigned or transferred any of its rights or obligations under the Management Documents.

7. All obligations of Owner required to be performed to date under the Management Documents have been performed; and, without limitation, all construction obligations of Owner under the Management Documents have been performed.

8. The Acquisition does not violate or constitute a default under the Management Documents, and the undersigned hereby consents thereto.

9. The address(es) for notices and other communications to be sent to the undersigned is as set forth in the Management Documents, or as may otherwise be specifically stated in part V of Exhibit “A” hereto.

10. The information set forth on Exhibit “A” hereto is true and correct. [E.g., STATEMENT OF OPERATING PROFITS OR GROSS RECEIPTS.]

11. The undersigned and the person or persons executing this certificate on behalf of the undersigned have the power and authority to render this certificate.
Very truly yours,

_____________________________________,

a ________________________________

By: ________________________________
Its: ________________________________

Exhibit “A” to Appendix B-3

I. DESCRIPTION OF MANAGEMENT DOCUMENTS:
   A. “Hotel Management Agreement” – that certain management agreement captioned “______________________________”, dated as of _____________, ____, between __________________________, as owner, and _____________________, as hotel manager.
   B. ________________________________

II. AMOUNTS DUE OR OWING (AND UNPAID):

III. AMOUNT AND CALCULATION OF COMPENSATION:
   A. Fiscal Year 20__ (ending December __, 20__):
      (1) Fees and Payments Accruing During Fiscal Year 20__:
          [CHANGE TERMS AS APPROPRIATE]
          “Management Fee”: $____________.
          “Incentive Fee”: $____________.
      (2) Calculations for Fiscal Year 20__:
          Gross Revenues: $____________.
          Deductions: $____________.
   B. Fiscal Year 20__ to end of Accounting Period Ending ____________, 20__ (most recent): [CHANGE TERMS AS APPROPRIATE]
      (1) Fees and Payments Accruing During Fiscal Year 20__:
          “Management Fee”: $____________.
          “Incentive Fee”: $____________.
(2) Calculations for Fiscal Year 20__:

Gross Revenues: $____________.

Deductions: $____________.

C. INCENTIVE THRESHOLD: [CHANGE TERMS AS APPROPRIATE]

(1) Incentive Threshold as of the end of Fiscal Year 20__: $____________.

(2) Incentive Threshold as of the end of Accounting Period ending ____________, 20__ (most recent): $____________.

IV. FF&E RESERVE:

A. Total for Fiscal Year 20__: $____________.

B. Portion of “A” actually funded by Owner: $____________.

C. Total for Fiscal Year 20__ to end of Accounting Period ending ____________, 20__ (most recent): $____________.

D. Portion of “C” actually funded by Owner: $____________.

E. Total unfunded amount of FF&E Reserve to end of Accounting Period ending ____________, 20__ (most recent): $____________.

V. ADDRESS(ES) OF THE UNDERSIGNED:

Appendix B-4

Certificate of Ground Lessor

As of __________, 20__

____________________________________
____________________________________
____________________________________

Re: [NAME OF PROPERTY]
[CITY, STATE] (the “Property”)

Gentlemen:
The undersigned is the holder of all right, title and interest of the lessor under the documents (the “Lease Documents”) described in paragraph 1 of Exhibit “A” hereto (including the “Lease” therein described). The undersigned understands (i) that _____________________, a __________________ (“Purchaser”), may be acquiring an interest in the leasehold estate under the Lease, and (ii) that Purchaser, Purchaser’s lender (the “Lender”) and their respective successors and assigns are relying upon this certificate in connection with such acquisition (the “Acquisition”) and any related financing.

With such understanding, the undersigned hereby represents, warrants, confirms, certifies and agrees, on behalf of itself and its successors and assigns, for the benefit of Purchaser and __________________________ and their respective successors and assigns, that:

1. The Lease Documents are presently in full force and effect and, except as may be set forth in part I of Exhibit “A” hereto, have not been amended or assigned, and there are no other agreements between __________________________ (or its predecessors) and the undersigned (or its predecessors) relating to the referenced property.

2. Rent under the Lease has been paid through the date set forth in part II of Exhibit “A” hereto. The amount of accrued but unpaid rent as of the date hereof is set forth in part III of Exhibit “A” hereto; with the exception of such accrued rent, if any, there are no amounts or charges currently accrued, outstanding or payable under the Lease Documents, except as may be otherwise stated in part IV of Exhibit “A” hereto.

3. The amount and date of the most recent payment received under the Lease are set forth in part V of Exhibit “A” hereto.

4. Except as may be set forth in part VI of Exhibit “A”, there are no mortgages currently encumbering the undersigned’s fee estate in the real property covered by the Lease Documents.

5. Except as may be set forth in part VII of Exhibit “A”, there are no escrow or impound accounts under the Lease Documents for taxes or insurance premiums or any other matter.

6. To the best knowledge of the undersigned, there is no default under the Lease Documents, nor does any state of facts exist which, with the passage of time or the giving of notice, or both, would ripen into any such default.

7. All the construction obligations (other than those pertaining to the restoration of future casualty damage), if any, under the Lease Documents have been performed.

8. The Acquisition does not violate or constitute a default under the Lease Documents, and the undersigned hereby consents thereto.

9. From and after the date we receive notice from you of the Acquisition, copies of all notices given to the tenant under the Lease Documents shall be given to Purchaser at:

______________________________
______________________________
______________________________
Attention: _____________________
[Include Lender’s contact information, if Lender is entitled to notice as well.

and to Lender at:

________________________________________
________________________________________
________________________________________
Attention: ______________________________

10. The information set forth in Exhibit “A” hereto is true and correct.

11. [CLARIFICATION OF AMBIGUITIES.]

12. The undersigned and the person or persons executing this certificate on behalf of the undersigned have the power and authority to render this certificate.

Very truly yours,

________________________________________,
a ___________________________________

By: ____________________________________
Its: ____________________________________

Exhibit “A” to Appendix B-4

I. DESCRIPTION OF LEASE DOCUMENTS:

A. “Lease” – that certain ground lease captioned “_______________”, dated ____________, 20__, by ________________________, as landlord, and ________________________, as tenant.

B. _________________

C. _________________

II. DATE THROUGH WHICH RENT HAS BEEN PAID UNDER THE LEASE:

III. AMOUNT OF ACCRUED BUT UNPAID RENT:

IV. OTHER AMOUNTS OR CHARGES:

V. MOST RECENT PAYMENT RECEIVED UNDER THE LEASE:

A. Amount: $__________.

B. Date: ____________, 20__.
VI. **MORTGAGES PRESENTLY ENCUMBERING THE FEE ESTATE:**

VII. **BALANCE OF ANY ESCROW OR IMPOUND ACCOUNTS:**

A. Taxes: $__________________.

B. Insurance: $__________________.

VIII. **ADDRESS(ES) FOR NOTICES TO LANDLORD (IF DIFFERENT FROM LEASE):**

____________________________________
____________________________________
____________________________________
____________________________________

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**Appendix B-5**

[Form for Acquisition Subject to Continuing Permanent Loan]

**Certificate of Permanent Lender**

____________________, 20__

[Signature]

____________________
[Signature]

____________________
[Signature]

____________________
[Signature]

Re: [NAME OF PROPERTY]

[CITY, STATE]____

Gentlemen:

Please refer to the documents (the “**Loan Documents**”) described in part I of Exhibit “A” hereto (including the “**Note**” and “**Encumbrance**” therein described). The undersigned understands (i) that _______ (“**Purchaser**”), may be acquiring the real property (the “**Subject Property**”) subject to the Encumbrance, and (ii) that Purchaser [and ____] will be relying on this certificate in connection with such acquisition (the “**Acquisition**”).

With such understanding, the undersigned hereby represents, warrants, confirms and agrees, on behalf of itself and its successors and assigns, for the benefit of Purchaser [and ____], and its [their respective] successors and assigns, as follows:
1. Except as may be set forth in part I of Exhibit “A” hereto, the undersigned is the holder of all right, title and interest in the Loan Documents, and the Loan Documents have not been assigned or transferred (in whole or in part).

2. Except as may be set forth in part I of Exhibit “A” hereto, none of the Loan Documents has been amended and there are no other agreements relating to the Subject Property to which the undersigned is a party. The Note is secured only by the Encumbrance.

3. The outstanding principal balance secured by the Encumbrance is as stated in part II of Exhibit “A” hereto.

4. Interest on the Note has been paid through the date set forth in part III of Exhibit “A” hereto. The amount of accrued but unpaid interest as of the date hereof is set forth in part IV of Exhibit “A” hereto; with the exception of such accrued interest, there are no amounts or charges currently accrued, outstanding or payable under the Loan Documents, except as may be otherwise stated in part IV of Exhibit “A” hereto.

5. The amount and date of the most recent payment received on the Note are set forth in part V of Exhibit “A” hereto.

6. The balance held in the escrow account under the Encumbrance is set forth in part VI of Exhibit “A” hereto and is intended to be used solely for payment of taxes or assessments levied against, and any insurance premiums due with respect to, the Subject Property.

7. To the best knowledge of the undersigned, there is no default under the Loan Documents, nor does any state of facts exist which, with the passage of time or the giving of notice, or both, would ripen into any such default.

8. The Acquisition does not violate or constitute a default under the Loan Documents, and the undersigned hereby consents thereto.

9. The information set forth in Exhibit “A” hereto is true and correct. [E.g., STATUS OF RENTAL ACHIEVEMENT REQUIREMENTS, CONFIRMATION OF HOLDBACK AMOUNTS, CALL AND OPTION NOTICE, AMOUNT OF CONTINGENT INTEREST, BALLOON DATE, PREPAYMENT RIGHT]

10. [CLARIFICATION OF AMBIGUITIES.]

11. The undersigned and the person or persons executing this certificate on behalf of the undersigned have the power and authority to render this certificate.

   Very truly yours,

   ____________________________________
   a __________________________________

   By: __________________________________
   Its: __________________________________
Exhibit “A” to Appendix B-5

I. DESCRIPTION OF LOAN DOCUMENTS:
   A. “Note” – that certain promissory note captioned “________________________”, dated as of ____________, 20__, by ______________________________ in favor of __________________________________.
   B. __________________________________________

II. OUTSTANDING PRINCIPAL BALANCE:

III. DATE THROUGH WHICH INTEREST HAS BEEN PAID:

IV. ACCRUED BUT UNPAID INTEREST AND CHARGES:
   A. Accrued But Unpaid Interest as of ____, 20__:
   B. Other Charges:

V. MOST RECENT PAYMENT:
   A. Amount:
   B. Date:

VI. ESCROW ACCOUNT:
   A. Taxes:
   B. Insurance:

VII. OTHER MATTERS: