

Friday, November 5, 2021  
12:00 PM – 1:15 PM

**Seminar 20**

**Scoring a Touchdown for Your Client on the Toughest Purchase-and-Sale Provisions: Fight for Every Yard or Fight to Make a Deal?**

Presented to

**2021 U.S. Law Conference  
San Francisco Marriott Marquis  
San Francisco, CA  
November 3-5, 2021**

by:

**Jonathan D. Block**  
Partner  
Honigman LLP  
39400 Woodward Avenue  
Suite 101  
Bloomfield Hills, MI 48304-5151  
[jblock@honigman.com](mailto:jblock@honigman.com)

**Bradley G. Siegal**  
Partner  
Maynard, Cooper & Gale, P.C.  
1901 6<sup>th</sup> Avenue North  
Suite 1700  
Birmingham, AL 35203  
[bsiegal@maynardcooper.com](mailto:bsiegal@maynardcooper.com)

**Megan Vallerie**  
Partner  
Seyfarth Shaw LLP  
620 Eighth Avenue  
32<sup>nd</sup> Floor  
New York, NY 10018-1405  
[mvallerie@seyfarth.com](mailto:mvallerie@seyfarth.com)

**INTRODUCTION**

Welcome back to “in person” learning. This seminar will discuss, analyze and attempt to provide some assistance in resolving those TOUGH provisions typically negotiated or over-negotiated in purchase and sale agreements (“PSA”) for retail properties. Working together with your clients is very important on these “tough” issues, as they typically involve both legal and business or deal terms. It is the intent of this program to provide insights into these provisions, how recent events/pandemic may have impacted them, try to relate each from a buyer and seller perspective, and due to the geographic diversity of the panel, hopefully provide some insight based upon the different parts of the country that each primarily devotes her/his time.

Within these materials, there are several “form” type examples for certain provisions, keeping in mind that geographic region may impact how strongly each is negotiated or requested. In addition, let’s keep in mind that representing a buyer or seller will lend to different hot points on each as well as source of funds, competition for the property, geographic regions and competition within that region, size of the center or if it is a single tenant outparcel, as well as economic size of the buyer or seller.

Tough provisions in PSA’s are also regulated somewhat by the desire of the buyer and seller or the need for speed in moving a deal through the negotiation, diligence, and closing process. Assisting the client in creating the best PSA is tempered by this speed as well. For many clients, there are the MUST HAVE’S, the WANNA HAVE’S, and the LET’S TRY BUT NOT LET IT HOLD UP THE DEAL. The discussion items try to cover each based upon items that tend to lead to more back and forth negotiations, such as (i) Material Adverse Conditions clauses, (ii) Due Diligence Items, such as AS IS language, Seller release language and leasing activities before and after hard money, (iii) Prorations, (iv) Representations and Warranties, (v) Estoppels/SNDA’s and similar tenant and lender issues, and (vi) Conditions to Close.

The goal of the lawyer negotiating these PSA’s and tough provision’s ultimate goal is to have an agreement in acceptable form for your client, that accomplishes their business intent, avoids the risks to the greatest extent possible, remains within the economic parameters of the client and achieves closing.

**PARTIES TO THE PSA**

Each of the tough issues differs depending upon who you represent in the transaction. For example, if you are representing a seller, the items that may start your review or preparation of the PSA would include: (a) limiting reps as much as possible, (b) caps on liability for those reps you have to make, (c) speed to get to the closing and (d) avoiding any continuing liability post-closing. If, on the other hand, you are representing the buyer, your client likely will want: (a) both broad reps and remedies in the event any reps are true, (b) estoppels from the tenants as

they are the basis of the economics for the purchase, (c) thorough review of diligence items, including title/survey, zoning, environmental and structural items.

There are other parties involved in most transactions as well. Brokers, title companies, surveyors, third party consultants, 1031 exchange agents, lenders, and tenants all have an impact on the resolution of these tough provisions in the PSA.

The economic viability of a retail property also will be a driver in negotiating these tough provisions. Is the center fully or partially leased? Will leases be expiring soon or are there significant concessions coming due? Are shops open/closed due to the pandemic and its impact on future survival? Percentages of major versus minor tenants?

As we explore the tough items, remember the ancillary factors that impact how they are negotiated, who are you representing, and the timetable/pressure to close on "your" party.

### **TOUGH ISSUE #1 – Due Diligence Items**

Rather than focus on the standard "inspection" items, which may not require much negotiation, this focus for Due Diligence will be on the section dealing with the "AS IS" language, Seller release section and leasing activities at the property before and after hard money.

Attached as **ATTACHMENT 2** are samples of AS IS paragraphs. As you can see, they vary greatly and typically involve substantial negotiation. Initially, let's explore the purpose behind these sections. They are beneficial to the sellers as they attempt to exclude or restrict liability on the sellers' part, and even include the representations and warranties, which are covered separately.

After a review of these examples, you can see the benefit they provide to the Sellers. In most due diligence sections, the buyer provides for rights to do many inspections and reviews. These limitations are intended to limit the liability for any express or implied warranties that may arise or give rise to successor liability type rights. Each state law will likely differ somewhat on enforcement rights for these limitations, but the language is pretty clear on the protections intended for the sellers.

During inspection periods, buyer often review seller's existing title, survey, environmental reports along with property specific reports such as financial records, rent rolls, loan documents and written notices and reports such as from governmental agencies. Knowing the breadth of the items to be reviewed, the language in these AS IS sections becomes more important to review. In other words, does a buyer want the seller "on the hook" for any of these specifically. If so, care must be taken in the review and negotiation of these AS IS section.

So, how do these sections appear, get negotiated, and what is market for these. In the current climate, post-pandemic, it will be hard to tell. Retail is struggling generally due to the shutdown. Seller's try to include everything, including the kitchen sink as these sections tend to be very advantageous to sellers. While these clauses likely do not protect against fraud, intentionally misrepresentations and similar intentional acts, deceptive trade practices and consumer protection statutes, they are a good seller protection that is very common to find in most PSA's. Buyer's, as a compromise, limit these sections by including items in representations and warranties (discussed separately below) since that is the initial exception to this AS IS language... Items Specifically Listed in the Representations and Warranties. In addition, Buyer's also try and seek some specific exclusions for items such as determination of "net income" from the financial records as that is how the purchase price is determined. This can take the form of reliance on the income statement of the seller.

We all see these in nearly every PSA. Most are ALL CAPS or specifically labelled AS IS. Further, sellers ask for a release in these sections as well. Again, as a diligence reference, these releases are not from the representations and warranties being made, but from liability arising as a result of the seller's ownership and operation of the Property, including items like environmental liability and physical condition. Examples follow on **ATTACHMENT 2**.

You will notice that the goal from a seller's perspective is to avoid any liability from and after the closing. Environmental liability is the most common item included in this release. The basis of the seller's position being that the buyer had time to inspect, evaluate and make its own decision to buy. Therefore, the seller says, you may have a problem, but you can't come after me. It is important to note that the release of seller is only a contractual right between the buyer and seller. Nothing limits the seller's liability to any governmental agency at any of the federal, state or local level.

The last diligence item covered as “tough” is leasing activity at the Property before and after earnest money is “hard” under a PSA. This is typically negotiated as the positions of the buyer and seller on this are nearly completely opposite. Note, this will vary somewhat on the buyer’s intended strategy: i.e., if the buyer is buying the income stream of an operating property vs. looking to add value by increasing rents vs. intending to redevelop for another use. In the first case, a buyer may want to know all tenants are remaining in occupancy at current rents for its planned holding period and therefore negotiate for to limit Seller’s ability to enter into lease amendments and pursue enforcement actions during the contract period. In the second case, a buyer may want to know the Property as currently leased has upside for the vacant space and therefore permit Seller to enter into new leases at market or better rates (or otherwise approved by buyer) to increase the return on the acquisition during the contract period. And in the third case, a buyer negotiate the PSA to require that its seller deliver certain space vacant so it can commence its redevelopment. On the other hand, sellers are trying to prepare for a “non-closing”... meaning seller want to continue to operate the property during the contract period in the normal course so that if the contract is terminated, they are not harmed and can easily remarket. The date that earnest money goes “hard” is a common place for rules on leasing to change - once a buyer has money “at risk”, it wants to know the leases it is buying won’t change without its say so.

## **TOUGH ISSUE #2 – Prorations**

Prorations in a retail setting can be complicated and most often require significant involvement between you and your client.

Attached as **ATTACHMENT 3** are samples of some proration language for a PSA. Rather than go into detail with the examples, we will cover the main items that are actually prorated and discuss how the negotiation of these between buyers and sellers may run.

In the prorations section of the PSA, we often see, “in accordance with the local custom”, “as typically handled in the Property jurisdiction”, or something along those lines. However, I have found that local custom varies greatly between jurisdictions and even within the same jurisdiction, depending upon the desire of the particular client as well as bargaining position of the parties. Let’s dive into the various items that are negotiated as “prorations”.

**RENT:** The income from the property to the owner/landlord is paid as rent. Purchase price for sales is determined using this as a primary factor as well. In a retail setting there are several iterations of rent. Base rent is the per square foot or gross amount payable for use of the space or land. Additional Rent is comprised of the “other” items payable by tenants such as insurance reimbursements, tax reimbursements and common area maintenance payments. Percentage Rent is the amount payable for tenants who create sales greater than a threshold for which a percentage is payable to the landlord/owner, or is used in some circumstances as the base rent. The “tough” negotiation you may experience with rents deals with whether you are prorating off of collected rent or scheduled rent (and confirming rent is payable monthly rather than on another schedule, such as quarterly or even less frequently).

**MAJOR TENANTS vs SMALL SHOP SPACE:** Purchase prices are most often calculated off of a capitalization rate of the net income from a property. What is a Major Tenant? Some PSA’s define a Major Tenant based upon the square footage or if that tenant is the “draw” to the center. Major Tenants may differ for proration purposes versus obtaining estoppels (which are dealt with below). For example, Major Tenants for prorations may be those that pay a fixed amount of CAM rather than a pro-rata share based upon square footage, as is typically paid by most tenants. Therefore, this section becomes important to quantify for the PSA to make sure buyers and seller each collect that portion of receipts from Major Tenants and small shop space as each is entitled.

**OTHER REVENUE SOURCES:** Many shopping centers/malls have other sources of revenue/receipts such as marketing funds or advertising accounts maintained by the owners. These are not technically sources of income as they are funds paid for by the tenants to assist with center marketing. In addition, some centers have gift certificate programs. Accounting for these to make sure buyers and sellers are “even” on these can be tricky. Gift Certificates may involve a turn or two of a PSA as the buyer needs to make sure it receives credit for unused gift certificates.

**LEASING COMMISSIONS, TENANT IMPROVEMENT ALLOWANCES, REIMBURSEMENTS and CONCESSIONS:** Another section to pay particular attention to is that dealing with leasing commissions and TI. Upon review of leases, we must detail the upcoming or outstanding commissions owed or to be owed broker’s for the lease, renewals, and expansion. Who is responsible for paying these should be handled in the PSA, particularly if a renewal or new lease is part of the purchase price. Tenant Improvement Allowances are also highly negotiated which relate to existing tenants, renewals or new tenants. Concessions granted to tenants can lead to open issues

between buyers and sellers. How much “free rent” was granted, which party is responsible for granted this free rent, when does the free rent kick in, and who is responsible for paying needs to be included in the PSA as well.

**CLOSING ESCROWS and HOLDBACKS:** Many times buyers and sellers deal with “open” items by creating an escrow or holdback to handle items known and disclosed in advance or discovered during the diligence of a property. These can include some items such as the commissions and TI as discussed above. It may also include property improvements or construction items such as roof, parking or similar items. In addition, outstanding tenant claims or enforcement actions may become part of these holdbacks and escrows. Post-closing clean up items are also handled by holdbacks as well.

**MASTER LEASE:** With the troubles some retailers have experienced recently, Master Leases are solutions sometimes used to solve the “gap” between income being paid versus the purchase price calculation. Master Leases serve as a way for sellers to receive the negotiated purchase price and the buyer to have collections equal to the net income used to calculate that price. In these circumstances, the seller “leases” the site and agrees to pay the rent to the buyer for some period of time. This can happen for tenants in distress or for vacant space. The seller assumes the risk for such space/tenant, while the buyer has income equal to its negotiated price. Not only is this a proration item, but getting a satisfactory form Master Lease can take time as well.

**TRIPLE NET LEASES, ABSOLUTE NET LEASES and SALE/LEASEBACKS:** In triple net lease settings, the other revenue sources (discussed above) lead to standard prorations. If there are absolute net leases, sellers typically insist that payment by the tenant of all items such as taxes and insurance flows with the lease assignment and becomes a buyer risk. Buyers need to be detailed on their review of tenant payment items to confirm everything remains current. In a sale/leaseback transaction, the buyer and seller basically “switch” sides on prorations as the buyer becomes the tenant. Detailing this language in the PSA and the subsequent lease should “match” and requires detailed attention.

Each of these items require intense client involvement. In addition, PSA’s also have post-closing true up obligations and mutual cooperation to deal with items that arise post-closing. Buyers need to pay particular attention to the seller being a single asset entity that may only have the asset sold as its sole ownership asset, which may lead to a holdback to handle post-closing items since the purchase price will be distributed and no assets will be available to satisfy these later determined prorations. The goal is always to be “even” at closing such that the purchase price and all collections and expenses are divided based upon the language in the PSA. Therefore, starting with detailed language for this section is important.

### **TOUGH ISSUE #3 – Representations and Warranties**

Sellers’ reps as to the Property, survival of those reps and remedies for breaches of reps are some of the most tensely negotiated provisions in PSAs.

The first items of negotiation are the subject and scope of a seller’s reps. As noted earlier in our discussion of the release provisions, sellers generally take the position of “buyer beware”; i.e., that a buyer must perform its own due diligence rather than rely on the statements of the seller in determining whether or not to purchase the Property. And it is worth noting that even if a buyer doesn’t have a diligence period, sellers aren’t likely to sympathize and make more reps to their buyers. The buyer, on the other hand, not only wants to have the Seller on the hook for as many representations as possible, it wants to make sure its seller is representing to things it cannot learn in its diligence, such as whether or not a tenant is in default.

Similarly with post-execution leasing covenants, the rep regarding the rent roll and leases is likely the most important rep for the buyer, both because it needs to know the income stream it is buying and because it needs to assume operations upon closing. The buyer may, of course, receive estoppels from tenants that provide a fair amount of information to the buyer on leases, but these will likely be incomplete because it is customary to limit the seller’s obligation to deliver tenant estoppels to certain (but not all) tenants (whether a percentage of leased square footage or “Major Tenants” or a combination thereof). These reps should cover whether or not there are defaults by either party under the lease, delinquencies, the amounts of security deposits being held, and whether or not the tenant has any offsets against the payment of rents or unapplied concessions. You may also include a rep as to outstanding leasing commissions and tenant allowances here or in a separate rep.

An important concept to cover in the seller’s reps is that the seller has delivered to the buyer true, correct and complete (or at least not intentionally withheld or altered) copies of the leases, service contracts, rent roll, arrears or delinquency report and other due diligence materials (i.e., items that that are not of record or otherwise publicly available) . A buyer can review the due diligence materials all its wants but that review has no value if the materials have been altered or otherwise paint a false picture of the Property.

Additional customary reps as to the property cover pending litigation, pending condemnation proceedings, pending tax certiorari proceedings and notices of violations.

It is also customary for sellers to make reps as to their due formation, good standing and authority to enter into the PSA, as well as to whether or not a seller is subject to FIRPTA and/or ERISA.

Reps are customarily made as of the date of execution of the PSA, so if you are representing the seller, it is important to work with the seller and its property manager to confirm there have been no changes in the reps over the course of the PSA negotiation and that all disclosure schedules are current, complete and accurate. It is also customarily a condition that the Reps be true and correct on the closing date, and care should be given to any disclosures made on the closing date (whether in a "bring-down" certificate or other disclosure statement). Note, language should be included in the PSA so that a rep that was true when made in the PSA which has changed as a result of the passage or change in circumstance (e.g. If seller reps that a tenant is not in default on the execution date, but within the 60 day contract period that tenant has ceased paying rent,) does not constitute a seller default or fail to satisfy the condition that reps must be true on the closing date.

In addition to limiting the subject matter of Reps, a seller will also look to limit their scope by making reps to knowledge (e.g. to Seller's knowledge, no tenant is in default) or qualified by materiality (e.g. no tenant is in default of a material obligation under its lease) or both. Much attention is devoted to the topic of "knowledge" in itself. Sellers will look to limit "knowledge" to that of a certain party or parties (and buyers should confirm that the party to whom knowledge is limited is appropriate, such as a property manager or asset manager and financial officers of seller). In addition, sellers will look to define "knowledge" in a way that does not impute a duty of inquiry or investigation on the Seller. Conversely, buyers look to expand knowledge to "best knowledge", to include a duty of inquiry on seller and to not be limited to the knowledge of only a few, named individuals.

On the topic of knowledge, if you are representing a seller it is also important to include a statement that buyer shall be imputed with the knowledge of matters disclosed in the due diligence materials delivered by seller. If the buyer has knowledge a rep is untrue and it proceeded to close, it cannot then make a claim against Seller for a breach of that rep. One example, is if the seller reps that seller is not in default as landlord under any of its leases, but a tenant estoppel claims the seller is in default, the buyer will then be charged with the knowledge that seller's rep was untrue and have no recourse against seller for the same.

If the buyer learns that a seller rep is not true in advance of closing, whether as a result of its due diligence or a seller disclosure, the buyer's only remedies are typically to (1) permit the seller to cure the breach (if susceptible to cure), (2) terminate the PSA (and occasionally this termination right will be conditioned upon the breach being material) or (3) waive the breach and close over it. In each case, the buyer will have no recourse against the seller following the closing for the breach of a rep of which it had knowledge in advance of closing.

If however, the seller made a misrepresentation and the buyer discovered the misrepresentation following closing, it can bring a claim for that breach against seller. Typically there are parameters around whether or not the buyer can bring a claim:

(1) Seller's representations are customarily limited to a survival period (i.e. a set period of time after following the closing during which the buyer must have learned of the breach). Survival periods are negotiated; there may be none, although more typically they range from 3 months to 12 months. Occasionally longer survival periods (or even perpetual survival) exist for certain reps - usually related to corporate existence of Seller (especially if the sale is structured as an interest sale as opposed to an asset sale) and tax reps.

(2) Buyer must bring the claim before the expiration of the survival period or a prescribed time (typically not more than 30-60 days) following its expiration.

(3) Buyer's claim must meet a prescribed "floor" or minimum threshold (i.e., it cannot bring a claim where no material damages have been suffered). The "floor" is negotiated; it can be as low as \$25,000 and up to \$100,000 (but can also be much higher for very large transactions).

(4) Seller's liability is customarily capped. The liability cap is negotiated; it can be as low as \$500,000 but is more typically set as a percentage of the purchase price (typical market range is 1%-2% of the purchase price, but again, for very large transactions it might be lower).

(5) It is customary that liability arising from the rep as to brokers arranging the sale and pro-rations are excluded (i.e., not subject to) the seller's liability cap.

An additional “tough” issue related to the buyer’s remedies for its seller’s breach of a rep, is credit support for seller’s potential post-closing liability. Sellers are often single purpose entities whose sole asset is the Property it has just sold. Buyers will often request that one of the following (1) the seller deposit a portion of the sales proceeds (usually the amount of the seller’s liability cap) into an escrow account for the survival period (plus any tail period during which the buyer must commence its claim), (2) the seller agree to maintain a minimum net worth (again, usually the amount of the seller’s liability cap) for the survival period and not distribute 100% of the sales proceeds until after its expiration (or the expiration of any tail period), or (3) a parent company with a net worth (of at least the seller’s liability company) guaranty any liability of the seller for the survival period (plus the tail period). A separate but related issue is whether or not this credit support can be utilized to satisfy any other liability of the seller arising after the closing- for the pro-rations “true up” or for any indemnification obligations of the seller.

#### **TOUGH ISSUE #4 – Conditions to Close**

“Conditions to Closing” in favor of both sellers and buyers are customary in retail PSA’s. In their simplest terms, closing conditions fill a vacuum of protecting sellers and buyers outside of the scope of typical due diligence and default scenarios. Many closing conditions are pretty standard such as the requirement that there be no material change in each party’s representations and warranties since the effective date of the PSA and that each party performs its obligations under the PSA required to close. However, it is worth noting that these conditions can be the impetus for a dispute as to whether a party’s actions rise to the level of a default under a PSA. A second group of closing conditions revolve more around the actions of specific third parties. These closing conditions encompass such items as tenant estoppels, REA and condominium estoppels, SNDA’s, loan assumptions and governmental approvals (e.g. a tax parcel split or re-zoning). Although typically one party plays a greater role in obtaining these items and is expected to use some form of reasonable efforts to deliver same, to some extent, the delivery of these items really hinges on the actions of specific third parties, namely tenants, REA parties, condominium associations, lenders, governmental entities and the like. Nonetheless, these closing conditions often result in heated negotiations especially as to tenant estoppels concerning the timing, number, form, cure rights and, most important, whether or not the tenant estoppel certificate contains “acceptable” information. Further, REA and condominium estoppels can be the source of heavy negotiations where an REA and/or condominium is an integral part of the operation of the property. A final note here is with respect to SNDA’s. In many regards, the obligation to deliver an SNDA is simply a financing contingency in disguise (often frowned upon as a condition of a deal) although arguably narrower than a financing contingency as a specific lender at least has been identified. Still, the delivery of an SNDA as a condition to close remains a PSA term often heavily negotiated. A third group of closing conditions seem to have percolated as a result of the recent pandemic and is driven by market conditions on a global scale. Many buyers over the years have requested “material adverse change” clauses as a condition to close and as a way to terminate the PSA after the expiration of the inspection period. Rightfully so, sellers have pushed back on this buyer request as the issue is one that buyer should be able to satisfy itself during due diligence as to, for instance, the financial health of a tenant and other typical underwriting concerns. Buyers can also mitigate this risk as least as it relates to financing by shortening the time from the expiration of the inspection period until closing and, additionally, a strongly negotiated tenant estoppel provision can provide buyers with a way to terminate the deal even after the expiration of the inspection period. While a buyer can mitigate its risks as provided above the pandemic has resulted in far more unpredictably, putting it mildly, as to the financial strength of tenants, a tenant’s ability to open and operate and has accelerated, to some extent, the trend away from “bricks and mortar” shopping.

It also makes some sense to bring another heavily negotiated PSA provision into discussion at this time. That being, the parameters under which a seller can operate the property during the term of the PSA. Historically, we have seen a bifurcated approach with seller enjoying more rights over the operation of the property prior to the expiration of the inspection period based on the argument that seller needs to continue to operate its property while buyer’s deposit remains fully refundable. This bifurcated approach would seem to be the starting point for negotiations in the future; however, the rapid pace by which the health and viability of a property may change might increase the tension between sellers and buyers as to this issue.

#### **CONCLUSION**

## **ATTACHMENT 2**

### **AS IS LANGUAGE**

#### **Example No. 1**

**As-Is Sale.** Buyer acknowledges and agrees that during the Due Diligence Period, Buyer has conducted and shall conduct such Due Diligence as Buyer deems necessary or appropriate. In addition, Buyer acknowledges and agrees that (a) except as set forth herein, the Property shall be sold, and Buyer shall accept possession of the Property on the Closing Date, "AS IS, WHERE IS, WITH ALL FAULTS," with no right of setoff or reduction in the Purchase Price; (b) except for Seller's Warranties, none of the Seller Parties have or shall be deemed to have made any verbal or written representations, warranties, promises or guarantees (whether express, implied, statutory or otherwise) to Buyer with respect to the Property, any matter set forth, contained or addressed in the Documents (including without limitation the accuracy and completeness thereof) or the results of Buyer's Due Diligence; and (c) Buyer shall independently confirm to its satisfaction all information that it considers material to its purchase of the Property or the Transaction. Buyer expressly understands and acknowledges that it is possible that unknown Liabilities may exist with respect to the Property, and that Buyer explicitly took such possibility into account in determining and agreeing to the Purchase Price, and that a portion of such consideration, having been bargained for between parties with knowledge of the possibility of such unknown Liabilities, shall be given in exchange for a full accord and satisfaction and discharge of all such Liabilities.

#### **Example No. 2**

**Condition of the Real Estate.** PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY NEGATES AND DISCLAIMS ANY REPRESENTATIONS, WARRANTIES (OTHER THAN IN THE SPECIAL WARRANTY DEED AND THE REPRESENTATIONS AND WARRANTIES SET FORTH HEREIN), PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO (i) THE VALUE, NATURE, QUALITY OR CONDITION OF THE REAL ESTATE, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, (ii) THE INCOME TO BE DERIVED FROM THE REAL ESTATE, (iii) THE SUITABILITY OF THE REAL ESTATE FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASER MAY CONDUCT THEREON, (iv) THE COMPLIANCE OF OR BY THE REAL ESTATE WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY, (v) THE HABITABILITY, MERCHANTABILITY, MARKETABILITY, PROFITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE REAL ESTATE, (vi) THE MANNER OR QUALITY OF THE CONSTRUCTION OR MATERIALS, IF ANY, INCORPORATED INTO THE REAL ESTATE, (vii) THE MANNER, QUALITY, STATE OF REPAIR OR LACK OF REPAIR OF THE REAL ESTATE, OR (viii) ANY OTHER MATTER WITH RESPECT TO THE REAL ESTATE, AND SPECIFICALLY, THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS REGARDING COMPLIANCE WITH ANY ENVIRONMENTAL PROTECTION, HAZARDOUS MATERIALS, POLLUTION OR LAND USE, ZONING OR DEVELOPMENT OF REGIONAL IMPACT LAWS, RULES, REGULATIONS, ORDERS OR REQUIREMENTS, INCLUDING THE EXISTENCE IN OR ON THE REAL ESTATE OF HAZARDOUS MATERIALS (AS DEFINED BELOW). PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE REAL ESTATE, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE REAL ESTATE AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER OR ITS AGENTS WITH RESPECT TO THE CONDITION OF THE REAL ESTATE AND AT THE CLOSING AGREES TO ACCEPT THE REAL ESTATE AND WAIVE ALL OBJECTIONS OR CLAIMS AGAINST SELLER (INCLUDING, BUT NOT LIMITED TO, ANY RIGHT OR CLAIM OF CONTRIBUTION) ARISING FROM OR RELATED TO THE CONDITION OF THE REAL ESTATE OR TO ANY HAZARDOUS MATERIALS ON THE REAL ESTATE. SELLER IS NOT LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR WRITTEN STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE REAL ESTATE THEREOF FURNISHED BY ANY REAL ESTATE BROKER, AGENT, EMPLOYEE, SERVANT OR OTHER PERSON. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE SALE OF THE REAL ESTATE AS PROVIDED FOR HEREIN IS MADE ON AN "AS IS", "WHERE IS" CONDITION AND BASIS WITH ALL FAULTS. IT IS UNDERSTOOD AND AGREED THAT THE PURCHASE PRICE HAS BEEN ADJUSTED BY PRIOR NEGOTIATION TO REFLECT THAT ALL OF THE REAL ESTATE IS SOLD BY SELLER AND PURCHASED BY PURCHASER SUBJECT TO THE FOREGOING. THE PROVISIONS OF THIS ARTICLE XI SHALL SURVIVE THE CLOSING.

### Example No. 3

#### Section 2.03 AS-IS.

(a) Except as expressly set forth in this Agreement to the contrary, Purchaser acknowledges that Purchaser is purchasing the Property "AS-IS, WHERE IS, AND WITH ALL FAULTS" and in the condition existing as of the date of this Agreement. Purchaser has undertaken or shall undertake all such investigations of the Property, and operations thereon, as Purchaser deems necessary or appropriate under the circumstances as to the status of the Property and the existence or non-existence of curative action to be taken with respect to any hazardous or toxic substances on or discharged from the Property, and based upon same, Purchaser is and will be relying strictly and solely upon such inspections and examinations and the advice and counsel of its own consultants, agents, legal counsel, and officers.

(b) No party to this Agreement is relying on any statement or representation not expressly stated in this Agreement. Purchaser specifically confirms and acknowledges that in entering into this Agreement, Purchaser has not been induced by, and has not relied upon, whether express or implied, any warranties, guaranties, promises, statements, inducements, representations, or information pertaining to the Property or its uses, the physical condition, environmental condition, state of title, income, expenses, or operation of the Property, or any other matter or thing with respect thereto, written or unwritten, whether made by any Seller or any agent, employee, or other representative of any Seller, or any broker or any other person representing (or purporting to represent) such Seller, which are not expressly set forth in this Agreement.

(c) The provisions of this Section 2.03 shall survive the Closing and shall not be deemed to have merged into any of the documents executed or delivered at the Closing.

### **SELLER RELEASE LANGUAGE**

#### Example No.1

Except as to the specific representations and warranties from Seller contained herein, Purchaser for itself and on behalf of all subsequent purchasers or assignees of the Real Estate which are owned or controlled by Purchaser, hereby releases and forever discharges Seller and its agents, employees, partners, members, directors, officers, shareholders, partners, beneficiaries, successors, and assigns (collectively "**Transferee**"), from any and all liability, loss, claims, demands, damages and causes of action or claims for relief (including, without limitation, claims for contribution), if any, that Purchaser ever had, now has, or may have, known or unknown, liquidated or unliquidated, or that anyone claiming through or under Purchaser may have or claim to have against Transferee, arising by reason of or with respect to the condition of the Real Estate, including, without limitation, the environmental condition of the Real Estate and the presence, release, discharge, transportation, and disposal of hazardous materials or substances in, at, or on, under, from, or related to the Real Estate. This release shall survive the Closing. Anything in this paragraph to the contrary notwithstanding, Purchaser does not release Seller from any claims Purchaser may have, now or hereafter, for Seller's breach of the representations, warranties, obligations and liabilities in this Agreement or for Seller's fraud.

#### Example No. 2

SUBJECT TO THE REPRESENTATIONS AND WARRANTIES OF SELLER AS ARE EXPRESSLY SET FORTH IN THIS AGREEMENT OR ANY OF SELLER'S CLOSING DOCUMENTS, UPON CLOSING, PURCHASER SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING BUT NOT LIMITED TO, CONSTRUCTION DEFECTS AND ADVERSE PHYSICAL AND ENVIRONMENTAL CONDITIONS, MAY NOT HAVE BEEN REVEALED BY PURCHASER'S INVESTIGATIONS, AND PURCHASER, UPON CLOSING, SHALL BE DEEMED TO HAVE WAIVED, RELINQUISHED AND RELEASED SELLER (AND SELLER'S OWNERS, MEMBERS, MANAGERS, PARTNERS, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS) FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION (INCLUDING CAUSES OF ACTION IN TORT), LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS) OF ANY AND EVERY KIND OR CHARACTER, KNOWN OR UNKNOWN, WHICH PURCHASER MIGHT HAVE ASSERTED OR ALLEGED AGAINST SELLER (AND ANY OF SELLER'S OWNERS, MEMBERS, MANAGERS, PARTNERS, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS) AT ANY TIME BY REASON OF OR ARISING OUT OF ANY LATENT OR PATENT CONSTRUCTION DEFECTS OR PHYSICAL CONDITIONS, VIOLATIONS OF ANY APPLICABLE LAWS (INCLUDING, WITHOUT LIMITATION, ANY ENVIRONMENTAL LAWS) AND ANY AND ALL OTHER ACTS, OMISSIONS, EVENTS, CIRCUMSTANCES OR MATTERS REGARDING THE PROPERTY.



### **ATTACHMENT 3**

#### **PRORATIONS**

##### Example No.1

Section 10.01 Apportionments at Closing. The Parties shall prorate the following as of 11:59 p.m. on the day immediately preceding the Closing Date (the "Apportionment Date") on the basis of the actual number of days of the month which shall have elapsed as of the Closing Date and based upon the actual number of days in the month and a [365/366] day year:

(a) Fixed rents payable by Tenants which are collected on or prior to the Closing in respect of the month (or other applicable collection period) in which the Closing occurs (the "Current Month"), on a per diem basis based upon the number of days in the Current Month prior to the Closing Date (which shall be allocated to Seller) and the number of days in the Current Month on and after the Closing Date (which shall be allocated to Purchaser). If, at the Closing, fixed rent in respect of the Current Month is unpaid by any Tenant, or fixed rent other than fixed rent in respect of the Current Month is past due by any Tenant, Purchaser agrees that the first moneys received by it from such Tenant shall be received and held by Purchaser in trust, and shall be disbursed as follows:

(i) First, to Seller and Purchaser, in an amount equal to all fixed rent owing by such Tenant to Seller and Purchaser in respect of the Current Month on a per diem basis based upon the number of days in the Current Month prior to the Closing Date (which shall be allocated to Seller) and the number of days in the Current Month on and after the Closing Date (which shall be allocated to Purchaser);

(ii) Next, to Seller in an amount equal to all fixed rents owing by any such Tenant to Seller in respect of all periods preceding the Current Month; and

(iii) Finally, to Purchaser, in an amount equal to all other fixed rent owing by any such Tenant to Purchaser in respect of all periods after the Current Month.

(b) All other income the Property generates.

(c) All current year real property taxes and assessments affecting the Property.

(d) All water, electric, telephone, fuel, and other utility charges based on the last ascertainable bill unless meter readings are made as of the Closing Date, in which case such meter readings shall govern. If the apportionment is not based on an actual current reading, but rather the last ascertainable bill, then upon the taking of a subsequent actual reading (which shall be conducted no later than [NUMBER IN WORDS] ([NUMBER]) day[s] following the Closing), the parties shall, within [NUMBER IN WORDS] ([NUMBER]) day[s] following notice of the determination of such actual reading, readjust such apportionment and Seller shall deliver to Purchaser or Purchaser shall deliver to Seller, as the case may be, the amount determined to be due upon such readjustment.

(e) Any charges or fees for transferable licenses and permits for the Property.

(f) Maintenance supplies in unopened containers based on Seller's actual cost therefor, including sales tax, as evidenced by paid invoices therefor.

(g) Any amounts prepaid or payable by the owner of the Property under the Assumed Contracts.

(h) [Wages and fringe benefits (including, without limitation, vacation pay, sick days, health, welfare, pension, and disability benefits) and other compensation payable to all of Seller's employees as set forth on Schedule [NUMBER] attached hereto (the "Employees") that are employed at the Property as of the Closing, and solely with respect to wages and payroll taxes, any other employees who accept Purchaser's offer of employment and are employed at the Property as of the Closing. Seller shall not be charged with termination pay arising by reason of Purchaser's termination of any Employees at or subsequent to the Closing, and Purchaser shall be fully liable for any such termination pay.]

(i) All other costs and expenses of operating the Property customarily apportioned in connection with sales of properties substantially similar to the Property in the City of [CITY] and State of [STATE].

Section 10.02 Property Taxes. Property taxes shall be apportioned on the basis of the fiscal period for which assessed. If the Closing Date shall occur before an assessment is made or a tax rate is fixed for the tax period in which the Closing Date occurs, the apportionment of such Property Taxes based thereon shall be made at the Closing Date by applying the tax rate for the preceding year to the latest assessed valuation, but, promptly after the assessment and/or tax rate for the current year are fixed, the apportionment thereof shall be recalculated and Seller or Purchaser, as the case may be, shall make an appropriate payment to the other within [NUMBER IN WORDS] ([NUMBER]) Business Day[s] based on such recalculation. If as of the Closing Date the Real Property or any portion thereof shall be affected by any special or general assessments which are or may become payable in installments of which the first installment is then a lien and has become payable, Seller shall pay the unpaid installments of such assessments which are due prior to the Closing Date and Purchaser shall pay the installments which are due on or after the Closing Date.

Section 10.03 Security Deposits.

(a) All unapplied security deposits and advance rentals in the nature of security deposits, if any, as set forth on Schedule [NUMBER] annexed hereto and made a part hereof, which are in the possession or control of Seller on the Closing Date shall be turned over and assigned to Purchaser at the Closing. Purchaser acknowledges and agrees that Seller shall not be liable with respect to the claim of any Tenant for any security deposit which was not turned over to Seller by the prior owner or owners of the Property. Purchaser further acknowledges that Seller shall be entitled to retain the security deposit of any Tenant whose Lease has been terminated and who is not in possession of the Property on the Closing Date. Seller agrees that it will not after the date hereof apply any security deposits for any Tenants against the payment of rents thereunder unless any such Tenant vacates.

(b) At Closing, Purchaser shall deliver to Seller a receipt for any security deposits actually turned over or credited by Seller to Purchaser. In the case of any security deposits held by Seller in the form of letters of credit, such letters of credit, to the extent permitted by the terms thereof, shall be assigned to Purchaser at the Closing. At Closing or as soon thereafter as is reasonably possible, with respect to such letters of credit which by their terms are assignable, Seller shall deliver any consents required by the issuing bank(s) to the assignment of such letters of credit. Any fees imposed by such issuing banks in connection with such assignments shall be paid by Purchaser at the Closing. In the case of any such letters of credit which by their terms are not assignable, Seller shall use reasonable efforts to cause the applicable Tenant(s) to replace such letters of credit with ones which are assignable to Purchaser. As to any letters of credit which are not assigned or replaced at Closing, then for the period from and after Closing, Seller shall hold such letters of credit in escrow for the benefit of Purchaser and, upon written request by Purchaser, shall draw down on any such letter of credit and simultaneously therewith, shall deliver the proceeds of such draw down to Purchaser. Purchaser shall indemnify Seller with respect to any judgments, suits, claims, demands, liabilities and obligations, and related costs and expenses (including reasonable attorneys' fees) arising out of Seller's draw down and delivery of the proceeds of such letters of credit as directed by Purchaser.

Section 10.04 Utility Charges. All water, electric, telephone, fuel, and other utility charges that were prorated as of the Closing Date based on the last ascertainable bill will be adjusted and prorated as of the Closing Date upon receipt of the actual statements for said utilities.

Section 10.05 Operating Costs and Expenses. All operating costs and expenses accrued before the Closing Date shall be paid by Seller on or before the Closing Date or promptly upon receipt of applicable statements. All operating costs and expenses accruing on or after the Closing Date shall be paid by Purchaser.

Section 10.06 Post-Closing Adjustments.

(a) To the extent that the amounts of any required prorations cannot be identified with reasonable certainty prior to the Closing Date, the prorations shall be made as soon as reasonably practicable after the Closing but in no event more than [NUMBER IN WORDS] ([NUMBER]) Business Day[s] thereafter. Refunds to Seller or Purchaser shall be made after the Closing Date as soon as reasonably practicable after identification, but in no event more than [NUMBER IN WORDS] ([NUMBER]) Business Day[s] thereafter.

(b) If the Leases contain obligations for utility charges, rent escalations for real estate taxes, operating expenses, cost-of-living adjustments, or other forms of rent other than fixed rent, and Seller shall have collected any portion of such additional rent for a period on or after the Closing Date, then the same shall be apportioned and credit given to Purchaser for such period. If such additional rent has not been billed, or if billed, has not been collected by Seller as of the Closing Date, then Purchaser shall: (i) in good faith and with due diligence bill and collect such additional rent and when the amount of such additional rent is determined and collected by Purchaser, the same shall be apportioned as provided herein; (ii) to the extent allocable to Seller, hold the first monies so

received in trust for the benefit of Seller; and (iii) to the extent required to pay the amounts due to Seller for the period up to the Closing Date, promptly remit the same to Seller.

(c) Each party agrees to remit reasonably promptly to the other the amount of such rents to which such party is so entitled and to account to the other party monthly in respect of same. Seller shall have the right from time to time for a period of [NUMBER IN WORDS] ([NUMBER]) Business Day[s] following the Closing, on reasonable prior notice to Purchaser, to review Purchaser's rental records with respect to the Property to ascertain the accuracy of such accountings. Purchaser shall have the right from time to time for a period of [NUMBER IN WORDS] ([NUMBER]) Business Day[s] following the Closing, on reasonable prior notice to Seller, to review Seller's rental records with respect to the Property to ascertain the accuracy of such accountings.

(d) Subsequent to the Closing, Purchaser agrees that it shall promptly render bills for and shall exercise reasonable diligence in the collection of any rent due to Seller pursuant to this Agreement. The obligations of Purchaser and Seller to pay over to the other rents collected as provided in this Section 10.01 shall be an independent covenant of Purchaser and Seller and such payments shall be made promptly without any setoff or deduction whatsoever. Nothing herein shall preclude Seller from asserting separate and independent claims against Tenants owing rent to which Seller is entitled hereunder, including, without limitation, the institution of such actions and proceedings as Seller shall deem necessary or advisable for the purpose of collecting such rent, except after the Closing Date, Seller shall not institute any summary dispossession, eviction, or similar proceedings which affect the possessory rights of any Tenant.

#### Example No. 2

### **PRORATIONS AND ADJUSTMENTS.**

(a) Prorations. Not less than ten (10) business days prior to Closing, Seller shall provide to Purchaser such information and verification reasonably necessary to support the prorations and adjustments under this Paragraph 7. The items in subparagraphs (i) through (iv) of this Paragraph 7(a) shall be prorated between Seller and Purchaser as of the close of the day immediately preceding the Closing Date, the Closing Date being a day of income and expense to Purchaser:

(i) Taxes and Assessments. Purchaser shall receive a credit for any accrued but unpaid real estate taxes and assessments (including without limitation any assessments imposed by private covenant) applicable to any period before the Closing Date, even if such taxes and assessments are not yet due and payable. If the amount of any such taxes have not been determined as of Closing, such credit shall be based on the most recent ascertainable taxes and shall be reprorated upon issuance of the final tax bill. Purchaser shall receive a credit for any special assessments which are levied or charged against the Property, whether or not then due and payable. If the taxing authority determines that through reappraisal or change in land use that "rollback" or similar taxes are due, the Seller shall be liable for such taxes. The provisions hereof shall survive the Closing.

(ii) Scheduled Rent. Purchaser shall receive a credit for any rent and other income (and any applicable state or local tax on rent) from the Property scheduled to be collected by Seller before Closing that applies to any period after Closing. All percentage rent shall be prorated, based upon ownership period during each percentage rent year, when the same are received. After Closing, Purchaser shall apply all rent and income collected by Purchaser from a tenant, first to such tenant's monthly rental for the month in which the Closing occurred and then to arrearages in the reverse order in which they were due, remitting to Seller, after deducting collection costs, any rent properly allocable to Seller's period of ownership. Purchaser may bill and attempt to collect such rent arrearages in the ordinary course of business, but shall not be obligated to do so or to engage a collection agency or take legal action to collect any rent arrearages. Seller shall not have the right to seek collection of any rents or other income applicable to any period before the Closing. Any rent or other income received by Seller after Closing which are owed to Purchaser shall be held in trust and remitted to Purchaser promptly after receipt.

(iii) Operating Expense Pass-throughs. Seller, as landlord under the Leases, is currently collecting from tenants under the Leases additional rent to cover taxes, insurance, utilities, maintenance and other operating costs and expenses (collectively, "Operating Expense Pass-throughs") incurred by Seller in connection with the ownership, operation, maintenance and management of the Property. If, at Closing, it can be determined whether the estimated prepayments of Operating Expense Pass-throughs collected by Seller prior to Closing were in excess of or less than any tenant's share of such expenses actually incurred by Seller, then

Purchaser shall receive a credit equal to the amount of any such excess, or if applicable, Seller shall receive a credit equal to the amount of any such underpayment. If the actual under- or overpayments received by Seller for Operating Expense Pass-throughs cannot be determined at Closing, then the parties shall perform their prorations, and make adjusting payments, when the correct amount owed to or from Seller for payments collected prior to Closing in respect of Operating Expense Pass-throughs can be determined. If Seller collected estimated prepayments of Operating Expense Pass-throughs attributable to any period after Closing, Seller shall pay or credit any such amounts to Purchaser at Closing.

(iv) Service Contracts. Seller or Purchaser, as the case may be, shall receive a credit for regular charges under Service Contracts assumed by Purchaser pursuant to this Agreement paid and applicable to Purchaser's period of ownership or payable and applicable to Seller's period of ownership, respectively.

(b) Tenant Reconciliations and Post-Closing Adjustments. After year-end (or other applicable period as Purchaser may reasonably determine) adjustments with tenants under Leases for Operating Expense Pass-throughs and receipt of final tax and other bills, Purchaser shall prepare and present to Seller a calculation of the reparation of such Operating Expense Pass-throughs, taxes and other items, based upon the actual amount of such items charged to or received by the parties for the year or other applicable fiscal period. The parties shall make the appropriate adjusting payment between them within 30 days after presentment to Seller of Purchaser's calculation. Seller may inspect Purchaser's books and records related to the Property to confirm the calculation. Either party shall be entitled to a post-Closing adjustment for any incorrect proration or adjustment. No other expense related to the ownership or operation of the Property shall be charged to or paid or assumed by Purchaser, whether allocable to any period before or after the Closing, other than those obligations expressly assumed by Purchaser.

(c) Leasing Commissions. Seller shall pay on or before closing, all leasing commissions due under all Leases, except those for renewals or expansions of existing Leases which Purchaser approves and are due as a result of the exercise of such right after the Closing.

(d) Tenant Improvements and Allowances. Tenant improvement expenses (including all hard and soft construction costs, whether payable to the contractor or the tenant), tenant allowances, rent abatement, moving expenses and other out-of-pocket costs which are the obligation of the landlord under Leases shall be allocated between the parties according to whether such obligations arise in connection with (1) Leases in place as of the date of this Agreement other than with respect to renewal or expansion rights under such Leases properly exercised after the date of this Agreement (collectively, "Existing TI Obligations"), or (2) Leases or amendments entered into during the pendency of this Agreement in conformity with the requirements of Paragraph 4(d) or renewals or expansion rights properly exercised after the date of this Agreement ("New TI Obligations");

(i) Existing TI Obligations. If, by Closing, Seller has not completed and paid in full Existing TI Obligations, then one hundred twenty-five percent (125%) of such costs, as reasonably agreed by Purchaser and Seller, shall be withheld from the Purchase Price at Closing, and shown as an expense of Seller, and placed in an escrow with the Title Company. Purchaser shall be responsible for completing and paying such Existing TI Obligations. Any funds held in the escrow shall be released to Purchaser without any requirement for the consent of Seller and shall be used by Purchaser to pay the landlord's share of such tenant improvements and allowances. If there are any funds remaining in the escrow after payment of such Existing TI Obligations, such excess shall be paid to Seller; but if the amount in escrow is insufficient for such purpose, Seller shall reimburse Purchaser for such deficiency upon demand. Alternatively, if landlord's obligation is a fixed amount or capable of exact quantification, Purchaser may elect as to any such Existing TI Obligations to receive a credit, equal to the landlord's obligation in respect of same, without any obligation to place such funds in escrow, and Purchaser shall assume landlord's responsibility for such Existing TI Obligations up to such credit amount. Any shortfall shall remain Seller's responsibility and paid to Purchaser upon demand.

(ii) New TI Obligations. At Closing, Purchaser shall reimburse Seller for the cost for New TI Obligations properly performed and paid for by Seller to the extent such obligations were expressly approved in writing by Purchaser, and Purchaser shall assume the obligation to perform and pay for such New TI Obligations.

(iii) Change Orders. From and after the Date of this Agreement and thereafter until the Closing hereunder has occurred or this Agreement has otherwise been terminated, Seller shall not agree to any change orders or additions to tenant improvements or changes in the scope of

work or specifications with respect to Existing TI Obligations or New TI Obligations without Purchaser's prior written approval.

(iv) Evidence of Payment. At Closing, Seller shall provide lien waivers, payment affidavits, certificates of completion, Tenant Estoppels and other evidence reasonably necessary or required by Purchaser to confirm Seller's compliance with its obligations pursuant to this Paragraph 7(d), and, to the extent such coverage is available, shall provide such indemnity or other assurance to enable the Title Company to insure against any claims against the Property arising from work performed before the Closing.

(e) Tenant Deposits. All tenant security deposits (and interest thereon if required by law or contract to be earned thereon) shall be transferred or credited to Purchaser at Closing. As of the Closing, Purchaser shall assume Seller's obligations related to tenant security deposits, but only to the extent they are properly credited and transferred to Purchaser.

(f) Wages. Purchaser shall not be liable for any wages, fringe benefits, payroll taxes, unemployment insurance contributions, accrued vacation pay, accrued pay for unused sick leave, accrued severance pay and other compensation accruing before Closing for employees at the Property or arising from the termination of such employees at or prior to Closing. Purchaser shall not be liable for any obligations accruing before Closing under any union contract applicable to any such employees or arising from the termination of any such employees at or prior to Closing.

(g) Additional Prorations. For matters not set forth, such as utilities, which cannot be prorated at Closing, Purchaser shall receive a credit at Closing for an amount equal to the previous month's invoice for such matter(s) ("Credit") which Purchaser shall hold for use in payment of the invoice when it is received, prorating the invoice for the period prior to Closing for which Seller shall be responsible. For all sums for which Purchaser receives a Credit hereunder, Purchaser shall account for all invoices within sixty (60) days following Closing. Any portion of the Credit not used to pay Seller's portion of any invoices shall be refunded to Seller at the expiration of this sixty (60) day period. A proration accounting shall also be delivered to Seller with any refund. Any shortfall shall be paid to Purchaser by Seller upon demand.

(h) Survival. The obligations set forth in this Paragraph survive Closing.