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Seminar 9

Purchase and Sale Agreements: A Blueprint for Negotiating Material Provisions

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by:

Carla M. Moynihan
Sherin and Lodgen LLP
101 Federal Street, 30th Floor
Boston, MA 02110
617.646.2043
cmmoynihhan@sherin.com

Louis Raymond
Irvine Company
110 Innovation Drive
Irvine, CA 92613
646.720.2297
lraymond@irvinecompany.com

Tara A. Scanlon
Holland & Knight
800 17th Street, N.W.
Washington, DC
202.457.7150
tara.scanlon@hklaw.com

Below are some of the retail specific hot topics that come up in negotiation of a purchase and sale. There are also certain differentiating positions that may be taken depending on the type of retail asset, such as a power center, strip center, street front retail portfolio etc.

- I. Retail Specific Conditions Precedent to Closing versus Contract Obligations. Purchase and Sale Agreements regarding retail assets have several provisions where the sellers often prefer to have retail specific property conditions be treated as a condition precedent rather than a seller obligation which could trigger a Seller default which could lead to liquidated damages or an obligation to reimburse the purchaser. The seller's confidence in their ability to meet the various conditions will often play into how hard a seller will negotiate to have the condition be a condition precedent instead of a covenant or obligation which could trigger a default. Purchasers will often push for a covenant or obligation in lieu of a condition precedent, if the condition is something that they believe is central to the price and reasonably achievable by seller and may want default remedies upon failure to incentivize the seller to satisfy the condition.
 - a. Estoppel Threshold: Typically, a condition imposed by purchasers will be that estoppels be obtained by Seller from the tenants at the property. Letters of intent can be very vague regarding how an estoppel condition will be satisfied and this negotiation usually revolves around certain key factors:
 - i. Threshold: The number of estoppels required to satisfy this condition is often heavily negotiated. Frequently there will be references to certain must-have or named tenants which are required, as well as a certain percentage of the rest of the tenants. Parties should be careful to specify whether the percentage applies to the number of tenants or the square footage of the shopping center.
 - ii. Form: Often a purchaser will want to use a particular form estoppel that is attached to the Purchase and Sale Agreement as an exhibit. Retail leases are much more likely than office or other asset types to have heavily negotiated tenant oriented estoppel provisions. In some cases, retailers may have negotiated the right to use their own estoppel format. It is important that the language provides that the seller will not be required to obtain estoppels which are not in compliance with the particular lease provisions. In addition, even if a lease doesn't specify that the retailers form will be used, many retailers will only use their own format.
 - iii. Clean or Dirty: From a purchaser's perspective, the condition should always specify that estoppels must be "clean" or not reference any defaults to satisfy the condition or obligation. It is not helpful if you meet a 100% estoppel threshold and 75% come back referencing landlord defaults. Sometimes the parties negotiate that they will accept a certain percentage of "dirty" estoppels. There are also instances where the parties negotiate materiality thresholds regarding what is and isn't a clean estoppel. Another way to handle this is to say that the estoppel will count towards the threshold as long as the information which is set forth in the estoppel is consistent with the rent roll information that was provided to the purchaser.
 - iv. Timing: Retailers often have very specific time frames and procedures that need to be met when issuing estoppel certificates. These often apply regardless of the time frames in a lease for when the estoppel is supposed to be returned. A landlord having default as a remedy isn't very helpful when they are trying to meet a threshold of clean estoppels returned, so generally it's important to work through the likely time periods established in the leases and with certain national tenants to ensure that the estoppels will be returned within the time frames required under the purchase and sale agreements. In addition, purchasers frequently request that estoppels be dated within a certain time period of the closing, and not be outdated or "stale." It is sometimes a delicate balance between asking too early and winding up with a stale estoppel and sending the request out to late and not receiving the estoppel back on time.
 - v. REA Estoppels. Many complex retail projects or retail components in mixed use projects have reciprocal easement agreement provisions where a buyer should request that seller obtain an estoppel addressing assessments, defaults and other concerns raised by the specific project documents. Control area provisions, ingress and egress and other

critical provisions should be addressed. This is also frequently required as part of the title due diligence.

- b. Co-Tenancy and Use Restrictions: The representations and warranties section of a purchase and sale agreement will often have some form of language that there are no defaults by landlord under the leases. Purchasers will push for more general catch all language and sellers will try to qualify these provisions. Some of the potential defaults that can come up in retail assets that are not found in other types of real property sales are set forth below and may require additional due diligence when speaking with clients regarding the specific language used in this type of representation and whether to address these particular types of issues as a breach of a representation which would lead into a default, or as a condition precedent to closing.
 - i. Co-Tenancy. Certain provisions may require that the shopping center, mall or portfolio continue to maintain certain occupancy levels or have certain anchor tenants remain in place as a seller obligation or condition precedent to closing. Tenant negotiated lease co-tenancy provisions could also come into play through a representation that there are no lease defaults by Landlord. Co-tenancy provisions commonly show up in two different formats, occupancy levels and named co-tenants, and each can have their own impacts on the way these issues are negotiated in the purchase and sale agreement. Particularly when the agreement may be negotiated before the purchaser has had an opportunity to review all of the applicable lease provisions.
 - 1. Occupancy Levels: Some contracts require that the shopping center maintain a certain occupancy level as a condition to closing or seller obligation. If this is a term that is agreed to, the parties need to carefully define how they are defining the test (e.g. percentage of square footage or number of tenants), address how to address tenants who are still in possession but not open and operating, and other property specific nuances that could impact how this type of condition is interpreted. As to tenant required occupancy covenants, the applicable time frames can be very important. Certain tenant co-tenancy provisions don't specify when a test must be satisfied and leave open the possibility that a tenant could make a claim of a co-tenancy violation in the past.
 - 2. Named Co-Tenant issues: Contract conditions requiring that certain specific tenants be in good standing, be open, not be insolvent etc. can also be challenging particularly when these requirements don't match the obligations of the tenants under their respective leases.
 - ii. Violation of Use Restrictions: Confirming that all lease use restrictions, prohibited uses, and exclusives are consistent is another area that could be triggered by general language that there are no events which could trigger a default under a lease, or could trip a condition precedent to closing that there be no landlord defaults under particular anchor or major leases.
- II. Retail Specific Reconciliation and True-Up Provisions. Retail assets have some of the most complicated reconciliation provisions of any type of real estate asset. The triple net pass-through provisions as well as percentage rent calculations both add an additional level of complexity when drafting closing reconciliation language in a purchase and sale agreement for a retail property.
- a. CAM Estimates and Payments to date. Purchaser's want to take over, and not have exposure to repay amounts which a seller may have over collected for CAM and taxes, but Seller's often want to settle up at closing and not have post-closing liability for amounts which were over-collected. It may be difficult to tell mid-year whether tenants have overpaid or underpaid. Additional expenses to be incurred in the balance of the year are also relevant as a buyer doesn't want to be short if expenses in the remainder of the year exceed amounts left to be collected, and the shortage is the result of an excess collected during the seller's period of ownership in the calendar year in which closing occurred. This will also impact credits between the buyer and the seller for the month in which closing has occurred.
 - b. CAM Reconciliation. Whether the buyer or seller handles the reconciliation of CAM and taxes for the year in which closing occurs may depend on the time of year the closing occurs, and the

complexity of the CAM records. If there is a current reconciliation under way at the time closing occurs that will typically be completed by the seller post-closing.

- c. Percentage Rent. Percentage rent can also provide additional complexities for reconciliation. First, depending on whether percentage rent is calculated on a monthly, quarterly or annual basis will impact how it is adjusted at closing. In addition, even if percentage rent is collected on a monthly basis, there typically would be an annual reconciliation some period of time after the end of the applicable calendar year. How the parties will handle that reconciliation and any over or under payment will also need to be addressed.
- d. On-going Tenant Allowance Obligations or Leasing Commissions. Retail projects can have very complex tenant allowance provisions which require detailed schedules and provisions to address whether seller or purchaser is required to fund unfunded allowance amounts at closing. In some cases, seller will provide a credit for future payments of an allowance. In other circumstances, buyers may be responsible for these payments. On-going commissions obligations are another area where there may be credits made at closing or post-closing obligations that need to be allocated between purchaser and seller.
- e. REA and Declarations. Retail projects often include shared expenses under declarations, reciprocal easement agreements or other shared costs among different owners or ground tenants in the shopping center. The annual assessments and other charges under these agreements need to be addressed in the closing true-up provisions.

III. Retail Specific Seller Covenants. Notwithstanding the preference of sellers to have as few, if any, ongoing obligations prior to Closing and for the purchaser to simply allow the seller to continue its operations in due course until such time as the seller receives the purchase price and the asset is transferred to the purchaser, most purchasers expect to receive some covenants. Any purchaser will want to ensure a certain level of care is undertaken by its seller with the understanding that the purchaser's consent rights as to any changes to conditions existing at time of PSA execution will inevitably increase once the deposit monies are hard – typically, following the expiration of due diligence period. In addition to using commercially reasonable efforts to obtain estoppel certificates/SNDAs from existing tenants, the most common seller covenants are as follows:

- a. Leases: From purchaser's perspective, seller should continue to enforce all of the terms and conditions of the leases in effect at the time the parties sign the PSA as well as not make any changes to same nor should seller enter into any new leases or lease extensions. On the other hand, sellers would find that negative covenant too restrictive particularly while the due diligence period is underway – which period may be several months in duration. Sellers would prefer to agree to lease in accordance with past practice without any approval rights by purchaser. Typically, the parties will compromise as to (i) materiality of the changes; (ii) purchaser's consent rights to material changes, new extensions and/or early termination; and (iii) certain set standards for entering into new leases. Some sellers may also seek to enter into temporary occupancy agreements (e.g., terminable in advance of closing) with agreement to deliver asset without said occupant(s).
- b. Financial Statements: Another concern of purchaser is that the asset does not suffer adverse material change with respect to income or operating expenses, particularly following the expiration of due diligence period. Accordingly, most purchasers will request being kept updated on a regular basis up through closing as to the financial conditions including all income and expenses, not simply the delivery of a rent roll. This obligation is in addition to seller's delivery of the prior 2-3 years of income and expenses to purchaser as part of the due diligence materials.
- c. Contracts: Similar to the lease covenant, purchasers will seek seller's agreement up to closing to continue to enforce all of its obligations under the contracts (e.g., property management, brokerage, landscaping, HVAC, and telecommunications) in effect at PSA execution as well as not make any changes to same nor enter into any new contracts or extensions. And sellers would find that negative covenant too restrictive and seek a compromise as to (i) materiality of the changes; and (ii) purchaser's consent rights to material changes, new extensions and/or early termination. Moreover, most sellers exclude from any consent rights of purchaser any contracts that allow for termination by seller without penalty upon 30 days or less notice. During the due diligence period, purchasers usually identify those contracts as to which seller will terminate as of the closing date.

d. Maintenance and Operation: Finally, sellers will typically start off with an agreement to maintain and operate the asset in substantially the same manner as past practice with full discretion and no consent rights of its purchaser. That said, sellers often agree to limitations on same following expiration of the due diligence period. Many purchasers will also seek detailed obligations as to maintenance of insurance as well as maintenance and repair obligations at existing levels utilizing a standard such as ensuring all repairs, maintenance and/or replacements are of same quality and condition as existed at end of due diligence period. Furthermore, as part of due diligence purchaser likely will have a property condition report undertaken. Depending on the results of same, there may be immediate repairs that buyer request be undertaken by seller rather than awaiting closing depending upon urgency of the immediate repair item and the length of interim time prior to the closing date.

IV. Retail Specific Representations and Warranties. Beyond the standard corporate type representations and warranties regarding the seller entity (e.g., organization, good standing, power, authority, and no conflict), most sellers are reluctant to take the risk of making any representation and warranty to purchaser that may otherwise be verified by purchaser through due diligence (e.g., title, zoning, property condition) versus items that are likely only known to seller (e.g., litigation, notices of violations). In addition, a seller's decision to provide a particular representation and warranty as well as whether to qualify same as to knowledge and/or materiality may also be influenced by the amount of time the seller has owned and operated the asset, the extent as to which seller has any prior representations and warranties from its acquisition of the asset that continue to survive, the length of the due diligence period, and the amount and quality of due diligence materials seller has delivered to purchaser. Many times, sellers will also seek to tie any knowledge qualifiers to certain individual(s) such as the property manager(s) operating the asset. Two of the more negotiated representations and warranties are described below:

a. Leases/Rent Roll: Sellers would expect purchasers to undertake their own due diligence on tenants and rents being paid including estoppel certificates and tenant interviews to support the rent roll numbers. Some sellers will seek to represent and warrant as to the rent roll that it is the one used by seller currently for property management and operations or that it is materially true and correct so that seller is not liable if there are some errors and buyer feels that seller has reviewed the rent roll to an acceptable degree of accuracy. That said, purchasers will seek to receive as many representations and warranties on economic factors including CAM, tenant defaults, tenant inducement amounts including free rent and tenant improvement allowances as seller will permit regardless of the ability of buyer to separately verify the information with each tenant.

b. Environmental: With respect to the property condition, especially as to environmental matters, most sellers will try to limit any representation and warranty to its ownership period and its knowledge with a carve out as to any environmental conditions set forth in environmental reports provided to purchaser as part of due diligence.

Finally, the parties will likely negotiate back and forth as to the survival period of the representation and warranties following closing, due to the fact that unless otherwise specified, all representations and warranties merge with the deed at closing. Sellers will seek the shortest survival periods possible while purchasers will want them to survive indefinitely. Since most breaches of any representation would inevitably be discovered by purchasers within a short time following closing, most would likely accept a survival period of 6 to 12 months, taking into consideration post-closing CAM reconciliations as applicable. With respect to the corporate type representations and a few others, sellers would be willing to allow those to survive indefinitely. Regardless, in the event damages are incurred by purchaser due to any breaches of the representations discovered prior to the expiration of the survival period, it is commonplace for the parties to establish a minimum threshold sometimes referred to as the "basket" before a purchaser may pursue a claim against seller, as well as to negotiate a cap or ceiling as to the aggregate limit of liability that a seller may incur as to same.

SAMPLE CLAUSES FOR RETAIL PURCHASE AND SALE AGREEMENTS

A. Sample Estoppel Clause:

Section 4.4 Estoppel Certificates. Seller shall make good faith efforts to obtain and deliver to Purchaser, at or prior to _____, "clean estoppel certificates" from the tenants and Adjoining Owners (defined below) under the Leases and Operating Agreement (defined below), as applicable, each addressed to Purchaser, in substantially the form of Exhibit B or C, as applicable attached hereto or in the event any Adjoining Owner or tenant fails to execute the requested form, then on such other form as may comply with the terms of such tenants' leases or the applicable Operating Agreement for at least (the "Required Estoppel Certificates"): (i) all adjoining property owners/anchors ("Adjoining Owners") that are bound by and/or parties to that certain Operating Agreement, as amended from time to time (as amended, the "Operating Agreement") described in Exhibit I hereof which require such Adjoining Owners to execute an estoppel, and (ii) tenants with leases in effect as of the Effective Date (exclusive of specialty licenses of one (1) year or less) who lease in the aggregate sixty-five percent (65%) of the gross leasable area of the improvements on the Property. Seller shall not be obligated to expend any funds in connection with obtaining any such tenant estoppel certificates, and the failure of Seller to obtain any such tenant estoppel certificates shall not be a breach or default hereunder so long as Seller makes good faith efforts to obtain them.

The term "clean estoppel letters" as used in this Section 4.4 means an estoppel in substantially the form provided by the first paragraph of this Section 4.4 that does not reveal (a) any material landlord/Seller/tenant and/or adjoining owner default that will not be cured by the Closing (an "Estoppel Default"), (b) any material adverse change in the economic terms of the subject agreement from those previously disclosed to Purchaser (an "Estoppel Discrepancy") or (c) any material and adverse issue of fact not already disclosed in the Leases or the Operating Agreement that will materially and adversely impact (as reasonably determined by Purchaser) (i) the value of the Property or (ii) the use of the Property.

As of the scheduled _____ Closing Date (subject to extension as hereinafter provided), if Seller has not obtained and delivered to Purchaser the Required Estoppel Certificates (the "Estoppel Requirement") then Purchaser shall be entitled to terminate this Agreement by written notice to Seller on the Closing Date and receive a return of the Earnest Money or waive the requirement and proceed to Closing.

Notwithstanding the foregoing, in the event that the Estoppel Requirement is not met as of the scheduled Closing Date, either Purchaser or Seller may by written notice to the other party, elect to extend the Closing Date for up to fourteen (14) business days to attempt to meet the Estoppel Requirement.

In the event that any estoppel certificates received by Seller and/or Purchaser prior to Closing show Estoppel Defaults or Estoppel Discrepancies which involve matters which in the aggregate exceed \$ _____ and Purchaser had no actual knowledge prior to the expiration of the Inspection Period of such Estoppel Defaults or Discrepancies (the "Material Estoppel Issues"), then Seller shall elect:

(i) if the Material Estoppel Issues involve amounts which exceed, in the aggregate, \$200,000 ("Estoppel Damage Threshold"), but are less than or equal to \$ _____ ("Estoppel Damage Cap") in the aggregate, Seller shall cause the Material Estoppel Issues which exceed the Material Estoppel Threshold to be cured on or before Closing or Purchaser shall receive a credit against the Purchase Price at Closing in an amount equal to the amount by which the Material Estoppel Issues which remain uncured as of Closing exceed the Estoppel Damage Threshold;

(ii) if the outstanding Material Estoppel Issues at Closing involve amounts in the aggregate which are less than the Estoppel Damage Threshold, then Seller shall not be obligated to cure such outstanding Material Estoppel Issues or provide Purchaser with a credit against the Purchase Price at Closing pursuant to this Section 4.4, and provided the Estoppel Requirement has been met, Purchaser shall have no right to terminate this Agreement pursuant to this Section 4.4 as a result of the Material Estoppel Issues;

(iii) if the Material Estoppel Issues involve amounts in the aggregate which exceed the Estoppel Damage Cap, Seller may elect to (A) cure all Material Estoppel Issues in excess of the Estoppel Damage Threshold on or before Closing or provide Purchaser with a credit against the Purchase Price in an amount equal to the amount of Material Estoppel Issues which were in excess of the Estoppel Damage Threshold and remain uncured or (B) to terminate this Agreement and return the Earnest Money to Purchaser; provided that if Seller elects to terminate this Agreement pursuant to clause (B), Purchaser shall have the right, by written notice to Seller given within five (5) business days following receipt of Seller's termination notice, to cause the parties to proceed to Closing, with Purchaser to receive a credit against the Purchase Price equal to \$ _____

to cover the Material Estoppel Issues which were in excess of the Estoppel Damage Threshold and were not cured (and thereafter Seller shall have no further obligations under this Section 4.4 with respect to Material Estoppel Issues disclosed by estoppel certificates provided to Purchaser).

In determining the Estoppel Damage Threshold for Material Estoppel Issues any matters which would accrue over time or are otherwise recurring in nature shall be discounted to present value using a discount rate of 10% per annum (for example, if there is an Estoppel Discrepancy of a shortfall of base rent of \$5.00 per foot for a 1,000 square foot tenant, and that tenant has five (5) years left on its lease term, the amount of the discrepancy would be an amount equal to \$25,000, discounted to present value at a discount rate of 10% per annum for the five (5) year period). Seller's cure and/or credit obligations shall only apply to the amount of Material Estoppel Issues in excess of the Estoppel Damage Threshold. If Seller cures or provides a credit for sufficient Material Estoppel Issues to reduce the amount outstanding to equal or fall below the Estoppel Damage Threshold, Seller shall not be further obligated under this provision. It shall not be deemed a default by Seller under this Section 4.4 in the event Seller is unable to cure any Material Estoppel Issues so long as Purchaser receives the credit against the Purchase Price described above, to the extent applicable. In no event shall any credits given by Seller or cure obligations of Seller exceed \$_____ except under clause (iii) above in which event Seller's aggregate credit and cure obligations shall not exceed the total Material Estoppel Issues less the Estoppel Damage Threshold.

Seller will request that all tenants and Adjoining Owners execute estoppel letters substantially in the forms called for by this Section 4.4. Purchaser acknowledges that Adjoining Owners may elect to use their own forms to the extent consistent with the Operating Agreement. Seller shall deliver to Purchaser copies of all estoppel letters that are to be sent to tenants and Adjoining Owners. Seller further agrees that all estoppels received by it will be delivered to Purchaser promptly after receipt, whether or not such estoppels are required in order to satisfy any of the requirements of this Section 4.4 and whether or not such estoppels are received before or after the Inspection Period or before or after the Closing. The provisions of the preceding sentence shall survive the Closing. Purchaser, at Seller's request, may assist in the process of obtaining estoppel letters.

B. Sample Reconciliation Clauses:

SAMPLE 1

ARTICLE 8 - Prorations, Deposits, Commissions

8.1 Prorations. At Closing, the following items shall be prorated as of the date of Closing with all items of income and expense attributable or allocable to the period from and after Closing for the Property being borne by Purchaser from and after (but including) the date of Closing and all such items attributable to the period prior to Closing to be borne by Seller: Tenant Receivables (defined below) and other income and rents that have been collected by Seller as of Closing; fees and assessments; prepaid expenses and obligations under Service Contracts which survive closing operating expenses; real and personal ad valorem taxes ("Taxes"); and any assessments under the Operating Agreement payable by the owner of the Property for the then-current calendar year of Closing (with Purchaser responsible for the portion of such assessments attributable to the period from and after Closing and Seller responsible for the portion attributable to the period prior to Closing). Specifically, the following shall apply to such prorations and to post-Closing collections of Tenant Receivables:

8.1.1 Taxes. If Taxes for the year of Closing are not known or cannot be reasonably estimated, Taxes shall be prorated based on Taxes for the year prior to Closing. Any additional Taxes relating to the year of Closing arising out of a change in ownership and attributable to the period from and after Closing shall be assumed by Purchaser effective as of Closing and paid by Purchaser when due and payable, and Purchaser shall indemnify Seller from and against any and all such Taxes, which indemnification obligation shall survive the Closing. Special assessments, if any, due and payable prior to Closing, shall be paid by Seller, with Purchaser being responsible for paying any special assessment due and payable following Closing.

8.1.2 Utilities. Purchaser shall take all steps necessary to effectuate the transfer of all utilities to its name as of the Closing Date, and where necessary, post deposits with the utility companies. Seller shall be entitled to recover any and all deposits held by any utility company as of the Closing Date or, alternatively, to take a credit for same on the settlement statement at Closing if said deposit remains in place.

8.1.3 Tenant Receivables. Rents due from tenants under Leases and operating expenses and/or taxes payable by tenants under Leases (including estimated payments) (collectively, "Tenant Receivables") and not collected by Seller as of Closing shall not be prorated between Seller and Purchaser at Closing but shall be apportioned on the basis of the period for which the same is earned and payable and if, as and when collected, as follows:

(a) Rent and other income received from tenants under Leases after Closing shall be applied in the following order of priority: (i) first, if received during the month the Closing occurs, to payment of the current Tenant Receivables then due for the month in which the Closing Date occurs, which amount shall be apportioned between Purchaser and Seller as of the Closing Date as set forth in Section 8.1 hereof (with Seller's portion thereof to be delivered to Seller); (ii) second, to Tenant Receivables first coming due after Closing and applicable to the period of time after Closing, which amount shall be retained by Purchaser; (iii) third, to payment of Tenant Receivables first coming due after Closing but applicable to the period of time before Closing, including, without limitation, the Tenant Receivables described in Subsection 8.1.3(b) below (collectively, "Unbilled Tenant Receivables"), which amount shall be delivered to Seller (net of reasonable costs of collection); and (iv) thereafter, to delinquent Tenant Receivables which were due and payable as of Closing but not collected by Seller as of Closing (collectively, "Uncollected Delinquent Tenant Receivables"), which amount shall be delivered to Seller (net of reasonable costs collection). Notwithstanding the foregoing, Seller shall have the right to pursue the collection of Uncollected Delinquent Tenant Receivables for a period of one (1) year after Closing without prejudice to Seller's rights or Purchaser's obligations hereunder, provided, however, that Seller shall not have the right to institute litigation or other similar proceedings against any tenant for any Uncollected Delinquent Tenant Receivables until the date which is 120 days following Closing, Seller shall give Purchaser at least thirty (30) days prior written notice before instituting any legal proceedings to collection the Uncollected Delinquent Tenant Receivables and Seller shall have no right to cause any such tenant to be evicted (and shall not institute any proceeding to evict or dispossess any tenant) or to exercise any other "landlord" remedy (as set forth in such tenant's Lease) against such tenant other than to sue for collection, Seller shall not take any action which would limit Purchaser rights to pursue any remedy for any defaults under any Lease. Purchaser, by written notice to Seller within twenty (20) days of receipt of Seller's notice, may restrict Seller from collecting such Uncollected Delinquent Tenant Receivables, but only if Purchaser first pays Seller such Uncollected Delinquent Tenant Receivables in exchange for Seller's assignment to Purchaser of all of Seller's rights and causes of action with respect thereto. Subject to Section 8.1.3(b) below, any sums received by Purchaser to which Seller is entitled shall be held in trust for Seller on account

of such past due rents payable to Seller, and Purchaser shall remit to Seller any such sums received by Purchaser to which Seller is entitled within thirty (30) days after receipt thereof less reasonable, actual costs and expenses of collection, including reasonable attorneys' fees, court costs and disbursements, if any. Seller expressly agrees that if Seller receives any amounts after the Closing Date which are attributable, in whole or in part, to any period on or after the Closing Date, Seller shall remit to Purchaser that portion of the monies so received by Seller to which Purchaser is entitled within thirty (30) days after receipt thereof. With respect to Unbilled Tenant Receivables, Purchaser covenants and agrees to (A) bill the same when billable and (B) reasonably cooperate with Seller to determine the correct amount of operating expenses and/or taxes due. The provisions of this Subsection 8.1.3(a) shall survive the Closing.

(b) To the extent tenants under Leases pay monthly estimates of common area maintenance charges, central plant charges, taxes and similar expenses (collectively, "Charges") with an adjustment at the end of each fiscal year applicable to Charges, they shall be prorated in accordance with this Section 8.1.3(b). Until the adjustment described in this Section is made, all amounts received by Seller as interim payments of Charges before the Closing Date shall be retained by Seller, except that all interim payments received by either party for the month in which the Closing Date occurs shall be prorated as between Seller and Purchaser based upon the number of days in that month and the party receiving the interim payment shall remit to (if received on or after the Closing Date) or credit (if received before the Closing Date) the other party its proportionate share. All amounts received by Purchaser as interim payments of Charges on or after the Closing Date shall be retained by Purchaser until year-end adjustment and determination of Seller's allocable share thereof except to the extent provided in Section 8.1.3(a) above. At the conclusion of the common area fiscal year, Seller's allocable share of actual Charges for Leases in effect as of the Closing Date shall be determined by multiplying the total payments due from tenants for such fiscal year (the sum of estimated payments plus or minus year-end adjustments) by a fraction, the numerator of which is Seller's actual cost of providing common area maintenance services and taxes (as the case may be) prior to the Closing Date (within that portion of the fiscal year prior to Closing Date in which the Lease is in effect), and the denominator of which is the cost of providing such services and paying such taxes for the entire fiscal year (or that portion of the fiscal year in which the Lease is in effect). If any Lease provides for the adjustment of Charges on the basis of a period other than the common area fiscal year, a reasonable method of calculating the adjustment for that tenant will be determined so that all adjustments can be made at the same time. If, on the basis of amounts actually incurred and the estimated payments received by Seller prior to the Closing Date, Seller has retained amounts in excess of its allocable share, it shall remit, within thirty (30) days after notice from Purchaser of the excess owed Purchaser, such excess to Purchaser. If, on the basis of the foregoing amounts, Seller has retained less than its allocable share, Purchaser shall remit, within thirty (30) days after notice from Seller of the amount owed Seller, such amount to Seller to the extent received from the tenants of the Property. In addition, if any tenant challenges or audits any Charges for the years 2001, 2002 and 2003, Seller shall be responsible for paying all amounts owed to the tenants and shall remit the amounts to Purchaser within thirty (30) days after written notice from Purchase as to the amounts owed.

With respect to any percentage rents payable under the Leases, such amounts shall be prorated if, as and when such amounts are collected for any tenants paying percentage rent annually or who pay monthly but reconcile such amounts on an annual basis. Percentage rents shall be deemed to have been received in equal installments during the measuring periods to which they relate under the Leases, not the month in which such amounts are collected, and shall be prorated based on the number of days during such measuring periods that Seller and Purchaser respectively owned the Property. For Tenants that pay percentage rent on a monthly basis without an annual reconciliation, percentage rent and base sales shall be pro-rated as provided in 8.1.3(a) in the same manner as rent. If such calculation shows that a net amount is owed by Purchaser to Seller, Purchaser shall remit such amounts to Seller within thirty (30) days of the receipt of such amounts by Purchaser. Notwithstanding anything to the contrary in this Section 8.1.3, Purchaser shall be entitled to withhold amounts payable to Seller on account of percentage rents or other payments received by Purchaser until the earlier to occur of (i) the date all final prorations and adjustments have been completed pursuant to Article 8 or (ii) August 30, 2004 and to offset against any amounts owed to Seller any sum owed to Purchaser pursuant to this Article 8. With respect to percentage rents, Purchaser covenants and agrees to use reasonable efforts to collect the same from the tenants when due and payable under the terms of the Leases.

Notwithstanding anything to the contrary contained herein, in the event any Tenants are paying a percentage of such Tenants' sales on a monthly basis in lieu of fixed rents under the Leases, and such rents have not been collected by Seller as of Closing, then such rents shall be apportioned on the basis of the period for which the same is payable and if, as and when collected, in accordance with Section 8.1.3(a), above.

The provisions of this Section 8.1.3(b) shall survive the Closing.

8.2 Leasing Costs. Seller agrees to pay or discharge at or prior to Closing all leasing commissions under the Leasing Commission Agreements, and all costs for tenant improvements, legal fees and other costs and expenses (collectively, "Leasing Costs") with respect to Leases in force as of or prior to the Effective Date and any other lease costs designated in Schedule 8.2 as Seller's obligation; provided, however, that Seller shall have no obligation to pay, and Purchaser shall assume the obligation to pay, all Leasing Costs payable with respect to any option to renew or option to expand that has not been exercised on or prior to the Effective Date and the leasing commissions designated as Purchaser's obligation on Schedule 8.2 annexed hereto and any leasing commissions for deals approved by Purchaser under Article 6, which obligation shall survive the Closing. Except to the extent set forth above, as of Closing, Purchaser shall assume Seller's obligations for Leasing Costs incurred with respect to Leases and Lease renewals and extensions executed subsequent to the Effective Date and any prospective Leasing Costs assumed pursuant to Section 6.1.4. The obligations of Purchaser and Seller hereunder shall survive the Closing.

8.3 Closing Costs. Closing costs shall be allocated between Seller and Purchaser in accordance with Section 1.2.

8.4 Final Adjustment After Closing. If final bills are not available or cannot be issued prior to Closing for any item being prorated under Section 8.1, then Purchaser and Seller agree to allocate such items on a fair and equitable basis as soon as such bills are available, final adjustment to be made as soon as reasonably possible after the Closing. Payments in connection with the final adjustment shall be due within thirty (30) days following the determination of the final amounts owed. All such rights and obligations shall survive the Closing for a period of eight (8) months, after which time if final bills are not available the parties agree to accept as final the allocation made at Closing.

8.5 Tenant Deposits. All tenant security deposits collected and not applied by Seller (and interest thereon if required by law or contract) 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 credited or transferred to Purchaser.

8.6 Commissions. Seller shall be responsible to Broker for a real estate sales commission at Closing (but only in the event of a Closing in strict accordance with this Agreement) in accordance with a separate agreement between Seller and Broker. Other than as stated above in this Section 8.6, Seller and Purchaser each represent and warrant to the other that no real estate brokerage commission is payable to any person or entity in connection with the transaction contemplated hereby as a result of contacts with the representing party, and each agrees to and does hereby indemnify and hold the other harmless against the payment of any commission to any other person or entity claiming by, through or under Seller or Purchaser, as applicable. This indemnification shall extend to any and all claims, liabilities, costs and expenses (including reasonable attorneys' fees and litigation costs) arising as a result of such claims and shall survive the Closing.

SAMPLE 2

6.3 Prorations. The following shall be prorated as of the Closing Date and be adjusted against the Purchase Price due at Closing:

6.3.1 Rents and any other amounts collected from the Tenants for that period up to and including the Closing Date. Percentage rent payable under any of the Leases shall be determined at the end of the lease year (or other applicable accounting period) in which the Closing occurs, and in the event any percentage rent is due and owing with respect to same, then such reconciliation shall be handled in accordance with the post-closing reconciliation set forth in Section 6.6 below.

6.3.2 Security deposits held by Seller from the Tenants;

6.3.3 Any unpaid and delinquent taxes, assessments, water charges or sewer rents, and any other liens and encumbrances due and owing, which Seller is obligated pursuant to the terms of this Agreement or the terms of the Lease to pay and discharge, together with the cost of recording or filing any instruments necessary to discharge the same of record, shall be paid at or prior to the Closing. If any such payments made by Seller at or prior to the Closing are payments made in advance for periods occurring after the Closing Date, the portion applying to the period after the Closing Date shall be paid by Buyer;

6.3.4 To the extent practicable, Seller shall cause any and all public utilities to issue bills to Seller on the basis of readings made as of the Closing Date and all such bills shall be paid by Seller. Buyer shall, if required by the respective utility companies or agencies, pay any necessary deposits in order to effect the transfer of utility service to Buyer. To the extent final expense figures are unavailable on the Closing Date, prorations shall be made based on estimates, and adjusting payments will be made by Seller or Buyer, as applicable, upon receipt of final figures, no later than forty-five (45) days after the Closing Date; and

6.3.5 To the extent applicable, Buyer shall provide Seller with a credit at Closing in an amount equal to any amounts Seller has incurred to obtain updated title insurance policy commitments at the request of Buyer and/or updated real estate surveys for the Property at the request of Buyer (the "Reimbursement").

6.4 Security Deposits in Form of Letters of Credit. If any security deposits shall be held by Seller in the form of letters of credit or surety bonds, Seller shall assign its rights thereunder to Buyer and shall cooperate reasonably with Buyer in respect of the reissuance of any such letters of credit or bonds in the name of Buyer. After Closing, until such letters of credit or bonds have been reissued in the name of Buyer, Seller shall hold each such letter of credit for the benefit of Buyer and shall draw on such letter of credit at Buyer's direction, until a substitute letter of credit is drawn in favor of Buyer and notification of delivery of such substitute letter of credit is given to Seller by Buyer, whereupon Seller shall promptly surrender such letter of credit to the applicable tenant, provided, however, that Buyer shall indemnify, defend and hold harmless Seller from any charge or claim from a third party that such post-closing draw request was improper or in violation of such letter of credit or surety bond. Seller shall reciprocally indemnify, defend and hold harmless Buyer from any charge or claim from a third party that any pre-closing draw request was improper or in violation of such letter of credit or surety bond.

6.5 Purpose and Intent. Except as expressly provided herein, the purpose and intent as to the provisions of prorations and apportionments set forth in this Section 6 and elsewhere in this Agreement is that Seller shall bear all expenses of ownership and operation of the Property and shall receive all income therefrom accruing through 11:59 p.m. of the day preceding the Closing Date and Buyer shall bear all such expenses and receive all such income accruing thereafter.

6.6 Post-Closing Collections. Buyer shall use commercially reasonable efforts during the six (6) month period immediately following the Closing to collect and promptly remit to Seller rents or other amounts due to the Seller for the period prior to the Closing. Buyer shall apply rents or other amounts received: first, to any cost of collecting such rents; second, to any amounts currently due to Buyer; third, to any amounts past due for the month in which the Closing occurs to be prorated between Seller and Buyer; fourth, to any amounts past due to Seller for periods prior to the month in which the Closing occurs; and the balance to be retained by Buyer. Notwithstanding the foregoing, the parties acknowledge that certain rents, including but not limited to the expense and reimbursement of tenant pass-through items such as operating expenses and common area maintenance charges, insurance charges and real estate taxes and assessments, attributable to the period prior to Closing may not have been billed or collected as of Closing or may have been prepaid by tenants. On or before March 31, 2020, Seller shall furnish to Buyer a reconciliation, together with supporting documentation, of all income and corresponding expenses associated with the rents (including but not limited to common area maintenance charges, insurance and real estate taxes) collected or paid by Seller, as the case may be, as well as percentage rent due from any tenant, for the year of Closing, including an analysis of any sums due by each tenant to Seller. In the event there are sums due from Seller to tenants, Seller shall remit such payments to Buyer simultaneously with the final reconciliation, and the Buyer shall forward such payments to the respective tenants. The Buyer shall be responsible for invoicing all tenants for the balance of their respective portions of the rents (including but not limited to common area maintenance, insurance, real estate taxes and similar charges) with regard to the year of Closing. The Seller shall provide Buyer with sufficient back-up invoices and records so that the Buyer may invoice the tenants. All rent reconciliations collected by the Buyer shall be delivered to Seller in the manner provided for in this Section 9.6. For purposes of this Section 9.6 percentage rent payable by any tenant of the Property that owes percentage rent for year of Closing shall be deemed earned ratably throughout the term of such lease for such calendar year and prorated accordingly. This Section shall survive the Closing.

C. Sample Seller Covenants Clause:

4. **Seller's Covenants For Period Prior To Closing.** Until Closing, Seller covenants and agrees as follows:

4.1 **Leases.** Between the Effective Date and the Closing Date, Seller will enforce the Leases in accordance with their terms and will not terminate or modify existing Leases or grant additional renewal rights to any tenant without the consent of Buyer, which consent shall not be unreasonably withheld prior to the end of the Due Diligence Period and which consent may be withheld in Buyer's sole discretion after the end of the Due Diligence Period. Seller shall not enter into (i) any new Leases and/or (ii) any extensions of the Lease with Petco, without the consent of Buyer, which consent shall not be unreasonably withheld prior to the end of the Due Diligence Period and which consent may be withheld in Buyer's sole discretion after the end of the Due Diligence Period.

4.2 **Financial Statements.** Seller shall furnish promptly to Buyer copies of the Seller Financial Statements (as defined herein) together with unaudited updated monthly reports of cash flow for interim periods beginning after the concluding date(s) of the latest of such Seller Financial Statements, to the Closing Date.

4.3 **Contracts.** Between the date hereof and the Closing, Seller covenants to fulfill all of its obligations in all material respects under all Contracts (as defined herein), and covenants not to terminate or modify any such Contracts or enter into any new contractual obligations relating to the Property without the consent of Buyer, which consent shall not be unreasonably withheld prior to the end of the Due Diligence Period and which consent may be withheld in Buyer's sole discretion after the end of the Due Diligence Period, except such obligations as are freely terminable without penalty upon not more than thirty (30) days' written notice. Upon notice from Buyer given after the expiration of the Due Diligence Period without termination of this Agreement by Buyer, Seller will terminate such Contracts as are designated by Buyer, in accordance with the terms of such Contracts, effective as of the Closing Date.

4.4 **Maintenance and Operation of Property.** From and after the date hereof and until the Closing, Seller shall keep and maintain and operate the Property substantially in the manner in which it is currently being maintained and operated and covenants not to cause or permit any waste of the Property nor undertake any action with respect to the operation thereof outside the ordinary course of business without Buyer's prior written consent. In connection therewith, Seller covenants to make all necessary repairs and replacements until the Closing so that the Property shall be of substantially the same quality and condition at the time of Closing as on the date hereof. Seller covenants not to remove from the Improvements or the Real Property any article included in the Personal Property.

4.5 **Insurance.** Seller shall maintain such casualty and liability insurance on the Property as is presently being maintained.

4.6 **Tenant Estoppel Certificates and SNDAs.** Seller agrees to use commercially reasonable efforts to obtain current tenant estoppel certificates and SNDAs acceptable to Buyer from all Tenants under the Leases, using the form of Tenant Estoppel Certificate attached hereto as Exhibit 4.6 (the "Tenant Estoppel Certificate"), and the form of SNDA attached hereto as Exhibit 4.6(A) (the "SNDA"). The Tenant Estoppel Certificates shall confirm the matters reflected by the Rent Roll as to the particular tenant and shall otherwise be reasonably acceptable to Buyer in all material respects. The Seller shall prepare the Tenant Estoppel Certificates and SNDAs and submit them to Buyer for its prior approval prior to sending the Tenant Estoppel Certificates and SNDAs to the Tenants, which approval shall be deemed granted if Buyer fails to respond to such request for approval within three (3) business days following Buyer's receipt thereof. To the extent any Tenant has not returned its Tenant Estoppel Certificate and/or SNDAs prior to the end of the Due Diligence Period, thereafter Buyer shall be responsible for following up with said Tenants and shall diligently pursue them prior to Closing. As a condition for Closing, Buyer shall have received, on or before three (3) business days prior to the Closing Date, tenant estoppel certificates from (i) _____, _____, and at least two (2) of the following tenants of the Shopping Center: _____, _____, _____, _____, and _____ (each an outparcel tenant) for a total of at least four (4) tenant estoppel certificates (collectively, the "**Major Tenants**"), and (ii) fifty percent (50%) by number of the remaining Tenants (the tenants in (i) and (ii) are collectively, the "**Required Tenants**"). Notwithstanding the foregoing, Seller may provide Landlord Estoppel Certificates to substitute for up to two of the Required Tenants so long as they are not Major Tenants. As used herein, a "**Tenant Estoppel Certificate**" shall mean an estoppel certificate which is dated no more than forty-five (45) days prior to Closing and meets the following conditions: (a) it is: (i) substantially in the form attached hereto as Exhibit 4.6 (except that in the event any Tenant deletes the Section 21 certification regarding environmental matters contained therein, such deletion shall not deem the certificate unacceptable), (ii) in the standard form utilized by the tenant for its leased properties (if such tenant is a

"national tenant"), or (iii) such other form as complies with the provisions of any Lease that specifies the form or content of an estoppel to be delivered by the tenant thereunder; (b) it shall not disclose any material defaults by Seller as landlord or Tenant under the applicable Lease; (c) it shall not contain any information which is materially inconsistent with the information contained in the Lease and Rent Roll and shall not disclose any matter materially adverse to the Property, and (d) it shall not reflect a valid monetary obligation of Seller, as landlord, under the Lease. Any failure of Buyer to obtain Tenant Estoppel Certificates from all Required Tenants within the time period required above, as it may be extended, shall not constitute a default by Seller under this Agreement, and in such case, Buyer's sole remedy shall be to either (x) waive such failure and proceed to Closing, or (y) terminate this Agreement by written notice to Seller prior to the Closing Date, in which case the Deposit shall be returned to Buyer and neither party shall have any further obligations under this Agreement. Seller shall deliver any received tenant estoppel certificate to Buyer within two (2) business days after receipt from the tenant. Buyer shall deliver to Seller any received tenant estoppel certificate within three (3) business days after receipt from the tenant. An estoppel certificate shall be deemed approved by Buyer unless written notice (the "**Estoppel Objection Notice**") stating the manner in which any such estoppel certificate deviates from the requirements for a Tenant Estoppel as set forth in this Section 4.6 ("**Estoppel Objection Matters**") is delivered to Seller not later than 5:00 pm Eastern time on the third (3rd) business day following Buyer's receipt from tenant or from Seller of any such estoppel certificate.

If Seller receives an Estoppel Objection Notice within such three (3) business day period, then Seller may, but shall not be obligated to, agree to cure some or all of the Estoppel Objection Matters described in such Estoppel Objection Notice by delivering written notice ("**Estoppel Cure Notice**") to Buyer of Seller's election to cure some or all of the Estoppel Obligation Matters within three (3) business days following Seller's receipt of Buyer's Estoppel Objection Notice. The previous provision to the contrary notwithstanding, the Seller shall be obligated to pay any monetary obligation of Seller as landlord under the Lease. If Seller fails to deliver Seller's Estoppel Cure Notice to Buyer within such time period, Seller shall be deemed to have elected not to cure any such Estoppel Objection Matters. If Seller timely elects (pursuant to Seller's Estoppel Cure Notice) to cure one or more of the Estoppel Objection Matters, then Seller shall have until the last business day immediately preceding the Closing Date to cure such Estoppel Objection Matters that Seller has committed to cure, and shall pay all costs associated with such cure.

If Seller either: (a) elects (or is deemed to have elected) not to cure one or more of the Estoppel Objection Matters, provided such Estoppel Objection Matters are not monetary obligations that Seller is obligated to cure on or before the Closing, or (b) fails to cure an Estoppel Objection Matter that Seller has elected (pursuant to Seller's Estoppel Cure Notice) to cure by the Closing, then Seller shall not be in default under this Agreement and, in such case, Buyer may exercise one of the following options: (1) continue this Agreement in effect without modification and purchase and acquire the Property in accordance with the terms of this Agreement, subject to such Estoppel Objection Matters; or (2) terminate this Agreement within five (5) business days after either clause (a) or (b) above has occurred, by delivering written notice of termination ("**Notice of Termination**") to Seller and Escrow Agent, in which event the Deposit shall be returned to Buyer and neither party shall have any further obligations to the other party hereunder.

4.7 Notices. Seller shall furnish to Buyer copies of any notice, claim or demand received by Seller which would materially change any representation given by Seller herein within two (2) business days after receipt of such notice.

D. Sample Representations and Warranties Clause:

5. Representations and Warranties.

5.1 By Seller. Except as set forth on the Schedules to this Agreement, Seller hereby represents and warrants to Buyer as of the Effective Date and as of the Closing Date, as follows:

5.1.1 Organization and Good Standing. Seller is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of _____ and has the full power and authority (corporate or otherwise) to own, lease and operate the Shopping Center and Property as now being conducted. Seller is duly qualified or registered to transact business under the laws of each jurisdiction where the character of its activities or the location of the properties owned or leased by it require such qualification or registration, except where the failure to be so qualified does not have a material adverse effect on the Shopping Center or Property.

5.1.2 Power and Authority. Seller has the power, capacity and authority to execute and deliver this Agreement, to perform hereunder, and to consummate the Transaction. The execution, delivery and performance by Seller of this Agreement and each and every agreement, document and instrument provided for herein have been duly authorized and approved by Seller. This Agreement and each and every agreement, document and instrument to be executed, delivered and performed by Seller in connection herewith, constitute or will, when executed and delivered, constitute the valid and legally binding obligations of Seller, enforceable against it in accordance with their respective terms, except as enforceability may be limited by applicable equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws from time to time in effect affecting the enforcement of creditors' rights generally.

5.1.3 No Conflict. The execution, delivery and performance by Seller of this Agreement or any agreements required hereby to be executed by Seller in connection herewith will not (a) constitute a violation of, conflict with or constitute a default under any term or provision of Seller's organizational documents, (b) constitute a violation of any statute, ordinance, judgment, order, decree, regulation or rule of any governmental authority, (c) result in the creation of any encumbrance upon the Shopping Center or the Property pursuant to the provisions of any of the foregoing, or (d) require any authorization, consent, approval, exemption or other action by or notice or declaration to any governmental authority.

5.1.4 Condemnation. Seller has not received any written notice from any governmental authority and does not have any knowledge of any condemnation proceedings affecting the Property or contemplated against the Property.

5.1.5 Leases. Except for the tenants in possession of the Improvements pursuant to the Leases under Schedule 1.1.7, there are no other parties in possession of the Improvements. There are no Leases affecting the Property, oral or written, except as listed on Schedule 1.1.7. Seller has delivered to Buyer true, complete and correct copies of the Leases, including all extensions, amendments, supplements and modifications related thereto. No rent or reimbursement under any Lease has been paid more than one (1) month in advance. All security deposits due under the Leases have been paid, and all are set forth on the Rent Roll, as defined below. Seller has neither received nor delivered written notice of any uncured default under any Lease. No tenant under any Lease has or will be promised any inducement, concession or consideration by Seller other than as expressly stated in such Lease, and except as stated in such Lease there are and will be no side agreements between Seller and any tenant. There are no outstanding and unpaid tenant improvement allowances owed to any tenant under any Lease except as set forth on Schedule 1.1.7(A). There are no leasing commissions or other obligations to brokers due or which will become due under any of the Leases as of Closing except as set forth on Schedule 1.1.7(B).

5.1.6 Foreign Person. Seller is not a "foreign person" as defined in, and Buyer shall not be required to withhold any portion of the Purchase Price pursuant to, Internal Revenue Code Section 1445.

5.1.7 Litigation. There is no litigation or proceeding pending against the Property, and Seller has no knowledge of any threatened, and has not received written notice of, any actions, suits, or proceedings of any kind having been or likely to be instituted against Seller in any court or before or by any governmental department, commission, board, bureau, agency, or other instrumentality which are now ongoing or threatened in connection with the Property that would materially adversely affect the ability of Seller to perform its obligations under this Agreement.

5.1.8 Intellectual Property. Seller has no trade names, trademarks or copyrights used in connection with the Shopping Center or the Property.

5.1.9 Violations. To Seller's Knowledge, (i) there are no violations of any building, fire, environmental or health law, or ordinance or regulation of any Federal, state or municipal governmental department, agency, board, or authority relating to the Property or the Shopping Center that have not been cured; (ii) Seller has not entered into any commitments or agreements that remain effective with obligations yet to be performed with any governmental authorities or agencies affecting the Property that have not been disclosed in writing to Buyer; and (iii) there are no open building permits or fire code violations with regard to the Property.

5.1.10 Title. Seller has good and marketable title to all of the Property, free and clear of any encumbrances except (i) those that will be released on or before the Closing Date, (ii) the Leases, and (iii) other Permitted Encumbrances. No person has a right of first refusal, option to purchase, or other right to purchase the Property pursuant to a written agreement to which Seller is a party or is otherwise bound. The Property is not subject to any unrecorded right of any third party to acquire any interest therein.

5.1.11 Environmental. Except to the extent as set forth in the Due Diligence Materials, to Seller's Knowledge, (i) Seller is in compliance in all material respects with all applicable Environmental Laws; (ii) Seller has not received any claim nor to Seller's Knowledge is there any basis for any claim against Seller related to the presence of Hazardous Substances at the Property; and (iii) Seller is not aware of any release of Hazardous Substances having occurred at the Property during or prior to Seller's ownership thereof.

5.1.12 Mechanics' Liens. There are no amounts presently due and owing to any person on account of labor performed or materials provided to Seller in connection with construction of, at or in the Land or buildings.

5.1.13 Financial Statements. Each of the Seller's financial statements (collectively, the "**Financial Statements**") delivered or to be delivered to Buyer hereunder has or will have been prepared in accordance with GAAP and to Seller's Knowledge presents fairly in all material respects the financial condition, results of operations and cash flows for the Property as of and for the periods to which they relate.

5.1.14 Contracts. Except for the Leases and the service contracts listed on Exhibit 5.1.14 (collectively, the "**Contracts**"), Seller has not entered into any management, service, maintenance, utility or other contracts or agreements affecting the Property, oral or written, and to Seller's Knowledge no other Contracts exist. Copies of the Contracts, which have been delivered to Buyer or shall be delivered to Buyer within two (2) business days of the Effective Date, are true, correct and complete copies thereof. None of the Contracts extend beyond the Closing Date which would bind Buyer or encumber the Property more than thirty (30) days after Closing. All Contracts are in full force and effect in accordance with their respective terms, and all obligations of Seller under the Contracts required to be performed to date have been performed in all material respects. No party to any Contract has asserted in writing any claim of default or offset against Seller with respect thereto, and to Seller's Knowledge, no event has occurred or failed to occur, which would in any way affect the validity or enforceability of any such Contract.

5.1.15 Zoning; Compliance with Law. To Seller's Knowledge, (i) the Property is in compliance with all applicable laws, regulations and ordinances, (ii) the Property is properly zoned for its present use without variance or grandfathering as a nonconforming use (including without limitation parking and the sale of alcoholic beverages, if applicable), (iii) the Property is not subject to any local, regional or state development order, and (iv) there are no outstanding assessments, impact fees or other charges related to the Property.

5.1.16 Rent Roll. The rent roll attached hereto as Exhibit 5.1.16 (the "**Rent Roll**") is true and correct in all material respects.

5.1.17 Assessments. To Seller's knowledge, there are no charges, assessments or liens for public improvements concerning the Property which remain unpaid, and Seller has not received any written notice of any charges, assessments or liens for public improvements concerning the Property.

5.1.18 Notice of Default Under Recorded Documents. Seller has not received written notice of any uncured default under any recorded documents affecting the Property.

5.2 By Buyer. Buyer hereby represents and warrants to Seller as of the Effective Date and, except where expressly limited to a specific date, as of the Closing Date, as follows:

5.2.1 Organization and Good Standing. Buyer is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of _____ and has the full power and authority (corporate or otherwise) to enter into this Agreement. Buyer is duly qualified or registered to transact business under the laws of each jurisdiction where the character of its activities or the location of the properties owned or leased by it require such qualification or registration, except where the failure to be so qualified does not have a material adverse effect on this Transaction.

5.2.2 Power and Authority. Buyer has the power, capacity and authority to execute and deliver this Agreement, to perform hereunder, and to consummate the Transaction. The execution, delivery and performance by Buyer of this Agreement and each and every agreement, document and instrument provided for herein have been duly authorized and approved by Buyer. This Agreement and each and every agreement, document and instrument to be executed, delivered and performed by Buyer in connection herewith, constitute or will, when executed and delivered, constitute the valid and legally binding obligations of Buyer, enforceable against it in accordance with their respective terms, except as enforceability may be limited by applicable equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws from time to time in effect affecting the enforcement of creditors' rights generally.

5.2.3 No Conflict. The execution, delivery and performance by Buyer of this Agreement or any agreements required hereby to be executed by Buyer in connection herewith will not (a) constitute a violation of, conflict with or constitute a default under any term or provision of Buyer's organizational documents, (b) constitute a violation of any statute, ordinance, judgment, order, decree, regulation or rule of any governmental authority, or (c) require any authorization, consent, approval, exemption or other action by or notice or declaration to any governmental authority.

5.2.4 Adequate Assurance. Buyer has, or will have prior to the Closing Date, sufficient cash, available lines of credit or other sources of immediately available funds to pay Seller the Purchase Price.

5.2.5 Litigation. Buyer has no knowledge of pending or threatened, and has not received written notice of, any actions, suits, or proceedings of any kind having been or likely to be instituted against Buyer in any court or before or by any governmental department, commission, board, bureau, agency, or other instrumentality which are now ongoing and which might materially adversely affect the ability of Buyer to timely perform its obligations under this Agreement.

5.3 Survival and Limitation of Representations and Warranties. The representations and warranties set forth in Sections 5.1.1, 5.1.2, 5.1.3, 5.1.6, 5.1.8, and 5.1.12 of this Agreement are made as of the Effective Date and are remade as of the Closing Date and shall survive the Closing by the lesser of: (a) the applicable statute of limitations period, if any; or (b) perpetuity. The representations and warranties set forth in Sections 5.1.4, 5.1.5, 5.1.7, 5.1.9, 5.1.10, and 5.1.11, of this Agreement are made as of the Effective Date and are remade as of the Closing Date and shall survive the Closing but written notification of any claim arising therefrom must be received by Seller within six (6) months of the Closing Date ("**Limitation Period**") or such claim shall be forever barred and Seller shall have no liability with respect thereto. In addition, upon Seller's receipt of written notification of any such claim, Seller shall first be afforded a period of at least thirty (30) days to cure any breach of Seller's representations and warranties prior to Buyer's filing any lawsuit in connection therewith. Notwithstanding the foregoing, Buyer shall not make any claim on account of a breach of representations or warranties discovered after the Closing unless and until the aggregate amount of such claims exceeds Twenty Five Thousand and No/100 Dollars (\$25,000.00) and in no event shall the aggregate liability of Seller for breach of any representations and warranties exceed Five Hundred Thousand and No/100 Dollars (\$500,000.00) and recovery of actual damages up to that amount is Buyer's sole and exclusive remedy for any such breach. Seller shall have no liability to Buyer for matters disclosed in writing by Seller or discovered by Buyer prior to Closing and in no event shall Seller ever be liable for consequential, incidental, special or indirect damages. For matters disclosed or discovered prior to Closing, Buyer shall have no right to make a claim or bring a lawsuit or other legal action against Seller and Buyer's sole rights and remedies shall be as set forth in Section 10.2. Whenever a representation or warranty is made in this Agreement "**to Seller's knowledge**," such representation and warranty is made with the exclusion of any facts otherwise known or disclosed to Buyer and is made solely on the basis of the actual knowledge of Seller. This Section shall survive the Closing or any termination of this Agreement.