



“NEW” CLAUSES OR REGULAR HOT SPOTS

J. Cary Barton

745 E. Mulberry Avenue, Suite #550
San Antonio, Texas 78212
BartonBensonJones.com
210.610.5335 · info@BartonBensonJones.com

DISCLAIMER: Barton Benson Jones presents the materials on this web site for informational purposes only. These materials do not constitute legal advice and are not a substitute for legal advice from qualified counsel. Moreover, due to the rapidly changing nature of the law and our reliance on information provided by outside sources, we make no warranty or guarantee concerning the accuracy or reliability of the content of this document or any other referenced documents. If you require legal advice, you may contact an attorney at Barton Benson Jones PLLC.

© 2020 by Cary Barton

J. Cary Barton

J. Cary Barton is a graduate of Baylor University (B.A. 1962) and Harvard Law School (LL.B. 1965) and was admitted to the State Bar of Texas in 1965.

He has been engaged in the private practice of law in Texas since 1969, consisting of six (6) years in Corpus Christi, 13 years in Austin and the period since 1988 in San Antonio.

He is currently the senior member of Barton, East & Caldwell, P.L.L.C., a thirteen-lawyer firm in San Antonio, Texas, that was founded in 1993. He is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization and his law practice consists primarily of representing real estate developers and investors in commercial real estate transactions.

Mr. Barton is a fellow of the American College of Real Estate Lawyers. He was a member of the Real Estate Forms Committee of the State Bar of Texas during 1986-2017 and is currently an advisor to the Committee. He served two four-year terms as a member of the Council of the Real Estate, Probate and Trust Law Section of the State Bar of Texas. He served a three-year term as a member of the Commission of the Texas Board of Legal Specialization that administers the annual examinations for board certification of real estate legal assistants. He is a Sustaining Life Member of the Texas Bar Foundation, which named him as one of its five 2016 Outstanding 50 Year Texas Lawyers.

He was selected as a Texas SuperLawyer in 2003-2017 by Texas Monthly and Law & Politics Magazine (Thomson Reuters), including recognition as one of the Top 50 SuperLawyers in Central and South Texas in 2006-2007, one of the Top 50 SuperLawyers in Central and West Texas in 2009-2012 and one of the Top 100 Texas SuperLawyers in 2007.

Texas Lawyer (ALM Media) chose Mr. Barton as one of five finalists for the first and second "Go To" Texas Real Estate Attorney awards for 2007 and 2012. He was designated as one of San Antonio's Best Attorneys in San Antonio Scene Magazine in 2004-2017.

He was listed in The Best Lawyers in America (Real Estate) (1987-1988 and 1997-2017) (Woodward White); and named The Best Lawyers in America Lawyer of the Year in real estate in San Antonio (2014) (Woodward White). He was selected as one of two Outstanding San Antonio Real Estate Lawyers by San Antonio Business Journal (2012) (American City Business Journals).

Mr. Barton received the fourth annual lifetime achievement award from the Real Estate, Probate and Trust Law Section of the State Bar of Texas in 2003 for contributions by a distinguished Texas real estate lawyer.

He received the Ralph A. Mock Award from Texas Lawyers Concerned for Lawyers in 2009 in recognition of his assistance to impaired lawyers in Texas and was the 2012-2013 president of that organization.

He is a member of the Founders Council of the Embrey Real Estate Finance and Development Department of the School of Business of the University of Texas at San Antonio, the San Antonio Chapter of ULI and the Real Estate Council of San Antonio. He recently served on the Relocation Committees for the San Antonio Children's Museum and Dress for Success – San Antonio.

He is the current editor of "Texas Practice Guide: Business Entities," 2017-2018 (Thomson Reuters) and has made approximately 200 presentations on real estate topics to various legal groups and other professional organizations.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. LEGAL ISSUES IN PURCHASE AND SALE CONTRACTS
 - A. Sole and Exclusive Remedies
 - B. Survival of Termination and Closing
 - C. Review of Seller's Representations and Warranties
 - D. Selected Miscellaneous Provisions
- III. TEXAS LAWYERS ASSISTANCE PROGRAM
- IV. CONCLUSION

Appendix A – Seller’s Representations and Warranties

Appendix B – Escrow Agreement

Appendix C – Selected Miscellaneous Provisions

I. INTRODUCTION

I am glad to have the opportunity to visit with you for a few moments today about some of the lessons I have learned as a commercial real estate lawyer. My legal career has extended for more than 52 years since I was sworn in as a member of the State Bar of Texas by a District of Columbia Notary Public at the former Federal Power Commission in December 1965.

During this period of time, I have received recognitions and awards that I did not deserve. And I have escaped the consequences of mistakes that I surely should have suffered. Through it all, however, I have sought continuously to learn more as a lawyer and to grow emotionally as a man. Some days – and years – have been better than others. But my ability to succeed in this mission has always been bolstered by the kindness of my friends and fellow lawyers and by the mercy and grace of a higher power that I did not understand then and understand only partially now.

I have summarized below some of the legal issues that have become important to me in connection with purchase and sale contracts during my practice of commercial real estate law. I thought these issues might be of particular interest to those attending this seminar on real estate drafting.

I will conclude this presentation with some comments on my experience in practicing law during the past five decades or so.

II. LEGAL ISSUES IN PURCHASE AND SALE CONTRACTS

A. Sole and Exclusive Remedies

There have been instances when I have negotiated strenuously for the other side to have a carefully crafted remedy for one default or another by my client, but I have neglected to provide that my proposed remedy would be the other party's sole and exclusive remedy for that default. We all know by now that a lawyer needs to include such language in connection with a buyer's loss of its earnest money for defaulting on a contract to purchase a parcel of real estate. That magic language also needs to be included, however, in a provision that limits the damages the buyer can collect for a breach of the Seller's representations and warranties in that same contract.

A related issue arises in connection with some printed forms of earnest money contracts, such as the TREC form that has been approved for many years. Contrary to widely accepted market practice in the commercial (and negotiated residential) real estate industry, those forms allow a Seller to seek specific performance and damages for the buyer's default and not just the remittance of the earnest money to the Seller by the escrow agent. A lawyer representing a buyer in such a transaction should endeavor to modify the form contract to eliminate the Seller's remedies other than the buyer's loss of the earnest money unless the parties have expressly bargained otherwise. If the buyer's lawyer does not do so and a controversy arises that involves this issue, the lawyer may be found to have violated the applicable standard of care.¹

¹ We were recently approached to represent a buyer involved in potential litigation in connection with such a contract. We declined the representation because of our professional relationship with one of the Sellers, but the experience demonstrated that the issue still persists.

B. Survival of Termination and Closing

A similar issue can arise in connection with the extent to which contractual obligations will survive the closing of the subject transaction (or termination of the contract).

A common use of this type of provision arises in connection with inspection period indemnities by a real estate buyer in favor of the Seller. This type of survivability is generally accepted in the real estate industry. The indemnity provision is written to provide for such survivability and references to termination of the contract usually re-confirm the survivability either specifically or, perhaps more commonly, generically. If an access agreement is used initially for inspections prior to the execution of the contract, the indemnity survival clause in that agreement should provide that it survives the execution of the contemplated purchase and sale agreement in order to capture clearly liabilities and costs that are incurred while only the access agreement is in effect.

Negotiating the survival of a Seller's representations and warranties may sometimes become complicated by the Seller's insistence that its representations and warranties will not survive closing. That creates a problem for the buyer, of course, since the representations and warranties really become relevant to the buyer only after the closing. Moreover, the buyer needs a period of time after the closing to occupy and become familiar with the property and determine whether there have been any breaches of the Seller's representations and warranties. I have often been able to resolve such situations by making clear that we are not asking the Seller to agree that the represented conditions will remain in effect after closing, which is often the Seller's real concern. I explain that the buyer just needs a reasonable period of time after closing to determine whether the represented conditions did, in fact, exist on the closing date and to resolve any exceptions to that status.

C Review of Seller's Representations and Warranties

A significant portion of our time spent in negotiating a purchase and sale agreement is devoted to the representations and warranties being made by the Seller. We view such provisions as important allocations of risk that deserve special attention. Attached as Appendix A is an example of contractual provisions pertaining to a Seller's representations and warranties in a purchase and sale agreement that we negotiated last year on behalf of the Seller of a substantial new rental apartment complex that had recently been completed. The reader should note that these provisions were the result of negotiations between the Seller and Purchaser and were less favorable to the Seller and more favorable to the Purchaser than those in the first draft of the agreement that we submitted to the Purchaser. Several aspects of these proposed provisions deserve mention.

The provisions in Section 4.1 of Appendix A set forth the representations and warranties that the Seller is making. As a matter of policy, we endeavor to avoid or limit the use of phrases such as "to the best knowledge of Seller," "to Seller's best knowledge," or even "to Seller's knowledge" in these types of provisions. We do not want to use those phrases because we believe they inherently convey a message that the Seller has some knowledge that the statement being made is true and correct. We understand that that may not be the meaning intended by many persons drafting provisions of this nature, but that seems to us to be the message that is inevitably being conveyed. Unless the issue is one with respect to which the Seller has actual knowledge which it would be difficult for the Purchaser to discover during its due

diligence activities, therefore, we prefer to use the phrase "Seller has no current actual knowledge that"

For example, Section 4.1(a) in Appendix A states that "Except as may be disclosed in the Title Commitment, Seller has no current actual knowledge that Seller does not have good and indefeasible title to the Property." Contrast this with an alternative provision stating that "Except as may be disclosed in the Title Commitment, Seller has good and indefeasible title to the Property to the best of Seller's knowledge." Quite frankly, it is not entirely clear what this second provision is saying. Does it convey the message that the Seller has investigated the title and has actual knowledge that its title is good and indefeasible? If so, that is normally not true (because the Seller is relying entirely on the title commitment) and we believe such a message should be avoided to the extent possible.²

The remaining provisions of Section 4.1 in Appendix A list specific topics as to which the Seller is making representations and warranties, most of which are not believed to be controversial. It should be noted that the representations regarding the condition of the property being sold are qualified by the Seller's not having any notice or knowledge of problems, rather than being affirmative representations as to the actual condition of the property itself.

Section 4.2 of the provisions in Appendix A defines how the Seller's knowledge is determined for purposes of the relevant representations and specifies the individuals whose knowledge is relevant for such purpose. The indicated employees do not have a duty of inquiry or investigation and have no personal liability in the event a breach of the Seller's representations is later identified.

Section 4.3 of the provisions in Appendix A addresses issues related to changes in the Seller's representations between the date the purchase and sale agreement is executed and the Closing Date. Under the referenced Section 8.2 of the purchase and sale agreement, if the Seller's representations changed due to the Seller's wrongful acts, the Purchaser had the right to seek specific performance or terminate the contract, recoup its earnest money and collect its actual transaction costs subject to an agreed limitation; if the change in the Seller's representations was not caused by the Seller's wrongful acts, then the Purchaser could either waive the change and close the purchase or terminate the contract and recoup its earnest money, as its sole remedies.

Section 4.4 of the provisions in Appendix A addresses the survivability of the Seller's representations and warranties. In subsections (a)-(c), the Purchaser must give the Seller written notice of alleged breaches of the Seller's representations and warranties within six months after the closing of the sale and must bring an action to recover for any such noticed breach within two years after the closing. Although such a notice requirement of less than two years is commonly found in agreements for the sale of commercial real property in Texas, is not clear that such a requirement is permissible under the prohibition against contractual statutes of limitation of less than two years in the Texas Civil Practice and Remedies Code.³ It is also not entirely clearly whether the invalidation of the contractual notice

² In the last sentence of Section 4.1(c), there is a statement that "to Seller's actual knowledge, Seller is not in default under any Lease; ..." That change from our normal language and several similar variations were specifically negotiated in that transaction.

³ Section 16.070, Texas Civil Practice and Remedies Code (not applicable to a sale of a business entity for consideration of more than \$500,000). A proponent of such a requirement would presumably argue that the shorter notice period should be upheld as an acceptable measure to enhance the Purchaser's incentive to identify timely

requirement of less than two years would leave intact the two-year contractual limitations period in the contract or would also invalidate that provision and subject the Seller's representations to the standard four-year statute of limitations for written contracts.⁴ In an attempt to address this issue, we have inserted language in the attached provision stating that the two-year contractual limitations period applies to all alleged breaches of the Seller's representations, whether or not notice of the alleged breach was given during the shorter notice period. This language might not prevent a Purchaser from successfully pursuing a breach of the Seller's representations of which the Purchaser failed to give notice during the six-month notice period. We believe that this language would make it difficult, however, for a Purchaser to argue that the invalidity of the shorter notice period should automatically invalidate the two-year contractual limitation period itself.

Section 4.4(e) of Appendix A provides for a minimum threshold of \$50,000 on the damages that must be sustained by the Purchaser before the Seller has any liability to the Purchaser for the Seller's breaches of warranties. Recovery of all damages is permitted under the attached provision subject to the Cap, however, once the threshold requirement is satisfied. In other contracts, the recoverable amounts are only those above the threshold. In any event, this threshold topic is usually not a big issue to the parties.

Section 4.4(f) of Appendix A imposes a limitation or "Cap" equal to two percent of the purchase price on the maximum aggregate amount of damages that the Purchaser can collect for breaches of the Seller's representations. That maximum amount appears to represent a generally accepted standard in the commercial real estate industry, although there will always be exceptions to that benchmark. Since we endeavor to qualify the representations of the Sellers we represent by their current actual knowledge, as discussed above, a Purchaser could perhaps contend for that reason that the maximum limitation on damages should be higher or even removed entirely. In our experience, however, although a Purchaser may sometimes use that logic to argue for a higher maximum liability limit, they almost never use it to object to a cap on damages entirely.

The provision attached as Section 4.4 in Appendix A has one more or less glaring omission. It does not address the issue of security after the closing for the Seller's obligations for its liabilities subject to the Cap. The security arrangements that are typically considered include (i) a net worth and non-termination covenant on the part of the Seller for the duration of its liability; (ii) a guaranty by the sponsor's parent of the Seller's post-closing obligations; and (iii) the escrow of a portion of the sale proceeds equal to the Cap for the duration of the Seller's obligations. A Purchaser often considers the net worth and non-termination covenant to be inadequate comfort that the Seller will fulfill its obligations. The Seller's sponsor may consider the parent's guaranty to be unduly burdensome if there are significant outside owners of the property being sold. With some regularity, then, an escrow arrangement becomes the solution that is mutually acceptable to both parties. Appendix B sets forth an adaptation of an escrow agreement we used last year for a transaction of this nature.

The disclaimer of warranties in Section 4.5(a) of Appendix A is a fairly standard provision of this nature and should not be particularly controversial. Sellers that have constructed multi-family residential

relevant evidence that the change in circumstances occurred prior to closing. The weight of such an argument may be questionable, though, since that is presumably a primary purpose of most statutes of limitation, including the permitted two-year contractual limitation the Legislature has already approved.

⁴ Section 16.004, Texas Civil Practice and Remedies Code.

properties that are being sold may want to include disclaimer provisions in the ultimate deeds in order to have an argument that some implied warranties are thereby foreclosed. Purchasers do not like such provisions and there is not believed to be any clear precedent for their efficacy. This provision does not contemplate including any disclaimer in the deed.

Section 4.5(b) of Appendix A contains a release of the Seller by the Purchaser for existing environmental liabilities and an indemnity of the Seller by the Purchaser for existing environmental liabilities known to the Purchaser that were not caused by the Seller's gross negligence.

D. Selected Miscellaneous Provisions

Section 10.1 of Appendix C limits the Purchaser's recovery to actual damages only. This type of limitation has potential for far-reaching relevance in many situations. For example, the sample language in the appendix was adapted from a construction contract we negotiated for a general contractor last year. A person wanting to use this language might want to consider where the provision might best be located in the contract for which the language is being considered. In some cases, this language might be revised to achieve reciprocity between the parties.

Section 10.2 of Appendix C exculpates all persons other than the Seller (and its general partner, if applicable) from liability for the Seller's representations, warranties, covenants and agreements under the agreement. This type of limitation might not have much relevance in today's environment of single purpose limited liability entities, but it does not seem harmful to consider the subject. In some cases, this language might be revised to achieve reciprocity between the parties.

Section 10.3 of Appendix C is largely a fairly standard counterpart execution provision. The last sentence is not as common, however, and explicitly authorizes the detachment of signature and acknowledgment pages and attachment of those pages to one counterpart of the agreement.

Section 10.4 of Appendix C is, again, a fairly common notice provision, but a couple of features of the provision seem worth of mention. First, the provision sanctions email notice as a primary means of giving notice, which is consistent with how the industry actually communicates. That notice is effective when given even though a confirmation of the notice is required to be given by overnight courier. Second, the provision includes a provision that is increasingly common to deal with notices given after hours at night or on week-end that may shorten periods of time to respond to the notices. Under this provision, those notices will be deemed given the next Business Day for purposes of calculating periods to respond.

Section 10.5 of Appendix C, also, is mostly a customary provision dealing with severability. This provision, however, includes language that prevents an unjust result if a provision vital to the bargain between the parties is declared unenforceable or invalid.

III. TEXAS LAWYERS ASSISTANCE PROGRAM

Studies show that approximately 10% of the members of the general population have problems with alcohol or drugs. That number is about 20%, however, with respect to lawyers. I am not sure whether those numbers have been updated to reflect the current opioid crisis. It is my impression, however, that those numbers do not include individuals who suffer primarily from depression, PTSD and

other non-chemically related afflictions. All of these problems are the result of medically identified diseases and not a lack of will power or a moral failure.

As most of you know, I am a recovering alcoholic. I had what I hope is my last drink on Halloween of 1989. The next day, I called what was then the fairly new Texas Lawyers Assistance Program and asked for help. Within a couple of hours, three lawyers representing TLAP contacted me and offered their support. I have been involved in that fellowship since that time. I did have one "recreational" relapse left in me, but my total clean and sober date is November 17, 1990. No date is more important in my life today.

Assistance from TLAP is available for lawyers suffering from alcoholism, drug dependence, depression, anxiety, PTSD and other problems. Their phone number is 1-800-343-8527 (TLAP). That phone is answered 24/7 on a confidential and privileged basis. If any of you believe you may have a problem with alcohol or drugs or suffer from other impairments, or if you know any other lawyer who is demonstrating symptoms of these problems, I urge you to contact TLAP as soon as you can do so. Once you have registered with TLAP, so our confidential communications will also be privileged, I would welcome any of you to contact me directly to share your story and concerns.

Recovery has saved my life. But, much more importantly, recovery has made my life worth living. My life today is filled with the love of my family and the support of colleagues and friends. I have three sons, three stepdaughters, two daughters-in-law, one former daughter-in-law and two former wives with whom I am reconciled from the damage caused by my alcoholism. I also have nine adorable grandchildren who have never seen me drunk. It doesn't get any better than that.

IV. CONCLUSION

Until a few weeks ago, I was pretty sure that I was going to retire from making CLE presentations after this conference. However, at the funeral in Brenham last month for our dearly departed friend, Steve Haley, I took one of the last two empty seats in the church and accidentally sat next to a very nice Aggie lawyer from College Station. Before I could even get fully situated, he was introducing himself and thanking me for something I said at this conference a year ago. So, if you are out there, Mike Gentry, thank you for remembering. I guess I'll keep going for a while longer, if I am invited to do so.

Thank you for your attention to my remarks.

Appendix A-Seller's Representations and Warranties

4.1 Representations and Warranties of Seller. The following representations and warranties of Seller are true and correct in all material respects on the Effective Date and (subject to the terms of Section 4.3 hereof) shall be true and correct in all material respects as of the Closing Date:

(a) Except as may be disclosed in the Title Commitment, Seller has no current actual knowledge that Seller does not have good and indefeasible title to the Property;

(b) Seller has the full right, power and authority to sell the Property to Purchaser as provided in this Agreement and to carry out Seller's obligations under this Agreement, and all requisite action necessary to authorize Seller to enter into this Agreement and to carry out Seller's obligations hereunder has been taken; this Agreement represents a legally binding obligation of Seller, enforceable against Seller in accordance with its terms in all material respects, except as limited by applicable bankruptcy and other creditors' rights laws of general application and by equitable principles; Seller is a limited liability company, duly organized and validly existing and in good standing under the laws of the State of Delaware; the execution, delivery and performance by Seller of this Agreement and the instruments referenced herein and the transaction contemplated hereby will not conflict with, or with or without notice or the passage of time or both, result in a breach of, violate any term or provision of, or constitute a default under any articles of formation, bylaws, operating agreement, indenture, deed of trust, mortgage, contract, agreement, judicial or administrative order, or any law to which Seller or any portion of the Property is bound;

(c) Seller has made, and will make, complete and accurate copies of all the Leases available at the Property for examination by Purchaser. The rent roll ("Rent Roll") attached hereto and incorporated herein by this reference as **Exhibit "L"** is correct as of the date thereof in all material respects and the information on the Rent Roll is the same as would be disclosed on a rent roll prepared as of the same date and provided by Seller in the ordinary course of its business. No rent under the Leases has been paid more than one month in advance except as set forth on the Rent Roll. There are no Leases as of the date of the Rent Roll, except for the Leases listed on the Rent Roll. Seller has no current actual knowledge that there are any adverse or other parties in possession of the Land or any part thereof as lessees, tenants at sufferance or trespassers other than Tenants (and their authorized occupants) under the Leases as of the date of the Rent Roll and third parties pursuant to the Property Agreements. Except as otherwise set forth in the Rent Roll or in a current rent arrearages report delivered to Purchaser: (i) no tenant, occupant or licensee has an option to purchase the Property or a right of first refusal or first offer with respect to a sale of the Property; (ii) there are no security deposits other than those set forth in the Rent Roll (and no security deposit is in the form of a letter of credit); and (iv) there are no arrears payable by tenants under any of the Leases. Seller has not received any written notice of a material default by Seller under any Lease that remains uncured, and to Seller's knowledge, Seller is not in material default under any Lease; Seller has or will deliver to Purchaser as part of the Due Diligence Materials, a true, correct and complete list of all landlord-tenant actions (including all eviction actions) pending with respect to the Property;

(d) Except as is disclosed in the Due Diligence Materials, Seller has not received any written notice from any governmental or quasi-governmental agency or insurance underwriter requiring or suggesting that Seller should correct any condition at the Property that has not previously been corrected or that Seller is required to modify or add any improvement with respect to the Property which has not been modified or added;

(e) Except as is disclosed in Section 4.1(f), Seller has not received any written notice of any pending or threatened condemnation action with respect to all or any portion of the Property or

existing violations of laws, rules, regulations, ordinances, restrictions or agreements affecting the Property, and Seller has no current actual knowledge of any existing condemnation or other legal proceedings affecting the existing use of the Property by any governmental authority having jurisdiction over or affecting all or any part of the Property or existing violations of laws, rules, regulations, ordinances, restrictions or agreements affecting the Property;

(f) Except as set forth in Exhibit "K" attached hereto, there is no suit, demand, claim, action, litigation, arbitration, governmental investigation, or proceeding, pending and served on or against Seller or with respect to the Property, at law or in equity or before any United States federal or state court of competent jurisdiction or before any other governmental authority or arbitral body; and Seller has no current actual knowledge that any such proceeding has been threatened by written notice to Seller;

(g) Neither Seller nor the Property is currently under the protection of the United States Bankruptcy Courts, and Seller is not a debtor in any state or federal insolvency, bankruptcy, or receivership proceeding;

(h) Seller has no current actual knowledge of the existence of any unpaid and outstanding assessments (governmental or otherwise) for sewer, water, paving, electrical power or otherwise affecting the Property;

(i) At the Closing, there will be no unpaid bills or claims in connection with Seller's ownership or operation of the Property except items which are being prorated as herein contemplated or items for which invoices have not yet been received which will be paid by Seller or prorated between the parties as applicable after the Closing;

(j) Except for liens for taxes which are not yet due and payable and liens that are being contested in good faith and for which adequate security has been provided, there are no liens affecting the Property arising by, through or under Seller which will not be satisfied at or prior to Closing;

(k) The Due Diligence Materials delivered by Seller to Purchaser pursuant to this Agreement are true, correct and complete copies of the materials in the files of Seller or its property manager, but except as otherwise expressly set forth herein, Seller makes no representation or warranty, express or implied, regarding the accuracy or completeness of the content or substance of any such Due Diligence Materials; provided, however, that (i) Seller has no current actual knowledge that the operating statements for the Property, including without limitation any expense statements, and other books, records and financial reports furnished by Seller to Purchaser, are not true and correct as of the dates thereof and (ii) Seller has no current actual knowledge of any fact or condition which would cause any such information to change in any material respect;

(l) Seller has no current actual knowledge of any pending change in the zoning of the Property or of any fact or circumstance that could result in the reduction of utilities or access to the Property;

(m) Except as may be disclosed in the Due Diligence Materials or the Title Commitment, Seller has not received any written notice that any "hazardous" or "toxic materials or pollutants" have contaminated, or have been used or stored upon, the Property, as such terms are defined in any federal, state or local rule or regulation pertaining to environmental regulation, clean-up, contamination or disclosure, except for reasonable quantities of such materials which are maintained and used on the Property in accordance with applicable law;

(n) Seller (i) is not acting, directly or indirectly for, or on behalf of, any person, group, entity or nation named by any Executive Order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism) or the United States Treasury Department as a terrorist, “Specially Designated National and Blocked Person,” or other banned or blocked person, entity, or nation pursuant to any law that is enforced or administered by the Office of Foreign Assets Control; (ii) is not engaging in this Transaction, directly or indirectly, on behalf of, or instigating or facilitating this Transaction, directly or indirectly, on behalf of, any such person, group, entity or nation; and (iii) is not engaged in any dealings or transactions, directly or indirectly, in contravention of any United States, international or other applicable money laundering regulations or conventions, including, without limitation, the United States Bank Secrecy Act, the United States Money Laundering Control Act of 1986, the United States International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, Trading with the Enemy Act (50 U.S.C. § 1 et seq., as amended), or any foreign asset control regulations of the United States Treasury Department (31 CFR, Subtitle B, Chapter V, as amended) or any enabling legislation or executive order relating thereto;

(o) Seller is not a “foreign person” or a “disregarded entity” as defined by the Internal Revenue Code of 1986, as amended (the “IRC”), Section 1445;

(p) Seller has not entered into any service or equipment leasing contracts relating to the Property or any part thereof which will be in force after the Closing, except for the Property Agreements pursuant to Section 3.9 hereof. The list of Property Agreements set forth on **Exhibit B-2** attached hereto is true, correct and complete and Seller has delivered and/or made available to Purchaser, true and correct copies of the Property Agreements. Seller has not received, nor has Seller delivered, any written notice of material default under any Property Agreement that remains uncured;

(q) Seller has no employees. Seller has engaged _____ (“Manager”) to manage the Property and to employ the individuals who work at the Property. Neither Seller nor Manager is party to any collective bargaining agreement or union agreement covering any employees of Seller or Manager at the Property. Seller has no current actual knowledge that there are any workers compensation claims pending, in process or overtly threatened, involving any employees or former employees employed at the Property; Seller has no current actual knowledge that there are any labor organizing activities pending or threatened with respect to the operation or maintenance of the Property;

(r) Seller is not an employee pension benefit plan subject to the provisions of Title IV of the Employee Retirement Income Security Act of 1974, as in effect from time to time (“ERISA”) and none of its assets constitutes or will constitute assets of any employee benefit plan subject to ERISA. Seller is not a “governmental plan” within the meaning of ERISA;

(s) Seller has not granted to any party (other than Purchaser) any outstanding options, rights of first offer, rights of first refusal or other similar rights to purchase the Property or any portion thereof or interest therein;

(t) Except as set forth in **Exhibit M**, Seller has not filed any tax certiorari proceedings, tax contest proceedings or any applications for the reduction of the assessed valuation of the Property that are ongoing as of the Effective Date;

(u) The Designated Employees (as hereinafter defined) are the individuals responsible for the current operation of the Property and include the individuals who have the most knowledge of the day-to-day operations at the Property; and

(v) Except as otherwise heretofore specified by written notice from Seller to Purchaser, Seller has no current actual knowledge that there has been any material change in the condition of the Property disclosed by the Existing Survey that would reasonably be expected to be disclosed by an Updated Survey.

4.2 Definition of Knowledge. References to the "knowledge" of Seller shall refer only to the current actual knowledge of the Designated Employees (as hereinafter defined) of affiliates of Seller, and shall not be construed, by imputation or otherwise, to refer to the constructive knowledge of Seller or the knowledge of any affiliate of Seller, any property manager, or any other officer, agent, manager, representative or employee of Seller or any affiliate thereof or to impose upon such Designated Employees, Seller or any other representative of Seller any duty to investigate the matter to which such actual knowledge, or the absence thereof, pertains. As used herein, the term "Designated Employees" shall refer to the following persons (but only in their capacities as officers and employees of affiliates of Seller, and not individually): _____, _____ and _____.

4.3 Changes in Conditions. Seller, during the term of this Agreement, agrees to notify Purchaser in writing promptly in the event that Seller acquires knowledge of any change affecting any of Seller's representations and warranties in this Agreement. Seller's warranties and representations deemed remade as of the Closing Date shall be qualified and modified as appropriate by any such notice from Seller to Purchaser, by any information included in the Due Diligence Materials provided by Seller to Purchaser pursuant to Section 3.7 hereof and by any contrary actual knowledge of Purchaser however acquired. All of Seller's representations and warranties, as so qualified and modified, shall survive Closing to the extent, and only to the extent, specified in Section 4.4 hereof. In the event that any of Seller's representations or warranties are so qualified or modified in a material manner prior to the Closing Date or if any representation or warranty of Seller is actually known by Purchaser before Closing to be untrue in a material respect, Purchaser may exercise the rights set forth in Section 8.2 hereof as Purchaser's sole and exclusive remedies. If Purchaser does not terminate this Agreement by giving Seller written notice of termination on or prior to the Closing Date, Purchaser shall be deemed conclusively to have elected to waive such matter and close the transaction as herein otherwise contemplated.

4.4 Survival of Seller's Representations and Warranties.

(a) All representations and warranties of Seller contained herein shall pertain only to the existence or absence of the circumstances therein described as of the date on which Seller executes this Agreement and, except as limited or qualified pursuant to Section 4.3 prior to the Closing, as of the Closing Date, but shall survive the Closing Date until the expiration of six (6) months from the Closing Date.

(b) The liability of Seller for any breach or alleged breach of its representations and warranties expressed or implied in this Agreement shall expire six (6) months after the Closing Date with respect to any and all matters which have not been described in a written notice given by Purchaser to Seller within such six (6) month period specifying the breach or alleged breach by Seller and describing in reasonable detail the actions that Purchaser wishes Seller to take in order to address such matters.

(c) The liability of Seller for any breach or alleged breach of its representations and warranties expressed or implied in this Agreement with respect to the matters specified in any written notice provided by Purchaser to Seller pursuant to Section 4.4(b) within six (6) months after the Closing Date shall expire two (2) years after the Closing Date except with respect to uncorrected matters specified in any such notice as to which Purchaser shall have initiated litigation prior to the expiration of two (2) years after the Closing Date.

(d) The liability of Seller for any breach or alleged breach of its representations and warranties expressed or implied in this Agreement shall terminate in its entirety in all events upon the expiration of two (2) years after the Closing Date except with respect to matters as to which Purchaser shall have initiated litigation prior to the expiration of two (2) years after the Closing Date.

(e) Seller shall not have any liability for damages sustained by Purchaser in connection with any or all breaches by Seller of any of its representations or warranties expressed or implied herein unless the valid claims for all such breaches aggregate more than \$50,000, in which event Purchaser may seek recovery for the full amount of Purchaser's claims, subject to the Cap.

(f) In no event shall Seller's liability for actual damages sustained by Purchaser in connection with any or all breaches of any of Seller's representations or warranties exceed, in the aggregate, the sum of [\$_____][two percent of the Purchase Price] (the "Cap"), as Purchaser's sole and exclusive remedy for all such breaches of any such representation or warranty. The Cap shall be inclusive of Purchaser's rights to collect fees and expenses, including attorney's fees, pursuant to Section ____ of this Agreement with respect to all such breaches of any representation or warranty by Seller.

(g) The foregoing provisions of this Section 4.4 shall survive Closing and shall constitute the sole and exclusive remedies of Purchaser with respect to breaches of Seller's representations and warranties by Seller discovered after Closing.

4.5 DISCLAIMER OF WARRANTIES AND ENVIRONMENTAL MATTERS.

(a) Disclaimer of Warranties and Release. PURCHASER ACKNOWLEDGES AND AGREES THAT, EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, SECTION 4.1 HEREOF) OR IN ANY DOCUMENT EXECUTED AND DELIVERED BY SELLER TO PURCHASER AT CLOSING, SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY NEGATES AND DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, 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 (A) THE VALUE, NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING, WITHOUT LIMITATION, ITS WATER, SOIL AND GEOLOGY, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY, (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASER OR ANY TENANT MAY CONDUCT THEREON, (D) THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY, (E) THE HABITABILITY, MERCHANTABILITY, MARKETABILITY, PROFITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, (F) THE MANNER OR QUALITY OF THE CONSTRUCTION OR MATERIALS, IF ANY, INCORPORATED INTO, ON, OR ABOUT THE PROPERTY, OR GOOD AND WORKMANLIKE CONSTRUCTION OR PERFORMANCE, (G) THE MANNER, QUALITY, STATE OF REPAIR OR LACK OF REPAIR OF THE PROPERTY, OR (H) ABSENCE OF ENVIRONMENTAL VIOLATION OR DEFECT, OR COMPLIANCE WITH ANY ENVIRONMENTAL PROTECTION, POLLUTION OR LAND USE LAWS, RULES, REGULATIONS, ORDERS OR REQUIREMENTS, INCLUDING THE EXISTENCE IN OR ON THE PROPERTY OF HAZARDOUS MATERIALS (AS DEFINED BELOW), OR (I) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT, HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON PURCHASER'S OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO

BE PROVIDED BY SELLER AND AGREES TO ACCEPT THE PROPERTY AT THE CLOSING, WAIVE ALL OBJECTIONS OR CLAIMS AGAINST SELLER (INCLUDING, BUT NOT LIMITED TO, ANY RIGHT OR CLAIM OF CONTRIBUTION) ARISING FROM OR RELATED TO THE PROPERTY OR TO ANY HAZARDOUS MATERIALS ON THE PROPERTY, AND RELEASE SELLER AND SELLER'S PARTIES THEREFROM. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT, EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, SECTION 4.1 HEREOF), ANY INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKES NO REPRESENTATION AS TO THE ACCURACY, TRUTHFULNESS OR COMPLETENESS OF SUCH INFORMATION. SELLER IS NOT LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR WRITTEN STATEMENT, REPRESENTATION OR INFORMATION PERTAINING TO THE PROPERTY, OR THE OPERATION THEREOF, FURNISHED BY ANY REAL ESTATE BROKER, CONTRACTOR, AGENT, EMPLOYEE, SERVANT OR OTHER PERSON. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE SALE OF THE PROPERTY AS PROVIDED FOR HEREIN IS MADE ON AN "AS IS, WHERE IS" CONDITION AND BASIS WITH ALL FAULTS, SUBJECT ONLY TO THE REPRESENTATIONS AND WARRANTIES EXPRESSLY SET FORTH IN THIS AGREEMENT OR IN ANY DOCUMENT EXECUTED AND DELIVERED BY SELLER TO PURCHASER AT THE CLOSING (AND NOTHING CONTAINED IN THIS SECTION 4.5 IS INTENDED TO, OR SHALL BE DEEMED TO, LIMIT SUCH REPRESENTATIONS AND WARRANTIES OF SELLER). EXCEPT AS OTHERWISE PROVIDED IN THE IMMEDIATELY PRECEDING SENTENCE, PURCHASER HEREBY AGREES TO INDEMNIFY, PROTECT, DEFEND, SAVE AND HOLD HARMLESS SELLER FROM AND AGAINST ANY AND ALL DEBTS, DUTIES, OBLIGATIONS, LIABILITIES, SUITS, CLAIMS, DEMANDS, CAUSES OF ACTION, DAMAGES, LOSSES, FEES AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES AND EXPENSES AND COURT COSTS) IN ANY WAY RELATING TO, OR IN CONNECTION WITH OR ARISING OUT OF ANY ACTION OR INACTION TAKEN BY PURCHASER BEFORE OR AFTER THE CLOSING DATE AND RELATING TO PURCHASER'S ACQUISITION, OWNERSHIP, LEASING, USE, OPERATION, MAINTENANCE AND MANAGEMENT OF THE PROPERTY. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, PURCHASER RELEASES SELLER FROM ANY LIABILITY WITH RESPECT TO ANY ADVERSE MATTERS, INCLUDING ADVERSE PHYSICAL CONDITIONS (INCLUDING ALL LATENT PHYSICAL CONDITIONS), DEFECTS, CONSTRUCTION DEFECTS, HEALTH, SAFETY AND WELFARE MATTERS WHICH MAY NOT HAVE BEEN REVEALED BY PURCHASER'S INSPECTIONS EVEN IF ARISING FROM EVENTS OCCURRING BEFORE THE CLOSING DATE. THE PARTIES AGREE THAT THE PURCHASE PRICE HAS BEEN DETERMINED BY NEGOTIATIONS WHICH REFLECTED THE FOREGOING DISCLAIMER AND THAT SELLER WOULD NOT HAVE BEEN WILLING TO SELL THE PROPERTY FOR THE PURCHASE PRICE SPECIFIED HEREIN ABSENT SUCH DISCLAIMER.

(b) Environmental Matters. ONCE CLOSING HAS OCCURRED, PURCHASER SHALL BE DEEMED CONCLUSIVELY TO HAVE RELEASED SELLER AND ITS MEMBERS AND THEIR RESPECTIVE AFFILIATES, PARTNERS, OFFICERS, AGENTS, REPRESENTATIVES AND EMPLOYEES ("SELLER'S PARTIES") FROM ANY AND ALL LIABILITY FOR ANY ENVIRONMENTAL CONDITION AFFECTING THE PROPERTY, EVEN IF ARISING FROM EVENTS OCCURRING BEFORE CLOSING AND REGARDLESS OF WHETHER SUCH CONDITION WAS KNOWN OR UNKNOWN AT CLOSING, INCLUDING, WITHOUT LIMITATION, ANY AND ALL LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE PROVISIONS OF ANY STATE LAWS

APPLICABLE TO THE PROPERTY; ANY AND ALL LIABILITY FOR ENVIRONMENTAL CONDITIONS AFFECTING THE PROPERTY ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE CLOSING DATE THAT WOULD OTHERWISE IMPOSE ON A SELLER IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ANY ENVIRONMENTAL CONDITION AFFECTING THE PROPERTY. PURCHASER HEREBY AGREES TO INDEMNIFY, PROTECT, DEFEND, SAVE AND HOLD SELLER HARMLESS FROM AND AGAINST ANY AND ALL LIABILITY IN CONNECTION WITH THE FOREGOING ENVIRONMENTAL REQUIREMENTS TO THE EXTENT FIRST ARISING WITH RESPECT TO THE PROPERTY FROM AND AFTER CLOSING. **PURCHASER AGREES TO INDEMNIFY, DEFEND, HOLD SELLER AND SELLER'S PARTIES HARMLESS FROM AND AGAINST ANY LIABILITY FOR ANY ENVIRONMENTAL CONDITION AFFECTING THE PROPERTY OF WHICH PURCHASER HAS ACTUAL NOTICE OR KNOWLEDGE PRIOR TO CLOSING, EVEN IF SUCH CONDITION ARISES AS THE RESULT OF THE NEGLIGENCE OF SELLER OR SELLER'S PARTIES BUT NOT IF SUCH CONDITION ARISES AS THE RESULT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SELLER OR SELLER'S PARTIES.**

(c) Survival. THE PROVISIONS OF THIS SECTION 4.5 SHALL SURVIVE CLOSING.

APPENDIX B

Escrow Agreement

This Escrow Agreement (this "Escrow Agreement") is made and entered into as of the ___ day of _____, 20__ ("Effective Date"), by and among _____, a Delaware limited liability company ("Seller"), _____, a Delaware limited liability company ("Buyer"), and _____ TITLE INSURANCE COMPANY, a California corporation ("Escrow Agent").

RECITALS:

A. Seller is the fee simple owner of that certain tract or parcel of land situated in _____, _____ County, _____, and more fully described in Exhibit A which is attached hereto and incorporated herein by reference as a part hereof for all purposes, including all improvements thereon and all rights and appurtenances pertaining thereto, which property and improvements are commonly known as the _____ Apartments (the "Property").

B. Of even date herewith, Seller and Buyer are consummating the closing of the sale of the Property pursuant to that certain Purchase and Sale Agreement (the "Contract") dated as of _____, _____, between Seller and Buyer's predecessor in interest, _____, pursuant to which Seller has sold to Buyer, and Buyer has purchased from Seller, the Property.

C. The parties are desirous of entering into this Escrow Agreement in order to set forth the terms and conditions under which the parties have agreed that an escrow account (the "Escrow Account") will be created with a portion of the proceeds of the sale of the Property in order to secure certain obligations of Seller pursuant to Section 4.4 of the Contract.

AGREEMENTS:

NOW, THEREFORE, for and in consideration of the premises and the covenants and agreements contained herein, the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, Seller, Buyer and Escrow Agent hereby agree as follows:

1. Recitals; Capitalized Terms. The above recitals are hereby acknowledged by the parties hereto as being true and correct and are incorporated herein as part hereof for all purposes. Any initially capitalized term used herein but not defined herein shall have the meaning ascribed to it in the Contract.

2. Appointment of Escrow Agent. Seller and Buyer hereby appoint the Escrow Agent, and the Escrow Agent hereby accepts such appointment, to serve as escrow agent of the Escrow Account for the purposes and on the terms set forth in this Escrow Agreement.

3. Establishment of Escrow Account. Concurrently with the execution of this Escrow Agreement, Seller has deposited with Escrow Agent for deposit in the Escrow Account the sum of \$ _____ (the "Seller Escrow Deposit"), such sum representing the portion of the Purchase Price equal to the Cap on Seller's liability specified in Section 4.4(e) of the Contract. Escrow Agent hereby acknowledges the receipt of the Seller Escrow Deposit from Seller. The Escrow Agent shall hold and disburse the Seller Escrow Deposit pursuant to the terms of this Escrow Agreement.

4. Investment of Escrow Deposit. The Escrow Agent shall invest the Seller Escrow Deposit pursuant to written instructions given jointly from Seller and Buyer or, in the event no such joint instructions are received, then in a federally-insured interest-bearing account at a financial institution selected by the Escrow Agent (the "Seller Escrow Deposit Account"). Any and all interest, dividends, income or proceeds of the Seller Escrow Deposit shall be added to and become a part of the Seller Escrow Deposit to be held and disbursed in accordance with this Escrow Agreement. Seller shall provide Escrow Agent with its applicable tax identification number as required by the depository bank for the Seller Escrow Deposit Account.

5. Disbursement of Seller Escrow Deposit.

(a) Except as otherwise provided in the penultimate sentence of Section 4.4 of the Contract and in the event that (i) Buyer gives notice to Seller within six (6) months after the Effective Date (the "Notice Period") that Seller has breached any of its representations or warranties or any other obligation of Seller under the Contract or any document executed by Seller in connection with the Contract in accordance with Section 4.4(e) of the Contract; (ii) Seller does not cure such matter in the manner and time specified in Section 4.4(e) of the Contract; (iii) Buyer thereafter cures such matter or otherwise suffers a loss or damage due to such matter; and (iv) the amount then and theretofore paid by Buyer to cure all such matters and/or the loss or damages actually incurred by Buyer exceeds \$50,000, Buyer may file a claim accompanied by appropriate supporting information with Escrow Agent for the amount reasonably expended by Buyer in curing such matter and/or the actual losses or damages incurred by or asserted against Buyer with respect thereto. Escrow Agent shall transmit copies of any such claim and supporting information to Seller not later than the second (2nd) business day after the receipt thereof by Escrow Agent. If, and to the extent that, Escrow Agent has not received an objection to the claim from Seller on or before the fifth (5th) business day after the claim and supporting information were transmitted to Seller, Escrow Agent will be authorized to disburse the undisputed amount of the claim to Buyer on the sixth (6th) business day after the claim and supporting information were transmitted to Seller.

(b) If, and to the extent that, Seller objects to the payment of any claim submitted to Escrow Agent by Buyer, Escrow Agent shall promptly give notice of such objection to Buyer. Seller and Buyer shall undertake to resolve such dispute by mutual agreement within thirty (30) days after notice of Seller's objection was given to Buyer (the "Negotiation Period"). A copy of any such agreement will be submitted by Seller and Buyer to Escrow Agent and Escrow Agent shall act, or refrain from acting, in such manner as is authorized in such agreement.

(c) If Seller and Buyer are unable to resolve any such disputed claim by mutual agreement prior to the expiration of the Negotiation Period, then the parties shall endeavor to resolve such matter within a period of thirty (30) days after the expiration of the Negotiation Period (the "Mediation Period") by non-binding mediation by a mediator mutually approved by Seller and Buyer. A copy of the mediator's report will be submitted by Seller and Buyer to Escrow Agent and Escrow Agent shall act, or refrain from acting, in such manner as is authorized in such report.

(d) If Seller and Buyer are unable to resolve any such disputed claim by non-binding mediation prior to the expiration of the Mediation Period, then such matter shall be resolved by binding mediation by an arbitrator mutually approved by Seller and Buyer. If the parties are unable to agree on an arbitrator within fifteen (15) days after the expiration of the Mediation Period, then either Seller or Buyer may at any time thereafter prior to agreement on the arbitrator, petition the then Presiding District Judge in _____ County, _____ to appoint such arbitrator. The arbitrator so appointed shall be authorized to consider such evidence and testimony as the arbitrator deems relevant in order to reach a just and equitable result regarding the claim then in dispute. A copy of the arbitrator's award will be

submitted by Seller and Buyer to Escrow Agent and Escrow Agent shall act, or refrain from acting, in such manner as is authorized in such award.

(e) Upon the expiration of the Notice Period, the Escrow Agent (i) shall retain a portion of the Seller Escrow Deposit and the earnings thereon equal to the aggregate amount, if any, of claims theretofore submitted by Buyer which have not theretofore been funded or otherwise resolved; and (ii) shall remit the balance of the Seller Escrow Deposit and the earnings thereon to Seller.

(f) During the period of time from the expiration of the Notice Period until the expiration of the period of two (2) years after the Effective Date (the "*Survival Period*"), the Escrow Agent (i) shall remit to Buyer from time to time as applicable the portion of the Seller Escrow Deposit and the earnings thereon equal to the amount, if any, of any claims made by Buyer during the Notice Period for which Buyer shall have theretofore been determined to be entitled to receive reimbursement; and (ii) shall remit to Seller from time to time as applicable a portion of the Seller Escrow Deposit and the earnings thereon equal to the amount, if any, of any claims made by Buyer during the Notice Period which have theretofore been withdrawn voluntarily or by agreement by Buyer and Seller or denied as the result of mediation or arbitration.

(g) Upon the expiration of the Survival Period, the Escrow Agent (i) shall retain a portion of the Seller Escrow Deposit and the earnings thereon equal to the aggregate amount, if any, of claims made by Buyer during the Notice Period which have not theretofore been funded or otherwise resolved and as to which Buyer shall have previously instituted litigation during the Survival Period; and (ii) shall remit the balance of the Seller Escrow Deposit and the earnings thereon to Seller.

(h) Upon the resolution by mutually binding agreement between Seller and Buyer or final and non-appealable judgment of any claim made by the Buyer during the Notice Period as to which Buyer shall have instituted litigation during the Survival Period, the Escrow Agent (i) shall remit to Buyer the portion of the Seller Escrow Deposit and the earnings thereon equal to the unpaid amount, if any, of such claim made by Buyer during the Notice Period as to which Buyer shall have instituted litigation during the Survival Period for which Buyer shall have theretofore been determined to be entitled to receive reimbursement; and (ii) shall remit the balance of the Seller Escrow Deposit and the earnings thereon pertaining to such claim then held in escrow, if any, to Seller. Any dispute between Seller and Buyer as to the balance of the Seller Escrow Deposit applicable to any such claim shall be resolved in the manner set forth under clause ((b), (c) and (d) of this Section 5.

(i) Upon (A)(1) the resolution by mutually binding agreement between Seller and Buyer or final and non-appealable judgment of all claims made by the Buyer during the Notice Period as to which Buyer shall have instituted litigation during the Survival Period and (2) the remittance by Escrow Agent to Buyer of the portion of the Seller Escrow Deposit and the earnings thereon equal to the unpaid amount, if any, of all such claims made by Buyer during the Notice Period as to which Buyer shall have instituted litigation during the Survival Period for which Buyer shall have theretofore been determined to be entitled to receive reimbursement, then (B) Seller shall remit the balance of the Seller Escrow Deposit and the earnings thereon, if any, to Seller.

6. Compensation and Expenses of Escrow Agent. Except as may otherwise be expressly provided elsewhere in this Escrow Agreement, Seller and Buyer shall split (i.e., on a 50/50 basis) and be equally responsible for and shall pay any and all costs and expenses, if any, incurred by Escrow Agent in connection with the observance and performance by Escrow Agent of its duties, responsibilities and functions under this Escrow Agreement.

7. Role of Escrow Agent. Seller, Buyer and Escrow Agent recognize, acknowledge, covenant and agree that the following terms and provisions shall control with respect to the rights, privileges, duties, liabilities and immunities of Escrow Agent hereunder:

(a) Escrow Agent is acting solely in the role of a depository hereunder and Escrow Agent shall have no liability for the holding, investment, disbursement or application of any monies by Escrow Agent hereunder other than to follow the specific instructions provided to Escrow Agent pursuant to this Escrow Agreement.

(b) Escrow Agent shall not be responsible or liable in any manner whatsoever for the sufficiency, correctness, genuineness or validity of the subject matter of the escrow hereby established, or any portion thereof, or for the form or execution thereof, or for the identity or authority of any person executing or depositing the same.

(c) Escrow Agent, as a part of the consideration for the acceptance of this escrow, shall not be liable for any acts or omissions done in good faith, or for any claims, demands, causes of action, losses, liabilities, damages, costs or expenses, or for any damages claimed or suffered by any party to this Escrow Agreement, except those arising directly from the gross negligence or willful misconduct of Escrow Agent.

(d) Escrow Agent is hereby authorized to rely upon, and shall be protected in acting upon, any written notice, statement, waiver, consent, certificate, affidavit, receipt, authorization, power of attorney or other instrument or document which Escrow Agent in good faith believes to be genuine and what it purports to be.

(e) In accepting any monies delivered to Escrow Agent hereunder, it is agreed and understood that Escrow Agent will not be called upon to construe any contract, instrument or document deposited herewith or submitted hereunder, but only to follow the specific instructions provided for pursuant to this Escrow Agreement.

(f) Except for this Escrow Agreement, the Escrow Agent is not a party to, and shall not be bound by, any agreements between Seller and Buyer, or any agreements between or among Seller, Buyer and/or other parties.

(g) Escrow Agent shall not be liable for anything which it may do or refrain from doing in connection herewith, except due directly to its own gross negligence or willful misconduct.

(h) Escrow Agent may consult with its legal counsel in the event of any dispute or question as to the construction of any terms or provisions of this Escrow Agreement or its duties hereunder, and it shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

8. Controversies.

(a) In the event of any disagreement between any of the parties to this Escrow Agreement, or between them or either or any of them and any other person, resulting in adverse or conflicting claims or demands being made upon the Escrow Agent in connection with the subject matter of this Escrow Agreement, or in the event that the Escrow Agent in good faith is in doubt as to what action it should take under this Escrow Agreement, then:

(i) the Escrow Agent may file a suit in interpleader and obtain an order from a court of appropriate jurisdiction (state or federal) in _____ County, _____ requiring all persons involved to litigate in such court their respective claims arising out of or in connection with the applicable Seller Escrow Deposit or this Escrow Agreement, and, in such event, Escrow Agent is authorized to make disbursement from the applicable Seller Escrow Deposit in the amount of reasonable attorney's fees and court costs incurred by Escrow Agent in bringing said interpleader suit within three (3) business days following delivery to the applicable parties of documentation of said attorney's fees and court costs;

(i) either Seller or Buyer may initiate an action in a court of appropriate jurisdiction (state or federal) in _____ County, _____ for the purpose of resolving any such dispute, and in connection therewith, may request the Escrow Agent to tender the Seller Escrow Deposit to the court in which such proceeding has been commenced; and provided that such court is authorized by applicable law to receive such tender and consents thereto (if such consent is necessary), the Escrow Agent shall tender the Seller Escrow Deposit to such court. The Escrow Agent shall thereupon be released for all further liability with respect to this Escrow Agreement or the Seller Escrow Deposit.

9. Reliance on Orders. The Escrow Agent is hereby expressly authorized to comply with and obey any and all orders, judgments, or decrees of any court relating to this Escrow Agreement or the Seller Escrow Deposit and in case the Escrow Agent obeys or complies with any such order, judgment or decree of any court, it shall not be liable to Seller or Buyer or to any other person by reason of such compliance, notwithstanding any such order, judgment or decree being subsequently reversed, modified, annulled, set aside or vacated, or found to have been entered

10. Indemnity of Escrow Agent. Seller and Buyer hereby jointly and severally agree to defend, indemnify and hold harmless Escrow Agent from and against any and all claims, demands, causes of action, losses, liabilities, damages, costs and expenses, including, without limitation, court costs, legal expenses and attorneys' fees, incurred or suffered by Escrow Agent in connection with the performance of its obligations under this Escrow Agreement or otherwise arising, directly or indirectly, by reason of this Escrow Agreement, except to the extent any such claims, demands, causes of action, losses, liabilities, damages, costs or expenses are incurred or suffered by Escrow Agent directly as a result of its own gross negligence or willful misconduct. In addition, Buyer hereby agrees to defend, indemnify and hold harmless Seller from and against any and all claims, demands, causes of action, lawsuits, liabilities, damages, costs and expenses, including, without limitation, court costs, legal expenses and attorneys' fees, incurred or suffered by Seller as a result of the foregoing indemnification of Escrow Agent by Seller, but only to the extent any such claims, demands, causes of action, lawsuits, liabilities, damages, costs or expenses are suffered by Seller directly as a result of Buyer's own negligence, willful misconduct or breach of this Escrow Agreement. In addition, Seller hereby agrees to defend, indemnify and hold harmless Buyer from and against any and all claims, demands, causes of action, lawsuits, liabilities, damages, costs and expenses, including, without limitation, court costs, legal expenses and attorneys' fees, incurred or suffered by Buyer as a result of the foregoing indemnification of Escrow Agent by Buyer, but only to the extent any such claims, demands, causes of action, lawsuits, liabilities, damages, costs or expenses are suffered by Buyer directly as a result of Seller's own negligence, willful misconduct or breach of this Escrow Agreement. The obligations of indemnity of Seller and Buyer as aforesaid shall survive the expiration or any termination of this Escrow Agreement and shall be performable with respect to any indemnification by Seller and/or Buyer of Escrow Agent as provided for herein at the office of Escrow Agent in _____ County, _____.

11. Resignation of Escrow Agent. Escrow Agent, or any successor to Escrow Agent, may at any time resign by giving written notice to such effect to Seller and Buyer, whereupon Escrow Agent, or

such successor, shall be relieved and discharged from the obligations and duties imposed upon Escrow Agent under this Escrow Agreement on the first to occur of (a) the appointment of a successor Escrow Agent as hereinafter provided or (b) the expiration of 30 calendar days after the giving of such written notice of resignation. In the event of any resignation as aforesaid, a successor Escrow Agent, which shall be a title company or state or national bank with trust powers, shall be appointed by Seller and Buyer. Any successor Escrow Agent shall deliver to Seller, Buyer and the resigning Escrow Agent a written instrument accepting its appointment under this Escrow Agreement, whereupon it shall then succeed to all the rights, privileges, duties, liabilities and immunities of the predecessor Escrow Agent under this Escrow Agreement and, concurrently with the execution of such acceptance, all monies held by the resigning Escrow Agent hereunder shall be delivered by it to the successor Escrow Agent.

12. Termination. This Escrow Agreement shall terminate on the delivery to Escrow Agent of an instrument in writing executed by Seller and Buyer advising Escrow Agent of the termination of this Escrow Agreement, including specific written instructions signed by Seller and Buyer for the disbursement of any funds remaining in the hands of Escrow Agent. Upon the termination of this Escrow Agreement as aforesaid, Escrow Agent shall be relieved and discharged from any further obligation or liability under this Escrow Agreement.

13. Conflict With Other Documents. Seller, Buyer and Escrow Agent recognize, acknowledge, covenant and agree that the instructions set forth in this Escrow Agreement shall, insofar as the Escrow Agent and its duties, responsibilities and functions hereunder are concerned, supersede any other contract, instrument or document executed between Seller, Buyer and Escrow Agent may rely absolutely hereon to the exclusion of any and all other contracts, instruments or documents.

14. Notices. Unless otherwise agreed to by the parties, all notices and consents required or permitted to be given hereunder shall be in writing. Such notices and consents shall be effective upon receipt or refusal of receipt following deposit into the United States mail, registered or certified, return receipt requested, postage prepaid, or if hand delivered or if sent by nationally recognized overnight courier providing evidence of delivery or when sent by telecopy, similar facsimile transmission or .pdf attachment to an e-mail transmission (with a copy by mail sent on the next business day), addressed as follows:

To Buyer:

c/o _____

Attention: _____
Telephone: _____
Facsimile: _____
Email: _____

With copy to:

Attention: _____

Telephone: _____

Facsimile: _____

Email: _____

To Seller:

c/o _____

Attention: _____

Telephone: _____

Facsimile: _____

E-mail: _____

With copy to:

Attention: _____

Telephone: _____

Facsimile: _____

E-mail: _____

If to Escrow Agent:

Attention: _____

Telephone: _____

Facsimile: _____

Email: _____

or at such other place as a party may designate by not less than five (5) days' prior written notice given in accordance herewith. Facsimile or e-mail transmissions received during business hours during a business day at the receiving location shall be deemed made on such business day if received prior to 5:00 P.M. Central Time. Facsimile or e-mail transmissions received at any other time shall be deemed received on the next business day. Subject to the preceding sentence, any such notice so given by facsimile or .pdf attachment to an e-mail transmission shall be deemed given upon receipt by the sending party of confirmation of successful transmission (provided that if any notice to be delivered by facsimile or e-mail is unable to be transmitted because of a problem affecting the receiving party's facsimile machine or e-mail system, the deadline for receiving such notice shall be extended to the next business day). The

attorneys for any party hereto shall be entitled to provide any notice that a party desires to give or is required to give hereunder.

15. Assignment. Neither Seller, Buyer nor Escrow Agent shall assign any of its rights or obligations under this Escrow Agreement, in whole or in part, and any such assignment contrary to the terms of this Escrow Agreement shall be null and void and of no further force or effect, without the prior written consent of the other. Notwithstanding the foregoing, this Escrow Agreement may be assigned by Buyer, in whole or in part, without the consent of Seller or Escrow Agent, to: (i) any entity owned or controlled by or under common control with Buyer, and /or (ii) any investment client of Buyer or other real estate fund owned or controlled by Buyer or, in each case, any entity formed on its behalf which owns an interest in the Property directly or indirectly, but Buyer shall not be released from any liabilities hereunder by reason of any such assignment.

16. Successors. Subject to the provisions of this Escrow Agreement restricting assignment, this Agreement shall inure to and be binding upon the parties to this Escrow Agreement, and their permitted successors and assigns.

17. Entire Agreement. This Escrow Agreement constitutes the entire agreement and understanding among the parties hereto and supersedes all prior agreements and understandings, if any, concerning the specific subject matter hereof. No subsequent alteration, amendment, change, deletion or addition to this Escrow Agreement shall be binding or effective unless the same shall be in writing and executed by the handwritten signature of all parties to this Escrow Agreement.

18. GOVERNING LAW. THIS ESCROW AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF _____. THE OBLIGATIONS SET FORTH HEREIN ARE AND SHALL BE PERFORMABLE IN _____ COUNTY, _____.

19. Limitation on Benefits. It is the explicit intention of the parties to this Escrow Agreement that no person or entity other than the parties to this Escrow Agreement or their respective successors or assigns as permitted under this Escrow Agreement is or shall be entitled to bring any action to enforce any provision of this Escrow Agreement against any of the parties to this Escrow Agreement, and that the covenants, undertakings, and agreements set forth in this Escrow Agreement shall be solely for the benefit of, and shall be enforceable only by, the parties to this Escrow Agreement or their respective successors or assigns as permitted under this Escrow Agreement.

20. Construction. The headings, captions, numbering system, etc. are inserted in this Escrow Agreement only as a matter of convenience and under no circumstances will they be considered in interpreting the provisions of this Escrow Agreement. Where required for proper interpretation, words used herein in the singular tense shall include the plural, and vice versa; the masculine gender shall include the neuter and the feminine, and vice versa. If any provision hereof is for any reason unenforceable or inapplicable, the other provisions hereof will remain in full force and effect in the same manner as if such unenforceable or inapplicable provision had never been contained herein. This Escrow Agreement shall be construed without regard to any presumption or rule requiring construction against the party causing the same to be drafted.

21. Counterparts. This Escrow Agreement may be executed by handwritten signature in any number of counterparts, each of which shall be deemed to be an original, and all of such counterparts shall constitute one and the same agreement. To facilitate execution of this Escrow Agreement, the parties may execute and exchange by telephone or electronic mail facsimile counterparts of the handwritten signature pages, and such signatures shall be deemed original and effective for all purposes.

22. Attorneys' Fees. In the event that any dispute arises between any parties to this Escrow Agreement resulting in litigation or arbitration with respect to this Escrow Agreement, the losing party shall pay all costs and expenses incurred by the prevailing party in connection with such litigation or arbitration, including, without limitation, reasonable attorneys' fees and expenses and court costs.

23. Amendments. This Escrow Agreement may not be amended except by a written agreement signed by all parties to this Escrow Agreement.

24. Severability. This Escrow Agreement is intended to be performed in accordance with, and only to the extent permitted by, applicable laws and regulations. If any provision of this Escrow Agreement, or the application thereof to any persons, entity, or circumstance, for any reason and to any extent, is invalid or unenforceable, and such invalidity or unenforceability does not destroy the benefit of the bargain of the parties, such provision shall be modified to the minimum extent necessary to make such provisions valid and enforceable and neither the remainder of this Escrow Agreement nor the application of such provision to other persons, entities or circumstances or other instruments shall be affected thereby, but rather, the same shall be enforced to the greatest extent permitted by law.

25. Time is of the Essence. Time is of the essence in this Escrow Agreement.

[Signatures appear on following pages]

[remainder of page intentionally left blank]

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

SELLER:

a Delaware limited liability company

By: _____
a Texas limited liability company,
its Managing Member

By: _____
Manager and Senior Vice President

BUYER:

a Delaware limited liability company

By: _____
a Massachusetts limited liability company
Its manager

By: _____
Name: _____
Title: _____

ESCROW AGENT:

_____,
a California corporation

By: _____
Name: _____
Title: _____

EXHIBIT A
THE LAND
[see attached]

Appendix C – Selected Miscellaneous Provisions

10.1 No Consequential Damages. Seller shall have no liability to Purchaser, either in contract or in tort, for any consequential, incidental, indirect, special, exemplary or punitive damages of Purchaser, or any loss of future revenue, income or profits, or any diminution of value or multiple of earnings damages, caused or allegedly caused by, or attributable to, any breach of Seller's representations and warranties or relating to any other breach or alleged breach hereof by Seller, whether or not the possibility of such damages has been disclosed to Purchaser in advance or could have been reasonably foreseen by Seller. This provision shall survive Closing and any termination of this Agreement.

10.2 Exculpation. Except for the general partner of Seller, if applicable, the affiliates, partners, managers, members, shareholders, directors, officers, employees, agents, and representatives of Seller and their partners, affiliates, managers, members, officers, directors, shareholders, employees, agents and representatives shall have no liability for any actual, consequential, incidental, indirect, exemplary, special or punitive damages caused or allegedly caused by, or attributable to, any breach of Seller's representations and warranties or relating to any other breach or alleged breach hereof by Seller. This provision shall survive Closing and any termination of this Agreement.

10.3 Counterparts and Execution. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which, taken together, shall constitute but one and the same instrument, which may be sufficiently evidenced by one counterpart. To facilitate execution of this Agreement, the parties may execute and exchange by electronic means (facsimile, pdf document or the like) electronic counterparts of the signature pages, and such electronic signatures shall be deemed original for all purposes. Signature and acknowledgment pages, if any, may be detached from the counterparts and attached to a single copy of this document to physically form one document.

10.4 Notices. All notices, demands, requests and other communications required or permitted hereunder shall be in writing, shall be addressed as set forth below and shall be deemed to be delivered on receipt if delivered by (i) hand, (ii) overnight delivery (with confirmation of successful transmittal) or (iii) electronic mail with electronic confirmation (but only if also sent thereafter as hereinafter provided by one of the other permitted methods of delivery), provided, however, that any such notice that is delivered on a day that is not a Business Day or is delivered after 5:00 p.m. Central Time on a Business Day shall be deemed to have been delivered on the next Business Day. If any notice is sent by electronic mail, then in order for such notice to be effective, a copy of such notice must thereafter be sent to the addressee within one (1) Business Day by overnight courier or hand delivery. For avoidance of doubt, a notice sent by electronic mail shall be deemed given (except as provided above) when such notice is so sent by electronic mail in accordance herewith, even if such notice is also sent by another method that is delivered after the delivery of such notice that is so sent by electronic mail. Notices on behalf of the respective parties may be given by their attorneys and such notices shall have the same effect as if in fact subscribed by the party on whose behalf it is given. Notice addresses may be changed upon not less than ten (10) days' prior written notice to the other parties.

10.5 Severability. If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be held invalid or unenforceable by a court of competent jurisdiction, to the extent such invalidity or unenforceability does not destroy the basis of the bargain between the parties, such invalidity or unenforceability shall not affect any other provision of this Agreement or the application thereof which can be given effect without the invalid or unenforceable provision or application, and to this end the parties agree that the provisions of this Agreement are and shall be severable.