THE EFFECTIVE USE OF REPRESENTATIONS AND WARRANTIES IN COMMERCIAL REAL ESTATE CONTRACTS

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I. Introduction

Specific provisions of commercial real estate contracts have been analyzed by many commentators. Generally, these materials focus on the substance of the provisions and the laws relating thereto. The exact structure and meaning of each provision in a commercial real estate contract is important knowledge for the real estate practitioner and real estate professional. Each provision is designed to achieve a specific purpose for the purchaser and seller of real property and is structured to allocate a risk or provide a right or remedy to one of the parties to the commercial real estate contract. What do each of these provisions achieve for the purchaser or seller? The author has attached a form of representations and warranties for a commercial real estate contract. These provisions together with the remedies provision are important in any commercial real estate contract and will form the basis for this presentation.

The scope and purpose of this article is to (i) define the meaning and structure of the representations and warranties discussed, (ii) identify the risks to be allocated by the provisions discussed, (iii) illustrate different positions that may be taken by the purchaser and the seller, and (iv) give practical suggestions to assist with the negotiation of the representations and warranties.

II. Representations and Warranties

A. Definition and Purpose of Representations and Warranties

As a basic premise, sellers of real property do not want to make any representations or warranties and will prefer to sell the property “as is” and without warranty. Purchasers on the other hand want a “fully” represented transaction. Typical representations and warranties that a sophisticated purchaser would request of the seller when purchasing income producing real property will be discussed. From the purchaser's viewpoint, the major purpose of representations and warranties is to cause the seller to reveal facts that, together with a program of due diligence, is designed to disclose risks that can be assessed by the purchaser in order to make an informed decision as to whether the purchase will be consummated. In fact, the prudent purchaser should assume that the seller may well overlook facts and should pursue every means available to uncover material risks.

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What are representations and warranties? Most contracts between purchasers and sellers of various types of property, including real property, include representations, warranties, affirmative covenants, negative covenants and conditions. In many commercial real estate contracts, representations and warranties and affirmative and negative covenants are commingled.

"Representation" is defined by Black's Law Dictionary 1301 (6th ed. 1990) as “[a] statement of fact made to induce another to enter into a contract,” while “warranty” is defined as “a promise that a proposition of fact is true,” an undertaking or stipulation, either written or oral, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be. Id. at 1586. In Great Atlantic & Pacific Tea Co. v. Walker, 104 S.W.2d 627, 632 (Tex.Civ.App.--Eastland), rev’d, 112 S.W.2d 170 (Tex. 1938) the Court stated that a warranty “is a statement or representation made . . . contemporaneously with and as a part of, the contract of sale . . . having reference to the character, quality or title of the goods and by which he promises or undertakes to insure that certain facts are, or shall be, as he then represents them.” The difference between representations and warranties is generally hard to distinguish and even the definitions blur the differences. See generally N. Georgia Ready Mix Concrete, Inc. v. L & L Const., Inc., 508 S.E.2d 722, 726 (Ga.App. 1998); Bruns v. Cooper Indus., Inc., 605 N.E.2d 395, 397 (Ohio App. 2 Dist. 1992); Broer v. Dr. Fenton's Vigortone Co., 4 N.W.2d 416 (Iowa 1942); Commonwealth Cotton Oil Co v. Lester, 9 P.2d 738 (Okla 1932).

A "covenant" is defined by Black's as “an agreement, convention or promise of two or more parties . . . by which either of the parties pledges himself to the other that something is either done or shall be done, or stipulates for the truth of certain facts . . . .” Black's at 363. A covenant is a promise the breach of which gives a right of action for damages. See Cramer v. Metro Sav. and Loan Ass'n., 258 N.W.2d 20 (Mich. 1977); Carpenter v. City of New Brunswick, 39 A.2d 40, 44 (N.J.Ch. 1944); Rosek v. Kotzur, 267 S.W. 759 (Tex.Civ.App.--Waco 1924, no writ); Waters, Representations, Warranties, Covenants and Conditions in Commercial Real Estate Contracts, State Bar of Texas, Advanced Real Estate Course, v. 2 (1986) (discussing in detail the distinction between representations, warranties, covenants, and conditions).

B. Categories of Representations and Warranties

Representations and warranties generally are designed to cover three separate and distinct areas: (i) the status and authority of the seller, (ii) the status of the real and personal property, and (iii) the operation and maintenance of the property. Attached hereto as Annex 1 is a form of representations and warranties that will be referred to and analyzed throughout this article.

1. Status and Authority of Seller

The representations and warranties set forth in Sections 1.1(a) through 1.1(d) on Annex 1 are requested by the purchaser to assure that the selling entity is in existence and good standing, that the seller has the right, power, and authority to perform its obligations under the contract, that the
contract is enforceable against the seller, that the seller is not required to obtain consent, and that seller is not a foreign person. The risk of each of these matters is the seller's, because the facts relating to these representations are usually within the exclusive knowledge of the seller. These provisions are generally not the subject of extensive negotiation.

a. **Status and Authority of Seller**. The representation and warranty, set forth in Section 1.1(a) on Annex 1, is structured to give assurance to purchaser that the seller is an entity existing and in good standing in its state of organization and that the persons executing the contract are authorized to execute on behalf of seller. It is important that the purchaser obtain this representation and warranty to assure that purchaser will have a separate claim for damages against seller for breach of the representation and warranty if the seller did not have the power or authority to enter into the contract. Purchaser should, of course, make independent inquiry of appropriate state agencies to assure the existence and good standing of the seller so that the validity of the conveyance is not questioned in the future.

The purchaser should verify this warranty by obtaining and examining (i) appropriate governmental certificates for the seller, and (ii) a certificate from the seller that the copies of the organizational documents, resolutions, consents and incumbency certificates given to the purchaser are true, correct, complete and current copies thereof.

The governmental certificates examined should include (i) certificates of existence from the Secretary of State (or other appropriate governmental agency) in which the entity was formed (available for all business associations other than joint ventures, general partnerships and certain trusts which generally do not file any documents with a governmental entity), (ii) certificates of good standing from the Secretary of State, (iii) certified copies of any and all documents filed with the Secretary of State (e.g., articles of incorporation, articles of organization or certificate of limited partnership), and (iv) as appropriate, an assumed name certificate. Ideally, these governmental certificates should be dated as of the date of the closing; however, this is usually not practical. As stated below, in addition to verifying the seller's legal existence, good standing and authority to transact business, these documents should be examined to ascertain the exact name of the entity (to make sure corrective action is not required, i.e., if record title is in a different name), the purpose or purposes for which the entity was formed, duration of existence and whether there are any restrictions on the ability to convey property.

The organizational documents typically encompass: (i) articles of incorporation and bylaws for a corporation, (ii) articles of organization and regulations (or operating agreement) for a limited liability company, (iii) certificate of limited partnership and limited partnership agreement for a limited partnership, (iv) partnership agreement for a general partnership or a joint venture, and (v) trust agreement for a trust. Of particular interest to the purchaser in reviewing the documents attached to the seller's incumbency certificate are the following: (i) the exact name of the entity, (ii) the purpose or purposes for which the entity was formed, including the ability to convey property, (iii) management structure, including the identity of the person(s) authorized to sign documents on
behalf of the entity, (iv) duration of existence, and (v) any other provisions which are either unusual in nature or affect the requirements or conditions of the conveyance.

Lack of "corporate capacity" cannot be made the basis of any claim or defense by the corporation at law or equity. See e.g., MODEL BUS. CORP. ACT § 3.04(A) (1997); TEX. BUS. CORP. ACT ANN. art. 2.04(A) (West 1998); New York's B.C.L. § 203 (McKinney 1986); WEST'S ANN. CAL. CORP. CODE § 208(b) (1990); S.H.A. 805 I.L.C.S. 5/3.15 ((Illinois) West 1993); WEST'S FLA. STAT. ANN. § 607.0304(1) (1993). However, it should be noted that certain claims may be asserted (i) against the corporation by a shareholder to enjoin such acts, (ii) by the corporation against the incumbent or former officers or directors of the corporation for exceeding their authority, or (iii) by the Attorney General to dissolve the corporation or enjoin the corporation from transacting unauthorized business. See e.g., MODEL BUS. CORP. ACT § 3.04(B); TEX. BUS. CORP. ACT ANN. art. 2.04(C) (West 1998); New York's B.C.L. § 203 (McKinney 1986); WEST'S ANN. CAL. CORP. CODE § 208(a) (1990); S.H.A. 805 I.L.C.S. 5/3.15 ((Illinois) West 1993); WEST'S FLA. STAT. ANN. § 607.0304(2) (1993). Further, a corporation is denied the defense of *ultra vires* when sued on its contracts. See Total Automation, Inc. V. Illinois Nat'l Bank & Trust Co., 351 N.E.2d 879 (Ill.App. 1976); Cooper Petroleum Co. v. LaGloria Oil and Gas Co., 423 S.W.2d 645 (Tex.Civ.App. -- Houston [14th Dist] 1967), rev'd on other grounds, 436 S.W.2d 889 (Tex. 1969); Reconstruction Fin. Corp. v. Eastern Terra Cotta Realty Corp., 48 N.Y.S.2d 920 (N.Y. Sup. 1944); Aitken v. Stewart, 18 P.2d 988 (Cal.App. 1933); Palm Beach Estates v. Croker, 143 So. 792 (Fla.App. 1932).

In *In re Westec Corp.*, 434 F.2d 195 (5th Cir. 1970), the court noted that the "corporate capacity" defense refers to acts beyond the corporate charter, not acts beyond authority of particular officers. See, e.g., Vanguard Equities, Inc. v. Sellers, 597 S.W.2d, 521, 525 (Tex. Civ. App. -- Corpus Christi 1979, no writ) (holding that the assignment of land interests is ineffective when the signatures required by the bylaws were not present).

Some state statutes provide that any corporation, in the absence of a requirement pursuant to the corporation's articles of incorporation or bylaws, may convey land by deed with or without the seal of the corporation, as long as it is signed by an officer thereof or agent thereto pursuant to board authorization. See, TEX. BUS. CORP. ACT art. 5.08 (West 1998). Other statutes provide that "no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that such act, conveyance or transfer was beyond the scope or purpose . . . of the corporation, as such limitations are expressed in the articles of incorporation or by reason of limitations on authority of its officers and directors to exercise any statutory power of the corporation, as such limitations are expressed in the articles of incorporation or bylaws." TEX. BUS. CORP. ACT art. 2.04(B) (West 1998). See also New York's B.C.L. § 202 (McKinney 1986); WEST'S ANN. CAL. CORP. CODE § 207(d) (1990); S.H.A. 805 I.L.C.S. 5/3.15 ((Illinois) West 1993); WEST'S FLA. STAT. ANN. § 607.0302(3) (1993).
have knowledge of the facts set forth in this representation, seller must be extremely careful in giving these representations. The warranty set forth in Section 1.1(b) on Annex 1 is extremely broad, and the seller and its counsel will attempt to obtain a “knowledge” exception to at least the Applicable Law portion of the representation because it is virtually impossible for any property owner to know if it is in compliance with all laws relating to the property. Alternatively, a narrowing of the definition of “Applicable Law” may be possible. See Section B.5 infra, for a discussion of the effect of the qualification of a representation or warranty with the terms “knowledge” or “best knowledge.”

c. **Contract Enforceable.** Section 1.1(c) dealing with enforceability is often challenged by seller's counsel that believe that these are legal matters and not the proper subject of a representation or warranty. The determination as to whether the contract is enforceable is ultimately the responsibility of purchaser's and seller's counsel. In large transactions, the seller's counsel may be asked to give a legal opinion. However, purchaser is entitled to know if seller has any reason, whether factual or legal, to believe that the contract is not enforceable. In this context, enforceable means that the contract is performable as drafted. Of primary concern to the purchaser is whether the remedies in the contract are enforceable so that the purchaser can eventually obtain title to the property that is the subject of the contract.

d. **No Consents Required.** The representation in Section 1.1(d) is designed to assure that no consents, either governmental or by members of the ownership entity, are required to consummate the sale. The seller should make sure of its authority to sell by obtaining consents of partners as may be required by specific partnership agreements or documents or by having approval of its board of directors, or shareholders, as required, if the seller is a corporation. See generally MODEL BUS. CORP. ACT § 1.28, 3.01-.02. If partners, board of directors or shareholders approval, as applicable, is not obtained in advance, such approval should be made a condition precedent to seller's and purchaser's obligations to consummate the sale. Purchaser should assure itself that the approval is obtained prior to execution of the contract so that further time and effort is not expended which could be wasted, if a subsequent decision of partners, board members, or shareholders is not to sell the property.

e. **No Bankruptcy or Insolvency Proceedings.** The representation and warranty set forth in Section 1.1(bb) on Annex 1 is designed to require the seller to disclose its financial difficulties to the purchaser. There have been instances where sellers have entered into contracts to sell property that was subject to the jurisdiction of the bankruptcy court or where, during the period prior to closing, the seller or a third party filed a petition in bankruptcy which affected the property. If the seller is in bankruptcy, the property still may be sold, but only with the approval of the bankruptcy court. Disclosure by the seller and due diligence by the purchaser should avoid such expensive, time-consuming circumstances. This representation is clearly basic protection for the purchaser and is designed to uncover a circumstance that could stop the consummation of the sale.

Bankruptcy papers are public records. See 11 U.S.C. § 107 (West 1993 & Supp. 1999). A variety of third-party credit reporting services monitor bankruptcy filings for a fee. However, Bankruptcy Courts have been liberal in allowing debtors to file in various jurisdictions, including
a district in which one of the debtor's properties is located; therefore, it is difficult to be absolutely sure that the seller has not filed a bankruptcy proceeding and multiple jurisdictions may need to be checked. Additionally, the filing of a bankruptcy petition operates as a "stay" and prevents the purchaser from taking certain actions, including without limitation: (i) the commencement or continuation of a judicial or administrative action against the seller, (ii) enforcement of any judgment against the seller, (iii) any act to obtain possession or exercise control over the property, or (iv) any act to create, perfect or enforce any lien against the property. See id. at § 362.

f. Seller Not a Foreign Person. Withholding is required on a foreign investor's disposition of United States real property interests. See, 26 U.S.C. 1445(a) (West 1998). The amount to be withheld on a foreign person's disposition of such interests is ten percent of the amount realized. This withholding obligation is generally imposed on the purchaser of the property and must be paid within twenty days of the transfer See Reg. § 1.1445-1(c)(1). Since such withholding complicates the transfer of the property, the representation set forth in Section 1.1(e) of Annex 1 seeks to prevent this result. See, generally, Dan L. McNeal, Taxation of Foreign Persons Disposing of U.S. Real Property, 60 Mich. B.J. 671 (1990); "Withholding Tax on Non-Resident Aliens or Foreign Corporations," C.J.S. Internal Revenue, § 1149, 1151.

2. Status of the Real Property

The representations and warranties in this category are specifically designed to require the seller to disclose facts that are necessary for the purchaser to make an informed decision as to whether the property is in such a legal and physical condition that the risks attendant to the purchase are not in excess of normal risks that the purchaser and its lender are willing to accept. Although the normal risks that are acceptable to a purchaser can and will vary from purchaser to purchaser, the structure of these warranties, in the absence of active failure to disclose, should identify the material risks associated with the property as opposed to the operations of the property. Selected representations and warranties will be briefly examined. Like the status of the purchaser, the facts surrounding the status of the property are mainly within the knowledge of the seller and, therefore, the majority of the risk should be allocated to the seller; however, sophisticated sellers will argue that much of the risk covered by these representations and warranties should be and is covered by the title insurance. If the purchase is being financed by an institutional lender, the acceptable risks are different and purchasers that finance the purchase will likely be required to give some if not all of these representations to their lender.

a. Ownership and Conveyance. Although the representation set forth in Section 1.1(f) on Annex 1 is an “even handed” version, sellers, if asked, should be careful in giving a representation that requires them to represent “marketable” or “merchantable” title. In Lund v. Emerson, 204 S.W.2d 639, 641 (Tex.Civ.App.--Amarillo 1947, no writ) the Court defined “marketable” title as:

[A] title free from reasonable doubt as to matters of law and fact, such a title as a prudent man, advised of the facts and their legal significance, would willingly accept

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it has been held that a title is not marketable if clouded by any outstanding contract, covenant, interest, lien, or mortgage sufficient to form a basis of litigation.


Based upon the definition in Lund, most property today would not be marketable. Indefeasible title is included within marketable title and is an acceptable standard within the marketplace when "marketable" title is narrowly construed. In addition, sellers should insist that any exception to title known to seller (usually what is shown on seller's policy of title insurance) be listed as permitted exceptions to title so that the purchaser will be required to examine the state of title prior to the execution of the contract, and purchaser's objections to the state of title can be addressed as the first priority. An effective title review must be made by examining a commitment for title insurance in conjunction with a current survey, and such an examination is sometimes impossible prior to execution of the contract. Sellers should require purchasers to review the owner's policy of title insurance (which was issued to the seller when it purchased the property) in conjunction with the survey that seller obtained. If all objections shown by such title policy and survey are listed as permitted exceptions, then (in the absence of something which happened during seller's ownership or some defect not uncovered by the title insurer or surveyor at the time of seller's purchase) there should be no title problems which would prevent the consummation of the sale. Purchaser may resist this review prior to closing; however, there is not an effective argument that purchaser can make if seller makes the appropriate documentation available for review.

b. No Condemnation. It is important that the purchaser know whether all or any portion of the property is the subject of a condemnation proceeding. Loss of a portion of the property can drastically affect the use of the property. The language in Section 1.1(p) of Annex 1 is drafted to give a knowledge exception to the seller in relation to threatened or contemplated proceedings because seller may not have knowledge of a proceeding that is threatened or contemplated by a condemning authority. Sellers may attempt to modify the first sentence to state that seller has not “received notice of a pending proceeding” because a proceeding may have been filed that has not been served upon seller. In addition, the seller should not make this representation as to personalty and should try to get the purchaser to define the words “similar proceeding.” Purchasers should avoid accepting a “written notice” exception because sellers may have had oral notice or information of a threatened or contemplated condemnation.

c. No Violations of Applicable Law. The representations set forth in Sections 1.1 (q), (r), (t) (w), (ii) and (jj) on Annex 1 are several of the broadest representations and yet some of the most important from the purchaser's viewpoint. Sellers must be certain that they fully
understand the definition of “Applicable Law,” which is generally broad. The purchaser must have assurance that the property being purchased does not violate Applicable Law and restrictive covenants, or, after the closing, the cost and expense relating to curing the problems will be the purchaser's responsibility. The parties will generally disagree in relation to whose responsibility it should be to determine violations and who should bear the cost of determination and risk of noncompliance. Depending upon the type and location of property, this determination may be a minor or major undertaking. The seller should, at a minimum, require a "knowledge" or "notice" exception. If there are violations, sellers should disclose these on an exhibit to the contract that fully explains the violations so that the purchaser can assess the risk involved.

d. **Litigation.** The representation set forth in Section 1.1(o) on Annex 1 is designed to make the purchaser aware of any litigation that affects or relates to the property or the occupancy of the property. See also representation in Section 1.1(bb) on Annex 1. If litigation is discovered, the purchaser and its counsel should thoroughly review all documentation relative to the matters in controversy. A seemingly innocent lawsuit can create an enormous risk to a purchaser (e.g., boundary line disputes, adverse possession claims, suits by tenants, etc.). Once disclosed, it is difficult for a seller to argue that any risk of litigation should be allocated to the purchaser, and because of the costs of litigation, no purchaser should assume that litigation is minor and therefore an acceptable risk. Sellers should require a “notice” exception and if disclosed litigation is acceptable to the purchaser it should be listed and adequately described on an exhibit to the contract.

e. **No Liens.** The purchaser has the right to have the property conveyed free of all liens except those for which the purchaser bargains and the representation in Section 1.1(z) on Annex 1 is structured to uncover facts known to the seller that may disclose the existence of liens. In negotiating this representation, the seller will argue that the title insurance will protect the purchaser and that this warranty is not necessary. The purchaser's position is that the seller may have knowledge of matters that the title insurer has no way of determining and that the representation is proper. The purchaser should be careful in dealing with this issue because of the potential for mechanics' liens, the facts of which should be known to the seller but which cannot always be determined through examination of the public records. The seller should attempt to get the word “encumbrance” removed because encumbrance is generally defined to mean any right to or interest in the property.

f. **Existing Liens.** If the purchaser is assuming or taking the property subject to an existing lien or liens, the purchaser will request the representations set forth in Section 1.1(ss) on Annex 1. These representations are fairly standard and do not create a problem in negotiation. In addition to these warranties, the contract should include provisions which require as a condition precedent to purchaser's obligation to consummate the purchase, that the seller deliver an estoppel certificate from the holder of all existing liens.

g. **Parties in Possession.** A determination of who has rights to possess or occupy the property legally and who, if anyone, is occupying the property has important long-term effects and any facts which may be known to seller concerning possession, except pursuant to written leases
or recorded documents should be disclosed by the seller. Questionable boundary lines are the most common cause of adverse possession problems. The representation in Section 1.1(m) on Annex 1 is designed to elicit disclosure by the seller of all parties in possession (legally or adverse). Sellers will want to negotiate (i) knowledge exceptions and (ii) exceptions to those facts shown on the survey (required to be provided under the other provisions of the contract) to the adverse possession portion of this representation and should attempt to qualify the portion dealing with the granting of licenses, leases, or other rights with the words “Seller has not granted . . . .”

h. No Other Contracts. The representation in Section 1.1(n) on Annex 1 is self-explanatory. Seller should determine whether it is necessary to qualify the language dealing with business operations on the property by excepting sales, exchanges, and transfers in the ordinary course of business prior to closing. Purchasers should insist on the right to approve such transfers or require approval when the value of the transactions exceed a certain monetary limit.

i. Access to Property. The representation in Section 1.1(dd) on Annex 1 is designed to avoid the embarrassing problem of the purchaser not being able to legally get to the property after having delivered the full purchase price to the seller. The representation is often resisted by sellers, especially when a survey is furnished. However, purchasers should uniformly require this representation or a form thereof because the risk should not fall solely on the surveyor. Many sellers resist the second sentence of this representation; however, if access is dependent upon easements, and these statements are not true, the purchaser may be required to spend considerable sums of money to establish access, and the risk of such loss should either be seller's, or the purchase price should be adjusted or escrowed at the time of sale. In addition, if the access to the property is through an easement, the title to the easement should be insured in the owner's policy of title insurance.

j. Taxes and Assessments. The purchaser is entitled to know the amount of the ad valorem taxes and that they have been paid by the seller. Section 1.1(ff) on Annex 1 is designed to give purchaser the assurance that taxes have been paid and that the purchaser will have no liability for taxes assessed prior to the date of closing. In Texas, there is a statutory provision requiring the payment of taxes that would have been due had there not been an "agricultural or open space exemption" by the person that changes the use of the land. See TEX. CONST. ART. VIII § 1-(d)-1 and TEX. TAX CODE §§ 23.51-23.56 and §§ 23.71-23.78 (West 1998). These roll-back provisions are generally applicable to land that has recently been agricultural land and has had an exemption (and thereby lower taxes) because of agricultural use. The adjustment for prior usage, if applicable, must be dealt with at the time of closing. The seller should know if there are facts that could cause additional tax to be assessed because of the change in land usage. Knowledge exceptions are appropriately included in the special assessment provisions.

k. No Environmental Violations. The purchaser wants to be forever protected from all costs and expenses for any environmental claims relating to the property prior to purchaser's ownership of the property. The representations in Section 1.1(s) on Annex 1 are extremely broad. In addition to this representation, the indemnity usually included in purchase and sale contracts will
specifically cover claims under or in relation to environmental laws. Sellers will and should deal with these representations and warranties with extreme caution. The real property will have been owned by numerous persons and entities, and unless there is an accurate history (with photographic evidence), there may not be any way to rely on these representations. How this problem is approached depends upon the willingness of the seller to allow an environmental review and to remedy any problems uncovered. Generally, sellers will give some form of environmental representations. Lenders now almost universally require some form of environmental representations from their borrowers. It is incumbent upon purchasers to protect themselves with appropriate environmental due diligence. Once a seller agrees to give some form of environmental representations and warranties, the seller will want to negotiate (i) knowledge exceptions, (ii) time limitations, (iii) limitations on damages, and (iv) a limitation on types of damages (e.g., limit to remedial costs and exclude lost profits and losses of third parties, loss of market value and exculpatory damages). By use of a broad representation, sellers should not allow expansion of the coverage of the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C.A. §§9601-9675 (West 1995 & Supp. 1999) ("CERCLA"). See Exxon Corp. v. Hunt, 475 U.S. 355, 359 (1986) (CERCLA was not intended to compensate third parties for damage that results from hazardous substance discharge); Artesian Water Co. v. Gov't of New Castle County, 659 F.Supp. 1269 (D. Del. 1987), aff'd, 851 F.2d 643 3rd Cir. 1988) and Piccolini v. Simon's Wrecking, 686 F.Supp. 1063 (M.D. Pa. 1988) (both denying private rights of recovery under CERCLA and Piccolini holding that diminution in property value and lost income are not recoverable under CERCLA). The seller will additionally want notice as soon as a violation is determined or alleged and should condition any liability upon receipt of notice. Sellers should not let their liability extend to future purchasers. Sellers, on the other hand, may wish to extract a release from the purchaser under proper circumstances and an indemnity for future environmental liabilities. See Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986) (state law should control whether and when agreements between private parties are enforceable in relation to releases and settlements under CERCLA). See also Kaufman and Broad-South Bay v. Unisys Corp., 822 F.Supp. 1468, 1473 (N.D.Cal. 1993); AM Int'l v. Int'l Forging Equipment Corp., 982 F.Supp. 989 (6th Cir. (Ohio) 1993); Village of Fox River Grove, Ill. v. Grayhill, Inc., 806 F.Supp. 785, 790 (N.D.Ill. 1992) (all holding that private parties may apportion CERCLA liability between themselves); Harley-Davidson, Inc. v. Minstar, Inc., 837 F.Supp. 978, 984 (E.D.Wis. 1993) (allowing transfer of liability by a culpable party to a non-liable party); Bumen Engineering v. Estate of Reeve, 799 F.Supp. 764, 484 (D.N.J. 1992) (indemnification for CERCLA liability allowed); FMC Corp. v. Northern Pump Co., 668 F.Supp. 1285 (D.Minn. 1987), dismissed, 871 F.2d 1091 (8th Cir. 1988) (release of former corporate owner for future causes of action released subsidiary or former owner).

1. **No Violation of Covenants, Conditions and Restrictions**

It is incumbent upon the seller to satisfy the purchaser that the property meets all legal requirements. While this representation, as with any other representation, is no substitute for the purchaser and its counsel undertaking appropriate due diligence, the seller is in the unique position to make this representation and is often the only party that has access to a series of notices or other matters which are not found in the public record which can affect the validity or completeness of the
matters set forth in this representation. It is of paramount importance that the purchaser know with as much certainty as possible that the property is, in fact, in compliance with all legal requirements. Additionally, the purchaser will want to review any documents reflecting the seller's ability to operate the property and carry on the seller's business as now being, and proposed to be, conducted. A certificate of occupancy provides some assurance that the developer had complied with the local building codes and laws at the time of issuance. Many cities issue certificates of occupancy for the shell structure and thereafter, serially, for the finished tenant improvements. Licenses and permits may be required for special activities, such as serving liquor, maintaining a swimming pool, operating an elevator, or for conducting certain businesses, such as nursing homes. If the Improvements are to be constructed or additional renovations are required, building, grading or other such permits may be required. Evidence of zoning should be obtained to verify that the seller's use of the property and the improvements comply with local zoning ordinances. If the property does not comply with the zoning ordinance (i.e., is non-conforming), the purchaser must explore the meaning and effect of such non-conforming use during the due diligence period. This requirement is usually satisfied by a letter from an appropriate government official stating the zoning classification and providing a copy of the applicable zoning ordinance and zoning map (and, where possible, a verification from such authority as to whether the property as built and operated conforms thereto). See also representations in Sections 1.1(w) and (kk) in Annex 1.

3. Operation of the Property

Not only is the purchaser concerned with the status of the seller and the status of the property, but when the property is improved (income-producing) property, the operations which produce the income are of major significance. The purchaser has contracted to acquire the property, the improvements and also the stream of income which is derived from operating and leasing the property, and the purchaser is entitled to certain assurances concerning the tenants and the operations so that it can confirm that its understanding and seller's preliminary statements and numbers are correct. Each of the following representations and warranties are designed to produce information and verify the operating history and income production of the property.

a. Tenant Leases. Purchaser is entitled to know that the leases supplied by the seller during the review period describe the current facts and that the leases are in full force and effect. The representation in Section 1.1(k) on Annex 1 in connection with a tenant estoppel certificate, that will be required by other provisions of the contract, are designed and structured to elicit the proper information from the seller and the tenants, respectively. Seller will want to negotiate a knowledge exception in relation to defaults under the leases. Most of the provisions of this warranty are even-handed and are not usually heavily negotiated; however, sophisticated sellers often take the position that the purchaser should rely on the tenant estoppels and purchaser's review of the leases, and will attempt not to give these warranties. The provision dealing with commissions is designed to disclose deferred commissions and force the parties to deal with the issue of allocation of the responsibility. Tenant estoppels, and subordination and non-disturbance agreements will also be required by the purchaser's lender, if the purchaser borrows any of the purchase price.
b. **Operating Agreements.** The purchaser will generally decide which of these agreements will be continued. Most management and operating agreements are terminable on thirty days' notice. The representation in Section 1.1(i) on Annex 1 is designed to uncover any long-term agreements and allow seller and purchaser to negotiate which of the parties will bear the cost and how the price will be adjusted.

c. **Books and Records.** The representation in Section 1.1(aa) on Annex 1 is designed to protect the purchaser from improper, and negligently prepared, financial information. Operating revenue is the core of the value of the property and the operating expenses will be a determinative of the net operating income on which the capitalization rate will be determined. Sellers often resist this representation because management companies are responsible for preparation of the data that constitutes the books and records of the seller. The risk should properly be borne by the seller, and the purchaser is entitled to this representation. A knowledge exception may be acceptable depending upon how knowledge is defined.

d. **Maintenance and No Defects.** The representation set forth in Section 1.1(ee) on Annex 1 is resisted and negotiated as heavily by sellers as any other representation in an income property sale. Sellers will strive to give no representations relating to the improvements and will attempt to negotiate an “as is” clause which specifically states that the purchaser is relying solely on its physical inspection of the property. See Williams, *The Enforceability of "As-Is" Clauses in Real Estate Sales Contracts*, American College of Real Estate Lawyers, Annual Meeting (October 1999). A “knowledge” exception has been included in the form representation and this often heads off lengthy negotiation. The definition of “knowledge” is extremely important to both sellers and purchasers. The result of these negotiations will depend on nonlegal factors. If defects are found, the purchase price will generally be adjusted. Builders and developers should attempt to negotiate releases from purchasers in relation to construction defects. Many builders and developers attempt to get the purchaser to agree to obtain releases from future purchasers. A purchaser should resist these attempts because of the problems caused when the purchaser tries to sell the property.

4. **Miscellaneous**

The representations set forth in Section 1.1(nn) through (tt) on Annex 1 are often resisted by sellers in real estate transactions, even though they are readily accepted in corporate transactions. However, once the other representations and warranties are fully negotiated, a purchaser should have the right to know if there are other material facts which would affect its decision to purchase the property. Sellers take the position that the provisions in 1.1(ss) and (tt) are nothing more than “catch-all” provisions designed to unduly broaden the seller's liability after closing.

a. **ERISA.** The ERISA representations are structured differently depending on whether the seller is (i) an employee benefit plan subject to ERISA (a "Plan") (or the property is an asset of a Plan) and the purchaser is not a Plan; (ii) the purchaser is a Plan (or the property will become an asset of a Plan) and the seller is not a Plan; (iii) both seller and purchaser are Plans (or the property is and will be an asset of a Plan); or (iv) neither seller or purchaser are Plans and the
property is not and will not be an asset of a Plan. Section 1.1(pp) sets forth the alternatives relating to the foregoing alternatives.

Although the prohibited transaction rules have an extremely broad scope, several statutory and regulatory exemptions are available, allowing many common real estate transactions that would otherwise be prohibited. See, e.g., 29 U.S.C.A. § 1108 (1999). Along with this representation, the Tax Code uses the term "disqualified person." 26 U.S.C.A. § 4975(e)(2) (1989 & Supp. 1999).

The first category of "absolute prohibitions" applies to specific transactions that are considered to have a high potential for abuse. See 29 U.S.C.A. § 1106(a)(1) (1999). Unless a statutory or regulatory exemption applies, these transactions are prohibited without regard to whether the fiduciary acts prudently and even if the transaction is beneficial to the Plan. The second category of "self dealing" transactions applies solely to fiduciaries and involves conflicts of interest. Id. at § 1106(b). Another category of prohibited transaction (not discussed here) applies to Plans that hold stock of the employer sponsoring the Plan. Id. at § 1106(a)(1)(E), (a)(2).

**Absolute Prohibited Transactions**: a fiduciary with respect to a Plan must not engage in a transaction if he knows or should know that the transaction involves a direct or indirect (among others) sale, exchange, or leasing of property between a Plan and a party in interest. See id. at § 1106(a)(1)(A)-(D).

**Self Dealing Prohibited Transactions**: a fiduciary with respect to a Plan must not: (i) deal with the assets of the Plan in his own interest or for his own account; (ii) in his individual or any other capacity act in any transaction involving the Plan on behalf of a party (or represent a party) whose interest are adverse to the interests of the Plan or of the Plan participants or beneficiaries; or (iii) receive any consideration for his own personal account from any party dealing with the Plan in connection with a transaction involving the assets of the Plan. See id. at § 1106(b)(1)-(3).

**Parties in Interest**: parties in interest include, but are not limited to, Plan fiduciaries, persons who provide services to the Plan, the employer sponsoring the Plan, fifty percent or greater owners of the Plan sponsor, family members of any of the above parties, certain subsidiaries of any of the above parties, and employees, officers, directors, and ten percent or greater shareholders/partners/joint venturers of any of the above parties. See id. at § 1002(14).

Fiduciaries of a Plan must act in accordance with the fiduciary duties outlined under ERISA when making decisions or taking actions with respect to the Plan. See id. at § 1104. A fiduciary who violates such duties is personally liable for any losses caused by the breach may be subject to civil penalties and such other equitable or remedial relief as a court may deem appropriate. See id. at § 1109.

b. **Money Laundering**  The representation in Section 1.1 (qq) should be included, from the seller's perspective, to evidence that the seller understands the issues relating to the money laundering statutes and that the seller does not condone the laundering of illegal funds. See, e.g. 18 U.S.C. § 1956-57 (West 1999). If the seller was the subject of a criminal investigation relating to money laundering, this representation might prove beneficial in convincing a zealous United States Attorney that the seller was trying to protect itself in every manner possible. In
addition, seller should, under no circumstances, allow the use of cash (wire transfer is preferred), multiple party checks, or third party checks, in the funding of the transaction. Seller should undertake due diligence, to "know" its purchaser. It is preferable for the seller to require, by means of an affidavit, full disclosure of the ownership structure of Grantor. Failure of the seller to understand such issues during the closing stages of a real estate transaction can have disastrous consequences. See, United States v. Campbell, 977 F.2d 854 (4th Cir. 1992), cert. denied, 507 U. S. 938 (1993) (holding that the defendant, a real estate agent, knew that her client drove new automobiles and flashed large amounts of money, stated that the money "might have been drug money" and participated in transaction where client failed to disclose large cash downpayment, was sufficient to create jury question as to whether defendant was willfully blind to fact that client was a drug dealer and transaction was intended to conceal proceeds of drug selling operation; such evidence could support money laundering conviction of real estate agent). See generally, Edward A. Peterson, Taking Precautions Against Money Laundering, ALI-ABA’s Practice Checklist Manual on Advising Business Clients: Checklist, Forms, and Advice From the Practical Lawyer, The Practical Real Estate Lawyer, and The Practical Tax Lawyer, ALI-ABA (1997).

5. What is a “Knowledge” Exception?

The seller and its counsel will consistently request that a representation or warranty be given only to the “knowledge” or “best knowledge” of the seller. When requested, several questions are raised: (i) What does “knowledge” mean? (ii) Does “knowledge” mean actual knowledge, implied knowledge, or constructive knowledge? (iii) Can a person have knowledge through negligence or negligent ignorance? (iv) Does the seller have a duty to find out facts? and (v) Is suspicion knowledge? Hexter v. Pratt, 10 S.W.2d 692 (Tex.Comm'n.App. 1928, judgm't adopted) holds that actual knowledge and negligent ignorance are the same and that actual knowledge includes not only that knowledge of which a party has express knowledge, but also that which would have been gained from a reasonably diligent inquiry and exercise of the means of information at hand. See also Simmons Creek Coal Co. v. Doran, 142 U.S. 417 (1892); Sandy Ridge Oil Co. v. Centerre Bank Nat'l Assoc., 510 N.E.2d 667 (Ind. 1987); State v. Berkely, 23 S.E.2d 608, 610 (W.Va. 1895). If a knowledge exception is used in relation to representations and warranties, a definition of the term “knowledge” should be included, which spells out exactly what knowledge means. The definition should include such considerations as (i) whose knowledge (i.e., if the seller is an entity rather than an individual, does the term include employees, agents, representatives, affiliates, etc.), (ii) is knowledge to be “actual” knowledge (taking into consideration the holding in Hexter), (iii) should the duty of inquiry be limited, (iv) should the knowledge be limited to that possessed at the time of execution of the contract.

6. Merger and Survival

The questions of whether representations and warranties survive after the delivery of a deed to the property has many complex considerations. See Waters, supra, at 2 for an extensive discussion. The seller will, of course, want all representations and warranties to come to an end at the time the deed is delivered while the purchaser wishes any cause of action it might have arising
out of the facts surrounding the contract to survive until the statute of limitations bars the cause of action or longer. There are basically four approaches that can be taken in regard to survival of representations and warranties (i) no provisions in the contract, (ii) express survival provisions in the contract, (iii) limited survival provisions in the contract, or (iv) express no survival. Practitioners must check each state’s limitations laws in this regard. For instance, Texas law provides that a person may not enter into a contract or agreement that purports to limit the time to bring a suit to less than two years. See, Tex. Civ. Prac. & Rem. Code Ann. § 16.070 (Vernon 1997); (Florida law provides that "[a]ny provision in a contract fixing the period of time . . . less than that provided by the applicable statute of limitations is void."); West’s Fla. Stat. Ann. § 95.03 (1993); In New York parties to a contract may shorten the statute of limitations only if such a limit is both reasonable and in writing. New York’s C.P.L.R. § 201 (McKinney 1990) and Spataro v. Kloster Cruise, Ltd. 894 F.2d 44 (2d. Cir. (N.Y. 1990). The result of negotiations regarding survival is generally determined by the relative bargaining strength of the parties; however, sellers will attempt to limit the survival period. The purchaser should try to obtain a sufficient survival period so that its on-site management can uncover undisclosed facts. Alternate provisions are set forth in Section 1.2 in Annex 1.

III. Summary

Although there is considerable negotiation and posturing in relation to representations and warranties in contracts relating to commercial real estate, the practicalities relating to the use of representations and warranties are probably more important than enforcing the breach of these provisions. The disclosure that accompanies the negotiation or representations and warranties, and due diligence by purchasers of commercial real estate is most important to the purchaser’s "purchase or pass" decision. Once the purchaser has assessed the risk relating to each matter covered by the "set" of representations and warranties and reviews the business and legal due diligence, the aggregate risk can be reviewed and the decision whether to purchase the property can be made based on a significant body of information. Many sellers are "single purpose" entities and any future responsibility for breach of representations and warranties is questionable if an escrowed sum is not retained to cover a breach. The knowledgeable negotiation of representations and warranties can be an important benefit to real estate clients.
ANNEX 1

FORM OF REPRESENTATIONS AND WARRANTIES

1. WARRANTIES AND REPRESENTATIONS

1.1 Warranties and Representations of Seller. Seller represents and warrants to Buyer on and as of the Effective Date and on and as of the Closing Date that:

(a) Status and Authority of Seller. Seller is a corporation, limited partnership, or general partnership duly organized, qualified to do business and in good standing under the laws of the state of _______________. The execution and delivery of this Contract by the signatories hereto on behalf of Seller and the performance of this Contract by Seller have been duly authorized by Seller. Seller has the legal capacity and authority to execute, deliver and perform this Contract.

(b) No Prohibitions. Seller is not prohibited from (i) executing or delivering this Contract, (ii) complying with or performing the terms of this Contract, or (iii) consummating the transactions contemplated by this Contract by any Applicable Law, agreement, instrument, restriction, or by a judgment, order or decree of any Governmental Authority having jurisdiction over Seller or Seller's properties, and execution by Seller of this Contract and performance by Seller of its obligations under this Contract shall not be in violation of or cause a default under any Applicable Law, agreement, instrument, covenant, condition, restriction, judgment, order or decree.

(c) Contract Enforceable. This Contract has been duly executed and delivered by Seller and constitutes a legal, valid, and binding obligation of Seller, enforceable against Seller in accordance with the terms hereof, except as enforceability hereof may be limited by bankruptcy, insolvency, or reorganization laws or applicable principles of equity.

(d) No Consents Required. No consent, except that of __________________, waiver, approval, or authorization of, or filing, registration, or qualification with, or notice to, any Governmental Authority or any other entity or person (including without limitation, its directors or shareholders if Seller is a corporation, or its partners, if Seller is a partnership) is required to be made, obtained, or given by Seller in connection with the execution, delivery, and performance of this Contract, except such consent, waiver, approval, authorization, filing, registration or qualification which has been made, obtained or given. The joinder of no entity or person other than Seller will be necessary to convey the property fully and completely to Buyer upon Closing.

(e) Seller Not a Foreign Person. Seller is not a "foreign person" but is a "United States person" as such terms are defined in the Foreign Investment in Real Property Tax Act of 1980 and §§ 1445 and 7701 of the Code; that is to say, Seller is a citizen or resident of the
United States, a domestic partnership, a domestic corporation, or an estate or trust which is not a foreign estate or foreign trust within the meaning of § 7701(a)(31) of the Code.

(f) **Title to Property.** [To Seller's knowledge.] Seller has good and indefeasible [marketable] fee simple title to the Property[, free and clear of all conditions, exceptions, or reservations, except the Permitted Exceptions]. Seller has not granted any option or right of first refusal or first opportunity to any person or entity to acquire the Property or any interest therein. Except as disclosed in Schedule ___, Seller has not entered into any agreement or understanding, either written or oral, pursuant to which any person or entity has the right to own, acquire, use or occupy any portion of the Property or any interest therein.

(g) **No Encroachments.** The Improvements do not encroach on any easement or on any land not included within the boundary lines of the Land and there are no neighboring improvements encroaching on the Land.

(h) **No Violation of Covenants, Conditions and Restrictions.** The Property and its present use do not violate or conflict with any covenants, conditions or restrictions applicable to the Property.

(i) **Operating Agreements.** Except as otherwise permitted herein, no portion of the Property shall, as of or subsequent to the Closing Date, be subject to the burdens or obligations of any Operating Agreement or other agreement that would restrict or inhibit the operation and use of the Property by Buyer, all Operating Agreements are current and not in default, and all Operating Agreements which Buyer elects to assume shall, at Closing, be current and not in default.

(j) **True Copies of Documents.** The survey, mechanical and structural plans and specifications, soil reports, Leases, certificates of occupancy, warranties, operating statements, and income and expense reports, and all other books and records relating to the Property and all other contracts or documents delivered to Buyer in connection with this Agreement (including, without limitation, the Service Contracts, the Other Documents and the Loan Documents) are true, correct and complete copies of such documents.

(k) **Tenant Leases.** Schedule ___ (the "Rent Roll") is a true, correct and complete list of all leases and tenancy agreements affecting any portion of the Property and all amendments, extensions and modifications thereto, showing the name of each tenant, its space number and approximate square footage, the date of each such lease and any amendment thereto, the minimum rent, additional rent and percentage rent due under each such lease, the options relating to such lease, and the other information set forth in the Rent Roll. Except as may be specifically noted to the contrary in the Rent Roll:

(i) Seller is the sole owner of the lessor's interest in all of the Leases;
(ii) all Leases are in full force and effect without current default by either Seller or the respective tenants and no event has occurred and no condition exists which, with the giving of notice or the passage of time, or both, will constitute a default under any Lease;

(iii) none of the Leases have been modified in a material way;

(iv) all obligations of the lessor under the Leases with respect to the performance of work or the installation of equipment or materials required to have been performed at or prior to the Effective Date have been fully observed and performed, and there are no agreements with any tenant for the performance of any work by lessor;

(v) no tenant is or shall become entitled to any concession, rebate, allowance, or free rent for any period subsequent to the Closing, without the prior written consent of Buyer;

(vi) no tenant has any purchase option or other interest (other than its leasehold tenancy for a specified term, as stated in the Rent Roll) in the Land, the Improvements, or the Personal Property;

(vii) To Seller’s knowledge, no tenant under any Lease has (A) commenced a voluntary case or had entered against it an order for relief under any chapter of the Federal Bankruptcy Code (Title XI of the United States Code) or any similar order or decree under any federal or state laws, (B) caused, suffered or consented to the appointment of a receiver, trustee, administrator, conservator, sequestrator, liquidator, or similar official in any federal, state or foreign judicial or non-judicial proceeding to hold, administer and/or liquidate all or substantially all of its assets, or (C) made an assignment for the benefit of creditors. Seller has not received any written notice of intention of any tenant in the Property to vacate its demised premises prior to the expiration of the term of its Lease and cease paying rent except where such premises are to occupied and the rent is to be paid by a subtenant or assignee;

(viii) All of the services required to be supplied to each tenant pursuant to the Leases are presently being supplied;

(ix) Seller has not received any notice of a failure of Seller to supply any service to any tenant, nor has Seller received any notice from any tenant of a default or alleged default by Seller (including failure by Seller to complete any item of work to be completed pursuant to any of the Leases). Seller has not received any notice to cancel any of the Leases or any notice disputing the computation of the rents payable pursuant to any of the Leases;
(x) there are no pending claims asserted by any tenants for offsets against rent or any other monetary claims made against Seller as landlord; and

(xi) no tenant has given Seller notice of its intention to vacate its demised premises prior to the end of the term of its lease.

(l) **Commission Agreement.** [Except as disclosed in Schedule __,] there are no leasing commissions or fees payable with respect to the Leases in effect as of the date hereof which are due after the Closing.

(m) **Parties in Possession.** There are no adverse parties in possession of the Property or of any part thereof and no parties in possession thereof except Seller and the tenants under the Leases, except as otherwise expressly disclosed herein, and no party has been granted any license, lease, or other right relating to the use or possession of the Property except the tenants under the Leases, or except as otherwise expressly disclosed herein.

(n) **No Other Contracts.** There are no written or oral agreements affecting the Property or binding on Seller, other than the Tenant Leases, this Agreement, the Contracts, the reciprocal easement agreement affecting the Property, and such other agreements as may be entered into by Seller in accordance with the terms of this Agreement.

(o) **No Litigation.** [Except as described in Schedule __,] there is no action, suit, proceeding or claim affecting the Land, the Improvements or the Personal Property or any portion thereof, or affecting Seller and relating to or arising out of any of the Leases or the ownership, operation, use or occupancy of the Property pending or being prosecuted before or by any Governmental Authority nor, to Seller's knowledge, is any such action, suit, proceeding or claim threatened or being asserted. **[To Seller's knowledge, information and belief, no pending or threatened litigation or proceedings described on Schedule __ attached hereto will adversely affect Seller's ability to consummate the transactions contemplated by this Agreement; all such pending or threatened litigation or proceedings will be fully covered by liability insurance coverage maintained by Seller.]**

(p) **No Condemnation.** There is no pending condemnation or similar proceeding affecting the Land, the Improvements, or the Personal Property or any portion thereof, and Seller has not received any written notice and has no knowledge that any such proceeding is contemplated.

(q) **Licenses and Permits.** Seller has obtained all licenses, permits, variances, approvals, authorizations, easements and rights of way, including proof of dedication, required from all Governmental Authorities having jurisdiction over the Property or from private parties for the intended use, operation and occupancy of the Property and to insure vehicular and pedestrian ingress to and egress from the Property.
(r) **No Violations of Applicable Law.** The [continued] location, ownership, operation, use, and occupancy of the Land or the Improvements [for the purposes for which they are presently used] [for purposes of _________] thereon do not violate any Applicable Law, including without limitation all Environmental Laws and the [Architectural Barriers Legislation] [Americans with Disabilities Act]. There are no violations of any Applicable Law affecting any portion of the Land, the Improvements or the Personal Property, and no written notice of any such violation has been issued by any Governmental Authority.

(s) **Environmental.** ///Variant 1///There are no Environmental Conditions and there is no Environmental Noncompliance with respect to the Property. All Permits have been obtained, are valid and in good standing, and are listed on Schedule 7.1(dd). All operations on or at the Property are and have been conducted in compliance with all applicable Environmental Laws. Seller has not received any Notification from any governmental instrumentality seeking any information or alleging any violation of any Applicable Law or Environmental Law. Seller has not caused or permitted the Property to be used to generate, manufacture, refine, transport, treat, recycle, store, handle, dispose of, transfer, produce, or process any Hazardous Materials or solid waste, except in small quantities utilized in connection with routine maintenance or repair of the Property, all of which have been and will be stored, used, handled, and disposed of in full compliance with all Environmental Laws and none of which require any Permits. Seller has not caused or permitted, and has no knowledge of, any Release of any such Hazardous Materials on-site or off-site of the Property. The Property (and all uses thereof and operations conducted thereon) complies with all Permits, and no Hazardous Materials are located on, in, or under the Property. No condition, circumstance, or set of facts directly or indirectly applicable to the Property constitutes or could reasonably be deemed to constitute a hazard to health, safety, property, or the environment for which Seller is or may be liable, or which is, or with the passage of time, could become an Environmental Claim or Environmental Noncompliance.

///Variant 2///. There has been no production, disposal, release or storage on or from the Property of any Hazardous Materials, as defined below, by Seller or, to Seller's knowledge, information and belief, any present or previous tenant of the Property, any previous owner or any other person, or any other activity which could have toxic or adverse environmental results, and there is no pending or threatened proceeding or inquiry by any governmental authority with respect thereto nor any violation of any Environmental Requirements, as defined below. To Seller's knowledge, information and belief, the Property contains no asbestos or material containing asbestos and no asbestos or material containing asbestos has been stored on or used in the construction, alteration or renovation of the Improvements. As used in this Agreement, "Environmental Requirements" mean all applicable present and future statutes, regulations, rules, ordinances, codes, licenses, permits, orders, approvals, plans, authorizations, concessions, franchises and similar items of all governmental agencies, departments, commissions, boards, bureaus or instrumentalities of
the United States, states and political subdivisions thereof and all applicable judicial and administrative and regulatory decrees, judgments and orders relating to the protection of human health or the environment, including: (a) all requirements, including but not limited to those pertaining to reporting, licensing, permitting, investigation and remediation of emissions, discharges, releases or threatened releases of Hazardous Materials, chemical substances, pollutants, contaminants or hazardous or toxic substances, materials or wastes whether solid, liquid or gaseous in nature, into the air, surface water, groundwater or land, or relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of chemical substances, pollutants, contaminants or hazardous or toxic substances, materials, or wastes, whether solid, liquid or gaseous in nature; and (b) all requirements pertaining to the protection of the health and safety of employees or the public.

As used in this Agreement, "Hazardous Materials" means, collectively, any substance: (a) the presence of which requires investigation, regulation or remediation under any federal, state or local statute, regulation, ordinance, order, action, policy or common law; or (b) which is or becomes defined as a "hazardous waste" or "hazardous substance" under any federal, state or local statute, regulation or ordinance or amendments thereto, including the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Section 9601 et seq.) and or the Resource Conservation and Recovery Act (42 U.S.C. Section 9601 et seq.); or (c) which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic or otherwise hazardous and is or becomes regulated by any governmental authority, agency, department, commission, board, agency or instrumentality of the United States, the State of California or any political subdivision thereof; or (d) the presence of which on the Property causes or threatens to cause a nuisance upon the Property or to adjacent properties or poses or threatens to pose a hazard to the health or safety of persons on or about the Property; or (e) which contains gasoline, diesel fuel or other petroleum hydrocarbons; or (f) which contains polychlorinated biphenyls (PCBs) or asbestos.

///Variant3///. To Seller's knowledge, neither the Property nor any real estate in the vicinity of the Property is in violation of any federal, state, local or administrative agency ordinance, law, rule, regulation, order or requirement relating to environmental conditions or Hazardous Material ("Environmental Laws"). Neither Seller, nor to Seller's knowledge, any third party, has used, manufactured, generated, treated, stored, disposed of, or released any Hazardous Material on, under or about the Property or real estate in the vicinity of the Property or transported any hazardous Material over the Property. Neither Seller, nor to Seller's knowledge, any third party has installed, used or removed any storage tank on, from or in connection with the Property except in full compliance with all Environmental Laws, and to Seller's knowledge there are no storage tanks or wells (whether existing or abandoned) located on, under or about the Property. To Seller's knowledge, the Property does not consist of any building materials that contain Hazardous Material. For the purposes hereof, "Hazardous Material" shall mean any substance, chemical, waste or other material which is listed, defined or otherwise identified as "hazardous" or "toxic" under any federal, state, local or administrative agency ordinance or law, including, without limitation,

(t) Changes in Applicable Laws. Seller has no information or knowledge of any change contemplated in any of the Applicable Laws or any judicial or administrative action, or any action by adjacent landowners, or any fact or condition relating to the Property which would adversely affect, prevent, or limit the use of the Property as [an] [a] [apartment complex] [office building] [shopping center] [regional mall] [____________] of the size and nature currently being operated.

(u) No Administrative Actions. The operation of the Property has not been, during Seller's ownership of the Property, and is not now, to Seller's knowledge, the subject of any administrative investigation, action or judicial proceeding in regard to sex, age, or racially discriminatory practices initiated by any Governmental Authority, or any private citizen, and no such investigation, administrative action, or judicial proceeding is now pending, nor is the Property presently operating under any court order or administrative agreement in regard to alleged sex, age, or racially discriminatory practices.

(v) Improvements. The Improvements consist of [___ apartment units, all of which are now, and at the time of Closing shall be, in rentable condition and contain a full complement of appliances] [a ____ story office building containing ______ number of rentable square feet] [a__________ square foot [neighborhood] [shopping center] [regional mall] [____________].

(w) Zoning and Permits. The Property is properly zoned for its present and contemplated use as a ____________ and is otherwise in full compliance with all Applicable Laws, including without limitation all federal, state and local laws, ordinances, rules, regulations or orders (including without limitation zoning laws, subdivision laws, building codes, fire codes, those relating to historical preservation, aviation, environment, health and safety. [To Seller's knowledge, information and belief,] all licenses, permits, approvals and consents required in connection with the construction and installation of the
Improvements and the present and contemplated use and occupancy of the Property have been duly issued by the appropriate Governmental Authorities or private authorities and are in full force and effect. There are no pending or threatened requests, applications or proceedings to alter or restrict the zoning or other use restrictions applicable to the Property; Seller has received no notice from any Governmental Authority of zoning, building, fire, water, use, health, environmental or other violations of Applicable Law issued in respect of the Property which have not been heretofore corrected, and Seller has no reason to believe that any Governmental Authority has issued, contemplates or has any basis for issuing any such notice, and no such violations exist; the Improvements and the present uses thereof are permitted, conforming structures and uses under all applicable zoning and building laws and ordinances.

(x) Plans of Authorities. No Governmental Authority has adopted any plan or study which in any way would adversely affect the use of the Property, or any portion thereof, for its current and intended uses. No Governmental Authority has adopted any plan or study for any intended public improvements which will result in any material charge being levied against, or any material lien assessed upon, the Property. To Seller's knowledge, information and belief there is no existing, proposed or contemplated plan to widen, modify or realign any street or highway contiguous to the Property except as has been disclosed to Buyer in writing by Seller. Seller has not received any notice of any contemplated or actual special assessments or reassessments for general real estate tax purposes affecting the Property.

(y) Development Rights. Neither Seller, nor any previous owner of the Property, has sold, transferred, conveyed, or entered into any agreement regarding "air rights", "excess floor area ratio" or other development rights or restrictions relating to the Property.

(z) No Liens. The Property is free and clear of all mechanic's liens, liens, mortgages, or encumbrances of any nature except as expressly permitted in this Contract, and no work has been performed or is in progress by Seller, and no materials have been furnished to the Land or the Improvements or any portion thereof, which might give rise to mechanics', materialmen's or other liens against the Land, the Improvements or the Personal Property or any portion thereof

(aa) Books and Records. All books and records relating to operating income and expenses of the Property furnished or made available to Buyer by Seller or Seller's agent were those maintained by Seller in regard to the Property in the normal course of business and are true and correct and accurately reflect [as of the date thereof] the matters contained therein and all financial statements relating to Seller or the Property for each of the periods preceding the date of the Contract heretofore delivered by Seller to Buyer have been prepared on a consistent basis; and are true, correct, and complete.
(bb) No Bankruptcy or Insolvency Proceedings. There are no attachments, executions, assignments for the benefit of creditors, receiverships, conservatorships or voluntary or involuntary proceedings in bankruptcy or pursuant to any other debtor relief laws contemplated or filed by Seller or pending against Seller or the Property.

(cc) Utilities. All utilities required by Applicable Laws or by the needs of occupants of the Property for the operation of the Improvements including, but not limited to, water, sewer, gas and electric, enter the Land through adjoining public streets or if they pass through adjoining private land, do so in accordance with valid public or private easements which will inure to the benefit of Buyer. All of said utilities are available to the Property in form and amount necessary for the present and contemplated use of the Property, appropriate connections to the Improvements and any tenant spaces therein have been installed and are operating, pursuant to valid permits, and there are no unpaid fees or assessments for the installation of these services or charges for making the connections. No fact, condition, or proceeding exists which would result in the termination or impairment of the furnishing of or an increase in rates or services to the Property of the foregoing utility services.

(dd) Access to Property. There are adequate means of ingress and egress for vehicular and pedestrian traffic to and from the Land and each adjoining street, road or highway. All routes of ingress and egress to and from the Land, to the extent they pass through adjoining land, do so in accordance with valid public or private easements which will inure to the benefit of Buyer. To Seller's knowledge, the Property does not violate any restriction, condition or agreement contained in any easement, reciprocal easement, restrictive covenant, or similar instrument or agreement affecting the Property or any part thereof.

(ee) Maintenance; No Defects. Seller has not received any notice and is not otherwise aware of any unsafe or other condition which presents risk of injury to persons or loss of or damage to property affecting or concerning the Property. To Seller's knowledge, the roofs of the buildings comprising the Improvements are free of leaks; the foundations, the structural and load-bearing components of the Property, the roofs, the parking lots, and all mechanical systems (including without limitation heating, ventilation, air-conditioning, plumbing, sewage drainage, electrical and ________________) are in good working order, repair and condition, are fully operable and are adequate to service the requirements of the Improvements and the Property. There are no unsatisfied requests for repairs, restorations or improvements from any person, entity or authority (including without limitation tenants, lenders or Governmental Authorities) which Seller is obligated to perform and with respect to which the obligations of Seller is delinquent.

(ff) Taxes and Assessments. There are no impositions which currently encumber the Property or any portion thereof or any interest therein, other than impositions disclosed to Buyer in the Title Documents which are not yet due or payable. Seller has not received
notice of, and has no other knowledge or information of, any proposed change in the valuation of the Property for real estate taxes from that assessed for the current assessment period, nor does Seller have any other knowledge or information of any action or proceeding designed to levy any special assessment against the Property. Seller has not received notice of, and has no other knowledge or information of, any possible future improvements by a Governmental Authority, any part of the cost of which would or might be assessed against the Property, or of any contemplated future assessments of any kind. There is no proceeding pending or presently being prosecuted for the reduction of the assessed valuation or taxes or other impositions payable in respect of any portion of the Land, the Improvements or the Personal Property. ///// [Texas Provision: No part of the Property has been assessed for real estate taxes during the preceding five (5) years using appraisal procedures established for either (i) lands designated for "agricultural use" value within the meaning of TEX. CONST. art. VIII, § 1-d to value the Land, or any part thereof, or (ii) "open-space land" devoted to timber production on the basis of its productive capacity or "open-space land" devoted to agricultural use within the meaning of TEX. CONST. art. VIII, § 1-d and TEX. TAX CODE §§ 23.51-23.56 and 23.71-23.78 to value the Land, or any part thereof. In the event that real estate taxes have been assessed based on either (i) or (ii), Seller shall pay any and all subsequent assessments therefor.] /////

(gg) Insurance. The insurance policies identified and described on Schedule are presently in force and all premiums thereon are paid through the dates set forth in Schedule. Seller has not received, and has no other knowledge or information of, any notice from any insurance company or board of fire underwriters requesting the performance of any work or alteration with respect to the Property, or requiring an increase in the insurance rates applicable to the Property. To Seller's knowledge, the Property complies with the requirements of all insurance carriers providing insurance therefor.

(hh) Soils; Flood and Other Zone Designations; There are no soil conditions adversely affecting the Property and the Property is not in an area identified by any agency or department of federal, state or local government as having flood or geological hazards. To Seller's knowledge, no portion of the Property is situated in an area designated by the Secretary of the United States Department of Housing and Urban Development (or by any other federal, state, municipal, or other governmental instrumentality) as having special flood or mudslide hazards. ///// [California Provision: The Property is not located within (i) an Alquist Priolo Special Study Zone as defined in California Public Resources Code Sections 2621-2625; (ii) an earthquake fault zone as defined in California Public Resources Code Section 2621.9; (iii) a seismic hazard zone as defined in California Public Resources Code Section 2694; (iv) a special flood hazard area as defined in California Government Code Section 8589.3; (v) an area of potential flooding as defined in California Government Code Section 8589.4, (vi) a very high fire hazard severity zone as defined in California Government Code Section 51183.5; (vii) a wildlife area that may contain substantial forest fire risks and hazards, as defined in California Public Resources Code Section 4136.]}/////
(ii) **Property Not in Wetland.** No portion of the Property is located in a wetland area, as defined by Applicable Laws, or in a designated or recognized floodplain, flood plain district, flood hazard area or area of similar characterization. No commercial use of any portion of the Property will violate any requirement of the United States Army Corps of Engineers or Applicable Laws relating to wetland areas.

(jj) **Compliance with Architectural Barriers Legislation.** The Improvements were built and continue to be in full compliance with all legal requirements relative to architectural barriers or accommodations of disabled persons, including, without limitation, [the American with Disabilities Act] [applicable Architectural Barriers Legislation].

(kk) **Separate Legal Parcel.** [Each of the _____ (___) parcels constituting] the Land is a separate and distinct legal parcel. [Each] such parcel has been created by way of a subdivision of land completed in accordance with all Applicable Laws, including any local ordinances, rules and regulations.

(ll) **Property is an Independent Operating Unit.** The Property is an independent operating unit which does not now rely on any facilities (other than facilities covered by Permitted Exceptions or facilities of municipalities or public utilities) located on any property that is not part of the Property to fulfill any municipal or other governmental requirement, or for the furnishing to the Property of any essential building systems or utilities (including drainage facilities, catch basins, and retention ponds). No other building or other property that is not part of the Property relies upon any part of the Property to fulfill any municipal or other governmental requirement, or to provide any essential building systems or utilities.

(mm) **Reciprocal Easement Agreements.** [No reciprocal easement agreements affect the Property.] [The reciprocal easement agreement affecting the Property is in full force and effect, there are no uncured defaults on the part of __________, __________ or Seller under the reciprocal easement agreement, and no event has occurred which, with the giving of notice or the passage of time, or both, will constitute a default under the reciprocal easement agreement.]

(nn) **Employees.** Schedule _____ contains a list of all employees serving the Property, including name, brief job description, hourly or weekly wage, accrued vacation pay and vacation allowance, age, sex, and union affiliation, if any. Such employees may be participants in a pension, profit sharing, or similar plan. Seller will pay all such employees their wages and other benefits through the Closing Date. Seller will not object if Buyer shall choose to hire any of such employees. By any such hiring, Buyer shall not be deemed to assume any liability under any pre-existing pension, profit sharing, or similar plan of Seller. Seller shall appropriately fund any pre-closing liability in any such plan.
(oo) **Labor Disputes.** There is no unfair labor practice charge or complaint pending or threatened against or relating to the Property and no pending or contemplated strikes, picketing, slow downs or other curtailments of work by any employees or representatives of employees or picketing or attempts to interfere with the normal operation of the Property by any person, group of persons or organization.

(pp) **ERISA.** On or before the Closing Date, Seller shall deliver a certificate, in the form attached hereto as Schedule____, to confirm the foregoing representation and warranty.

*If neither Buyer nor Seller is an employee benefit plan and the Property is not and will not be an asset of an employee benefit plan*

Seller is not "an employee benefit plan," as such term is defined in Section 3(3) of ERISA, which is subject to Title 1 of ERISA. Neither the Property nor any of the other assets of Seller constitute or, to the knowledge of Seller, have ever constituted "plan assets" of one or more such plans within the meaning of 29 C.F.R. Section 2510.3-101.

*If Seller is an employee benefit plan or the property is an asset of an employee benefit plan*

No non-exempt "prohibited transactions," as such term is defined in Section 4975(c)(1) of the Code and Section 406 of ERISA, have ever occurred with respect to the property. Neither Seller nor any affiliate thereof has participated in a violation of Part 4 of Title I, Subtitle B of ERISA with respect to the Property, and, to the knowledge of Seller, no such violation of ERISA has otherwise occurred with respect to the Property. To Seller's knowledge, the sale and purchase of the Property pursuant to this Agreement will not constitute a non-exempt prohibited transaction and will not result in a violation of Part 4 of Title 1, Subtitle B of ERISA.

*If Buyer is an employee benefit plan or the Property will become an asset of an employee benefit plan after the purchase by Buyer*

To Seller's knowledge, as of the Closing, neither Seller nor any of its affiliates is a party in interest or a disqualified person with respect to Buyer or any plan, the assets of which are used to purchase the Property in accordance with this Agreement. To Seller's knowledge, Seller has not entered into any agreement with respect to the Property, including any Leases, with any party who is a disqualified person or a party in interest with respect to Buyer or any plan, the assets of which are used to purchase the Property in accordance with this Agreement. To Seller's knowledge, the sale and purchase of the Property in accordance with this Agreement will not constitute a non-exempt prohibited transaction and will not result in a violation of Part 4 of Title I, Subtitle B of ERISA.
No non-exempt "prohibited transactions," as such term is defined in Section 4975(c)(1) of the Code and Section 406 of ERISA, have ever occurred with respect to the Property. Neither Seller nor any affiliate thereof has participated in a violation of Part 4 of Title I, Subtitle B of ERISA with respect to the Property, and to the knowledge of Seller, no such violation of ERISA has otherwise occurred with respect to the Property. To Seller's knowledge, the sale and purchase of the Property pursuant to this Agreement will not constitute a non-exempt prohibited transaction and will not result in a violation of Part 4 of Title I, Subtitle B of ERISA.

To Seller's knowledge, as of the Closing, neither Seller nor any of its affiliates is a party in interest or a disqualified person with respect to the Buyer or any plan, the assets of which are used to purchase the Property in accordance with this Agreement. To Seller's knowledge, Seller has not entered into any agreement with respect to the Property, including any Leases, with any party who is a disqualified person or a party in interest with respect to Buyer or any plan, the assets of which are used to purchase the Property in accordance with this Agreement.

As used herein, the term "party in interest" has the meaning set forth in Section 3(14) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), a copy of which is attached hereto as Schedule _, as such Section is interpreted or amended on the date any undertaking is made with respect thereto. As used herein, the term "disqualified person" has the meaning set forth in Section 4975(e) of the Code, as such Section is interpreted or amended on the date any undertaking is made with respect thereto.

(qq) **Money Laundering.** [_____________ and ______________ are the sole shareholders of the Buyer, ______________ and ______________ are all of the general partners of the Buyer and ______________ and ______________ are all of the limited partners of the Buyer and the Buyer and its [shareholders] [partners] will furnish all of the funds for the purchase of the Property (other than funds supplied by institutional lenders which will hold valid mortgage liens against the Property) and such funds will not be sources that are described in 18 U.S.C. §§1956 and 1957 as funds or property derived from "specified unlawful activity" and Purchaser agrees to execute and deliver to Seller the Certificate of Entity Structure and Ownership attached to this Agreement as Exhibit ______, at the Closing. Buyer has no agreement, either written or oral, to sell, transfer, or convey the Property, or any interest therein (other than liens or security interests that may be granted to Buyer's mortgagee at Closing), to any third party within the 12-month period following the Closing, and Buyer has no present intent to immediately offer the Property for sale after the Closing.
No interest in this Contract may be transferred or assigned by any party hereto without the express written consent of the non-assigning party. If the Seller consents to an assignment of this Contract, or any interest therein, an express condition of that assignment shall be that the assignee must execute the Certificate of Entity Structure and Ownership provided in Section ______ hereof.

(rr) Material Disclosure. Seller has disclosed to Buyer in writing any and all facts and circumstances that materially affect the Property or the construction, use, operation, management, leasing, occupancy, status, condition and legal compliance of the Property or any portion thereof.

(ss) No Untrue Statements or Omissions. No representation or warranty made by Seller in this Contract, in any Exhibit attached hereto, or in any letter or certificate furnished to Buyer pursuant to the terms hereof, contain any untrue statement of material fact necessary to make the statements contained herein or therein not misleading.

(tt) Prior Notes and Prior Deeds of Trust. The unpaid principal balance of [each] [the] Prior Note does not exceed the unpaid principal balance thereof contemplated by the amortization schedule with respect thereto in effect as of and at the initial funding thereof, all payments of principal or interest thereunder for the applicable time periods having been made, and all other terms thereof remain the same and are unmodified, there is no default nor has any event occurred which with the passage of time or the giving of notice or both would constitute a default under [any] [the] Prior Note or [any] [the] Prior Deed of Trust. The [aggregate] principal balance of the Prior Note as of the Date of Closing shall not exceed $__________, or be less than $____________.

1.2 Survival of Seller's Representations and Warranties. The representations and warranties made by Seller in Sections ____ through ____ of this Agreement shall survive any inspection or investigation made by or on behalf of Buyer. [All such representations and warranties shall survive/// until the Closing Date, but shall not survive the Closing./// The representations and warranties made by Seller in Sections _________ of this Agreement shall survive until the Closing, but shall not survive the Closing. The representations and warranties made by Seller in Sections __________ of this Agreement shall survive the Closing for a period of ______ years and shall not merge into the Deed./// Each of the representations and warranties of Seller that is to survive the Closing shall be deemed remade as of the Closing. Any claim by Buyer for a breach of any representation or warranty that survives Closing must be asserted on or before ____ days from and after the Closing Date. The representations and warranties deemed remade will be deemed to have been modified at Closing by the following matters: (a) any matter of which Buyer becomes aware (and nevertheless is obligated to close or proceeds with closing as provided herein), (b) defaults under Tenant Leases (other than defaults by Seller), (c) material changes in the underlying facts which result from operations conducted in accordance with provisions of Section ____, and (d) any notice, or service of process, received after the date of this Agreement.
Any disclosure made to Buyer by Seller or any other entity prior to the end of the Contingency Period, and any fact or matter which is reasonably discoverable by the conduct of a prudent due diligence investigation of the Property during the Contingency Period (taking into account any restrictions or limitations on Buyer's due diligence investigation which is caused or imposed by Seller), shall constitute notice to Buyer of the fact or matter so disclosed or reasonably discoverable, as applicable, and Buyer shall be deemed to have waived any claim against Seller on account of any inconsistencies between such fact or matter any of the foregoing representations and warranties if Buyer does not terminate this Agreement prior to the end of the Contingency Period. In addition, any disclosure made to Buyer by Seller or any other entity following the expiration of the Contingency Period and prior to the Closing which is materially inconsistent with any of the foregoing representations and warranties shall constitute notice to Buyer of the matters disclosed and Seller shall have no further liability on account of any such inconsistencies if Buyer waives such matter in writing and consummates the transaction contemplated hereby. // /[Alternative] // In the event that, prior to the Closing, Buyer receives actual notice of any information which indicates that any of the representations and warranties are untrue, Buyer shall promptly advise Seller in writing of such information and Buyer shall have the right to ________________. Buyer shall be deemed to have waived the inaccuracy of any such representation and warranty to the extent Buyer fails to notify Seller of Buyer's disapproval of such information pursuant to the preceding sentence and thereafter consummates the transaction contemplated hereby. In the event Buyer waives in writing any representations or warranty, then Seller shall have no liability under this Agreement for such representation or warranty to the extent waived. /////

1.3 Knowledge. As used in this Agreement, reference to "notice" to Seller or to "to Seller's knowledge" or words of like import means and refers to written notices actually received by, or to facts in question being actually known (as opposed to imputed, inquiry or constructive knowledge) to, ________________, without any due diligence or duty of inquiry. Seller shall have no duty of investigation with respect to any representation made to the best of its knowledge.

[ALTERNATIVES MORE FAVORABLE TO BUYER]

... means to the knowledge of Seller after due inquiry and investigation. ///// Seller hereby represents and warrants that the persons listed in Section 9.19 are the officers or employees of Seller who are responsible for administering Seller's interest in the Property during the twelve-month period immediately preceding the date of this Agreement, and who are likely to have, in Seller's good faith belief, any material knowledge of the Property or the preparations or physical conditions of the Improvements. /////
[ADDITIONAL ALTERNATIVE: Qualify each representation and warranty with "Except as disclosed in any Disclosure by Seller" and add following defined term]

"Disclosure by Seller" means any matters addressed in any document forwarded by, or any written notice given by Seller, or its representatives to Buyer or its representatives, any matter which may be disclosed in the management, maintenance, leasing and other files currently maintained by Seller at the Property and which are made available for on-site inspection by Buyer, and any matter disclosed in this Agreement or any Exhibit or Schedule attached hereto.