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# Discussion Draft of the Proposed North Carolina Bar Association Illustrative Form of Legal Opinion for Uniform Commercial Code Secured Lending Transactions

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**DISCUSSION DRAFT OF THE PROPOSED NORTH  
CAROLINA BAR ASSOCIATION ILLUSTRATIVE  
FORM OF LEGAL OPINION FOR UNIFORM  
COMMERCIAL CODE SECURED LENDING  
TRANSACTIONS**

DAVID L. BATTY\*

This discussion draft of the illustrative form of legal opinion (“Proposed Form”) and accompanying annotations attached as Appendix 1, are the product of the joint efforts of the Uniform Commercial Code Committee<sup>1</sup> (“UCC Committee”) of the Business Law Section of the North Carolina Bar Association (“Business Law Section”) and the Legal Opinion Committee (“Legal Opinion Committee”) of the Business Law Section.<sup>2</sup> Together these two committees form a diverse group of North Carolina lawyers including law school professors and corporate

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1. Members of the UCC Committee are: Mark T. Cain (Chair), Bank of America; David L. Batty, Kennedy Covington Lobdell & Hickman, L.L.P.; James P. Beckwith, Jr., North Carolina Central University School of Law; Lissa L. Broome, University of North Carolina School of Law; Caroline N. Brown, University of North Carolina School of Law; Richard K. Brown, Kennedy Covington Lobdell & Hickman, L.L.P.; Donald F. Clifford, Jr., University of North Carolina School of Law; Jeffery Oakes, Carruthers & Roth, P.A.; Holmes P. Harden, Maupin, Taylor & Ellis, P.A.; F. Donald Nelms, Ward & Smith, P.A.; Scott Templeton, North Carolina Secretary of State; and John C. Warren, Wachovia Bank, N.A.

2. Members of the Legal Opinion Committee are: John R. Miller (Chair), Robinson, Bradshaw & Hinson; Diana S. Allen, Helms Mulliss & Wicker, PLLC; David L. Batty, Kennedy Covington Lobdell & Hickman, L.L.P.; Charles L. Cain, Banner Pharmacaps, Inc.; Mark T. Cain, Bank of America Corp.; Thomas D. Eatman, Jr., Poynor & Spruill LLP; Kenneth M. Greene, Carruthers & Roth, P.A.; William B. Gwyn, Jr., Maupin Taylor & Ellis, P.A.; Christopher B. Capel, Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP; T. Hall Clarke, Jr., Wachovia Corp.; William A. Davis, II, Womble Carlyle Sandridge & Rice; Alfred L. Purrington, III, The Purrington Firm, LLP; Richard K. Schell, Parker, Poe, Adams & Bernstein LLP; and Melanie Samson Tuttle, Schell Bray Aycock Abel & Livingston PLLC.

counsel.<sup>3</sup> Members of the committee were therefore able to represent both the practical and academic aspects of legal opinion practice, as well as the different perspectives of secured parties and debtors in secured transactions under the Uniform Commercial Code (“UCC”). Although both the UCC Committee and the Legal Opinion Committee have authorized publication of the Proposed Form, it has not yet been finalized or adopted by either committee.<sup>4</sup>

Following the adoption of revised Article 9 of the UCC by the State of North Carolina,<sup>5</sup> many practitioners across the state recognized the need to adjust UCC secured transaction opinion practice. In the months following the effective date of the new law,<sup>6</sup> a number of practitioners across the state began collaborating informally to discuss legal issues as well as to share experiences regarding the evolution of opinion practice resulting from changes to the UCC. At the 2002 University of North Carolina Banking Institute, a number of these practitioners recognized the value of formalizing this collaboration. As a result of these discussions, the task of creating an illustrative form of legal opinion for UCC secured transactions for use by North Carolina lawyers was referred to the UCC Committee.

At the outset of this process, the UCC Committee decided to base the Proposed Form on the existing January 1, 1999 illustrative form of legal opinion (“1999 Form”) adopted by the Legal Opinion Committee in connection with the Legal Opinion Committee’s report on Third Party Legal Opinions in Business Transactions (“1999 Report”).<sup>7</sup> The goal was to create a form

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3. See *supra* notes 1-2.

4. The proposed form reflects the preliminary views of the UCC Committee and the Legal Opinion Committee. It does not necessarily reflect the views of any law firm, institution or individual practitioner, including individual members of the UCC Committee or the Legal Opinion Committee. Moreover, this discussion draft has not been submitted to or approved by the Business Law Section, the North Carolina Bar Association or the State Bar of North Carolina.

5. See N.C. GEN. STAT. § 25-9-101 (2002).

6. Revised Article 9 of the UCC became effective in North Carolina on July 1, 2001. See N.C. GEN. STAT. § 25-9-701.

7. See *Third Party Legal Opinions in Business Transactions*, Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association, 62-67 (1999). Neither the 1999 Form nor the 1999 Report addressed legal opinions with respect to UCC secured transactions. *Id.* at 3.

opinion for UCC secured transactions that would be familiar to practitioners that use the 1999 Form.

During this time, the Committee on Legal Opinions of the Section of Business Law of the American Bar Association (“ABA Opinion Committee”) undertook a revision and restatement<sup>8</sup> of the legal opinion guidelines (“1991 Guidelines”) published in connection with the 1991 Third Party Legal Opinion Report.<sup>9</sup> These efforts ultimately led to the adoption of revised legal opinion guidelines (“Revised Guidelines”) that replaced the 1991 Guidelines.<sup>10</sup> Simultaneously, the TriBar Opinion Committee<sup>11</sup> was working on a special report on UCC security interest opinions under Revised Article 9 of the UCC.<sup>12</sup> These two ongoing American Bar Association projects, together with the UCC Committee’s efforts to prepare a North Carolina form of UCC secured transaction legal opinion and the fact that the 1999 Report and 1999 Form had not been updated since they were originally promulgated, led the Legal Opinion Committee to undertake a review and evaluation of the 1999 Report and 1999 Form.

In August 2002, the UCC Committee referred a draft of the Proposed Form to the Legal Opinion Committee for its consideration. In evaluating that draft, the Legal Opinion Committee considered the Revised Guidelines and various drafts of the TriBar Report. In many instances, the Legal Opinion Committee determined that the Guidelines and the TriBar Report accurately set forth the appropriate standard of conduct for legal opinion practice in North Carolina.<sup>13</sup> The Legal Opinion

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8. See Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter *Revised Guidelines*].

9. *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, Committee on Legal Opinions, 47 BUS. LAW. 167 (1991).

10. *Revised Guidelines*, *supra* note 8, at 875.

11. See The TriBar Opinion Committee, *Special Report of The TriBar Opinion Committee U.C.C. Security Interest Opinion – Revised Article 9*, 58 BUS. LAW. (forthcoming Aug. 2003), [hereinafter *TriBar Report*] for a description of the composition of the TriBar Committee.

12. *Id.* at 1-92.

13. It is important to remember, however, that the standard of care owed by a lawyer to those whom the lawyer owes a duty of care is that of “competence and diligence normally exercised by lawyers in similar circumstances.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) (2000). This type of

Committee built upon the work of the UCC Committee by expanding the annotations that accompany the Proposed Form. Ultimately, the Legal Opinion Committee reorganized the structure of the Proposed Form to make it easier to use in the context of a typical UCC secured lending transaction. Although this reorganization caused the Proposed Form to diverge somewhat from the structure of the 1999 Form, the Legal Opinion Committee concluded that the benefit of such variations outweighed the downside of not tracking the 1999 Form more closely. On November 19, 2002, the Proposed Form was first presented to the members of the North Carolina Bar Association at a video and teleconference continuing legal education seminar sponsored by the North Carolina Bar Association. Members of the bar who have comments to the Proposed Form are welcome to submit comments to the UCC Committee of the Legal Opinion Committee.

The Legal Opinion Committee has focused on re-evaluating the 1999 Report and 1999 Form. It is anticipated that the Legal Committee will conclude the re-evaluation process by the end of 2003, at which time the Proposed Form will be conformed (where applicable) to track revisions to the 1999 Form. At that time, the Business Law Section Council will submit both forms for approval.

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“community standard” test is by its nature subject to evolution and change over time. This is particularly true with regard to UCC secured transactions legal opinion practice given the wholesale revision of Article 9. Practitioners are cautioned to actively engage in evaluating such changes in customary practice, rather than simply rely on a “static form” opinion. *See generally* FORMS UNDER REVISED ARTICLE 9 (Uniform Commercial Code Committee, Section of Business Law, Am. Bar Ass’n) 253 (Johnathan C. Lipson ed., 2002); *TriBar Report*, *supra* note 11, at app. (giving other recent examples of UCC secured transaction form legal opinions).

## APPENDIX 1

### ILLUSTRATIVE FORM OF OPINION

[Date]

[Addressee]

Ladies and Gentlemen:

We have acted as counsel to *[Insert Name of Borrower]* (the "Borrower") in connection with the secured loan transaction (the "Loan Transaction") contemplated by the Credit Agreement dated \_\_\_\_\_, 20\_\_ (the "Credit Agreement") between the Borrower and *[Insert Name of Lender]* (the "Lender"). This opinion letter is delivered pursuant to Section \_\_\_\_ of the Credit Agreement. All capitalized terms used herein and not otherwise defined herein shall have the same meanings as are ascribed to them in the Credit Agreement. Terms defined in the Uniform Commercial Code in effect in the State of North Carolina (the "UCC") shall have the meanings set forth in the UCC.

In rendering the opinions set forth herein, we have reviewed *[Insert as Applicable]*:

(i) the Credit Agreement;

(ii) the Security Agreement dated \_\_\_\_\_, 20\_\_ (the "Security Agreement"), between the Borrower, as the debtor, and the Lender, as the secured party;

(iii) the Pledge Agreement dated \_\_\_\_\_, 20\_\_ (the "Pledge Agreement"), between the Borrower, as the pledgor, and the Lender, as the pledgee;

(iv) the Deposit Account Control Agreement dated \_\_\_\_\_, 20\_\_ (the "Deposit Account Control Agreement"), among the Borrower, the Lender and \_\_\_\_\_, as the bank (the "Bank");

(v) the Securities Account Control Agreement dated \_\_\_\_\_, 20\_\_\_\_ (the “Securities Account Control Agreement”), among the Borrower, the Lender and \_\_\_\_\_, as the securities intermediary<sup>1</sup> (the “Securities Intermediary”); and

(vi) the UCC financing statement naming the Borrower, as the debtor, and the Lender, as the secured party (the “Financing Statement”), describing personal property of the Borrower that is subject to the UCC and in which a security interest may be perfected by the filing of financing statements under the UCC (such personal property, except for fixtures, as-extracted collateral and timber to be cut,<sup>2</sup> being herein called the “UCC Filing Collateral”),<sup>3</sup> as well as other property of the Borrower; and

(vii) the other loan documents described on Exhibit A hereto.

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1. See N.C. GEN. STAT. § 25-8-102(14) (2002) (defining securities intermediary, which must be a clearing corporation, or bank or broker that, in ordinary course of its business maintains securities accounts for others and is acting in that capacity).

2. In most non-real estate financing transactions, fixtures are not a critical element of collateral. Although a security interest in fixtures may be perfected by filing in the Office of the Secretary of State of North Carolina (see N.C. GEN. STAT. § 25-9-501(a)(2)), such a filing will not qualify as a “fixture filing” under section 25-9-102(40) of the North Carolina General Statutes and will not be entitled to the special priority rules that protect “fixture filings.” See N.C. GEN. STAT. § 25-9-501(a)(1) (requiring “fixture filings” to be filed in “the office designated for the filing or recording of a record of a mortgage on the related real property”); see also N.C. GEN. STAT. §§ 25-9-502(a), (b) (setting forth required contents of a fixture filing). See generally N.C. GEN. STAT. § 25-9-334. In a real estate financing, the secured party should take advantage of section 25-9-502(c) and file a deed of trust that will qualify as a fixture filing. In addition to eliminating the need to file a separate fixture filing, a deed of trust that qualifies as a fixture filing will remain effective without the need to file a continuation statement until the deed of trust is released, satisfied or otherwise terminated. See N.C. GEN. STAT. § 25-9-515(g). Similarly, because “as-extracted collateral” and “timber to be cut” will not be relevant to most transactions, the opinion-giver should avoid the added expense of analyzing the specific UCC provisions applicable to such collateral by excluding such items from the opinion.

3. Section 25-9-310(a) of the North Carolina General Statutes states the general rule that a financing statement must be filed to perfect a security interest in personal property subject to the UCC. However, a financing statement will not be effective in certain circumstances. See also N.C. GEN. STAT. § 25-9-312(b) (stating that a security interest in (i) deposit accounts and in letter of credit rights may be perfected only by “control” and (ii) money may be perfected only by possession). See generally N.C. GEN. STAT. § 25-9-311(a) (financing statement ineffective to perfect a security interest in property subject to (i) a statute, regulation, or treaty of the United States that preempts section 25-9-310(a) or (ii) a certificate-of-title statute).

The documents described and identified in clauses (i) through (vii) above are herein for convenience referred to as the "Loan Documents".

We have also reviewed a copy of the articles of incorporation of the Borrower as certified by the North Carolina Secretary of State dated \_\_\_\_\_, 20\_\_ (the "Articles of Incorporation"),<sup>4</sup> the by-laws of the Borrower, the minute book of the Borrower, certified copies of the resolutions of the board of directors of the Borrower and such other documents, and have considered such matters of law and fact, in each case as we, in our professional judgment, have deemed appropriate to render the opinions contained herein. With respect to certain facts, we have considered it appropriate to rely upon certificates or other comparable documents of public officials and officers or other appropriate representatives of the Borrower without investigation or analysis of any underlying data contained therein. In rendering our opinion that the Borrower "is a corporation" and "is in existence," we have relied solely upon a Certificate of Existence regarding the Borrower from the North Carolina Secretary of State dated \_\_\_\_\_.

The phrases "to our knowledge" and "known to us" mean the conscious awareness by lawyers in the primary lawyer group of factual matters such lawyers recognize as being relevant to the

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4. The form of this opinion assumes that the Borrower is a corporation and is incorporated under the laws of the State of North Carolina. If the Borrower is not a corporation, but instead another kind of "registered organization" coming within the definition of section 25-9-102(73) of the North Carolina General Statutes formed under the laws of another state or of the United States, then section 25-9-301 provides that the local laws of the jurisdiction where the Borrower is located will govern perfection, the effect of perfection or nonperfection, and priority of a security interest in collateral. In turn, section 25-9-307(e) provides that the Borrower is deemed located in the jurisdiction in which organized. Because a number of entities are organized under the laws of the State of Delaware, Delaware law will therefore frequently govern perfection of a security interest. Therefore, practitioners may be asked to render a perfection opinion which necessarily will involve Delaware law. In this instance, the practitioner has three choices similar to those involving a Delaware corporate opinion: (i) hire local Delaware counsel, (ii) do not give the opinion or (iii) give the opinion based solely upon a review of the applicable provisions of the Delaware UCC, as contained in a recognized loose leaf service. A sample form of such language is attached hereto as Annex I. Although opinion practice is currently unsettled in this area, it appears that the last option is the most prevalent practice at this time.



opinion or confirmation so qualified. Where any opinion or confirmation is qualified by the phrase “to our knowledge” or “known to us,” the lawyers in the primary lawyer group are without knowledge, or conscious awareness, that the opinion or confirmation is untrue.<sup>5</sup> “Primary lawyer group” means any lawyer in this firm (i) who signs this opinion letter, (ii) who is actively involved in negotiating or documenting the Loan Transaction or (iii) solely as to information relevant to a particular opinion or factual confirmation issue, who is primarily responsible for providing the response concerning the particular opinion or issue.

The opinions set forth herein are limited to matters governed by the laws of the State of North Carolina [and the federal laws of the United States], and no opinion is expressed herein as to the laws of any other jurisdiction. [For purposes of our opinions, we have disregarded the choice of law provision in the Loan Documents and, instead, have assumed that the Loan Documents are governed exclusively by the internal substantive laws and judicial interpretations of the State of North Carolina.] We express no opinion concerning any matter respecting or affected by any laws other than laws that a lawyer in North Carolina exercising customary professional diligence would

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5. This explanatory sentence is intended to clarify the meaning of the phrase “to our knowledge” in response to the decision of the Fourth Circuit Court of Appeals in *Hitachi Credit America Corp. v. Signet Bank*. See 166 F.3d 614, 622 (4th Cir. 1999). In *Hitachi*, Signet assigned a portion of an existing loan to Hitachi. See *id.* at 622. Because Hitachi’s willingness to purchase the assignment depended on the existence of an underlying lease agreement involving the borrower, Hitachi requested, and Signet provided, a representation that “[t]o the best knowledge of the Assignor. . . [the underlying lease] . . . is in full force and effect.” *Id.* Ultimately, the underlying lease did not exist and Hitachi sued Signet, *inter alia*, for a breach of contract on the grounds that Signet breached its representation regarding the lease. See *id.* at 623. In concluding that Signet had breached its representation to Hitachi, the court reasoned that a plain language reading of Signet’s representation led to a determination that Signet had represented that it had actual knowledge that the underlying lease was in full force and effect. See *id.* at 623-25. Moreover, the court refused to consider parol evidence in the form of merger and acquisition and banking treatises indicating that the “knowledge” qualification to Signet’s representation meant that Signet lacked actual knowledge that the lease was not in full force and effect. See *id.* at 625. The court noted that Signet could have drafted the representation to say “[t]he Assignor is without knowledge” had it intended to qualify its representation in that manner. See *id.*

reasonably recognize as being directly applicable to the Borrower, the Loan Transaction or both.<sup>6</sup>

Based upon and subject to the foregoing and the further assumptions, limitations and qualifications hereinafter expressed, it is our opinion that:

1. The Borrower is a corporation in existence under the laws of the State of North Carolina.

2. The authorized capital stock of the Borrower consists of \_\_\_\_\_ common shares, of which \_\_\_\_\_ shares are outstanding. [Describe other classes if applicable.] The outstanding shares have been duly authorized and validly issued, and are fully paid and nonassessable.

3. The Borrower has the corporate power to execute, deliver and perform its obligations under the Loan Documents [and to operate its business as currently conducted. For purposes of this opinion, we have assumed that the business presently conducted by the Borrower consists of \_\_\_\_\_ and activities directly related thereto, as set forth in an officer's certificate rendered to us in connection with this opinion].

4. The Borrower has authorized the execution, delivery and performance of the Loan Documents by all necessary corporate actions and has duly executed and delivered the Loan Documents.

5. The Loan Documents constitute the legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with their respective terms, subject to the following:

(a) This opinion is subject to the effect of applicable bankruptcy, insolvency, reorganization, fraudulent conveyance, moratorium and similar laws affecting the enforcement of creditors' rights generally; and

(b) This opinion is subject to the effect of general principles of equity (regardless of whether considered in a proceeding in

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6. Depending on the type of loan transaction, the opinion-giver may consider adding a specific exclusion for (i) compliance by the Borrower with applicable zoning, health, safety, building, environmental, land use or subdivision laws, ordinances, codes, rules or regulations; (ii) ERISA laws, rules and regulations; or (iii) federal or state taxation, antitrust, securities or "blue sky" laws, rules or regulations.

equity or at law), which may, among other things, deny rights of specific performance.

6. The execution and delivery by the Borrower of the Loan Documents and the performance by the Borrower of its obligations therein (i) do not violate the Articles of Incorporation or bylaws of the Borrower, (ii) do not breach or result in a default under any Other Agreements, and (iii) do not violate the terms of any Court Order. For purposes hereof, (A) the term “Other Agreements” means any of those agreements listed on [the disclosure schedule to the Credit Agreement] [the officer’s certificate attached hereto] and (B) the term “Court Order” means any judicial or administrative judgment, order, decree or arbitral decision that names the Borrower and is specifically directed to it or its properties and that is listed on [the disclosure schedule to the Credit Agreement] [the officer’s certificate attached hereto] or that is known to us.

7. The execution and delivery by the Borrower of the Loan Documents, and performance by the Borrower of its obligations therein, do not violate applicable provisions of statutory laws or regulations.

8. The Security Agreement creates a security interest in favor of the Lender in all of the right, title and interest of the Borrower in the UCC Filing Collateral.<sup>7</sup>

9. The Financing Statement is in proper form for filing in the Office of the Secretary of State of North Carolina,<sup>8</sup> and, upon the filing of the Financing Statement in that filing office, the security interest of the Lender granted pursuant to the Security Agreement will be perfected in the Borrower’s right, title and interest in the UCC Filing Collateral.<sup>9</sup>

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7. Since the definition of UCC Filing Collateral is limited to collateral in which a security interest may be perfected by filing, the opinion in paragraph 8 does not cover letter-of-credit rights as original collateral, collateral subject to federal statutes, certificate of title statutes or deposit accounts. Because letter of credit rights and certificate of title collateral are not typically significant in most transactions, such exclusion is more cost effective than analyzing the legal principles applicable to such collateral. Deposit accounts as original collateral are covered by the opinion in paragraph 14 *infra*.

8. See generally N.C. GEN. STAT. §§ 25-9-502(a), 25-9-516 (stating the requirements of an acceptable financing statement).

9. Section 25-9-301(1) of the North Carolina General Statutes sets forth the

10. The provisions of the Pledge Agreement are effective to create a security interest in favor of the Lender in all of the right, title and interest of the Borrower in all of the investment property (the “Pledged Investment Property”) described in the Pledge Agreement.

11. With respect to that portion of the Pledged Investment Property that are certificated securities,<sup>10</sup> the Lender will have a perfected security interest in such certificated securities upon delivery to the Lender in the State of North Carolina the originals of the certificated securities for holding by the Lender in the State of North Carolina<sup>11</sup> either (i) in bearer form or (ii) in registered form, issued or indorsed in the name of the Lender or in blank by an effective indorsement or accompanied by undated stock powers

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general choice of law rule that the law of the jurisdiction in which the debtor is located governs the perfection (including the effect of perfection or non-perfection) of security interests in both tangible and intangible collateral. Section 25-9-307 contains the rules for determining the location of a debtor. Because a North Carolina corporation is a registered organization under section 25-9-102(73), it is located in North Carolina under section 25-9-307(e). *See also* N.C. GEN. STAT. §§ 55-1-28, 55D-15 (describing the obligations of the Secretary of State of the State of North Carolina to maintain public records showing that corporations have been duly incorporated – a necessary element of the determination that corporations are registered organizations).

There are several exceptions to the general rule set forth in section 25-9-301(1) of the North Carolina General Statutes which are applicable to the following types of security interests or collateral: (i) possessory security interests (*see* N.C. GEN. STAT. § 25-9-301(2)), (ii) security interests in fixtures, timber to be cut and as-extracted collateral (*see* N.C. GEN. STAT. §§ 25-9-301(3), (4)), (iii) goods covered by certificates of title (*see* N.C. GEN. STAT. § 25-9-303), (iv) deposit accounts (*see* N.C. GEN. STAT. § 25-9-304), (v) investment property (*see* N.C. GEN. STAT. § 25-9-305), and (vi) letter of credit rights (*see* N.C. GEN. STAT. § 25-9-306). The opinion-giver should carefully review all of the types of collateral covered by the security agreement to ensure that the opinions given above do not address matters of perfection that are not properly matters of North Carolina law.

10. *See* N.C. GEN. STAT. § 25-8-102 (defining the portion of the Pledged Investment Property that are certificated securities).

11. This assumption is necessary to ensure that the opinion set forth in paragraph 11 is a matter of North Carolina law. Under section 25-9-305(a) of the North Carolina General Statutes, the local law of the jurisdiction where a “security certificate” (which includes certificated limited liability company interests and partnership interests that qualify as “securities” under the UCC) is located governs matters of perfection, the effect of perfection or non-perfection, and the priority of a security interest in the certificated security represented thereby, when such security interest is perfected by a method other than by filing. Note, similar assumptions may be needed (or further qualifications included) to the extent the choice of law provisions of the UCC require the application of the law of a state other than North Carolina with respect to perfection.

with respect thereto duly endorsed in blank by an effective indorsement.<sup>12</sup>

12. With respect to that portion of the Pledged Investment Property that are uncertificated securities,<sup>13</sup> the Lender will have a perfected security interest in such uncertificated securities when the issuer thereof has agreed that it will comply with the instructions with respect to such uncertificated securities originated by the Lender without further consent by the registered owner of such uncertificated securities.<sup>14</sup>

13. With respect to that portion of the Pledged Investment Property that are security entitlements,<sup>15</sup> the Lender will have a perfected security interest in such security entitlements upon the execution and delivery of the Securities Account Control Agreement by the Borrower, the Lender and the Securities Intermediary.

14. The provisions of the Deposit Account Control Agreement are effective to create a security interest in favor of the Lender in all of the right, title and interest of the Borrower in all of the deposit accounts<sup>16</sup> and the funds therein (the "Deposit Account Collateral") described in the Deposit Account Control Agreement.<sup>17</sup>

15. The security interest of the Lender in the Deposit Account Collateral will be perfected upon the execution and delivery of the Deposit Account Control Agreement by the Borrower, the Lender and the Bank.

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12. *See generally* N.C. GEN. STAT. § 25-8-106(b).

13. *See* N.C. GEN. STAT. § 25-8-102(18) (defining the portion of the Pledged Investment Property that are uncertificated securities to mean a security that is not represented by a certificate).

14. *See generally* N.C. GEN. STAT. § 25-8-106(c).

15. *See* N.C. GEN. STAT. § 25-8-102(17) (defining the portion of the Pledged Investment Property that are security entitlements).

16. Defined in section 25-9-102(29) of the North Carolina General Statutes to include "a demand, time, savings, passbook, or similar account maintained with a bank." A deposit account "does not include investment property or accounts evidenced by an instrument."

17. The opinion-giver will need to confirm that the Deposit Account Control Agreement is sufficient to create a security interest in the relevant deposit accounts. N.C. GEN. STAT. § 25-9-203.

[The following is a list of possible assumptions and qualifications to the opinion letter. The lawyer drafting the opinion should only include those qualifications that are relevant given the specific nature of the transaction and the documents subject to the opinion letter. General assumptions and qualifications are listed under "Part I," and assumptions and qualifications that relate only to the secured transactions opinions are listed under "Part II."]

#### PART I

- We express no opinion on the enforceability of any provisions contained in the Loan Documents that (a) purport to excuse a party for liability for its own acts, (b) purport to make void any act done in contravention thereof, (c) purport to authorize a party to act in its sole discretion, (d) require waivers or amendments to be made only in writing, (e) purport to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws, or (f) impose liquidated damages, penalties or forfeiture.
- We do not express any opinion as to the validity or effect of contractual provisions of the Loan Documents concerning choice of forum or consent to the jurisdiction of courts, venue of actions or means of service of process.
- We do not express any opinion as to the effect of provisions of the Loan Documents purporting to waive the right of jury trial.
- We do not express any opinion as to provisions of the Loan Documents purporting to reconstitute the terms thereof as necessary to avoid a claim or defense of usury.
- We do not express any opinion as to provisions of the Loan Documents purporting to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees.
- We note that the Loan Documents provide that disputes arising thereunder are subject to binding arbitration. While

our opinion as to the validity and enforceability of the Loan Documents includes our opinion as to the validity and enforceability of such arbitration provisions, our opinions as to the validity and enforceability of the Loan Documents are subject to the discretion afforded to an arbitrator under applicable law in rendering a binding and enforceable arbitration award.

- No opinion is expressed as to the enforceability of provisions relating to evidentiary standards or other standards by which the Loan Documents are to be construed.
- Enforcement of the Guaranty may be limited by the provisions of Chapter 26 of the North Carolina General Statutes, and we express no opinion as to the effectiveness of any waiver by any Guarantor of his or her rights under that Chapter.
- Based on the provisions in the Loan Documents providing that the laws of the State of \_\_\_\_\_ will govern the enforcement and interpretation of the Loan Documents, we believe that a North Carolina court, if properly presented with the question, would apply the internal laws of the State of \_\_\_\_\_ as the laws governing the Loan Documents, unless the court finds (a) that the State of \_\_\_\_\_ has no substantial relationship to the parties or the Loan Transaction or (b) application of the laws of the State of \_\_\_\_\_ would be contrary to a fundamental policy of the State of North Carolina. We note, however, that choice-of-law issues are decided on a case-by-case basis, depending on the facts of a particular transaction, and we are thus unable to conclude with certainty that a North Carolina court would give effect to such provisions.
- Certain of the remedies provided under the terms of the Loan Documents may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not, subject to the other qualifications and exceptions stated elsewhere in this opinion, make the remedies afforded by the Loan Documents inadequate for the

practical realization of the principal benefits purported to be provided thereby.

## PART II

- We express no opinion with respect to the security interest of the Lender in any commercial tort claims.<sup>18</sup>
- Our opinion in paragraph 5 above is also subject to the effect of general principles of commercial reasonableness, good faith and fair dealing to the extent required of the Lender by applicable law.<sup>19</sup>
- The Loan Documents contain provisions to the effect that the acceptance by the Lender of a past-due installment or other performance by the Borrower shall not be deemed a waiver of any right to declare an event of default and to exercise any rights and remedies thereunder. The North Carolina Court of Appeals has held that when the holder of a promissory note regularly accepts late payments, it is deemed to waive its right to accelerate the indebtedness because of late payments until it notifies the maker that prompt payments are again required. *Driftwood Manor Investors v. City Federal Savings & Loan Ass'n*, 63 N.C. App. 459, 464, 305 S.E. 2d 204, 207 (1983).
- Perfection of the security interest of the Lender in any proceeds of the UCC Filing Collateral is subject to the limitations set forth in section 25-9-315 of the North Carolina General Statutes and, in addition, we note that with respect to certain types of proceeds other parties such as holders in due course, protected purchasers of securities, persons who obtain control over securities entitlements and buyers in the ordinary course of business may acquire a

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18. Because this type of collateral is very specific and uncommon, and section 25-9-108(e)(1) of the North Carolina General Statutes requires that the Security Agreement describe commercial tort claims with specificity, it should probably be excluded from the security agreement unless it is actually relevant to the transaction at issue. In that case, the secured party should insist on deleting this exclusion.

19. Because a secured loan transaction is subject to the UCC, section 25-1-203 of the North Carolina General Statutes imposes "an obligation of good faith" in the performance and enforcement of such transaction.



superior interest or may take their interest free of the security interest of the Lender.

— No opinion is expressed as to (a) the priority of the Liens in favor of the Lender granted by any of the Loan Documents,<sup>20</sup> (b) whether the Lender is a “protected purchaser” of any securities within the meaning of section 25-8-303 of the North Carolina General Statutes,<sup>21</sup> or (c) the effect of any prohibitions against assignment that may be contained in any account, lease agreement, promissory note, chattel paper, general intangible, health-care receivable or letter-of-credit right.<sup>22</sup>

— The continued perfected security interest of the Lender in that portion of the UCC Filing Collateral perfected by the filing of the Financing Statement (a) requires the filing of continuation statements within the period of six (6) months prior to the expiration of five (5) years from the date of filing of the Financing Statement, and (b) may also depend on (i) the continued incorporation of the Borrower in the State of North Carolina and (ii) the continuation of the Borrower’s present corporate name and structure.<sup>23</sup>

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20. In view of all of the exceptions in a full priorities opinion, the costs and expenses of rendering such a full priorities opinion would far exceed the value of the opinion and would probably confuse the opinion recipient. As a less costly alternative, the opinion recipient may desire a filing priorities opinion which focuses primarily on counsel’s review of a UCC search report rather than a listing of theoretical adverse interests that could, under every conceivable circumstance, have priority. Such a filing priority opinion would confirm that (i) a UCC search correctly identifying the debtor has been obtained from the proper filing office, (ii) the search report shows financing statements on file as of an identified date, and (iii) counsel has reviewed the search report and made a determination, unless otherwise stated, that no other person has a currently effective financing statement naming the debtor or that no prior filing has priority either because the earlier filing describes different collateral or because appropriate releases, terminations or subordinations have been obtained.

21. A “protected purchaser” is a purchaser of a certificated or uncertificated security, or of an interest therein, who (a) gives value, (b) does not have notice of an “adverse claim” to such security, and (c) obtains control of such security. N.C. GEN. STAT. § 25-8-102(a)(1).

22. Prohibitions against assignments are found generally in sections 25-9-406, 407, 408 and 409 of the North Carolina General Statutes. Revised Article 9 has expanded the invalidation of restrictions on alienability, but applicability of the restrictions should be carefully analyzed for particular classes of collateral.

23. N.C. GEN. STAT. § 25-9-515(d); *see* N.C. GEN. STAT. §§ 25-9-507, 508.

- \_\_\_\_\_ In the case of any UCC Filing Collateral hereafter acquired by the Borrower, § 552 of the Bankruptcy Code (11 U.S.C. § 101 as amended from time to time) limits the extent to which the property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.<sup>24</sup>
- \_\_\_\_\_ We have assumed that the Borrower has rights in the UCC Filing Collateral or the power to transfer rights in the UCC Filing Collateral to a secured party,<sup>25</sup> and we express no opinion as to the nature or extent of the Borrower's rights in, or title to, any of the Collateral and we note that the security interest of the Lender will not attach to any after acquired property until the Borrower acquires rights therein.
- \_\_\_\_\_ We have assumed that the Lender has given "value" (as defined in section 25- 1-201(44) of the UCC) to the Borrower.
- \_\_\_\_\_ We have assumed that the Borrower is not organized in any jurisdiction other than as indicated in its Articles of Incorporation.<sup>26</sup>
- \_\_\_\_\_ We express no opinion on any provisions of the Loan Documents wherein the Borrower appoints the Lender or others as the Borrower's agent or attorney-in-fact

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24. Although the opinion set forth in paragraph 5, *supra*, expressly states that *enforcement* of the Loan Documents is subject to applicable bankruptcy laws, that qualification does not address limitations on the *attachment* of a pre-petition security interest on property of the Borrower acquired following the commencement of a bankruptcy proceeding. The qualification set forth in this paragraph identifies these additional limitations for the opinion recipient.

25. A debtor need not have "rights in the collateral" for a security interest to attach so long as it has the "power to transfer rights in the collateral to a secured party." N.C. GEN. STAT. § 25-9-203(b)(2).

26. Because the definition of "registered organization" refers to "an organization organized solely under the law of a single state," this qualification is necessary to protect against the risk that the borrower is organized in multiple jurisdictions. *See* N.C. GEN. STAT. § 25-9-102(73).

In addition, we advise you that to our knowledge, there is no action, suit or proceeding at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, now pending or overtly threatened against the Borrower, except as listed on [the disclosure schedule to the Credit Agreement] [the officer's certificate attached hereto].

This opinion letter is delivered solely for the benefit of the Lender and any successor or permitted assignee of the Lender in connection with the Loan Transaction and may not be used or relied upon by any other person or for any other purpose without our prior written consent in each instance. Our opinions expressed herein are as of the date hereof, and we undertake no obligation to advise you of any changes in applicable law or any other matters that may come to our attention after the date hereof that may affect our opinions expressed herein.

Very truly yours,

Signature of Opining Lawyer or Firm

## ANNEX I

Our opinion herein as to the perfection of the Lender's security interest in the UCC Filing Collateral (other than the Pledged Investment Property to the extent the security interest therein is perfected by a means other than by filing) is, with your permission, based solely on a review of Article 9 of the Uniform Commercial Code (200\_) as reprinted in Volume 3 (Part I) of the Uniform Laws Annotated (200\_) (such review being limited to the provisions of Article 9 of the UCC and annotations identifying non-uniform provisions of Article 9 of the UCC as in effect in the State of Delaware only and not including any other annotations or commentary or other parts of such publication) and is not intended to address any other matters of the law of the State of Delaware. We are not admitted to practice law in the State of Delaware and do not purport to be experts on the laws of Delaware generally and disclaim any representations or implications to the contrary; and with your permission such opinions are based solely on the limited review as described in the preceding sentence.

