

**ACQUISITIONS AND DISPOSITIONS OF
NON-PERFORMING AND SUB-PERFORMING
MORTGAGE LOANS**

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I. INTRODUCTION

The business of buying and selling non-performing and sub-performing mortgage loans is back.

"Non-performing" loans are loans that are in default. "Sub-performing" loans are loans that are currently paying but storm clouds are on the horizon, such as when the balance of the loan substantially exceeds the value of the collateral.

Prior to 1990, most professionals thought it wasn't possible to sell a non-performing or sub-performing mortgage loan, much less a portfolio of them. By the end of 1992, however, non-performing and sub-performing mortgage loan sales had become a multi-billion dollar industry, thanks to the pioneering efforts of the Resolution Trust Corporation (the "RTC"). The RTC's portfolio sales program alone was responsible for the sale of hundreds of millions of dollars of non-performing and sub-performing real estate loans in the early 1990s. Banks, savings and loan associations and other financial institutions followed suit, often patterning their offerings after the RTC's portfolio offerings. Then, for about 15 years, the business of buying and selling "bad loans" mostly went into hibernation, as the torrid economy ensured that very real estate loans ended up as "non-performing" or 'sub-performing".

Now, the hard times are back, and so are large volumes of non-performing and sub-performing loans that must be disposed of. Unlike last time, the government is not (yet) a major holder or seller of such paper, since the FDIC has been much slower to shut down insolvent banks and, when such action is taken, the FDIC has been more likely to enter into "loss sharing" and other arrangements with the bank that acquired the failed bank's deposits rather than have the FDIC take control of and liquidate the failed bank's bad loans itself. But many of these acquiring banks have become aggressive sellers of such loans. In addition, financial institutions and CMBS trusts hold billions of dollars worth of non-performing loans and they are beginning to realize, just as the RTC did a decade ago, that **selling the loan often yields a much better resolution than foreclosing on the property**, dealing ownership headaches and expenses and then selling the property. Finally, loan offerings are increasingly coming to market as stronger bank balance sheets allow banks to stop the game of "extend and pretend" and instead go ahead and absorb the losses that sales of non-performing and sub-performing loans often generate.

Yet, despite the abundance of such loan offerings and the billions of dollars in loan sale transactions that will occur during the next few years, the sale and acquisition of non-performing and sub-performing real estate loans is still a relatively unusual transaction with which many lawyers and their clients are relatively unfamiliar.

The purpose of this article is to acquaint you with some of the issues and problems you will face when buying or selling a non-performing or sub-performing loans mortgage loan. This article assumes that you are already experienced in making real estate loans and in purchasing and selling real estate, and are also familiar with the basic concepts, concerns, procedures and documents involved in the purchase and sale of performing mortgage loans. Given that background, this article will focus on the special problems encountered in the purchase of non-performing and sub-performing mortgage loans. This article will first provide a brief overview of the process typically involved, then will discuss the major issues you are likely to face when negotiating a Confidentiality Agreement and Loan Purchase and Sale Agreement. This article will not discuss what you should do with a bad loan after you get it because the article is already too long. This article assumes in all cases that the loan documents are governed by Texas law, the mortgaged property is located in Texas, and the deed of trust purports to create a first lien.

II. ARTICLES AND FORMS

Several samples of forms and checklists for loan purchase transactions, as well as excellent discussions of this topic, can be found in the following recent Texas State Bar seminar articles:

Billie J. Ellis, Jr. and Mark M. Sloan, *The Nuts and Bolts of Purchasing a Real Estate Note: Issues, Approaches and Forms*, STATE BAR OF TEXAS 27TH ANNUAL ADVANCED REAL ESTATE LAW COURSE, July 7-9, 2005 (San Antonio).

Richard K. Martin, Angela R. Lilly and Dan J. Hopper, *Acquisition of Distressed Debt*, STATE BAR OF TEXAS 31ST ANNUAL ADVANCED REAL ESTATE LAW COURSE, July 9-11, 2009 (San Antonio).

Rick Reed and Eric Taube, *Note Purchase and Sale Agreements*, STATE BAR OF TEXAS 21ST ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE, March 4-5, 2010 (Dallas).

The forms attached to these articles were generally drafted from the purchaser's perspective, which was appropriate given the focus of these articles. In the current marketplace, however, holders most always insist on using their own forms. Not surprisingly, such forms are not at all friendly toward the purchaser. To the contrary, most purchasers view most seller-promulgated forms as shockingly harsh. To offer a counter-point, I have attached as Exhibit A a seller-oriented form of Confidentiality Agreement and have attached as Exhibit B a seller-oriented form of Loan Purchase and Sale Agreement. These forms may more closely reflect what a purchaser will be forced to accept when buying a non-performing or sub-performing loan in the current market.

III. OVERVIEW OF THE PROCESS

A. No Cookie-Cutter Deals. While all note purchase transactions share certain characteristics, there is no such thing as a "cookie-cutter" note deal. A large number of variables make each transaction unique. For example, is the deal a single-asset transaction or a portfolio transaction? Is the loan performing, sub-performing non-performing? Is the purchaser buying the loan for its yield, or does he simply want to get fee simple title to the underlying property at a discount price (a "loan to own" strategy)? Is the purchaser's relationship with the borrower, or the holder, or both, or neither? Does the purchaser intend to cut a deal with the borrower, or is the purchaser willing to fight a war with the borrower after

closing? Is the loan the subject of pending litigation? Is the borrower in, or at risk of filing, bankruptcy? Are there any guaranties? Was the loan made in connection with a tax-exempt financing? Are there any junior liens or mezzanine loans? And so forth. Indeed, the only constant in these transactions is that they can be complex, time-consuming and expensive. Accordingly, the purchaser should be prepared to incur much higher legal fees and other expenses to acquire and resolve a non-performing or sub-performing loan than would be incurred in connection with an acquisition of a fee simple property.

B. Identify the Loans. On single asset transactions, there are several ways a purchaser can identify and select a loan. The purchaser can start with a desired property and either ask the owner **who** his lender is or check the deed records for the name of the lender. Alternatively, the purchaser can start with a developer, investor or borrower who owns the type of properties the purchaser is interested in, looking for opportunities to either (i) create “win-win” situations (i.e., by releasing the guarantor from liability or helping the borrower avoid or delay adverse tax consequences), or (ii) obtain leverage (i.e., by buying a package of loans to entities controlled by the same developer or syndicator). The purchaser can also start with the lender and request the opportunity to review the lender’s loan portfolio for loans that fit the purchaser’s investment parameters (very unlikely) or request that the lender contact the purchaser if the lender intends to sell a loan that fits certain parameters (more likely). The purchaser can also review foreclosure postings, bankruptcy records, receivership orders and notices of temporary restraining orders. Finally, and most commonly, banks, CMBS special servicers and other holders have begun to utilize brokerage firms to market loans and loan portfolios.

C. Identify the Holder and Analyze Its Motivation. It is essential for the prospective purchaser and his lawyer to invest some time up front to make sure they understand the nature of the holder of the desired loan. All government agencies are not the same and each have separate sales staffs, regulations and, in many cases, philosophies. Similarly, many holders manage assets on behalf of several sources and it is important to understand in which capacity such holder is acting (since the holder’s authority and financial motivation may vary considerably depending on which “hat” it is wearing). Finally, individual holders may have varying needs and concerns.

Once the prospective purchaser and his lawyer have figured out who the holder is and on whose behalf it is acting, they should seek to understand the holder’s motivation (or lack thereof) to sell the loan. For example, most individual holders of notes took back the note when they sold a property. These individual holders are often in need of cash and can be highly motivated sellers. Additionally, it may be more advantageous from a tax perspective for a holder who originally sold his property on an installment basis to sell the loan rather than foreclose on the property. Under Internal Revenue Code Section 1038, if the property is foreclosed on, the holder will be required to recognize gain on any installment payments previously received to the extent they were not subject to taxation due to the installment reporting method. Since the holder probably already spent the cash received from prior payments, this gain recognition rule gives rise to tax obligations without the necessary cash to pay the tax. If the holder instead sells the loan, he will at least have the cash to pay the taxes.

D. Convince the Holder to Sell the Loan. Once the purchaser understands the motivation of the holder, the next step is to convince the holder to sell the loan. Some holders are interested in selling their non-performing or sub-performing loans, but haven’t done it before, are nervous about violating securities or financial privacy laws or creating lender liability, and are too busy to take the time to make themselves comfortable about these matters. But fortunately most holders of non-performing and sub-performing loans are generally much more

inclined to consider a loan sale than they were 15 years ago. In fact, some holders, such as the FDIC, are already aggressive sellers of non-performing loans, and many banks and CMBS special servicers have also become aggressive loan sellers during the past year or so.

In most cases, a holder's decision whether to sell a loan should be based on an analysis comparing the estimated net present value of the net proceeds to be received by the holder from the sale of the loan versus the estimated net present value of the net proceeds to be received from by the holder from either (a) foreclosing then selling the asset and seeking a deficiency, or (b) allowing the borrower to effect a "short sale". The analysis should take into account the funds to be received under each scenario, the potential legal, management and other costs and liabilities under each scenario and, if applicable, the cost of any applicable servicing, management or assistance agreements.

E. Understand the Approval Process. Who has authority to approve the deal? How long will it take? What authority does the purchaser's contact have? Time spent up front to make sure you are talking to the right person will be worth the effort. Don't waste countless hours cutting a deal with someone who has no ability to make a sale decision, and remember that most loan officers' decisions are subject to approval of "the credit committee".

F. Confidentiality Agreement. Virtually all holders will require that the prospective purchaser sign a Confidentiality Agreement prior to any substantive discussions regarding the loan and prior to the purchaser's review of any of the loan files. The prudent purchaser will seek his lawyer's advice before executing such agreements, since such Confidentiality Agreements present a number of issues that can have an important effect on the ultimate success or failure of the transaction. The issues and problems likely to be encountered in the negotiation of such Confidentiality Agreement are discussed in detail later in this article.

G. Preliminary Review of Loan Files or Summaries. Following the execution of the Confidentiality Agreement, the purchaser will typically be allowed to review certain information regarding the loan. Sometimes the holder allows the purchaser access to the entire loan file, but more often the holder provides only selected information or summaries thereof, often with attorney-client privileged communication removed. In the 1990s such inspections usually took place in a reading room set up by the holder, with original notes and guarantees typically kept in the vault and requiring special arrangements to review. That process may still apply in the case of less sophisticated individual sellers and single-loan purchases from smaller financial institutions; however, more often these days the seller or its loan sale advisor will have set up an online virtual due diligence room, which greatly facilitates the due diligence process.

H. Agreement on Price. Obviously, the gating issue in a loan purchase transaction is the purchase price. The price is most often set by competitive bid on portfolio sales; however, most loan sellers set a reserve price (and several recent portfolio sales have been pulled due to the failure of bids to hit the seller's minimum price). Most single asset sales are priced on a negotiated basis rather than through a bid process; however, many sellers engage brokers to seek numerous offers. Many buyers, on the other hand, seek direct negotiations with holders regarding loans that are not being marketed by a broker.

Historically, in the early stages of a real estate downturn a general "state of shock" inhibits full realization of the free-fall of real estate values, such that holders tend to over-value their loan assets and underestimate the cost of holding and servicing such loan assets. Fortunately, holders in the current downturn have become increasingly realistic about the value of the assets in their portfolio, as well as the holding costs involved. For example, holders have

begun to realize that the costs of holding an asset include not only the holder's out-of-pocket costs, but also their cost of funds (*i.e.*, opportunity costs) and overhead. Additionally, holders seem increasingly willing to compensate loan purchasers for the risk they are undertaking in purchasing the loan. Recent sales of equity by larger banks, as well as write-downs of loan values, have alleviated a potential impediment to a discounted sale due to an institution's unwillingness to take a charge against its capital. Finally, profit-sharing arrangements being used by the FDIC and other portfolio sellers are helping to alleviate holders' traditional fear of a loan purchaser making an obscene profit at the holder's expense.

One word of caution: do not spend several weeks identifying a loan, convincing the holder to sell it, hammering out a purchase price and helping the holder clean up problems uncovered during the due diligence process only to then have the holder decide that the sale needs to be "exposed to the market"!

I. Loan Purchase and Sale Agreement. When the loans have been selected and the price agreed upon, the prospective purchaser and the noteholder will execute a Loan Purchase and Sale Agreement. The issues and problems likely to be encountered in the negotiation of such Loan Purchase and Sale Agreement are discussed in detail later in this article.

J. Inspection Period. Following the execution of the Loan Purchase and Sale Agreement, the purchaser will *sometimes* have a period of time to further inspect the loan documents and the mortgaged property.

K. Search for Financing. Prior to the end of the inspection period or, if none, prior to executing the Loan Purchase and Sale Agreement, the purchaser must of course obtain financing for the acquisition. While sellers of loan portfolios sometimes, out of necessity, offer seller financing on portfolio transactions, sellers of single loans rarely (if ever) offer such financing. Similarly, very few traditional lenders have any interest in offering seller financing on their loan sales. Most traditional lenders, such as banks and savings and loan associations, are currently reluctant to make any loan on real estate in general (as they have been instructed to reduce their real estate exposure), and are especially reluctant to make a "loan secured by a loan on real estate." Thus, non-traditional financing sources typically are required to accomplish these single-asset transactions. The author's experience is that most note deals getting done these days are done on an all equity basis, with the purchaser hoping to finance the investment following the resolution of the loan.

L. Closing. Finally, the purchaser acquires the loan at the closing.

M. Resolution of the Loan. Of course, acquiring the loan is only the beginning. Prior to closing most loan purchasers will have mapped out their strategy for realizing value with respect to the loan and will begin to execute their action plan immediately following closing. The road to resolution can have many twists, turns and forks – the prudent buyer will have a plan for dealing with each possible scenario and will have anticipated the possible legal and tax consequences of each scenario (including servicing, loan modification, foreclosure, deed in lieu of foreclosure, resale of the loan, bankruptcy and litigation).

IV. CONFIDENTIALITY AGREEMENT: ISSUES AND PROBLEMS

A. Use of Confidential Information. Most all Confidentiality Agreements will require the prospective purchaser to maintain the confidentiality of the contents of the loan

documents, loan files and other materials provided by the holder to the prospective purchaser. Holders often attempt to extend the covenant of confidentiality to cover not only information contained in the holder's loan files, but also any other matters uncovered by the purchaser during his review and inspection of the loan and the mortgaged property. Obviously, this can create issues regarding the purchaser's use of general information it acquires during the due diligence process on later transactions involving related loans, properties or borrowers. Similarly, such Confidentiality Agreements often limit the purchaser's use of the confidential information to the purchaser's decision about whether to purchase the loan. In such event, the purchaser faces a dilemma if it later decides to buy the mortgaged property directly from the borrower (instead of buying the loan from the holder), or if the purchaser is unsuccessful in acquiring the loan but later has the opportunity to acquire the loan or the mortgaged property from the party who was in fact the successful purchaser of the loan from the holder.

B. Exclusions. The definition of "confidential information" should exclude information that: (i) is already known to the purchaser from non-holder sources not known by the purchaser to be subject to any confidentiality obligations to the noteholder; (ii) is or becomes generally available to the public other than as a result of a disclosure by the purchaser or any of its representatives; or (iii) is required to be disclosed by law or regulatory or judicial process.

C. Right to Copy and Remove Documents. Often this point is moot since loan and property information is contained in an electronic "virtual war room". If there is going to be a physical "war room", however, the Confidentiality Agreement should specifically discuss whether the purchaser has the right to copy any documents in the loan files or to remove such files from the holder's office. If there is no war room, the purchaser will need to send its due diligence team (including its lawyers) to the holder's location to review the documentation.

D. Permitted Disclosures. The Confidentiality Agreement should provide for the disclosure of the confidential information without the holder's consent to the purchaser's officers, directors and employees, as well as third parties such as the purchaser's affiliates, lawyers, accountants, financial advisors, other contractors and agents, insurance agents, prospective purchasers of the assets from purchaser and prospective lenders and equity investors, provided such persons or entities have a need to know such confidential information for a permitted purpose and either agree to maintain the confidentiality of the information or enter into a similar confidentiality agreement. Many Confidentiality Agreements do not initially provide for such disclosure to prospective lenders and equity investors. Purchasers should beware of supplying the names of its financing sources to the holder (since the purchaser might then not be needed on the next deal)!

E. Representation Regarding No Affiliation with the Borrower. Many Confidentiality Agreements and Loan Purchase and Sale Agreements require the purchaser to represent that it has no affiliation or relationship with, has no financial agreement or understanding with, and/or has had no communication with, the borrower, any guarantor or any affiliate thereof. In effect, such holders are prohibiting the borrower from buying their own loan. Such prohibitions are apparently based in part on the old prohibitions from the days of the savings and loan crisis of the late 80s and in part on holders' fears that they will look stupid if the borrower ends up making money due to the holder's discounting of its note to the borrower. Fortunately, many holders these days have realized that the borrower is often the best buyer because (1) cash is cash, so whether the borrower is involved or receives some consideration in connection with the transaction should be irrelevant to the holder, (2) the borrower, as buyer, should have perfect information about the property, should not need a lengthy due diligence period and should not be in a position to ask for extensive representations or warranties, and

(3) if the borrower can put together the funds necessary to purchase its loan, the borrower will likely pay more than anyone would because borrowers typically have several reasons to "overpay" (including an emotional attachment to the asset, the desire to avoid the taint of a foreclosure, a desire to avoid the loss of its equity investment, the desire to avoid COD income upon foreclosure and/or the desire to avoid personal liability on the guaranty).

On the other hand, holders are well advised to proceed with caution when dealing with any mortgagor, borrower or other obligor under any loan, or any affiliate thereof, as there are obviously a number of risks inherent in disclosing the contents of a holder's loan files to such parties. Some holders allow such borrower parties to purchase their own loans, but such parties are not allowed to review any due diligence information prior to closing, and are not entitled to rely on any representations and warranties made by the holder (in effect, the transaction is simply a discounted pay-off structured as a loan sale, typically to facilitate the borrower's financing of the purchase price).

F. Prohibition Against Contact with the Borrower. Finally, many Confidentiality Agreements and Loan Purchase and Sale Agreements require the purchaser to covenant that it will not contact or communicate with the borrower or any guarantor or their attorneys or accountants relative to any loan and will not communicate with the property management personnel of the mortgaged property. Such prohibitions against contact with the borrower are often caused by holders' fear that confidential information will be inadvertently disclosed to the borrower (*i.e.*, "You realize you, don't you, that the bank lost your note?"). It is the author's experience that most holders never allow pre-closing contact with the borrower. A few holders take the opposite view, particularly on single-asset deals, reasoning that they won't entertain negotiations at all with a prospective purchaser unless the borrower is involved in the process and consents to such negotiations in advance. In general, prospective purchasers should address this issue up front and urge the holder to allow the purchaser to contact the borrower because: (i) the borrower's involvement in the negotiations is essential if the purchaser hopes to reach a settlement with the borrower simultaneously with acquisition of the loan (thereby reducing the potential for future problems, costs and liability) and/or if the borrower hopes to obtain (or his financing source requires him to obtain) an estoppel letter from the borrower prior to closing; and (ii) without such pre-closing contact with the borrower, the purchaser has much less chance of getting the deal done. On the other hand, there is always a risk that if the borrower finds out that the loan is for sale it will make a better offer to the holder, leaving the purchaser out in the cold if the purchaser does not have an exclusivity agreement and/or a binding purchase agreement.

V. THE LOAN PURCHASE AND SALE PURCHASE AGREEMENT: ISSUES AND PROBLEMS

Many provisions and issues encountered in drafting and negotiating a Loan Purchase and Sale Agreement are identical to those found in contracts of sale for the acquisition of real property. Such issues include, for example, provisions regarding earnest money, option consideration and assignability. Since most readers of this article are already quite familiar with such provisions and issues, this section will focus on those provisions and issues that are relatively unique to loan sale transactions.

A. Loan Documents and Rights Being Purchased. It would seem to go without saying that the purchaser is purchasing the loan and all related rights of the seller with respect thereto; however, some sellers attempt to retain rights against various obligors under guaranties or under common law for fraud, misrepresentation and similar causes of action. Obviously,

such rights retained by the seller might make the resolution of the loan more difficult (or impossible), so the purchaser should resist the retention of any such rights by the seller. On the other hand, it seems reasonable for the seller to retain the right to seek, concurrently with the purchaser, the benefit of any environmental or other indemnification obligations of the borrower, guarantor or other obligors under the loan documents.

B. Purchase Price and Adjustments. The purchase price of the loan is typically a fixed number based upon the outstanding balance of principal, interest and other charges as of a given date. In such case, the purchaser should receive the benefit of any payments made on the loan after such date (including as a result of insurance or condemnation proceeds), either by having the seller turn over such funds to the purchaser at closing or by providing for a credit against the purchase price in such amount. The purchaser should also receive the benefit of any escrows held by the seller. Such adjustment provisions should survive the closing, since sometimes borrowers, guarantors and other obligors pay the prior holder after the closing. Some sellers will attempt to obtain the right to terminate the Loan Purchase and Sale Agreement if the loan is repaid in full prior to the closing date, but of course the purchaser should resist that provision.

C. Approvals. Sometimes, particularly on single-asset deals, the Loan Purchase and Sale Agreement will be expressly subject to the approval of one or more internal committees or regulatory agencies. Obviously, most purchasers will be extremely reluctant to incur any time, cost or expense in the due diligence process prior to knowing they have a “firm deal.” One way to compromise on this issue is to delay the commencement of the inspection period until all approvals have been obtained.

D. Due Diligence; Inspection Period. Most Loan Purchase and Sale Agreements will allow the purchaser a period of time to review the loan documents and perform limited due diligence with respect to the property pledged as collateral for the loan. Such inspection periods are often shorter than the 30-day (or longer) period typical in real property purchase agreements, sometimes the seller allows no inspection period at all (requiring that the purchaser complete all due diligence prior to executing the Loan Purchase and Sale Agreement).

E. Review of Loan Documentation. The purchaser’s first area of concern from a due diligence perspective will be to review the loan documents and associated documentation. The seller should be obligated to provide copies of all loan documents, correspondence, title policies, loan participation agreements, estoppel letters, subordination agreements, borrower’s organizational and authorization documents, insurance certificates or policies, foreclosure information, and all documents regarding any claim, litigation or bankruptcy. Borrowers’ lawyers, particularly in states such as Florida, have become very skilled at using omissions or discrepancies in the loan files and foreclosure process to challenge the validity of foreclosures, so a careful review of the loan documents and associated documentation is essential.

1. From the purchaser’s standpoint, it is important to make sure that all documents in the holder’s possession and relating to the loan and the collateral property will be made available for the purchaser’s inspection; however, many noteholders will attempt to withhold certain materials from the purchaser’s review, such as (a) communications and work product deemed subject to the attorney-client privilege, (b) legal conclusions of non-lawyers or summaries prepared by non-lawyers related to legal conclusions reached or expressed by lawyers, (c) legal opinions, (d) intra-bank memoranda, (e) appraisals and other valuations and opinions regarding the loan or the mortgaged property, (f) financial statements or other information subject to written confidentiality obligations or restrictions, (g) other non-public

information, the disclosure of which in the seller's opinion could be in violation of any legal requirement or agreement, (h) environmental reports, or (i) correspondence. Obviously, from the purchaser's perspective, the more information the purchaser is allowed to review, the better.

2. The purchaser will want to make sure that the original promissory note is in the seller's possession and will be delivered to the purchaser at closing. If the original note is missing, the Loan Purchase and Sale Agreement should require the seller to deliver a certified copy of the note together with a "lost note affidavit (in which case the purchaser should be familiar with the risks and costs of proceeding under § 3.309 of the Texas Business and Commerce Code).¹

3. If the seller was not the original holder, confirm that the loan (and all associated documentation) has been properly indorsed and assigned to the seller. Often, particularly in the case of CMBS loans, the loan files do not contain a good record of the chain of title to the loan documents.

4. Be sure to determine the date of maturity or acceleration. Remember that the four-year statute of limitations begins to run upon the earlier of maturity or acceleration, so any foreclosure or other enforcement action must be commenced prior to the end of the limitations period.

5. The purchaser should request the seller to provide a certified loan payment history schedule. Beware if this schedule shows that the seller has a history of accepting late loan payments, since the borrower could argue that such actions constitute a waiver of the holder's right to accelerate the loan without further notice to the borrower that late payments will no longer be accepted.

F. Inspection of the Mortgaged Property. In most acquisitions of non-performing loans, the guarantors, general partners and other obligors are often insolvent (or close to it); therefore, the price the purchaser is willing to pay for the loan will be a percentage of the value of the mortgaged property. This is particularly true in a "loan to own" transaction. Accordingly, the purchaser's due diligence must include not only the loan documents, but the mortgaged property as well.

1. In most cases, the purchaser wants to perform the same due diligence on the mortgaged property as if he were buying it outright. Such due diligence includes not only a physical inspection of the property, but also a thorough review of the survey, zoning, utilities, environmental and engineering reports, rent roll, operating statements, leases, service contracts, handicap access certificates and compliance, permits and licenses, etc. Such physical inspection often may be difficult or impossible, however, where, as is most often the case, (a) the seller prohibits the purchaser from entering the mortgaged property, (b) the borrower does not know the loan sale is taking place, and/or (c) the borrower hinders the purchaser's efforts to physically inspect the mortgaged property or obtain a survey and environmental site assessment. Accordingly, as a practical matter, most loan purchasers end up simply walking the property (without express authority to do so) and going without obtaining

¹ Section 3.309 of the Texas Business and Commerce Code governs the enforcement of lost, destroyed or stolen instruments and generally provides that the person seeking enforcement of the instrument must prove the terms of the instrument and the person's right to enforce the instrument. The court must find that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.

new environmental site assessments, property condition reports and surveys. Sometimes the purchaser can at least obtain reliance letters from the parties that prepared the prior environmental site assessments and property condition reports contained in the holder's files.

2. That being said, the purchaser should certainly seek the right to enter the mortgaged property and at a minimum obtain the seller's agreement to use reasonable efforts to facilitate the purchaser's inspection of the mortgaged property and other due diligence. In all cases, unless the borrower grants express permission for the purchaser's inspections, the purchaser's rights will likely be based upon the holder's inspection rights in the loan documents. If the loan documents permit the holder to allow any party to enter the mortgaged property to perform inspections and tests, then of course the holder can designate the purchaser as the party to perform such inspections and tests. If the loan documents only permit the holder to enter the mortgaged property to perform inspections and tests, then the holder can either agree to accompany the purchaser on the property or agree to perform whatever inspections and tests are requested by the purchaser (typically, at purchaser's cost and risk).

G. Title and Survey. Most Loan Purchase and Sale Agreements will not contain provisions regarding a title and survey objection and cure process; however, the purchaser will still need to review and approve title and survey with respect to the mortgaged property.

a. The purchaser should review the seller's Mortgagee or Loan Policy of Title Insurance, together with all exception documents. The purchaser should also obtain a "Nothing Further Certificate" from the title company that issued such title policy. Such Nothing Further Certificate does not update coverage, but will show any changes in title from the date of the policy to the current date.

b. Typically, a loan purchaser does not obtain a new title policy at closing, but rather, the purchaser relies on the seller's existing title policy. While the old form of Mortgagee Policy of Title Insurance did not automatically include successors in ownership of the loan within the definition of the "Insured", the newer Loan Policy of Title Insurance on Form T-2 (adopted May 1, 2008) does. Moreover, the Loan Purchase and Sale Agreement should provide that at closing the title company that issued the original Mortgagee or Loan Policy of Title Insurance will issue Form T-3 endorsement to seller's existing Mortgagee or Loan Policy of Title Insurance under Procedural Rule P-9b(2) of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas². Such endorsements are relatively cheap (the promulgated basic premium rate, currently \$229) and easy for the holder to obtain. Such endorsements not only name the purchaser as the insured, but also update the effective date of the policy, add any matters that have arisen since the date of the policy and insure the payment of standby fees, taxes and assessments through the year specified in the endorsement. Of course, in the absence of an existing Mortgagee or Loan Policy of Title Insurance, the purchaser should require the holder to supply it with a new Mortgagee or Loan Policy of Title Insurance at closing.

² Technically, Rule P-9b(2) simply provides, with respect to loans other than loans secured by one-to-four family residential properties, for the issuance of the endorsement provided for in Rule P-9b(1) to be issued to parties other than certain government agencies. Rule P-9b(1) provides that as a condition to the issuance of such endorsement, the title company "may require" a showing from the assignor that such assignor has not accelerated the maturity of the indebtedness, or if it has, that there has been a proper reinstatement of the obligation. Fortunately, most title companies are taking the position that they are not obligated to so require the assignor to make such a showing, so P-9b(2) endorsements are generally available even when the loan has been accelerated.

2. Most loan files will contain a copy of the survey that was prepared when the loan was made. Very few Loan Purchase and Sale Agreements require the holder to provide the purchaser with an updated survey of the mortgaged property; yet, as all lawyers know but most clients forget, it is impossible to evaluate the state of title to a property in the absence of a survey. Since the existing survey in the loan file may no longer be accurate, purchasers should request the seller to provide an updated survey or, at the very least, allow the purchaser to obtain such survey.

H. Environmental. Regardless of the strength of any environmental representation from the holder, purchasers will be well advised to proceed with caution with respect to the environmental condition of the mortgaged property.³

Hopefully, the loan file will contain a recent Phase I environmental site assessment by a licensed engineering firm under the most current ASTM standards and under the requirements of 42 U.S.C. §9601(35)(B)(iii) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") A "clean bill of health" in such report should give some comfort to the purchaser; however, at a minimum, the purchaser will want to obtain a reliance letter from the engineering firm to establish privity of contract with respect to such assessment. Depending on the age of the report, the quality of the report and the firm that prepared it, the availability of a reliance letter, and the purchaser's ability to enter the mortgaged property, the purchaser may need to obtain a new environmental site assessment prior to closing.

In any loan acquisition, particularly one in which a pre-closing environmental site assessment is not allowed by the holder or is impossible due to the borrower's refusal to grant consent, the purchaser should be familiar with a holder's potential responsibility for environmental problems on mortgaged properties. Prior to 1996, there was a fair amount of confusion about a holder's potential liability under CERCLA and its related statutes. Under 42 U.S.C. § 9601(20)(A) an "owner or operator" who had potential liability under CERCLA excluded a person who, without participating in the management of a facility, held "indicia of ownership" primarily to protect his security interest in the facility. This so-called "secured creditor exception" was called into question, however, by the Eleventh Circuit's decision in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 752 (1991). In order to resolve such confusion, Congress enacted the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 (the "Asset Conservation Act") to provide specific pre-foreclosure and post-foreclosure safe harbors to protect holders from liability under CERCLA and its related statutes. The provisions of the Asset Conservation Act were specifically incorporated into CERCLA under 42 U.S.C. §9601(20)(E) and (F), entitled "Exclusion of Lenders Not Participants in Management." This Section provides that a holder will not be subject to CERCLA liability prior to foreclosure merely because it: (1) holds a security interest in the property; (2) includes in a contract a covenant relating to environmental compliance; (3) monitors or enforces the terms and conditions of the extension of credit or security interest or monitors or undertakes inspections; (4) requires a response action to address the release or threat of release of a hazardous substance (5) provides financial advice or counseling; (6) restructures or renegotiates the terms of an extension of credit or security interest; or (7) exercises any other rights that may be available. 42 U.S.C. §9601(20)(F)(iii) . CERCLA also provides that liability will not attach to a holder after foreclosure as long as the holder seeks to sell, release or divest itself of the property at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market

³ The author would like to thank Mary Koks, an environmental partner at Munsch Hardt Kopf & Harr, P.C., for her contribution to this discussion of environmental issues.

conditions and legal and regulatory requirements. 42 U.S.C. §9601(20)(ii)(II) Even so, the Asset Conservation Act does not eliminate all of a loan purchaser's environmental concerns. For example, the post-foreclosure protections of the CERCLA will not apply if the purchaser is executing a "loan to own" strategy and therefore does not seek to sell the mortgaged property at the earliest practicable time or if the holder takes any action that participates in the management of its borrower. 42 U.S.C. §9601(20)(F)(i).

Texas followed the federal lead by adding state law environmental liability protections for lenders in House Bill 2776, effective September 1, 1997. These protections apply to potential liabilities under both the Texas Water Code and the Texas Health and Safety Code and were codified under the Texas Health and Safety Code §361.701-703. The provisions are comparable to those found under federal law, although Texas law provides a listing of what constitutes "the earliest practicable, commercially reasonable time" within which a lender attempts to re-lease or sell the property and requires, within 12 months of foreclosure, that the lender both list the property with a real estate agent and take certain steps to market the property. Tex Health & Safety Code §361.702(b). Further, the Tex Health and Safety Code goes further than federal law by allowing a lender, after foreclosure, to wind up business activities of a facility and conduct certain environmental response actions to deal with existing environmental conditions prior to sale. Tex Health and Safety Code §361.702(a)(2)(B).

Keep in mind that although both the federal CERCLA laws and the Texas Health and Safety Code, while providing limitation on liability to federal and state agencies for environmental issues, do not provide protection to lenders should any adjacent landowner, or other third party file suit under tort causes of action against a lender for contamination alleged to have migrated offsite while the lender owned the property.

I. Estoppel Letters. Ideally, the purchaser would be able to obtain an estoppel letter from the borrower, guarantor and any other obligors during the inspection period. Such an estoppel letter would greatly reduce the risk in a loan purchase transaction. In practice, however, sellers almost never agree to provide a borrower estoppel certificate with respect to a non-performing or sub-performing loan. At best, the seller might agree to *request* the borrower to execute such an estoppel certificate. Similarly, although the purchaser would love to obtain estoppel letters from the major tenants of an improved mortgaged property, in reality such tenant estoppel letters are almost never possible.

J. Optional Repurchase by Seller. Holders in portfolio sales may sometimes seek the right to repurchase loans for a period of time after the closing if the holder discovers that there is a lawsuit or proceeding involving the loan which could adversely affect the holder or if the holder discovers that the loan is related to another asset or claim retained by the holder. Purchasers should generally avoid granting such rights to the holder if possible, since the repurchase price is typically set at only the original purchase price plus a minimal return, and such repurchase right can severely inhibit a purchaser from taking actions with respect to the loan during the option period.

K. Removal of Loans. Holders in portfolio sales sometimes seek the right to remove loans from the pool following the execution of the Loan Purchase and Sale Agreement but prior to closing. Purchasers should generally avoid granting such right to the holder if possible, since the removed loans may well be the "pick of the litter," leaving the purchaser with the leftovers. At a minimum, the removal right should be limited to certain circumstances (i.e., the holder discovers it does not own or have the power to convey the loan), and the purchaser should be entitled to terminate the Loan Purchase and Sale Agreement and receive a refund of

his earnest money (and perhaps his due diligence costs as well) in the event loans are removed prior to closing.

L. Representations and Warranties. The most heavily negotiated portion of the Loan Purchase and Sale Agreement – or, perhaps put more accurately, the portion of the Loan Purchase and Sale Agreement that purchasers *attempt* to negotiate the most heavily -- is the representations and warranties section. On single-asset deals, holders are typically very reluctant to make any representations and warranties whatsoever with regard to the loan or the mortgaged property. In the event such representations and warranties are made, holders typically attempt to provide that such representations and warranties either don't survive closing or survive for only a limited time. Some holders give more extensive representations and warranties on portfolio sales, although the purchaser's remedies with respect to a breach thereof are quite limited. Gone are the days when the RTC gave very extensive representations and warranties on its portfolio sales, with repurchase obligations in the event of a breach of such representations and warranties.

This section first discusses the survival of representations and warranties and the remedies for a breach thereof, then analyzes the typical representations purchasers will seek from holders regarding (i) the authority and ability of the holder to consummate the transaction, (ii) the loan documents, and (iii) the mortgaged property. In all cases, the purchaser should ensure that the representations and warranties are deemed made both as of the date of the Loan Purchase and Sale Agreement and as of the closing date. Additionally, the purchaser should seek representations that are absolute rather than representations which are qualified by language such as "except as otherwise known to purchaser and/or disclosed or contained in the loan documents, loan files or other materials provided to or reviewed by purchaser." Such qualifications significantly reduce the value of the representations.

1. Survival of Representations and Warranties. As in any agreement, the Loan Purchase and Sale Agreement must address whether the holder's representations and warranties survive closing, and if so, for how long. Obviously, from the purchaser's standpoint, the longer the survival period, the better. Most holders will limit any surviving representations to those that could not reasonably be verified prior to closing given the structure of the offering, the pre-closing due diligence period, if any, and the extent, if any, to which contact is allowed with the borrower.

2. Remedies for Breach of Representations and Warranties. Where representations do not survive closing, the purchaser's sole remedy upon discovery of a breach is typically to terminate the Loan Purchase and Sale Agreement and receive a refund of the earnest money if the holder is unable to cure the breach prior to closing. It would also seem fair to allow the purchaser to recover as damages its actual out-of-pocket costs and expenses in connection with the transaction (up to a cap), but holders are often very reluctant to allow such remedy. Where representations survive closing for some period, some holders limit the purchaser's remedies in the event of a breach to require the holder, at the holder's option, to either cure the breach or repurchase the loan (typically at the original purchase price plus an agreed-upon return). Occasionally, the holder is also given the option of replacing the defective loan with a similar loan or of re-valuing the defective loan. Where claims for damages are allowed they are typically subject to a cap. Given the fact that many loan sellers may be of dubious financial wherewithal and/or have limited net worth or assets after the sale, the purchaser may want to ask for a guaranty of such representations and warranties by an entity with stronger financial wherewithal and/or a holdback or escrow fund from which to satisfy post-closing damage claims during the survival period.

3. General Representations and Warranties.

a. Authority; Binding; Enforceable; Consents. The purchaser should request the holder to represent that it has authority to enter into the Loan Purchase and Sale Agreement and to consummate the transactions contemplated thereby, and that the Loan Purchase and Sale Agreement is a legal, valid and binding obligation of the holder, enforceable against the holder in accordance with its terms. The purchaser should also request the holder to represent that it has obtained any consents, approvals or orders of any court or governmental agency required for the execution, delivery and performance by the holder of the Loan Purchase and Sale Agreement.

b. No Conflict with Law, Contracts or Legal Actions. The purchaser should request the holder to represent that the holder's execution and delivery of the Loan Purchase and Sale Agreement and the consummation of the transactions contemplated thereby will not: (i) conflict with any law, rule or regulation to which the holder is subject; or (ii) conflict with or result in a breach of or default under any contract to which holder is bound or any order, decree or proceeding applicable to holder; or (iii) result in the imposition of any lien on any of holder's assets or property which could affect the holder's ability to carry out the terms of the Loan Purchase and Sale Agreement. The purchaser should also request the holder to represent that there is no action, suit or proceeding pending against the holder in any court or before any governmental agency which would affect the holder's ability to perform its obligations under the Loan Purchase and Sale Agreement.

c. Compliance with Covenants. The purchaser should request the holder to represent that, as of the closing date, the holder has complied with all its pre-closing covenants, duties and obligations.

4. Representations and Warranties Regarding the Loan Documents.

a. Sole Owner. The purchaser should request the holder to represent that it is the sole owner of all legal and beneficial title to the loan, that the loan has not been transferred, assigned or pledged, and that the transfer of the loan to purchaser will be free of any right, interest or claim of any third party. If the purchaser discovers any evidence of a loan participation or syndication the purchaser should demand to see evidence of either (i) the payment by the holder to the participants or syndicate of their share of the loan and a release by the participants or syndicate of their participation interest therein, or (ii) the consent of the participants and syndicate lenders to the loan sale transaction and either the participation of all the syndicate lenders in the sale or a delegation to the holder of the authority to convey the loan to purchaser.

b. Valid Assignment. The purchaser should request the holder to represent that the assignment of the loan documents will constitute the legal, valid and binding assignment of such loan documents from the holder to the purchaser.

c. Loan Documents Constitute Entire Agreement. The purchaser should request the holder to specify the "loan documents" and represent that they evidence the entire agreement between the holder and the obligators on the loan.

d. Loan Files and Summary Information Accurate and Complete. The purchaser should request the holder to represent that the documents in its loan files are true and correct original counterparts or copies, as the case may be, of the documents they

purport to be and that they have not been superseded, modified, amended, changed, canceled, satisfied, released, subordinated or otherwise changed in any respect. The purchaser should request the holder to also represent that such loan file includes all material documents relating to the loan. Holders sometimes attempt to limit this representation by stating that the file includes all material documents relating to the loan that are "held by" the holder, thus, the purchaser may have no remedy in the event of a missing document which was never in the possession of the holder. The purchaser should make sure that the Loan Purchase and Sale Agreement includes a listing of the documents that are required to be in the loan files. At a minimum, such documents would include the original note (not a copy) or a "lost note affidavit," and originals or certified copies of the loan agreement, deed of trust, assignment of rents and leases, security agreement, financing statements, other security documents, modification and assumption agreements, mortgagee or loan policy of title insurance and all endorsements, environmental reports, property condition reports, other reports, all foreclosure, receivership, litigation or bankruptcy documents and all correspondence. In the event that the holder provides any information packages or summaries to the purchaser, the purchaser should request the holder to also represent that the information contained therein accurately describes information as it appears in the loan documents and loan files. It may be reasonable for the holder to disclaim any such representation or warranty as to the accuracy of any facts recited in any document included in the loan file that was provided to the holder by a third party other than the holder's agents and contractors.

e. Amount of Loan. The purchaser should request the holder to state the outstanding balance of principal and accrued but unpaid interest on the loan, as well as any other outstanding charges and any escrows held for taxes, insurance or other impositions. The purchaser should request the holder to also state the amount of any such obligations which are currently due and owing. Finally, the purchaser should request the holder to make specific representations about the current interest rate, the current monthly principal and/or interest payments (or, in the case of a cash flow loan, the agreement for determining the monthly amount due), the date to which interest and other payments have been made, and the maturity date of the loan.

f. Loan Documents Enforceable. The purchaser should request the holder to represent that the loan documents are the legal, valid and binding obligations of the borrower which are enforceable against the borrower in accordance with their terms. Holders will want to add language to the effect that such enforceability representation is limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and general equitable principles.

g. No Defenses. A "holder in due course" of a "negotiable instrument" takes the instrument free and clear of defenses the maker has against the payee and also receives the benefit of the implied transfer warranties set forth in Section 3.416(a) of the Texas Business and Commerce Code⁴. Unfortunately, most mortgage notes held by real

⁴ Section 3.416(a) of the Texas Business and Commerce Code generally provides that a person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee, that: (1) the warrantor is a person entitled to enforce the instrument; (2) all signatures on the instrument are authentic and authorized; (3) the instrument has not been altered; (4) the instrument is not subject to a defense or claim in recoupment of any party that can be asserted against the warrantor; (5) the warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and (6) with respect to a remotely-created item, that the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn.

estate holders fail to meet the requirements for a "negotiable instrument" in Section 3.104(a) of the Texas Business and Commerce Code⁵ due to features such as an adjustable interest rate, non-recourse, references to other loan documents, or other provisions. Moreover, even if a negotiable instrument exists, a purchaser of a non-performing note will almost never qualify as a "holder in due course" under Section 3.302 of the Texas Business and Commerce Code⁶ because the note fails the requirement that the note not be "overdue." Thus, a purchaser of a non-performing or sub-performing note will invariably take the note subject to all the defenses the borrower has against the holder (and its predecessors). Accordingly, the purchaser should request the holder to represent that the borrower has no defenses to the payment in full of the loan, and the loan is not subject to, and no party has asserted, any right of rescission, set-off, abatement, diminution, counterclaim or defense which could affect purchaser's ability to enforce the provisions of the promissory note, the deed of trust and the other loan documents or realize against the mortgaged property the intended benefits of such deed of trust and other loan documents. Purchasers should beware of any attempt by the holder to limit the "no defenses" representation to defenses arising out of the violation of law only, since this qualification leaves open the possibility of a defense arising from a private contractual agreement or waiver. Purchasers should also beware of any special qualifications placed on the "no defenses" representation as it applies specifically to usury. In particular, some holders may attempt to limit this representation to a statement such as "the loan complied *as of the date of origination* with, or is exempt from, applicable usury laws." Such representation does not protect a purchaser from a *later* usury violation (in a demand letter, for example) and is inadequate.

h. Proceeds Fully Disbursed. The purchaser should request the holder to represent that the proceeds of the loan have been fully disbursed (or if partially disbursed, the amount thereof), and that the borrower does not have the right to disbursement of any additional loan proceeds or future advances (or if such right exists, the amount, terms and conditions pertaining thereto). If the proceeds of the loan have not been fully disbursed, the purchaser needs to carefully assess whether it could become liable to advance additional proceeds following its acquisition of the loan.

i. Valid Lien on Realty and Personality.

(1) Real Property. The holder should represent that the loan documents create a valid lien in the priority they purport to create (*i.e.*, first or second) on the realty and personalty described therein and that no portion of such property has been released. This representation is often the subject of much negotiation. Holders often argue, with some justification, that such representation should not be required with respect to real property, since the Mortgagee or Loan Policy of Title Insurance to be assigned to the purchaser at closing will adequately protect the purchaser in this regard. In such event, the representation regarding such title insurance policy (described below) becomes even more important.

⁵ Section 3.104(a) of the Texas Business and Commerce Code generally provides that in order for a promissory note to be considered a "negotiable instrument" it must (1) be signed by the maker, (2) contain an unconditional promise to pay a sum certain, (3) be payable on demand or at a definite time, and (4) be payable to order or bearer.

⁶ Section 3.302 of the Texas Business and Commerce Code generally provides that in order for a holder to be a "holder in due course" of an instrument, the holder must have taken instrument: (A) for value; (B) in good faith; (C) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (D) without notice that the instrument contains an unauthorized signature or has been altered; (E) without notice of any claim to the instrument; and (F) without notice that any party has certain specified defenses or claims in recoupment.

(2) **Personal Property.** Difficult issues are often created by personalty. Many holders refuse to make any representations whatsoever regarding the existence, validity or priority of any security interests in personal property. Yet on some properties the amount and value of personalty may be substantial and the existence of such personalty is essential to the effective operation of the project. Even worse, after running UCC-1 searches during the due diligence period, the purchaser of a non-performing or sub-performing loan is often likely to find that financing statements either were never filed or have expired and continuation statements have not been filed. While new UCC-1's can be filed by the holder or purchaser without joinder of the borrower in order to reinstate the financing statement and re-perfect the security interest, the holder's priority vis-a-vis other perfected secured parties will date only from the date of such reinstatement. Even more troubling, in the event of bankruptcy, such unperfected security interest may be avoidable altogether by a trustee in bankruptcy (or by a debtor-in possession), since a security interest in personalty which is perfected by the filing of a UCC-3 within ninety days (and under certain circumstances one year) of the commencement of the case may be avoidable as a preference under 11 U.S.C. 547. Also, a security interest as to which no viable UCC filing exists as of the commencement of the bankruptcy case may be avoidable by the trustee or debtor-in-possession acting as a hypothetical bona fide purchaser under 11 U.S.C. § 544. The significance of a lapsed UCC-1 problem is as much pragmatic as economic; while the personalty encumbered by the putative liens may have little independent value, the cost of replacement (including potential operational disruptions), resulting from the assertion of rights as to such collateral by heretofore subordinate holders or a trustee, can be substantial. Where the borrower is a debtor-in-possession in bankruptcy, this problem can create a significant shift in negotiating dynamics and leverage.

j. **Title Insurance.** The purchaser should request the holder to represent that the loan file contains an original Mortgagee or Loan Policy of Title Insurance which will be delivered to the purchaser at closing, that such title policy is valid, binding and enforceable against the title company in accordance with its terms, that the title company has no defenses thereto, that all premiums with respect thereto have been paid in full, that the coverage under such title policy is in an amount not less than the original balance of the loan, that the holder is the sole beneficiary thereof, that the assignment of such policy will vest in the purchaser the full rights and interests of the holder therein, and that the underwriter of such policy is currently licensed by the State Board of Insurance to operate in Texas, is currently operating in Texas and is solvent. If a thorough review of the title policy, exception documents and survey is not possible prior to the expiration of the due diligence period, the purchaser should also request the holder to represent that the policy insures that the deed of trust creates a first lien on the mortgaged property and that the mortgaged property is otherwise free and clear of all encumbrances and liens having priority over the lien of the mortgage with the exception of the lien for current taxes and restrictive covenants, easements and other matters to which like properties are commonly subject, which are typically acceptable to holders in the area and which do not materially interfere with the benefits of the security intended to be provided by the deed of trust or the ownership, use, operation, marketability or financeability of the mortgaged property.

k. **No Additional Collateral for Loan.** The purchaser should request the holder to represent that there are no liens, security interests or other claims with respect to the loan other than as disclosed in writing to the purchaser.

l. **No Cross-collateralization.** The purchaser should request the holder to represent that the property securing the loan is not pledged as collateral for any other loan held by holder (unless such other loan is also being acquired by the purchaser). In the

event the holder refuses to make such representation, the purchaser should be able to gain some comfort regarding this issue from a review of the loan documents and the title policy.

m. Adjustable Rate. In the event of an adjustable rate loan, the purchaser should request the holder to represent that all of the terms of the loan documents pertaining to interest rate adjustments, payment adjustments and adjustments of the outstanding principal balance are enforceable, have previously been properly made and calculated, and that all notices to the borrower with respect thereto have been properly sent. The purchaser should request the holder to represent that such adjustments have not affected and will not affect the priority of the liens and security interests of the loan documents.

n. Escrows. The purchaser should request the holder to represent that all escrows held and account records reflecting amounts held in escrow by holder for taxes, governmental assessments, insurance premiums and water, sewer and municipal charges with respect to the loan have been delivered to the purchaser, and that such escrows have been maintained and applied in accordance with the loan documents.

o. Tax-exempt Financing. Where loans were originated in connection with the issuance of industrial revenue bonds, industrial development bonds and/or exempt multifamily housing finance programs, the purchaser is advised to obtain the advice of experienced bond counsel to determine what specific representations are necessary under the circumstances to protect the purchaser with respect to such loans.

p. Defaults. The purchaser should request the holder to represent that there are no defaults by any party under the loan documents that have not been disclosed in writing to the purchaser. Most holders will seek to limit such representation to their "current actual knowledge."

q. Enforcement Actions. The purchaser should request the holder to represent whether it has accelerated the loan, posted the property for foreclosure or taken any other enforcement actions. If the mortgaged property is located in California or another state that has the so-called "one action rule," the purchaser should request the holder to represent whether there has been an election of remedies.

r. No Litigation. The purchaser should request the holder to represent that there is no litigation, proceeding or governmental investigation pending, or any order, injunction or decree outstanding, existing or relating to the loan or the mortgaged property except as previously disclosed in writing to the purchaser. The holder might seek to limit this representation to such litigation or proceedings as could have a material adverse effect upon the loan. In the event such litigation is disclosed, the purchaser should conduct a complete investigation into such proceeding.

s. No Bankruptcy. The purchaser should request the holder to represent that neither the borrower nor the owner of the mortgaged property nor any general partner thereof nor any other party obligated on the indebtedness is involved in bankruptcy proceedings except as previously disclosed in writing to the purchaser. In the event such bankruptcy proceedings are discovered, the purchaser should conduct a complete investigation into such proceedings.

5. Representations and Warranties Regarding the Mortgaged Property. In addition to representations and warranties about the loan documents, the purchaser is well

advised to seek representations and warranties from the holder as to a number of matters concerning the mortgaged property as well. In general, such representations and warranties are no different than what the purchaser would attempt to obtain if buying the mortgaged property outright. Purchasers should generally expect that holders will be reluctant to give such representations or warranties, reasoning that they are selling the loan, not the mortgaged property, and since they do not own the mortgaged property and may not have much information about it, such representations and warranties are inappropriate. On the other hand, from the purchaser's standpoint, the loan acquisition is often merely a way to get at the mortgaged property; and therefore, the characteristics of the mortgaged property are vitally important to the purchaser. Moreover, since often the purchaser has no ability to talk to the borrower or perform any formal inspections or studies with respect to the property, representations and warranties may be the only way for the purchaser to gain any comfort with respect to key property matters. Listed below are some (but by no means all) of the representations and warranties the purchaser might seek (it can't hurt to ask!).

a. **Real Estate and Personal Property Taxes.** The purchaser should request the holder to state that there are no unpaid real property taxes due and payable against the mortgaged property. In the event the holder refuses to make such representation, it is generally easy for the purchaser to obtain this information from a title company or a tax reporting service.

b. **Hazard Insurance.** The purchaser should request the holder to represent that the mortgaged property is covered by a valid hazard insurance policy with a standard mortgagee clause in the amount of the full replacement cost of the mortgaged property, and that the loan documents require the owner of the mortgaged property to maintain such insurance policy at the owner's cost and expense. To verify such representation (or in the absence of such representation), the purchaser should review the insurance certificate or policy in the loan file, and should review the applicable portions of the loan documents.

c. **Condemnation.** The purchaser should request the holder to represent that there is no pending or threatened condemnation or similar proceeding affecting the mortgaged property or any part thereof. To verify such representation (or in the absence of such representation), the purchaser should check with the applicable municipal, county, state and federal governments.

d. **Compliance with Zoning, Laws and Restrictive Covenants.** The purchaser should request the holder to represent that the mortgaged property, and the maintenance, operation, occupancy and use thereof in its present manner, do not violate any zoning, building or other federal, state, or municipal law, ordinance or regulation, or any applicable private restrictive covenant, and that all licenses, permits, inspections, authorizations, certifications and approvals required by all governmental authorities having jurisdiction over the operation of the mortgaged property have been performed or issued and paid for and are in full force and effect.

e. **Building Lines and Encroachments.** The purchaser should request the holder to represent that all of the improvements on the mortgaged property lie wholly within the boundaries and building restriction lines of such real property and do not encroach upon any easements thereon, and no improvements on adjoining properties encroach upon such mortgaged property. To verify such representation (or in the absence of such representation), the purchaser should review any survey in the loan files and obtain an updated or new survey if possible.

f. **Mechanics' Liens.** The purchaser should request the holder to represent that the mortgaged property is free and clear of all mechanics' and materialmen's liens, and no rights are outstanding that under law could give rise to such liens. To verify such representation (or in the absence of such representation), the purchaser should obtain an updated title report as described above.

g. **Compliance with Insurance Policies.** The purchaser should request the holder to represent that it has not received from the insurance company that carries the insurance on the mortgaged property or any board of fire underwriters any notice of any defect or inadequacy in connection with the mortgaged property or its operation.

h. **Leases.** The purchaser should request the holder to represent that the borrower has performed all of its obligations under any leases that are or will be required to be performed prior to the closing date, and that no brokerage commissions or other compensation is or will be due or payable with respect to any leases or any renewal thereof that could constitute a lien against the mortgaged property.

i. **Service Contracts.** The purchaser should request the holder to represent that there are no management, service, supply, security, maintenance or similar contracts with respect to the mortgaged property other than (i) the leases and (ii) contracts that may be terminated upon no more than thirty days' notice without penalty.

j. **Licenses and Permits.** The purchaser should request the holder to represent that all licenses and permits which are necessary and required under the laws, ordinances, rules and regulations of the appropriate jurisdiction for the occupancy and use of the improvements on the mortgaged property have been issued and are binding and enforceable.

k. **Outstanding Charges and Assessments.** The purchaser should request the holder to represent that there are no delinquent taxes, ground rents, water charges, sewer rents, assessments or other outstanding charges that affect the mortgaged property.

l. **Flood Plain.** The purchaser should request the holder to represent that the mortgaged property is not located in any area identified by the Federal Emergency Management Agency as having special flood hazards (or, in the event any improvements on the mortgaged property do lie within such flood plain, a flood insurance policy has been issued and is in full force and effect in an amount not less than the maximum amount of insurance available under the Flood Disaster Protection Act of 1973).

m. **Utilities.** The purchaser should request the holder to represent that all public utility connections located at or near the mortgaged property have been paid for and all sewer, water and other utilities required for the operation of the mortgaged property enter through adjoining public streets or through valid recorded easements across adjoining private lands.

n. **Condition of the Mortgaged Property.** Few holders make any representations about the condition of the mortgaged property, and most include explicit "as is, where is" disclaimers. However, in certain cases, it may be appropriate for the holder to represent to the purchaser that the mortgaged property is in good condition and repair and that there are no latent defects with respect thereto. Some holders make no representations

regarding the condition of the mortgaged property, but do provide that if the purchaser discovers following closing that there is a defect in the improvements, fixtures or mechanical systems comprising a part of the mortgaged property which was not previously disclosed to or known by the purchaser and which would require the investment of more than a certain threshold amount to cure or repair, then the holder will either (i) repair the defect and pay any cost therefor over the floor amount, (ii) repurchase the loan, or (iii) revalue the loan and refund the difference.

o. Environmental Matters. From the purchaser's standpoint, it is obviously desirable to obtain a representation from the holder that no hazardous substances have been disposed of or exist on, under or at the mortgaged property, and that the mortgaged property and the operations thereon are in compliance with all applicable environmental laws. Many holders absolutely refuse to make any environmental representations, and those that do carefully word their environmental representations so as to reduce their potential liability. For example, some holders state that the loan file "includes one or more environmental assessments . . . showing that no material amount of hazardous substance has been disposed of or identified on, under or at the mortgaged property." Such representation raises an obvious question: if the environmental assessment in the loan file is wrong (*i.e.*, the report says that the property is clean when, in fact, it is contaminated), such representation arguably has not been breached. Many holders also insert a "materiality" standard into the environmental representation, such that the representation is only breached if the hazardous substances cannot be abated or remediated for a cost to the owner equal to or less than a certain dollar amount. The purchaser should also pay special attention to the definition of "hazardous substances" in the Loan Purchase and Sale Agreement. Many such definitions exclude non-friable asbestos and mold.

6. Disclaimer and Damage Limitations. Most all Loan Purchase and Sale Agreements will contain an extensive "AS IS" disclaimer, reflecting the seller's desire never to hear about the loan once the closing has occurred and seeking to limit any post-closing liability to the breach of any representations and warranties that the seller has expressly agreed to provide. Many Loan Purchase and Sale Agreements will also provide for (a) waiver of any breaches of representations and warranties known by the purchaser, or disclosed in the due diligence materials, prior to closing, and (b) limitations on the amount of the seller's liability for any breaches of representations and warranties or other surviving obligations.

M. Pre-Closing Covenants. The purchaser should request the holder to covenant that, prior to closing, it will:

1. Continue to service the loan in a prudent manner consistent with its past practices or industry standards.

2. Not amend, modify, subordinate, cancel, forgive or release the loan or any collateral therefor or any party liable for payment thereof, or compromise or settle any claims with respect to the loan.

3. Not collect principal or interest in addition to that scheduled to be paid under the loan documents (and if any such scheduled or extraordinary payments are made, they should either be turned over to purchaser at closing or purchaser should receive a credit therefor).

4. Not exercise any of its rights or remedies under the loan documents arising from or in connection with any default thereunder. In this regard, some sellers will insist

on retaining the sole right to control all actions with respect to the loan prior to the closing, including the right to foreclose or otherwise realize upon and enforce all of its rights under the loan documents. In such situations, one possible compromise is to require the seller to consult with the purchaser regarding all such enforcement actions (and any related correspondence or notices), and if the parties do not agree, then in lieu of the seller taking such action the purchaser has the right to accelerate the closing to a date that is soon (such as five days) after their disagreement, in which case the seller will forbear from taking such actions in the meantime.

5. Allow purchaser access to all the holder's books, records and files relating to the loan and the mortgaged property.

6. Immediately deliver to the purchaser any and all correspondence, invoices or other documents received by the holder and relating to the loan or the mortgaged property.

7. Use reasonable efforts to facilitate the purchaser's physical inspection, testing or surveying of the mortgaged property, including, if necessary, asserting and delegating to the purchaser its rights (if any) under the loan documents to inspect the mortgaged property.

8. Not take, or omit to take, any action that would result in the breach of any of the seller's representations and warranties in the Loan Purchase and Sale Agreement.

N. Pre-Closing Litigation or Bankruptcy. The Loan Purchase and Sale Agreement should have provisions dealing with the parties' rights, duties and obligations in the event of a claim, action, lawsuit, bankruptcy or other proceeding that first arises after the execution of the Loan Purchase and Sale Agreement and prior to the closing date. The holder will typically require the ability to control the legal response to such proceeding and may seek to require the purchaser to reimburse it for its out-of-pocket costs and expenses in connection therewith (under the theory that all such actions will accrue to the benefit of the purchaser.)

O. Closing. The following basic actions should take place at closing:

1. Delivery of Indorsed Note. The holder should deliver the original promissory note to the purchaser, properly indorsed "pay to the order of [the purchaser]" so that the purchaser will become a "holder" in accordance with Texas Business and Commerce Code Section 1.201(21). Most holders will add "without recourse, representation or warranty of any kind or character, express or implied." Such indorsement will almost always be done with a separate allonge.⁷

⁷ Prior to 1995, purchasers typically begged holders to indorse the note itself rather than simply attach a separate allonge, since former Section 3.202 of the Texas Business and Commerce Code required that an allonge be "so firmly affixed [to the note] as to become a part thereof" and there was some authority for the proposition that an indorsement by allonge was permitted only if a note was so covered with previous indorsements that convenience or necessity required additional space for further indorsements. There was also a lot of confusion about what method was sufficient to attach the allonge to the note (which confusion was finally resolved when the Texas Supreme Court determined in *Southwestern Resolution Corp. v. Watson*, 964 S.W. 2d 262 (Texas 1997) that an allonge stapled to an instrument was "firmly affixed" to the instrument). Fortunately, Section 3.204(a) of the Texas Business and Commerce Code now provides that for the purpose of determining whether a signature is made on an instrument, "a paper affixed to the instrument is a part of the instrument." Thus, the Texas Business

2. Assignment. The holder should deliver to the purchaser an "Assignment of Debts and Liens" or "Assignment of Loan Documents", duly executed, acknowledged and in form for recording, then such document should be recorded. This document should assign all of the loan documents to the purchaser as well as all claims, causes of action and rights of the holder with respect to the loan documents.

3. UCC-3s. In the event personal property is pledged as additional collateral for the loan, UCC-3s should be filed evidencing the transfer of the security interest from the holder to the purchaser, and should be recorded with the Secretary of State and the county in which the mortgaged property is located.

4. Notice to Obligors. The holder and purchaser should jointly notify the borrower, guarantors and any other obligors in writing of the transfer of the loan, which notice should specify the purchaser's address for the purpose of payments and notices.

5. T-3 Endorsement to Title Policy. The purchaser should obtain a T-3 endorsement to the existing Mortgagee Policy of Title Insurance under Procedural Rule P-9b(2) as described above.

6. Insurance Policies. The holder and purchaser should cause the applicable insurance companies to add the purchaser and delete the holder as the "mortgagee/loss payee" or "additional insured", as applicable, on all casualty, liability and other insurance policies carried by the borrower.

7. Delivery of Loan Documents and Materials. The holder should deliver to the purchaser all loan documents, servicing records, correspondence, title policies, surveys, insurance certificates and other relevant documents and materials in the holder's possession pertaining to the loan. Original documents are preferred; however, except for the note and any guaranties, certified copies are generally acceptable. As described above, most sellers will want to exclude certain documents, such as those that are subject to the attorney-client privilege.

8. Evidence of Authority. The holder should deliver evidence of its authority to consummate the transaction.

9. Settlement Statement. The parties will typically prepare and execute a settlement statement.

P. Remedies for Default: Specific Performance. A purchaser should insist upon an express remedy of specific performance against the holder in the event of the holder's refusal to convey the loan to the purchaser at closing in accordance with the terms and conditions of the Loan Purchase and Sale Agreement. Under Texas law, it is unclear whether specific performance is available for the acquisition of a loan secured by real estate if the parties do not expressly contract therefor. Ordinarily, specific performance is available for real estate contracts only, and a court will not grant specific performance unless it is shown that no

and Commerce Code provides that an allonge constitutes an indorsement and no longer requires that such allonge must be "firmly" affixed to the note. Most practitioners believe that a paper clip is now sufficient to affix an allonge to a note, at least in Texas, and as a practical matter most allonges aren't even clipped to the note in most transactions. Of course, whether or not the allonge is affixed to the instrument only matters if the purchaser is seeking "holder in due course" status, which as described above is typically not available in purchases of non-performing or sub-performing loans.

adequate remedy exists at law. *American Hous. Resources, Inc. v. Slaughter*, 597 S.W.2d 13 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). However, where personal property contracted for has a special, peculiar, or unique value or character, and the plaintiff would not be adequately compensated for his loss by an award of money damages, specific performance may be decreed. *Madariaga v. Morris*, 639 S.W.2d 709 (Tex. App.—Tyler 1982, writ ref'd n.r.e.). Also, specific performance of a contract involving personal property may be granted where damages are not measurable. *Id.* Applying these basic principals, the critical consideration in bringing an action for specific performance in a loan acquisition is whether or not the action could be satisfied by the recovery of money damages. Arguably, where the holder is a receivership or conservatorship or is bankrupt or insolvent, monetary damages would be uncollectible, and the remedy of specific performance should therefor be available. Furthermore, since the loan is secured by real estate and is non-performing, the purchaser could argue that the transaction is more akin to a real property conveyance than a personal property conveyance.

Whether or not the holder refuses to grant the remedy of specific performance, a purchaser should seek damages at least equal to its out-of-pocket costs and expenses (typically subject to a cap) if the Loan Purchase and Sale Agreement is terminated as a result of the seller's breach.

Q. Post-Closing Obligations.

1. **Cooperation in Proceedings.** The purchaser should request to holder to cooperate with the purchaser following closing in connection with any litigation, bankruptcy or other proceeding involving the loan or the mortgaged property (provided the purchaser reimburses holder for any costs and expenses incurred by the holder in connection therewith).

2. **Indemnification.** The holder will often require the purchaser to indemnify the holder against any claims arising with respect to the loan from and after the closing date, including without limitation those resulting from any enforcement action taken by the purchaser or its successors. The purchaser will at least want to try to exclude from such indemnity any claims caused by the seller's gross negligence, willful misconduct or breach of any representation, warranty, covenant or other obligation in the Loan Purchase and Sale Agreement.

3. **Compliance with Laws.** The holder will often require the purchaser to agree to comply with all laws and other legal requirements with respect to the loan and the collection thereof after the closing (particularly the Fair Debt Collection Practices Act). If the purchaser must agree to such requirement, it will at least want to limit its obligation to situations where non-compliance could result in a claim against the seller or a related party.

4. **Release of Seller Parties.** The holder will often require the purchaser to agree that it will not release the borrower or any guarantor or other obligor from any liability with respect to the loan unless the purchaser shall have obtained the prior or simultaneous release of the holder and its related parties from all claims which such obligor could have against it with respect to the loan as of the date of such release. If the purchaser must agree to such requirement, it will at least want to try to be responsible only for using its "reasonable efforts" or "best efforts" to obtain such release.

5. **Access to Documents.** The holder will often require that the purchaser maintain, and allow the holder access to, the assigned loan files and any other information

relating to the loan or the mortgaged property, for some period (such as three years) after the closing.

6. Notices of Claims. The holder will often require that the purchaser notify the holder of any actual or threatened claim, lawsuit or other proceedings relating to the loan after the closing. If the purchaser must agree to such requirement, it will at least want to try to limit such notices to situations in which the seller or any related party is named or threatened to be named as a party.

7. Servicing of Loans. Most loans are sold on a "servicing released" basis, such that the purchaser becomes responsible for servicing the loan at closing. Sometimes, in order to provide a smooth transition of loan servicing, a loan servicing transfer agreement will be executed providing for the transfer of servicing to the loans at some point (*i.e.*, within 30 days) after closing. Such agreements are particularly prevalent on portfolio transactions. In some portfolio offerings in which the holder might be required to repurchase the loan in the event of a breach of a representation or warranty, the holder will probably require the purchaser to service and administer the loans in conformity with certain standards (such as "customary prudent industry servicing standards employed by servicers of similar loans.") Additionally, most such holders will prohibit sales, foreclosures and other dispositions of the loans prior to the end of the post-closing due diligence period without the prior written consent of the holder.

8. IRS Reporting. The Loan Purchase and Sale Agreement should specify which party will be responsible for submitting Internal Revenue Service Forms 1098 and 1099 Information Returns for the loan for the year in which the closing occurs. Usually this is the purchaser's responsibility, with the holder being responsible to provide the necessary data with respect to the period prior to closing.

R. Tax Traps; Beware of Post-Closing Loan Modifications. The purchaser should always confirm the tax consequences of its acquisition and resolution of the loan. For example, just to name one such possible consequence, if the purchaser and borrower enter into a loan modification after the closing, and such modification is considered "significant" under Treas. Reg. § 1.1001-3 (such as a change in the obligor, a change in the recourse nature of the debt, or a material change in the maturity date or interest rate), then such modification will be deemed a taxable exchange of the original debt instrument for a "new" debt instrument, in which case the purchaser will recognize gain equal to the excess of the face amount of the modified loan over the purchaser's basis in the loan (*i.e.*, the purchase price).

VI. SECURITIES AND FINANCIAL PRIVACY ISSUES

In the early days of distressed debt sales, holders worried a lot about securities and financial privacy concerns. Current holders are much less concerned about such matters, as the market for the trading of such debt has become well established; however, prospective seller should still have a basic understanding of the securities and financial privacy laws that could impact a loan sale transaction.

A. Securities Law Concerns. Holders who are considering selling one or more mortgage loans should consider whether the loan could be classified as a security under state and federal securities laws. If the loan is a security, the offering must be registered under the Securities Act of 1933 and under state blue sky laws unless an exemption from registration exists. Registration of a securities offering is a very expensive and time consuming process, entailing periodic reporting requirements, disclosure of information, as well as accounting and

legal fees. Fortunately, in most cases, an offering of non-performing or sub-performing loans should not constitute a sale of securities.

1. Loans as “Securities”. Much uncertainty exists about which types of promissory notes are considered securities. Section 2(1) of the Securities Act of 1933 provides that the term “security” includes notes “unless the context otherwise requires.” 15 U.S.C. § 77b(1) (1988). Even though the term “note” is included in this definition, many cases have held that notes in the context of normal commercial transactions are not securities within the contemplation of the securities laws. See, e.g., *Smith International, Inc. v. Texas Commerce Bank NA*, 844 F.2d 1193 (5th Cir. 1988). Determining the circumstances in which “the context otherwise requires” remains a gray area. However, the United States Supreme Court gave some guidance in determining when a note is a security in its decision in *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

In *Reves*, the Court considered both the “investment versus commercial” test and the “family resemblance” test. Under the “investment versus commercial” test, a court will look at the “economic reality” of the transaction under scrutiny in order to determine whether it is an investment vehicle (which would trigger the securities acts’ coverage) or whether it is more properly characterized as a commercial venture (which would not be subject to the securities laws). The Court provided a laundry list of types of notes not considered securities, such as notes secured by residential mortgages and short-term notes secured by liens on small businesses or their assets. The Court stated that notes not on the list should be excluded from the definition of securities if there is a “strong family resemblance” to those notes included on the list.

Using these factors, a non-performing or sub-performing mortgage loan sold in a commercial transaction should not be found to constitute a sale of security. Under the family resemblance test, this type of loan resembles the laundry list types of notes which are not securities, such as notes secured by residential mortgages or notes secured by liens on small businesses. In fact, a non-performing or sub-performing loan secured by commercial real estate appears to be an even more “commercial” transaction than some of the laundry list notes, since any profit to the purchaser will likely come only after the purchaser has waged some hard-fought battles with the borrower.

2. Exemptions. Even if the holder fears that its loans might be classified as a sale of securities, private offerings exemptions from registration under the 1933 Securities Act and state blue sky laws are often available, including the private offering safe harbors under Regulation D. Many Loan Purchase and Sale Agreements will include typical “investor representations” to provide the seller with some protection in case the purchaser later makes a claim that the sale of the loan constituted the sale of a security. Whenever possible, the holder should have the purchaser represent that it is an “accredited investor”.

B. Financial Privacy Laws. As discussed above, the first issue a purchaser may face is a holder’s reluctance to disclose any information about the loan to the purchaser due to fears about violating financing privacy laws. Frankly, this was a much bigger issue in the 1990s than it is now, since these days most loan sellers are comfortable with the privacy issues. The law in this area is still not fully developed, however, since most all cases in the area of financial privacy deal with depository relationships rather than borrower-holder relationships. This section will explore the relevant areas of potential liability in order to help the lawyer and his client decide how to handle disclosures of facts about a loan. *Disclaimer: The research that*

follows has not been updated since the 1993 version of this article and therefore and should not be relied upon for a description of the current state of the law in this area.

1. **State Common Law.** Common law liability for disclosure of private or confidential information can exist due to: (i) invasion of privacy; (ii) breach of an express or implied contract; or (iii) defamation.

a. **Invasion of Privacy.** The tort of invasion of privacy under the common law of most states typically consists of either: (i) unreasonable intrusion into a person's seclusion, solitude, or private affairs; (ii) public disclosure of embarrassing private facts; (iii) publicity that places a person in a false light in the public eye; or (iv) appropriation, for another's advantage, of a person's name, image or likeness. See L. RICHARD FISCHER, *THE LAW OF FINANCIAL PRIVACY* 5, 12-13 (2d ed. 1991). The author was unable to uncover a Texas case ruling on whether and to what extent a holder's disclosure of information involving a borrower-holder relationship could violate a borrower's right of privacy; however, liability can clearly be imposed in Texas for an unwarranted invasion of an individual's privacy. In *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973), the Texas Supreme Court defined the right of privacy as:

[T]he right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Id. at 859. A few years later the Texas Supreme Court in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) upheld the idea that an individual has the right to be free from the publication of his private affairs with which the public has no legitimate concern. The court stated that in order to recover for public disclosure of private facts one must show: (i) that publicity was given to matters concerning his private life; (ii) the publication of which would be highly offensive to a reasonable person of ordinary sensibilities; and (iii) that the matter publicized is not of legitimate public concern. *Id.* at 682. The continued existence of the tort of invasion of privacy in Texas was affirmed in *Clarke v. Denton Pub. Co.*, 793 S.W.2d 329 (Tex. App. - Fort Worth 1990, writ denied).

Fortunately, it is widely held that the mere disclosure to a single person, or even to a small group of persons, does not constitute an invasion of privacy. See, e.g., *Palmatier v. Beck* 636 S.W.2d 575 (Tex. App. - Fort Worth 1982, no writ); *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F.Supp. 440, 449 (S.D.N.Y. 1988); *aff'd*, 916 F.2d 820 (2d Cir. 1990), cert. denied, 110 S.Ct. 1109 (1991); *Rush v. Main Sav. Bank* 387 A.2d 1127 (Me. 1978); Edward L. Raymond, Jr., Annotation, *Bank's Liability, Under State Law, for Disclosing Financial Information Concerning Depositor or Customer*, 81 A.L.R. 377, 396 (4th ed. 1990). Also, the general rule in most states appears to be that disclosure of information which is a matter of public record (i.e., the existence of a foreclosure action) is not actionable since no right of privacy is invaded. See, e.g., *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648 (Minn. 1976).

b. **Breach of Express or Implied Contract.** Obviously, a holder would be liable to its borrower for violating an express confidentiality provision in a loan document or other agreement. Accordingly, a prospective seller of a loan should review the loan documents to determine whether (i) the lender owes an express confidentiality obligation to the borrower, guarantors or other obligors, or (ii) conversely, the borrower, guarantors or other

obligors expressly disclaim such confidentiality obligation and instead authorize the holder to disclose financial and other information about such parties, the loan and the mortgaged property to prospective loan participants and purchasers.

Additionally, it could be argued that a bank has an implied agreement with its customers arising out of the bank-customer relationship that the bank will keep the customer's financial affairs confidential. While the author found no Texas cases on point, there is a split among jurisdictions on the issue of whether, and in what circumstances, a confidential relationship can be implied between a bank and its depositors or loan customers. Cases in some states have affirmed the existence of such implied contract. For example, the Idaho Supreme Court has stated that "[i]t is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract." *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 290 (Idaho 1961). Similarly, an Indiana court held that a bank impliedly contracts that it will not reveal a loan customer's financial status unless a public duty arises. *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474, 482 (Ind. App. 1985). Also, in an action by a loan applicant alleging that a loan officer wrongly disclosed confidential financial investment information to third parties who bought the investment property for their own account, an Oklahoma court found that the customer's cause of action was properly framed in terms of the bank's tortious violation of its duty to keep the contents of the loan application confidential. *Djowharzadeh v. City Nat'l Bank & Trust Co.*, 646 P.2d 616, 620 (Okla. Ct. App. 1982). The Tenth Circuit affirmed that there is a duty on the part of a bank and a loan officer to keep loan application materials confidential under Oklahoma law. *Jordan v. Shattuck Nat'l Bank* 868 F.2d 383 (10th Cir. 1989).

Other courts have held that a bank does not have an implied contractual duty to keep financial information concerning a borrower confidential. For example, the Nebraska Supreme Court relied on the proposition that the relationship between a bank and a borrower is solely that of creditor and debtor and that one who defaults on his debts cannot expect that his default will be kept a secret. *Schoneweis v. Dando*, 435 N.W.2d 666, 673 (Neb. 1989). While New York recognizes an implied duty of confidentiality between a bank and its depositors, it does not recognize one between a bank and its borrowers. *Graney Dev. Corp. v. Taksen*, 400 N.Y.S.2d 717, *aff'd*, 66 A.D.2d 1008 (1978). The *Graney* court held that because information about a borrower's loan is not information received in a bank's capacity as an agent for the depositor but rather is information obtained as a party to the loan agreement, the information is not such that the borrower would normally expect to be kept confidential.

Finally, some courts have held that the existence of a contractual duty of confidentiality is a question of fact to be resolved on a case by case basis. For example, a Colorado court held that although there is no per se fiduciary relationship between a borrower and holder, one "may arise from a business or confidential relationship which induces one party to relax the care and vigilance it would ordinarily have exercised in dealing with a stranger." *Rubenstein v. South Denver Nat'l Bank*; 762 P.2d 755, 756 (Colo. Ct. App. 1988). Thus, said the court, it is necessary to determine as a matter of fact whether the loan customers trusted the bank to hold confidential the information they disclosed concerning their financial status, and whether the bank accepted or invited this trust. *Id.*

c. Defamation. Proof of the truth of an alleged defamatory matter is a complete defense to a defamation action; therefore, accurate loan sale disclosures would not give rise to a defamation action. Also, the law of defamation generally recognizes legitimate business interests in transferring information in good faith through the notion of "qualified

privileges,” such that organizations that have legitimate business interests in transferring information about their customers may escape liability for defamation even if the information is false. In such a case, the imposition of liability would depend upon the lack of a legitimate business interest or the existence of “malice.” Fischer, *supra* VIB.1.A., at 5-15; see *also*, W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS §§ 115-116 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 581A, 593 (1981).

2. Avoidance of Financial Privacy Liability. Holders should make sure they are aware of the case law in their jurisdiction, the specific reasons for disclosure and the relationship between the customer and the holder before disclosing any information about a loan to a third party. Confidentiality Agreements should be required by any holder, both to protect the holder from widespread dissemination of information about the assets in its portfolio, as well as to protect the borrower from embarrassing disclosures about his financial affairs. A detailed review of the loan documents should be undertaken to make sure that the holder has not undertaken any express contractual obligation to keep the loan documents or any information about the loan or the borrower confidential. The holder should try to avoid disclosing the name of the borrower in marketing materials. Disclosure to the public should be limited, and no detailed information should be provided until after the Confidentiality Agreements have been signed. In some situations, the holder may want to completely withhold sensitive materials (such as the guarantors' personal financial statements), or provide such materials only after a Loan Purchase and Sale Agreement has been entered into.

Exhibit A

Form Confidentiality Agreement For Loan Sales (Seller-Oriented)

CONFIDENTIALITY AGREEMENT

The undersigned ("Recipient") is considering a purchase (the "Transaction") of a loan (the "Loan") owned by [_____, a _____] ("Lender"), made by Lender to [_____] pursuant to that certain [Loan Agreement] dated [_____, 20__] (the "Loan Agreement") and all of the other documents and instruments entered into in connection therewith (the Loan Agreement, along with such other documents and instruments, being hereinafter referred to as the "Loan Documents"). For this purpose, Lender or its representatives may provide Recipient and its Representatives with Confidential Information (all as defined below). In consideration of this furnishing of Confidential Information, Recipient hereby agrees for the benefit of Lender as follows:

1. Confidential Information. All verbal and written information, regardless of medium (including, without limitation, electronic format), provided by Lender or any of its representatives to Recipient or its Representatives relating to the Loan or the Loan Documents (regardless of whether prepared by Lender or otherwise, and whether furnished before or after the date hereof), together with all analyses, compilations, studies or other documents or records prepared by Recipient or its Representatives that contain or otherwise reflect such information or are generated by such information, constitutes "Confidential Information," except that the term does not include information that (a) is or becomes generally available to the public through no fault or action by Recipient or its Representatives, or (b) is or becomes known to Recipient or a Representative of Recipient on a non-confidential basis through a source unrelated to Lender, provided that Recipient and the Representative relating the information do not know the source to be under a confidentiality obligation, (c) was already in Recipient or a Representative's possession prior to disclosure hereunder, or (d) is or becomes independently developed by Recipient or a Representative.

2. Disclosure. Recipient may share the Confidential Information, on a need to know basis for the purpose of evaluating the Transaction, with its officers, directors, employees, agents, counsel, accountants, financial advisors or other independent experts or representatives (each a "Representative" and, collectively, "Representatives"), and Representatives may share Confidential Information with other Representatives on a need to know basis for the same purpose, provided that Recipient has informed the Representatives of this Agreement and requires them to comply with the obligations hereunder. Except as permitted by this Agreement, Recipient shall not, and shall cause its Representatives not to, disclose any Confidential Information to any person or entity. Disclosure mandated by law, regulation, judicial process, or other governmental authority shall be permissible; provided, however, that prior to such disclosure, Lender shall be promptly notified in writing, to the extent permitted by law, so that Lender has a reasonable opportunity to contest such mandate, seek a protective order and/or waive compliance with the terms of this Agreement. In the event that such protective order or other remedy is not obtained, or that Lender waives compliance with the provisions of this Agreement, Recipient shall furnish only that portion of the Confidential Information that it is advised by counsel is legally required to be furnished.

3. Use. Recipient shall, and shall cause its Representatives to, use the Confidential Information solely for the purpose of evaluating the Transaction by Recipient or its affiliates, and not as agent, representative, or broker of any other party. Recipient shall, upon Lender's written request, promptly return or destroy all Confidential Information and copies of and notes relating to the Confidential Information created by Recipient or its Representatives, not related to a consummated Transaction by Recipient or its affiliates.

4. Third-Party Contact. Recipient shall not, and shall direct its Representatives not to, make any direct or indirect contact with any debtor, guarantor or obligor of the Loan, or any of their respective officers, directors, shareholders, employees, partners, members, managers, affiliates, attorneys, independent experts or other representatives in connection with the Transaction without the prior written consent of Lender, which consent will be in Lender's sole discretion. Recipient shall not, and shall direct its Representatives not to, disclose to any person or entity the fact that the Confidential Information has been made available to them, that discussions or negotiations may take, have taken or are taking place concerning the Transaction, or any of the terms, conditions or other facts with respect to the Transaction (including the status thereof).

5. Limitations. The Confidential Information does not purport to be all-inclusive or to contain all information which a prospective purchaser may desire. Neither Lender nor any of its officers, directors, employees, affiliates, advisors or agents, makes any representation or warranty, expressed or implied, as to the accuracy or completeness of any of its contents, and no legal liability is assumed or shall be implied with respect thereto. Recipient should not construe the contents of the Confidential Information as advice of any kind, and should make its own inquiries and consult its own advisors as to matters concerning the Transaction. The Confidential Information is intended solely for the undersigned's own limited use as set forth herein and therein. Neither this Agreement nor the furnishing of the Confidential Information is intended to be an offer for the sale of the Loan or any interest therein, and Lender reserves the right to withdraw the Loan from the sale, to reject any or all expressions of interest to acquire the Loan, or to terminate the sale at its sole discretion.

6. Prospective Investment. Recipient acknowledges that in evaluating a Transaction Recipient must rely on its own examination of the Confidential Information, including the merits and the risks reflected therein. Neither the loan nor any interests therein nor any offering with respect thereto have or will be registered under the Securities Act of 1933, as amended (the "Act"), or any state securities law or the laws of any jurisdiction. The loan will be offered and sold under certain exemptions provided under the Act and the regulations promulgated thereunder and other exemptions of similar import in the laws of the states and jurisdictions where the offering of the Loan will be made. Recipient acknowledges that there will be no public market for the interests in the Loan, and no obligation on the part of any person to register the Loan under the Act or any state securities laws, and it is aware that it will be required to bear the financial risks of any investment in the Loan for an indefinite period of time. Recipient acknowledges that the Transaction will involve significant risks and Recipient will evaluate for itself whether it has the financial ability and willingness to accept such risks and lack of liquidity which are characteristic of such investment.

7. Representations and Warranties of Recipient. Recipient represents and warrants to Lender that Recipient (a) is not (i) a debtor, guarantor or obligor of the Loan, or (ii) an officer, director, shareholder, employee, partner, member, manager, affiliate, representative or agent of any debtor, guarantor or obligor of the Loan, and (b) has not communicated directly or indirectly with any debtor, guarantor or obligor of the Loan, or any of their respective officers,

directors, shareholders, employees, partners, members, managers, affiliates, attorneys, independent experts or other representatives in connection with the Transaction.

8. Application. In the event Recipient or any of its Representatives fails in any respect to comply with its obligations under this Agreement, it shall be deemed a breach of this Agreement. The rights, powers and remedies provided for in this paragraph shall be in addition to and do not preclude the exercise of any other right, power or remedy available to Lender under law or in equity. It is further understood and agreed that money damages may not be a sufficient remedy for a breach of this Agreement by Recipient or its Representatives and that Lender shall be entitled to seek specific performance as a remedy for such breach or injunctive relief to otherwise enforce this Agreement. Such remedy shall not be deemed to be an exclusive remedy for such breach of this Agreement, but shall be in addition to all other remedies, including money damages (if appropriate), available at law or in equity to Lender. No forbearance, failure or delay in exercising any such right, power or remedy shall operate as a waiver thereof or preclude its further exercise.

9. Governing Law. This Agreement shall be governed by and construed in accordance with the laws applicable in the State of Texas, without giving effect to conflict of laws principles.

IN WITNESS WHEREOF, the undersigned has executed this Agreement to be effective as of the date first set forth above.

RECIPIENT:

[_____],
a [_____]

By: _____
Name: _____
Title: _____

Contact Information:

[_____]
[_____]
[_____]
Attention: [_____]
Phone: [_____]
Fax: [_____]
Email: [_____]

Exhibit B

Form Loan Purchase and Sale Agreement (Seller-Oriented)

LOAN PURCHASE AND SALE AGREEMENT

THIS LOAN PURCHASE AND SALE AGREEMENT ("Agreement") is executed to be effective as of [_____, __, 20__] (the "Effective Date") between [_____, a _____] ("Seller") and [_____, a _____] ("Purchaser").

RECITALS:

A. Seller is the owner and holder of that certain (i) Promissory Note (the "Note") in the amount of [\$_____] dated [_____, __, 20__] executed by [_____, a _____] (the "Borrower") evidencing the loan more particularly described therein (the "Loan"), and (ii) a [Deed of Trust, Security Agreement and Assignment of Rents] concerning the real and personal property as more particularly described therein (the "Property").

B. Purchaser desires to purchase the Loan and all documents and instruments evidencing, securing or pertaining in any respect to the Loan as more particularly described on Exhibit A attached hereto (collectively, the "Loan Documents") on the terms and subject to the conditions set forth herein.

AGREEMENT:

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser agree as follows:

1. Sale and Purchase. Seller agrees to sell to Purchaser and Purchaser agrees to purchase from Seller, for the Purchase Price (as hereinafter defined) and on the terms and conditions set forth in this Agreement, all of Seller's right, title and interest in the Loan and the Loan Documents. Seller's obligations under this Agreement are expressly subject to the condition that Seller's Loan participant has received all of its internal approvals to the transactions evidenced hereby.

2. Purchase Price; Earnest Money.

(a) The purchase price ("Purchase Price") to be paid by Purchaser to Seller for the Loan is [\$_____], which Purchase Price shall be delivered by Purchaser to [_____, Attention: _____] (the "Escrow Agent") in immediately available funds at the Closing (as hereinafter defined) for delivery to Seller upon the consummation of the Closing. [Any amounts paid to Lender prior to Closing in respect of the Loan (e.g., principal or interest payments or governmental reimbursements) will not be credited against the Purchase Price.] **or** [Any amounts paid to the Lender between the Effective Date and the Closing in respect to the Loan, including without limitation principal or interest payments and governmental

reimbursements ("Pre-Closing Loan Payments") will be credited against the Purchase Price at Closing.]

(b) On or before 12:00 PM CST, [_____, ___, 20__], Purchaser shall deliver to the Escrow Agent the sum of [\$_____] (the "Earnest Money") in immediately available funds. If Purchaser fails to timely deliver the Earnest Money, then Seller, as its sole remedy therefor, may terminate this Agreement by delivering to Purchaser written notice thereof.

(c) The Escrow Agent shall, promptly upon receipt, place the Earnest Money in a federally insured financial institution in an account which is FDIC-insured for the full amount in such account (to the maximum extent permitted by applicable law) and, if possible, an interest bearing account. Any interest thereon will be added to principal as additional Earnest Money and disbursed in the same manner under this Agreement as principal. Interest earned on the Earnest Money will be reportable under Purchaser's taxpayer identification number. If at any time during the term of this Agreement the financial institution that actually holds the Earnest Money or its parent entity (i) is the subject of a bankruptcy, insolvency, conservatorship, receivership, custodianship or similar proceeding; (ii) is otherwise adjudicated as, or determined by any governmental authority to be, insolvent or bankrupt; (iii) is the subject of a cease and desist order by any governmental authority and such cease and desist order is not resolved within 20 days after the issuance of such order, or (iv) admits in any filing that it is not able to continue as a going concern, Escrow Agent shall promptly move the Earnest Money to another financial institution.

3. Purchaser's Investigation. Purchaser has reviewed all of the Loan Documents and has had the opportunity to review certain materials provided by Seller to Purchaser with respect to the Loan and/or the Property (the "Evaluation Material") and obtain all such other information and documentation that Purchaser deemed appropriate ("Other Information") prior to the Effective Date. Purchaser has made its own, independent evaluation of all the aspects of the Loan as Purchaser deems necessary, including, without limitation, (a) the enforceability of the Loan Documents, (b) title to, and the value of, the Property, and (c) the value of the Loan. Purchaser is assuming all risk with respect to the completeness, accuracy or sufficiency of the Loan Documents, Evaluation Material and Other Information. Purchaser understands that the Evaluation Material and Other Information may be incomplete and outdated and may contain errors, omissions and inaccurate and conflicting information, and that Seller has not attempted to verify, correct or reconcile the information contained in the Evaluation Material or Other Information. Further, Purchaser understands that Privileged Materials (described below) may have been removed by Seller from the Evaluation Material. Such Privileged Materials could contain information which, if known to Purchaser, could have a material impact on its determination of the value of the Loan and its decision to purchase the Loan. Purchaser further acknowledges that in acquiring the Loan, Purchaser is assuming the risk of full or partial loss which is inherent with the credit, collateral and collectability risks associated with the Loan. Purchaser understands that the Loan may be in default and may be non-performing and that pending legal proceeds may have been filed by or against one or more of the borrowers, guarantors or other obligors on the Loan, including without limitation, proceedings with the United States Bankruptcy Court. As used herein, "Privileged Materials" shall mean those documents and materials that Seller has determined, in its sole discretion, are inappropriate to release to Purchaser, including, without limitation, (i) valuations and opinions regarding the Loan or the Property, (ii) attorney-client privileged communications and work product, (iii) legal conclusions of non-lawyers or summaries prepared by non-lawyers related to

legal conclusions reached or expressed by lawyers, (iv) financial statements or other information subject to written confidentiality obligation or restriction, or (v) non-public information, the disclosure of which could be in violation of any law, rule, regulation, court order or agreement.

4. Representations of Seller.

(a) Seller represents and warrants to Purchaser that:

(i) Seller is the sole owner of the Loan and the Loan Documents. The Loan and the Loan Documents are not subject to any prior assignment, conveyance, transfer, or participation [; except for a participation with _____].

(ii) Seller has all requisite power and authority to execute, deliver, and perform all of its obligations under this Agreement and all instruments and other documents executed and delivered by Seller in connection herewith.

(iii) Seller's execution of this Agreement, and closing hereunder, will not breach any agreement to which Seller is a party.

(iv) The Loan Documents set forth on Exhibit A attached hereto have not been amended or modified, except as set forth on Exhibit A to this Agreement. Seller has not subordinated its interest in the Loan or the Loan Documents to any other liens.

(v) The outstanding unpaid principal balance of the Loan as of [_____, 20__] is [\$_____]. The amount of accrued unpaid interest on the Loan as of [_____, 20__] is [\$_____]. Seller is not holding any escrows related to the Loan.

(vi) A [Mortgagee] [Loan] Policy of Title Insurance (herein so called) has been issued to Seller in the amount of [\$_____].

(b) The representations of Seller set forth in Section 4(a) above will be deemed to be made both as of the Effective Date and as of the Closing Date. Seller's representations under this Agreement will survive the Closing Date for a period of [six (6) months] and any action or claim thereon must be instituted within [two (2) years]after the expiration of such [six (6) month] period.

(c) **EXCEPT FOR THOSE REPRESENTATIONS SPECIFICALLY MADE BY SELLER UNDER SECTION 4(a) ABOVE:**

(i) THE LOAN AND THE LOAN DOCUMENTS ARE PURCHASED AND SOLD "AS IS", "WHERE IS", AND WITH ALL FAULTS, AND WITHOUT RECOURSE AND WITHOUT ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS, IMPLIED OR OTHERWISE, INCLUDING, WITHOUT ANY LIMITATION ANY REPRESENTATION THAT THE LOAN DOCUMENTS ARE ENFORCEABLE OR THAT THE COLLATERAL

DESCRIBED IN THE LOAN DOCUMENTS MAY BE REALIZED UPON OR ADEQUATELY SECURES THE LOAN;

(ii) PURCHASER ACKNOWLEDGES THAT THE LOAN MAY BE IN DEFAULT AND MAY BE NON-PERFORMING;

(iii) PURCHASER ACKNOWLEDGES THAT ANY EVALUATION MATERIAL THAT SELLER PROVIDES OR MAKES AVAILABLE TO PURCHASER, WHETHER WRITTEN OR ORAL, PERTAINING TO THE LOAN, THE LOAN PARTIES, THE LOAN DOCUMENTS OR THE PROPERTY IS FURNISHED TO PURCHASER SOLELY AS A COURTESY AND SELLER GIVES NO REPRESENTATIONS OR WARRANTIES ABOUT, AND ASSUMES NO RESPONSIBILITY FOR, THE ACCURACY OR COMPLETENESS OF THE EVALUATION MATERIAL, AND PURCHASER IS NOT ENTITLED TO RELY ON ANY OF THE EVALUATION MATERIAL;

(iv) NO PARTNER, OFFICER, EMPLOYEE OR AGENT OF SELLER HAS BEEN AUTHORIZED TO MAKE ANY REPRESENTATIONS OR WARRANTIES REGARDING THE EVALUATION MATERIAL, THE LOAN, THE LOAN PARTIES, THE LOAN DOCUMENTS OR THE PROPERTY, AND IF GIVEN, THESE REPRESENTATIONS OR WARRANTIES MAY NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY SELLER; AND

(v) THE RELIANCE BY PURCHASER UPON ANY EVALUATION MATERIAL WILL NOT CREATE OR GIVE RISE TO ANY LIABILITY OF OR AGAINST SELLER, ITS PARENT COMPANY OR AFFILIATES OR ANY OF THEIR RESPECTIVE PARTNERS, OFFICERS, DIRECTORS, PARTICIPANTS, EMPLOYEES, CONTRACTORS, CONSULTANTS, ATTORNEYS, REPRESENTATIVES OR AGENTS, EXCEPT TO THE EXTENT OF THOSE REPRESENTATIONS.

5. Representations, Warranties and Covenants of Purchaser.

(a) Purchaser represents and warrants to Seller that:

(i) Purchaser has all requisite power and authority to execute, deliver, and perform all of its obligations under this Agreement and all instruments and other documents executed and delivered by Purchaser in connection herewith.

(ii) Purchaser (A) is not (1) a debtor, guarantor or obligor of the Loan, or (2) an officer, director, shareholder, employee, partner, member, manager, affiliate, representative or agent of any debtor, guarantor or obligor of the Loan, and (B) has not communicated directly or indirectly with any debtor, guarantor or obligor of the Loan, or any of their respective officers, directors, employees, partners, members, shareholders, managers, attorneys, accountants, financial advisors, agents, contractors, affiliates or other representatives (collectively, "Representatives") in connection with this Agreement or Purchaser's acquisition of the Loan and Loan Documents or otherwise in connection with the Loan or the Property.

(iii) Purchaser, whether by itself or through its Representatives, has not (A) in any way colluded, conspired, connived or agreed directly or indirectly with any person or entity in connection with the Loan to refrain from submitting an offer to purchase the Loan, or (B) in any manner directly or indirectly sought by agreement, collusion, communication or conference with any other offeror or other person or entity to fix the Purchase Price. The Purchase Price has not been disclosed by Purchaser or any of its Representatives, other than to Purchaser's Representatives.

(iv) Purchaser has had an opportunity to meet and consult with counsel of Purchaser's choice in relation to the negotiation of Purchaser's purchase of the Loan and the Loan Documents, the drafting of this Agreement, and any and all other rights, duties and obligations of Purchaser.

(v) Without implying any characterization of the Loan, or any part thereof or interest therein, as a "security" within the meaning of the federal Securities Act of 1933, as amended, and any applicable state securities act, and all regulations promulgated thereunder or any other similar applicable law (the "Securities Act"), Purchaser is not purchasing the Loan in contemplation of, or for resale in connection with, any distribution, private placement or public offering of the Loan or any part thereof or any interest therein, in a manner that would violate any applicable law. Purchaser is acquiring the Loan for its own account, in each case not with a view to the distribution of the Loan or any interest therein within the meaning of any Securities Act, unless such distribution will be pursuant to an effective registration statement filed in accordance with any Securities Act, or an exemption thereto. Purchaser acknowledges that: (A) the Loan has not been registered or qualified under any Securities Act, (B) Seller does not intend to so register or qualify the Loan, and (C) the Loan may not be eligible for resale by Purchaser unless the Loan is so registered or qualified by Purchaser or are lawfully exempt from registration or qualification. Purchaser is an "accredited investor", as that term is defined by the Securities Act. Purchaser has such knowledge and experience in financial and business matters, relating to the ownership and collection of loans comparable to the Loan, that it is capable of evaluating the merits and risks of an investment in the Loan.

(vi) Neither Purchaser nor any of its respective officers, directors, shareholders, partners, managers, members or affiliates (including without limitation indirect holders of equity interests in Purchaser) is or will be an entity or person (A) that is listed in the Annex to, or is otherwise subject to, the provisions of Executive Order 13224 issued on September 24, 2001 ("EO13224"), (B) whose name appears on the United States Treasury Department's Office of Foreign Assets Control ("OFAC") most current list of "Specifically Designated National and Blocked Persons" (which list may be published from time to time in various mediums, including, but not limited to, the OFAC website, <http://www.treas.gov/ofac/t11sdn.pdf>), (C) who commits, threatens to commit or supports "terrorism", as that term is defined in EO13224, (D) is subject to sanctions of the United States government or is in violation of any federal, state, municipal or local laws, statutes, codes, ordinances, orders, decrees, rules or regulations relating to terrorism or money laundering, including, without limitation, EO13224 and the Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of

2001, or (E) who is otherwise affiliated with any person or entity listed above (any and all parties or persons described in clauses (A) through (E) above are referred to herein as a "Prohibited Person". Purchaser covenants and agrees that neither Purchaser nor its any of its respective officers, directors, shareholders, partners, managers, members or affiliates (including without limitation indirect holders of equity interests in Purchaser) shall (1) conduct any business, or engage in any transaction or dealing with any Prohibited Person, including, but not limited to, the making or receiving of any contribution of funds, goods, or services, to or for the benefit of a Prohibited Person, or (2) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the provisions set forth in EO13224.

(b) Purchaser covenants and agrees that:

(i) From the Effective Date to the Closing Date, Purchaser shall not, and shall not permit any of its Representatives to, (A) make any direct or indirect contact with or have any communication with any debtor, guarantor or obligor of the Loan, or any of their Representatives in connection with the Transaction, or (B) enter the Property, in each case without the prior written consent of Seller, which consent will be in Seller's sole discretion.

6. [Servicing and Enforcement of Loan Prior to Closing. From the Effective Date to the Closing Date, Seller has the right to control all actions relating to the Loan and the Loan Documents, including without limitation, actions to realize upon or enforce any of its rights with respect to the Loan and the Loan Documents. Seller shall deliver to Purchaser copies of all correspondence and notices sent to Borrower or any other obligor relating to collection and enforcement of the Loan. Seller shall consult with Purchaser with respect to the actions Seller proposes to take to realize or enforce its rights under the Loan and Loan Documents. Purchaser shall be entitled to comment, in good faith, on the content of any such correspondence or notices prepared by Seller or on the course of action proposed by Seller. Seller shall exercise reasonable judgment in determining whether to accept or reject Purchaser's comments. If Purchaser and Seller are unable to agree on the content of any such proposed correspondence or notice, or are unable to agree on the course of action proposed to be taken by Seller, Purchaser shall have the right to accelerate the Closing Date to a date that is five (5) Business Days after the date on which Seller rejected Purchaser's comments. After receipt of such notice accelerating the Closing Date, Seller shall suspend any enforcement actions being pursued by Seller in respect of the Loan and the Loan Documents. If Purchaser does not elect to accelerate the Closing Date, then Seller shall be entitled to pursue its proposed course of action and the Closing shall occur at the originally scheduled Closing Date. Except as expressly set forth in this Section, there shall be no limitation on the rights of Seller to pursue all its rights and remedies with respect to the Loan and the Loan Documents, to the extent such action is consistent with applicable law and the terms of the Loan Documents.]

7. Conditions Precedent to Performance by Purchaser.

(a) Purchaser's obligations under this Agreement will be contingent and specifically conditioned upon the following:

(i) The representations made by Seller in Section 4(a) of this Agreement will be true and correct in all material respects as though made at and as of the Closing Date, except as otherwise contemplated by this Agreement or

consented to in writing by the Purchaser (it being understood that representations that speak as of a specified date will continue to speak as of the date so specified).

(b) If any of the conditions described in Section 7(a) hereof have not been satisfied at or prior to the Closing, Purchaser shall have the option, as Purchaser's sole and exclusive remedies, at any time at or before the Closing, to either (i) terminate this Agreement by written notice to Seller, whereupon the Earnest Money will be returned to Purchaser and neither party hereto will have any further right or obligation hereunder other than any rights or obligations that survive the termination of this Agreement as expressly set forth herein, or (ii) waive such condition and close the purchase of the Loan in accordance with the terms hereof.

8. Conditions Precedent to Performance by Seller.

(a) Seller's obligations under this Agreement will be contingent and specifically conditioned upon the following:

(i) [Seller's Loan participant has obtained all internal approvals necessary to close the transactions contemplated hereby.]

(ii) The representations made by Purchaser in Section 5(a) in this Agreement will be true and correct in all material respects on the Effective Date and as though made at and as of the Closing Date, except as otherwise contemplated by this Agreement or consented to in writing by the Seller (it being understood that representations that speak as of a specified date will continue to speak as of the date so specified).

(b) If any of the conditions described in Section 8(a) hereof have not been satisfied by the Closing Date, Seller shall have the option, as Seller's sole and exclusive remedies, at any time on or before the Closing, to either (i) pursue its remedy as provided in Section 10(a) hereof or (ii) waive such condition and close the sale of the Loan in accordance with the terms hereof.

9. Closing.

(a) The closing ("Closing") of the sale of the Loan by will occur at the offices of the Escrow Agent or any other mutually acceptable location on [_____, 20__] (the "Closing Date") or such earlier date as agreed to by the Seller and Purchaser. If the Closing has not occurred by the Closing Date, and provided that Seller is not in default under this Agreement, then Seller may terminate this Agreement, whereupon neither party will have any further right or obligation hereunder, other than any rights or obligations that survive the termination of this Agreement as expressly set forth herein, and the Escrow Agent shall promptly disburse the Earnest Money to Seller. [Purchaser shall have the right to extend the Closing Date until [_____, 20__] by the delivery on or before [_____, 20__] of: (i) written notice to Seller of the same, (ii) [\$_____] to Seller as a nonrefundable extension fee which will not be applied against the Purchase Price, and (iii) [\$_____] to the Escrow Agent, which sum will be added to the Earnest Money for all purposes and will be applied against the Purchase Price at Closing.]

(b) At the Closing, all of the following will occur, all of which will be deemed concurrent conditions precedent:

(i) Seller, at Seller's sole cost and expense, shall deliver or cause to be delivered to Escrow Agent the following:

A. An executed Allonge (the "Allonge") to the Promissory Note substantially in the form of Exhibit B attached hereto.

B. An executed and notarized Loan Assignment (the "Assignment") substantially in the form of Exhibit C attached hereto.

C. The originals of the Loan Documents and any original title insurance loan policy in Seller's possession or control.

D. A settlement statement ("Closing Statement") prepared by the Escrow Agent, setting forth the Purchase Price, closing expenses and any adjustments and prorations called for by this Agreement.

(ii) Purchaser, at Purchaser's sole cost and expense, shall deliver or cause to be delivered to Escrow Agent the following:

A. The Purchase Price, less (1) the amount of the Earnest Money held by Escrow Agent[, and (2) any Pre-Closing Loan Payments].

B. An executed and notarized Assignment.

C. The Closing Statement.

(iii) Purchaser shall pay, or shall cause to be paid by third parties, all costs and expenses incurred by Purchaser and Seller in connection with the transfer and delivery of the Loan, including without limitation, (A) fees for recording each of the Assignment and filing fees for any UCC assignments, (B) the title insurance premiums payable to obtain any endorsements to the [Mortgagee] [Loan] Policy of Title Insurance in connection with such assignment (the "Title Policy Endorsements"), (C) any mortgage or stamp taxes or any other taxes payable in connection with the transfer of the Loan to Purchaser and (D) legal fees and expenses incurred in connection with the preparation and negotiation of this Agreement and closing of the transactions contemplated by this Agreement.

10. Termination, Default and Remedies.

(a) If Purchaser fails or refuses to consummate the purchase of the Loan pursuant to this Agreement at the Closing for any reason, then, such event will constitute a default by Purchaser hereunder and Seller may, as Seller's sole and exclusive remedy, terminate this Agreement by giving written notice to Purchaser,

whereupon neither party hereto will have any further right or obligation hereunder, other than any rights or obligations that survive the termination of this Agreement as expressly set forth herein, and Escrow Agent shall disburse to Seller the Earnest Money, which will constitute liquidated damages for Purchaser's default under this Agreement (with the exception of any default under any rights or obligations that survive the termination of this Agreement as expressly set forth herein, in which event Seller's remedies will not be limited as provided herein). It is agreed that the Earnest Money represents a reasonable forecast of just compensation for the harm that would be caused to Seller by such default, that the harm that would be caused by such default is one that is impractical and extremely difficult, if not impossible, to calculate, and that payment of the Earnest Money upon such default will constitute full satisfaction of Purchaser's obligations hereunder, other than any rights or obligations that survive the termination of this Agreement as expressly set forth herein. Other than receipt of the Earnest Money and as provided in Section 10(c) below, in no event will Seller be entitled to consequential, punitive or special damages or specific performance from Purchaser due to Purchaser's default hereunder.

(b) If Seller fails or refuses to consummate the sale of the Loan pursuant to this Agreement at the Closing, or if Seller fails to perform any of Seller's other obligations hereunder, when required, either prior to or at the Closing, for any reason other than the termination of this Agreement by Seller pursuant to a right to terminate expressly set forth in this Agreement or Purchaser's failure to perform Purchaser's obligations under this Agreement, then Purchaser shall have the right, as Purchaser's sole and exclusive remedies, to either (i) terminate this Agreement by giving written notice thereof to Seller or (ii) seek and enforce specific performance of this Agreement; provided however, that Purchaser must institute suit for specific performance and advise Seller in writing that suit has been filed within thirty (30) days of Seller's default hereunder. If Purchaser elects to terminate this Agreement under clause (i) above, upon such termination neither party hereto will have any further right or obligation hereunder, other than any rights or obligations that survive the termination of this Agreement as expressly set forth herein, and Escrow Agent shall deliver the Earnest Money to Purchaser. Except as provided in Section 10(c) below, in no event shall Purchaser be entitled to receive consequential, punitive, speculative or other damages.

(c) Notwithstanding the foregoing, if after the Closing, either party fails to perform its obligations that expressly survive the Closing pursuant to this Agreement, then the non-defaulting party may exercise any remedies available to it at law or in equity, in any order it deems appropriate in its sole and absolute discretion, including but not limited to seeking specific performance or actual damages, but not punitive, consequential or incidental damages (or any other kind of damages other than actual damages).

11. Post Closing Obligations.

(a) Informational Tax Reporting. Purchaser agrees to assume, as of the Closing Date, all obligations arising from and after the Closing Date with respect to federal, state and local income tax informational reporting relating to the Loan. [Without limiting the generality of the foregoing, Purchaser shall submit Internal Revenue Service Form 1098 and 1099 Information Returns for the Loan for the entire year of the year in which the Closing Date occurs.] [Purchaser agrees to reasonably cooperate with Seller, at Seller's expense, to the extent necessary to allow Seller to fulfill its obligations with

respect to such informational reporting for the Loan for the period prior to the Closing Date.]

(b) Purchaser's Duties Regarding Litigation. If the Loan becomes subject to any claim, action, lawsuit or other proceeding, administrative or otherwise, including but not limited to, a foreclosure or similar action or any bankruptcy filed by or against Borrower (collectively, "Litigation"), Purchaser shall accept the Loan subject to such Litigation without any reduction or adjustment to the Purchase Price. In such event, Purchaser shall have its attorney file appropriate pleadings with all applicable courts within ten (10) days after the Closing Date substituting Purchaser's attorneys for Seller's attorneys, removing Seller as a party to all Litigation and substituting Purchaser as the real party in interest in all such Litigation. Seller may proceed unilaterally to have such matter dismissed, either with or without prejudice, if such substitution of parties and counsel is not effectuated by Purchaser; as aforesaid. Purchaser acknowledges that its failure to comply with the provisions of this Section may affect Purchaser's rights in any such Litigation including, without limitation, dismissal with prejudice and the running of any statute of limitations if any such action or other legal proceeding is dismissed. Purchaser shall reimburse and indemnify Seller for any costs and legal fees incurred by Seller in connection with such proceeding from and after the Closing Date, including, without limitation, any fees and costs incurred by Seller in connection with Purchaser's failure to comply with the above requirements. Without limitation to the foregoing, Purchaser agrees to take all actions necessary to timely file (i) proofs of claims in pending bankruptcy cases involving the Loan purchased for which Seller has not already filed proofs of claims, and (ii) evidence of the assignment and transfer of the Loan hereunder with the appropriate bankruptcy court in cases in which Seller has filed proofs of claims.

(c) Assumption of Duties and Servicing. As of the Closing Date, all rights, obligations, liabilities and responsibilities of Seller with respect to the Loan will pass to and be assumed by Purchaser, and Seller shall be discharged from all liability therefor. From and after the Closing Date, Purchaser shall assume all of Seller's obligations and duties with respect to the servicing of the Loan and shall service the Loan in accordance with applicable law and commercially reasonable standards. Seller shall have no obligation to perform any servicing activities with respect to the Loan from and after the Closing Date.

(d) Use of Seller's Name. Purchaser shall not institute any legal action in the name of Seller. Purchaser shall not, through misrepresentation or nondisclosure, mislead or conceal from any person or entity the identity of the owner of the Loan purchased under this Agreement. Purchaser shall not use or refer to Seller, or any name derived from the name of Seller or confusingly similar therewith, to promote Purchaser's sale, servicing, management or collection of the Loan purchased under this Agreement.

(e) Collection Practices. Purchaser will use its best efforts to comply with any law relating to unfair collection practices in connection with the Loan purchased under this Agreement. Purchaser agrees to indemnify, defend and hold Seller and its Representatives harmless from and against any claims, demands, causes of action, losses, liabilities, obligations, damages, penalties, fines, forfeitures, judgments, legal fees and other costs, fees and expenses at any time incurred by them as a result of (i) Purchaser's breach of its obligations under this Section 11(e) or any acts or omissions of

Purchaser resulting in any claim, demand or assertion that Seller was in any way involved in or had in any way authorized any unlawful collection practices after the Closing Date in connection with the Loan. Each of Purchaser and Seller agree to notify the other party within ten (10) days after receiving notice or knowledge of any claim, demand or assertion that Purchaser or Seller was in any way involved in or had in any way authorized any unlawful collection practices after the Closing Date in connection with the Loan.

(f) Access to Records. At all times following the Closing Date and upon two (2) Business Days' written notice, Purchaser shall allow Seller and its Representatives during normal business hours to have complete access to and use, inspect and copy any documentation related to the Loan, including without limitation any original purchased Loan Documents. In addition, Purchaser shall provide Seller at least thirty (30) days' prior written notice before destroying, transferring to a third party or otherwise disposing of any portion of the Loan Documents or Loan files at any time prior to the date that is three (3) years following the date on which the Loan is paid in full or the obligations thereunder are terminated. Seller shall have the right to take possession of any portion of such Loan Documents or Loan files that would otherwise have been disposed or destroyed. If Purchaser transfers possession of any portion of the Loan Documents or Loan files, Purchaser agrees to notify Seller of the name and address of the transferee and to impose these same requirements on any transferee.

(g) Environmental Indemnity. Nothing in this Agreement or any documents delivered pursuant to this Agreement will prejudice Seller from seeking the benefit of any environmental indemnity delivered by any indemnitor in connection with the Loan to the extent permitted by applicable law and provided further that the rights of the then holder of the Loan are not reduced in any material respect.

(h) Survival. The provisions in this Section will survive the Closing.

12. Confidentiality. Purchaser acknowledges that (a) the discussions and negotiations culminating in the execution of this Agreement, and (b) the terms and conditions of this Agreement and any other document executed in connection herewith, are to remain confidential for the parties' benefit, and may not be disclosed by Purchaser to anyone, by any manner or means, directly or indirectly, without Seller's prior written consent; however, Purchaser may disclose the terms and conditions of this Agreement if required by law or court order, and to Borrower, Guarantor and Purchaser's attorneys, accountants, consultants, employees and direct and indirect owners provided same are advised by the disclosing party of the confidential nature of such terms and conditions and agree to maintain the confidentiality thereof (in each case, prior to disclosure). The disclosing party shall use reasonable efforts to ensure that no disclosure is made in violation of this Section by any person or entity to whom the terms and/or conditions of this Agreement were disclosed or made available by the disclosing party. The consent by Seller to any disclosure shall not be deemed to be a waiver on the part of Seller of any prohibition against any future disclosure. The terms of this Section will survive the Closing and the termination of this Agreement.

13. Brokers. Seller represents and warrants to Purchaser, and Purchaser represents and warrants to Seller, that no broker or finder has been engaged by the representing party, respectively, in connection with any of the transactions contemplated by this Agreement; provided however, Purchaser, at its own expense, anticipates engaging a broker to assist it with locating the financing to acquire the Loan. Purchaser will indemnify, save

harmless, and defend Seller from any liability, cost, or expense arising out of or connected with any claim for any commission or compensation made by any person or entity claiming to have been retained or contacted by Purchaser in connection with this transaction. Seller will indemnify, save harmless, and defend Purchaser from any liability, cost, or expense arising out of or connected with any claim for any commission or compensation made any person or entity claiming to have been retained or contacted by Seller in connection with this transaction. This Section will survive the Closing or any earlier termination of this Agreement.

14. Notices. Any notice or communication required or permitted hereunder will be given in writing, sent by (a) personal delivery; (b) a nationally recognized overnight service via overnight service; or (c) United States Mail, postage prepaid, registered or certified mail. Any such notice or communication will be deemed to have been given (a) at the time of personal delivery; (b) one Business Day following deposit with such nationally recognized overnight delivery service; or (c) three (3) Business Days following deposit in the United States Mail. Notices transmitted by electronic "e-mail" will not be effective for any purpose. For purposes of notice, the addressees of the parties will be as set forth below; provided, however, that any party will have the right to change its address for notice hereunder to any other location within the United States by the giving of ten (10) Business Days' notice to the other parties in the manner set forth hereinabove.

If to Seller:

[_____
[_____
[_____
Attention: [_____]

With a copy of Seller's notices to:

[_____
[_____
[_____
Attention: [_____]

If to Purchaser:

[_____
[_____
[_____
Attention: [_____]

With a copy of Purchaser's notices to:

[_____
[_____
[_____
Attention: [_____]

15. Governing Law. The terms and provisions hereof will be governed by, and construed in accordance with, the substantive laws of the State of Texas without regard to conflict of law principles.

16. Construction. Whenever the context hereof so requires, reference to the singular will include the plural and the plural will include the singular; words denoting gender will be construed to mean the masculine, feminine or neuter, as appropriate; and specific enumeration will not exclude the general, but will be construed as cumulative of the general recitation. The headings contained in this Agreement are inserted for convenience only and will not affect the meaning or interpretation of this Agreement or any provision hereof.

17. Severability; Headings. If any provision of this Agreement or the application thereof to any party or circumstance will, for any reason and to any extent, be invalid or unenforceable, neither the application of such provision to any other party or circumstance nor the remainder of the instrument in which such provision is contained will be affected thereby, but rather will be enforced to the greatest extent permitted by law. The article, paragraph and subparagraph headings hereof are inserted for convenience of reference only and will in no way alter, modify or define, or be used in construing, the meaning of such articles, paragraphs or subparagraphs.

18. Counterparts. To facilitate execution, this Agreement may be executed in multiple identical counterparts. It will not be necessary that the signature of, or on behalf of, each party, or that the signature of all parties required to bind any party, appear on each counterpart. All counterparts, taken together, will collectively constitute a single instrument. But it will not be necessary in making proof of this Agreement to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, each of the relevant parties. Any signature page may be detached from one counterpart and then attached to a second counterpart with identical provisions without impairing the legal effect of the signatures on the signature page. Signing and sending a counterpart (or a signature page detached from the counterpart) by facsimile or other electronic means to another party will have the same legal effect as signing and delivering an original counterpart to the other party. A copy (including a copy produced by facsimile or other electronic means) of any signature page that has been signed by or on behalf of a party to this Agreement will be as effective as the original signature page for the purpose of proving such party's agreement to be bound.

19. **NO ORAL AGREEMENTS. THIS AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE TRANSACTION CONTEMPLATED HEREIN, SUPERSEDES ANY AND ALL PRIOR DISCUSSIONS AND AGREEMENTS (WRITTEN OR ORAL) BETWEEN SELLER AND PURCHASER WITH RESPECT TO THE TRANSACTION CONTEMPLATED HEREIN AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.**

20. Attorneys' Fees. If either party will default in the performance of any of the terms and conditions of this Agreement, the non-defaulting party will be entitled to recover all costs, charges, and expenses of enforcing this Agreement including reasonable attorneys' fees, paralegal fees, and costs, including, but not limited to, attorneys' and paralegal fees incurred in any trial or appellate proceedings.

21. Rule of Construction. The normal rules of construction to the effect that any ambiguities are to be resolved against the drafting party will not be employed in the interpretation of this Agreement or any amendments or exhibits hereto.

22. Saturday, Sunday or Legal Holiday. If any date set forth in this Agreement for the performance of any obligation by Purchaser or Seller or for the delivery of any document

or notice should be on other than a Business Day, the compliance with such obligation or delivery will be deemed acceptable on the next following Business Day. The term "Business Day" will mean any day on which banks in [_____] are required to be open for business.

23. Amendments. This Agreement will not be amended, waived, discharged or terminated orally but only by an instrument executed by the party against which enforcement of the amendment, waiver, discharge or termination is sought.

24. No Third Party Beneficiaries. No person or entity not a party to this Agreement will have any third party beneficiary claim or other right hereunder or with respect thereto.

25. Exhibits. Each exhibit referred to in this Agreement is attached hereto and each such exhibit is incorporated by reference and made a part hereof as if fully set forth herein.

26. Assignment. Purchaser will not assign any of its rights or obligations under this Agreement to any person or entity that is not an Affiliate of Purchaser without Seller's prior written consent, which consent Seller may withhold in its sole discretion. Any assignment of this Agreement by Purchaser in violation of this provision will be considered null and void, and will constitute a default by Purchaser under this Agreement. No assignment by Purchaser will release Purchaser from any of its obligations under this Agreement. The foregoing notwithstanding, Purchaser may, with notice to Seller, assign its rights and obligations hereunder to an Affiliate of Purchaser without Seller's consent, provided such assignee assumes all of Purchaser's duties and obligations hereunder. As used herein, an "Affiliate" will mean any entity controlled by, under common control with, or that controls Purchaser. [As Purchaser is an Affiliate of the Borrower, Purchaser waives any right it has to require notice of the sale of the Loan.]

27. Submission of Drafts. The submission of a draft, or a marked up draft, of this Agreement by one party to another is not intended by either party to be an offer to enter into a legally binding agreement with respect to the purchase and sale of the Loan. The parties will be legally bound with respect to the purchase and sale of the Loan pursuant to the terms of this Agreement only if the parties have fully executed and delivered to each other a counterpart of this Agreement.

28. **WAIVER OF JURY TRIAL**. EACH PARTY WAIVES, IRREVOCABLY AND UNCONDITIONALLY, TRIAL BY JURY IN ANY ACTION BROUGHT ON, UNDER OR BY VIRTUE OF OR RELATING IN ANY WAY TO THIS AGREEMENT AND/OR ANY OF THE DOCUMENTS EXECUTED IN CONNECTION HERewith, THE LOAN, THE PROPERTY OR ANY CLAIMS, DEFENSES, RIGHTS OF SET-OFF OR OTHER ACTIONS PERTAINING HERETO OR TO ANY OF THE FOREGOING.

[END OF TEXT - SIGNATURE BLOCKS ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the undersigned have executed this Agreement to be effective as of the date first set forth above.

PURCHASER:

[_____] ,
a [_____]

By: _____
Name: _____
Title: _____

SELLER:

[_____] ,
a [_____]

By: _____
Name: _____
Title: _____

[SIGNATURE PAGE TO LOAN PURCHASE AND SALE AGREEMENT]

The Escrow Agent acknowledges its receipt of a counterpart of this Agreement executed by Seller and Purchaser on [_____, 20__]. Escrow Agent agrees to be bound by the terms of this Agreement with respect to the disposition of the Earnest Money and the other funds and instruments deposited with Escrow Agent pursuant to this Agreement.

ESCROW AGENT:

[_____].

By: _____

Name: _____

Title: _____

[SIGNATURE PAGE TO LOAN PURCHASE AND SALE AGREEMENT]

EXHIBIT A
TO LOAN PURCHASE AND SALE AGREEMENT
List of Loan Documents

EXHIBIT B

TO LOAN PURCHASE AND SALE AGREEMENT

ALLONGE

This Allonge is made to that certain Promissory Note dated [_____, 20__] in the original principal amount of [\$_____] executed by [_____] a [_____] and made payable to the order of [_____] a [_____].

Pay to the order of [_____] a [_____] **WITHOUT RECOURSE OR REPRESENTATION OR WARRANTY, EXPRESS, IMPLIED OR BY OPERATION OF LAW, OF ANY KIND AND NATURE WHATSOEVER, EXCEPT AS, AND TO THE EXTENT, SPECIFICALLY SET FORTH IN THE LOAN PURCHASE AND SALE AGREEMENT DATED AS OF [_____, 20__] BETWEEN [_____] A [_____] AND [_____] A [_____].**

Effective Date: [_____, 20__].

[_____] a [_____]

By: _____
Name: _____
Title: _____

EXHIBIT C

TO LOAN PURCHASE AND SALE AGREEMENT

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

After Recording Return To:

Attention: _____

LOAN ASSIGNMENT

This Loan Assignment (this "Assignment") is executed to be effective as of _____, 2010 between [_____] a [_____] ("Seller") and [_____] a [_____] ("Purchaser").

RECITALS:

A. Seller is the owner and holder of that certain Promissory Note dated [_____, __, 20__] in the original principal sum of [\$_____], executed by [_____] a [_____] ("Borrower") payable to the order of Seller (as amended or modified, the "Note").

B. The Note is secured by that certain [Deed of Trust, Security Agreement and Assignment of Rents] dated of even date with the Note, executed by Borrower in favor of [_____] Trustee, for benefit of Seller, recorded as Instrument No. [_____] Real Property Records of [_____] County, Texas (as amended or modified, the "Security Instrument") covering certain real property located in [_____] Texas as more particularly described therein.

C. This Assignment is being executed pursuant to that certain Loan Purchase and Sale Agreement (the "Agreement") dated August __, 2010 between Seller and Purchaser.

AGREEMENT:

1. Grant. For good and valuable consideration paid to Seller by Purchaser, the receipt and sufficiency of which are hereby acknowledged, Seller has ENDORSED, SOLD, TRANSFERRED, ASSIGNED, GRANTED, CONVEYED and DELIVERED, and by these presents does hereby ENDORSE, SELL, TRANSFER, ASSIGN, GRANT, CONVEY and DELIVER unto Purchaser, all of Seller's right, title and interest to the following:

(a) the Note and all indebtedness now or hereafter evidenced thereby (the "Indebtedness");

(b) the Security Instrument and all of the rights, benefits, privileges, liens, security interests, and assignments owned, held, accruing, and to accrue to, and for the benefit of the Seller thereunder, and any vendor's lien securing the Indebtedness;

(c) all other loan documents referred to on Exhibit A to the Agreement (collectively, the "Loan Documents"); and

(d) all other liens, security interests, assignments, collateral assignments, rights, benefits, and privileges in anywise belonging or to accrue to the benefit of Seller, in respect of the Note and the other Loan Documents (collectively, the "Liens").

TO HAVE AND TO HOLD, the Indebtedness, the Loan Documents and Liens unto Purchaser its successors and assigns, forever.

2. Assumption. Purchaser accepts the foregoing assignment and assumes all of the obligations of Seller under the Indebtedness, the Loan Documents and the Liens accruing or arising from and after the date hereof.

3. **AS-IS. EXCEPT FOR THOSE REPRESENTATIONS SPECIFICALLY MADE BY SELLER UNDER THE AGREEMENT:**

THE INDEBTEDNESS, THE LOAN DOCUMENTS AND THE LIENS ARE PURCHASED AND SOLD "AS IS", "WHERE IS", AND WITH ALL FAULTS, AND WITHOUT RECOURSE AND WITHOUT ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS, IMPLIED OR OTHERWISE, INCLUDING, WITHOUT ANY LIMITATION ANY REPRESENTATION THAT INDEBTEDNESS, THE LOAN DOCUMENTS OR THE LIENS ARE ENFORCEABLE OR THAT THE COLLATERAL DESCRIBED IN THE LOAN DOCUMENTS MAY BE REALIZED UPON OR ADEQUATELY SECURES THE INDEBTEDNESS;

3. **PURCHASER ACKNOWLEDGES THAT THE LOAN MAY BE IN DEFAULT AND MAY BE NON-PERFORMING;**

4. **PURCHASER ACKNOWLEDGES THAT ANY EVALUATION MATERIAL (AS DEFINED IN THE AGREEMENT) THAT SELLER HAS PROVIDED OR MADE AVAILABLE TO PURCHASER, WHETHER WRITTEN OR ORAL PERTAINING TO THE INDEBTEDNESS, THE LOAN DOCUMENTS AND THE LIENS IS FURNISHED TO PURCHASER SOLELY AS A COURTESY AND SELLER GIVES NO REPRESENTATIONS OR WARRANTIES ABOUT, AND ASSUMES NO RESPONSIBILITY FOR, THE ACCURACY OR COMPLETENESS OF THE EVALUATION MATERIAL, AND PURCHASER IS NOT ENTITLED TO RELY ON ANY OF THE EVALUATION MATERIAL;**

5. **NO PARTNER, OFFICER, EMPLOYEE OR AGENT OF SELLER HAS BEEN AUTHORIZED TO MAKE ANY REPRESENTATIONS OR WARRANTIES REGARDING THE EVALUATION MATERIAL, THE INDEBTEDNESS, THE LOAN DOCUMENTS AND THE LIENS, AND IF GIVEN, THESE REPRESENTATIONS OR WARRANTIES MAY NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY SELLER; AND**

6. **THE RELIANCE BY PURCHASER UPON ANY EVALUATION MATERIAL WILL NOT CREATE OR GIVE RISE TO ANY LIABILITY OF OR AGAINST SELLER, ITS PARENT COMPANY OR AFFILIATES OR ANY OF THEIR RESPECTIVE**

PARTNERS, OFFICERS, DIRECTORS, PARTICIPANTS, EMPLOYEES, CONTRACTORS, CONSULTANTS, ATTORNEYS, REPRESENTATIVES OR AGENTS, EXCEPT TO THE EXTENT OF THOSE REPRESENTATIONS.

4. Miscellaneous. If any term or provision hereof is declared by a court of competent jurisdiction to be illegal or invalid, such illegal or invalid term or provision will not affect the balance of the terms and provisions hereof. If any action or suit is brought by reason of any breach of this Assignment or any other dispute between the parties concerning this Assignment, then the prevailing party will be entitled to have and recover from the other party all costs and expenses of suit, including reasonable attorney's fees. This Assignment will be governed by and construed and enforced in accordance with the laws of the State of Texas. This Assignment is to be deemed to have been prepared jointly by Seller and Purchaser, and if any inconsistencies or ambiguities exist herein, they will not be interpreted or construed against either party as the drafter. All paragraph headings are inserted for convenience only and will not be used in any way to modify, limit, construe or otherwise affect this Assignment. This Assignment will be binding upon and inure to the benefit of Seller and Purchaser and their respective heirs, successors, legal representatives and assigns.

[END OF TEXT - SIGNATURE AND NOTARY BLOCKS ON FOLLOWING PAGES]

IN WITNESS WHEREOF, Seller and Purchaser have caused this Assignment to be effective as of the date set forth above.

[_____] ,
a [_____]

By: _____
Name: _____
Title: _____

STATE OF TEXAS §
 §
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20____, by
_____, _____ of
_____, _____, on behalf of said
_____.

Notary Public, State of Texas

(Printed name)

My Commission Expires:

PURCHASER:

[_____] ,
a [_____]

By: _____
Name: _____
Title: _____

STATE OF TEXAS §
 §
COUNTY OF _____ §

This instrument was acknowledged before me on _____, 20____, by
_____, _____ of
_____, _____, on behalf of said
_____.

Notary Public, State of Texas

(Printed name)

My Commission Expires:

RELEASE AND INDEMNITY AGREEMENT

[To be executed when Borrower, Guarantor or an Affiliate is the Purchaser under the Loan Purchase and Sale Agreement]

THIS RELEASE AND INDEMNITY AGREEMENT ("Agreement") is executed to be effective as of [_____, ___, 20__] (the "Effective Date") between [_____, a _____] ("Seller"), [_____, a _____] ("Borrower") and [_____, a _____] ("Guarantor").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, [_____, a _____] and [_____, a _____] (collectively, "Guarantor") and Borrower agree as follows:

1. Terms. This Agreement is attached to the Loan Purchase and Sale Agreement of even date herewith by and between Seller and Borrower (the "Purchase Agreement"). Accordingly, capitalized but undefined terms used herein have the meanings assigned to such terms in the Purchase Agreement.
2. Consent. Borrower and Guarantor consent to the execution of the Purchase Agreement.
3. Release. Borrower and Guarantor release, remise, acquit and forever discharge Lender and any co-lender or loan participant, together with their respective employees, agents, representatives, consultants, attorneys, fiduciaries, servants, officers, directors, partners, predecessors, successors and assigns, subsidiary corporations, parent corporations, and related corporate divisions (all of the foregoing the "Seller Parties"), from any and all actions and causes of action, judgments, executions, suits, debts, claims, counterclaims, defenses, demands, liabilities, obligations, damages and expenses of any and every character, known or unknown, direct and/or indirect, at law or in equity, of whatsoever kind or nature, whether heretofore or hereafter accruing, for or because of any matter or things done, omitted or suffered to be done by any of the Seller Parties prior to and including the date hereof, and in any way directly or indirectly arising out of or in any way connected to this Agreement, the Purchase Agreement or the Loan Documents, or any of the transactions associated therewith, or the Property, including specifically but not limited to claims of usury, lack of consideration, fraudulent transfer and lender liability. **THE FOREGOING RELEASE INCLUDES ACTIONS AND CAUSES OF ACTION, JUDGMENTS, EXECUTIONS, SUITS, DEBTS, CLAIMS, DEMANDS, LIABILITIES, OBLIGATIONS, DAMAGES AND EXPENSES ARISING AS A RESULT OF THE NEGLIGENCE AND/OR THE STRICT LIABILITY OF ONE OR MORE OF THE SELLER PARTIES.**
4. Indemnification. Effective as of the Closing, Purchaser agrees to indemnify, hold harmless, protect and defend the Seller Parties from and against any and all claims, losses, damages, costs and expenses (including, without limitation, attorneys' fees and expenses) to which any of the Seller Parties may become subject to on account of, arising out of, or related to any act, omission, conduct, or activity of Purchaser, Borrower, Guarantor or any of their respective officers, directors, managers, members, employees, agents, servants, shareholders, successors, assigns or any other party acting on behalf of Purchaser, Borrower or Guarantor (collectively, "Purchaser's Parties"), on account of, arising out of, or related to any of the following: (i) this Agreement, (ii) the Loan purchased hereunder, (iii) the use, ownership, control,

operation, or condition of the collateral for the Loan, (iv) any acts and/or omissions by Purchaser or Purchaser's Parties resulting in any claim that Seller, subsequent to the date of this Agreement, was in any way involved in, or had in any way authorized, any unlawful collection practices in connection with the Loan; (v) any action that taken by Purchaser after the Closing Date to enforce Purchaser's rights under the Loan Documents; (vi) any material inaccuracy in or breach of Purchaser's representations, warranties, covenants and acknowledgments, made pursuant to this Agreement or the Purchase Agreement; or (vii) any violation by Purchaser of any confidentiality agreement to which Purchaser is a party relating to the Loan Documents. Promptly after receipt by any Indemnified Person of notice of the commencement of any action to which this Section will apply, the Indemnified Person so notified will notify Purchaser, in writing, of the commencement of such action if a claim in respect of such action is to be made against Purchaser under this Section; but the failure by any of the Seller Parties to notify Purchaser shall not relieve Purchaser from any liability that Purchaser may have to the Seller Parties. **THE FOREGOING INDEMNIFICATION, HOLD HARMLESS, PROTECTION AND DEFENSE INCLUDES ACTIONS AND CAUSES OF ACTION, JUDGMENTS, EXECUTIONS, SUITS, DEBTS, CLAIMS, DEMANDS, LIABILITIES, OBLIGATIONS, DAMAGES AND EXPENSES ARISING AS A RESULT OF THE NEGLIGENCE AND/OR THE STRICT LIABILITY OF ONE OR MORE OF THE SELLER PARTIES.**

5. Survival. The agreements contained in Sections 1, 2, 3 and 4 above will survive the Closing and the termination of this Agreement and the Purchase Agreement.

[END OF TEXT - SIGNATURE BLOCKS ON FOLLOWING PAGES]