

MODEL NEW YORK CONTRACT OF PURCHASE AND SALE



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Buyers and Sellers of commercial real property in New York City negotiate their transactions in a difficult environment. Taxes are high. Those taxes fund, among other things, a panoply of agencies that regulate real estate, enforcing an ever-growing collection of laws and regulations. Diligent inspectors are everywhere. And if the taxes, regulations, agencies and inspectors aren't enough, New York attorneys have thought through every possible event or issue that might arise in a purchase and sale.

All of these things come together to make New York purchase and sale contracts notoriously complex. It is not unusual for a contract to devote several pages to some obscure situation that has occurred only once or twice in the entire history of commercial real estate. The usual "80/20" Pareto Principle doesn't apply to New York purchase and sale agreements. Instead, it's a "99/1" rule—99 percent of the contract delivers only one percent of its value and one percent of the contract delivers 99 percent of its value.

For a long time, the prevailing attitude in New York was that the Seller was King; the wretched Buyer was lucky to be granted a seat at the negotiating table and have a contract shoved under its nose to sign. Seller's counsel still nearly always prepares the contract, but as of 2017, Buyers are getting a little more respect. Property owners receive fewer unsolicited calls from brokers than they did a few years ago. And some Sellers are trying a little harder to hook Buyers with Buyer-friendly contract terms. But Sellers still (legitimately) want the contract to help them to avoid exposure and claims. These transactions still proceed from the idea that the Buyer has the primary responsibility for protecting itself and should fully check out the property, decide whether it really

wants the property or not, and then buy the property as is, without relying on Seller for much.

We have moved far away from the days of caveat emptor, though. Even in a Seller's market, Buyers usually demand extensive representations and warranties, the trimming back of which in a contract requires a tremendous investment of time, effort, and legal fees. Ultimately, the parties usually agree that Seller will represent and warrant: (1) matters about Seller itself; and (2) full disclosure of information in Seller's actual possession, subject to various forms of dilution.

New York contracts typically allow Seller to keep Buyer's deposit on default. But the deposit remains in escrow until closing or a court resolves the dispute over who defaulted. This invites a defaulting Buyer to file a *lis pendens*, usually with the goals of:

- Preventing a sale to anyone else;
- Suing to blame Seller for the default;
- Asserting a right to specific performance; and
- Negotiating a partial or complete return of its deposit.

The New York courts are extraordinarily overburdened and slow, in part as a result of their openness to creative theories and arguments of all types. Very simple litigation can take months or years to move through the system. This puts tremendous pressure on Seller to settle and let Buyer keep part of the deposit, regardless of the merits of Buyer's theories. To a Seller, this may represent the most efficient way to remove the *lis pendens* and move on to the next transaction.

In response, New York Sellers sometimes want to add contract language to discourage defaulting Buyers

from undertaking questionable litigation to recover part of the deposit. That language could take the form of a personal guaranty of attorneys' fees or strict limitations on the conditions to Buyer's obligation to close. The contract could also require Buyer to increase the deposit as a condition to filing a *lis pendens*, to deliver monthly estoppel certificates, to release part of the deposit to Seller, or to give Seller notice and a meaningful opportunity to cure any alleged default. The contract could also convert the entire deal structure into an option (which courts tend to interpret strictly) rather than a sale contract (which invites considerations of substantial performance and judicial sympathy). None of this is "standard" or even common. Thus this model does not include any such provisions. The author can provide sample language on request and may present it in a future article.

New York does have a small handful of state-specific issues. They tend to require less space and attention than in, for example, California. In New York, the parties don't need to initial anything. No statute limits the amount of Buyer's deposit, controls the contract terms, or requires any disclosures in commercial transactions in **BOLD CAPITAL LETTERS** or otherwise. New York law does drive several closing deliveries, though, particularly relating to mortgages. Although a New York contract includes very little statutorily driven language, other state-specific issues affect many provisions of the contract.

This model contract is suitable for any straightforward sale of an existing commercial building or raw land (including "real estate owned" being disposed of by a lender) located in New York, primarily New York City.¹ Practices vary outside New York City. This model makes no effort to describe those variations. This model also does not consider leasehold transactions, transfers of development rights, lodging properties, multi-property acquisitions, or other variations.

This model contract started two decades ago as a short letter agreement. It emphasized issues actually likely to arise, handling them as simply and briefly as possible. It worked well for many transactions for many years. Over time, it grew. The letter agreement format

raised eyebrows for no good reason. So the document became an ordinary contract. Its treatment of many issues expanded. The net result still remains a reasonable template for a New York purchase and sale contract.

This model is in many ways a Seller's form but it also includes Buyer-friendly provisions. It gives both parties a useful reference point. Bracketed language in text identifies possible variations. Footnotes offer alternatives and optional language that Buyer or Seller might favor. Except for that language, footnotes address only state-specific issues and a nonexhaustive (though possibly exhausting) handful of generic purchase and sale issues. This model and its footnotes do not purport to cover everything potentially relevant to purchase and sale transactions and contracts.

We have tried to demonstrate Plain English writing in this model. Basic business terms appear only in the first few pages. Less important terms appear later. This format produces a readable and user-friendly agreement that helps the parties and counsel focus on business terms. This model contains not a single section cross-reference, relying instead on defined terms. Sentences are kept short where possible. They use the active voice. This model expresses general principles before dealing with exceptions or variations. Words starting with "here-," "there-," or "where-" generally do not appear. The result should be more readable than most contracts. The attached exhibits with template closing documents sometimes do not reflect full translation into Plain English.

Please forward corrections or comments to the author at joshua@joshuastein.com. Permission is granted for any attorney to adapt and use this model for appropriate transactions, but only if the user forwards to the author any comments or improvements. Anyone who wishes to use this model Contract for a transaction can obtain a copy in editable electronic form on request from the author. Any future copy of this Contract will also have the benefit of any later improvements or corrections made by the author or future users.

¹ In 2007, the New York City Bar Association promulgated a careful and modern form of "Contract of Sale—Office, Commercial and Multi-Family Residential Premises." Anyone can download it from: <https://goo.gl/T6R3qv>. That template and its accompanying commentary add up to a good resource, covering ground similar to this model Contract. The author's model is simpler, shorter, and, in the author's opinion, easier to use. Like any other template document, it reflects the experience of the author and those who reviewed it in draft. The City Bar form does not benefit (or suffer) from the author's views and efforts to simplify and shorten.

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CONTRACT OF PURCHASE AND SALE

THIS CONTRACT OF PURCHASE AND SALE (this “Contract”) is entered into as of _____, 20____ (the “Contract Date”), between:

- [NAME OF SELLER], a _____ limited liability company (“Seller”); and
- [NAME OF BUYER], a _____ limited liability company (“Buyer”).

This Contract may use terms before defining them. Reference is made to the Index of Defined Terms that precedes this Contract. Buyer and Seller enter into this Contract based on these circumstances:

- Seller wants to sell the Property more particularly described in this Contract and in Exhibit A.
- Buyer wants to purchase the Property from Seller.

NOW, THEREFORE, the parties agree:

1. BASIC BUSINESS TERMS

Seller shall sell and convey title to the Property to Buyer, and Buyer shall purchase and accept title to the Property from Seller, for the Purchase Price, all as this Contract states. The basic business terms of this Contract are:

1.1. Broker.

The “Broker” means _____. Seller shall pay Broker’s commission.²

1.2. Deposit.³

[Within one business day after] [On] the Contract Date, Buyer shall deliver to Escrowee a deposit of \$_____ (excluding interest, the “Deposit”), in immediately available federal funds, at the wire transfer address below Escrowee’s signature.⁴ If Buyer does not timely fund the Deposit, then this Contract shall be null and void. The parties shall jointly direct Escrowee to release the Deposit in any case where this Contract requires it.

1.3 Escrowee.

The “Escrowee” means _____ Title Insurance Company.⁵

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- 2 Custom dictates that Seller pays Broker. If Buyer enlisted Broker to find an off-market deal—every Buyer’s fantasy—Buyer will often pay Broker. A deal will sometimes have multiple brokers with varying obligations on who pays whom. New York allows a licensed broker to assert claims without a written agreement or a closing, if the broker was the “procuring cause” of a Buyer ready, willing, and able to pay Seller’s price. Hence, a careful Seller will insist on suitable waivers from brokers before going very far down the road, especially if Seller works with multiple brokers or less well-known brokers. Within reason, Brokers typically accommodate that request.
 - 3 Typically, Buyer will deposit at least five percent of the Purchase Price in cash. For larger transactions, Buyer may deliver a lower percentage, or a letter of credit in place of cash, raising modest concerns for Seller. The author can provide sample language for letters of credit used as deposits. If the market is particularly strong for Sellers, the Buyer weak, or the Purchase Price low, the Deposit might rise to as high as 10 percent.
 - 4 Under this Contract, the Deposit excludes interest. Instead, it says interest always goes to Buyer, thus resolving the single most wasteful negotiation in Contracts. One might call that resolution Buyer-friendly. Or one could point out: (1) the Deposit is intended to secure Buyer’s performance, not create an investment opportunity or income for Seller; (2) if Buyer delivered a letter of credit, the Deposit would earn no interest; and (3) at today’s interest rates, the cost to negotiate this issue usually exceeds the interest earned.
 - 5 In New York, the parties can use as Escrowee: (1) a national title insurance company with a balance sheet; (2) a title agency or abstract company without a balance sheet; or (3) Seller’s counsel. Option “1” probably reduces the risk of escrow theft. See, e.g., “Former President of Title Insurance Agency Pleads Guilty in Manhattan Federal Court to Misappropriating Millions of Dollars’ Worth of Client Funds,” US Attorney’s Office, Southern District of New York (Dec. 14, 2010) (<https://goo.gl/NrEKHI>). The risk of escrow theft is of course quite low, but probably higher than some very small risks that every Contract addresses at length. The author favors use

1.4. No Contingencies.⁶

This Contract is not subject to any contingency for financing or anything else except as this Contract states. That does not prevent Buyer from seeking and obtaining financing.

of a national title insurance company or other creditworthy party to hold escrow funds for any substantial transaction. A major law firm would suffice, but New York law firms hesitate to act as escrowees because of fear of liability and the rise of risk management committees.

If Escrowee is a title agent or abstract company, a national title insurance company will—at least outside New York—often deliver a closing protection letter to backstop Escrowee's performance and proper handling of escrow funds. These letters may not protect Seller, though, as opposed to Buyer, who is buying title insurance. New York's insurance regulators have made these ordinary letters a subject of great concern and complexity. In purportedly clarifying its earlier ruling (Circular Letter No. 18 (1992) by Hon. Salvatore R. Curiale, Superintendent of Insurance of the State of New York), the New York State Insurance Department determined in its wisdom that "[t]he protection afforded by closing protection letters should be limited to the title insurance policy itself." (New York State Insurance Department, Office of the General Counsel, Opinion Regarding Issuance of Closing Protection Letter by Title Insurance Company, December 28, 2005.) This means closing protection letters, to the extent available at all, limit themselves to acts and omissions in issuance of title insurance and nothing else, such as handling of funds or documents. They benefit only the purchaser of title insurance. Hence the need for a creditworthy Escrowee, i.e., a national title insurance company. The parties can still use an agency or abstract company to issue title insurance. A careful Buyer or Seller may request proof of agency. The author's requests for that sort of proof have typically failed, suggesting that concerns in this area might not be entirely unfounded. This Contract has a separate definition of "Title Company" for ease of reference and implementation. If the parties keep it simple and have a national title insurance company act as Escrowee and Title Company, the two definitions can become one, eliminating the issues in this footnote.

- 6 If a Contract gives Buyer a Due Diligence Period, adjust as appropriate, here and elsewhere, e.g., access, due diligence, environmental, and inspections. Even in a seller's market, usually the case in New York City, Buyers often obtain a free look for at least 30 and sometimes up to 90 days. This is so common that perhaps it belongs in the model Contract text rather than a footnote. Here is sample language on Due Diligence:

Due Diligence. The "Due Diligence Period" runs from the Contract Date until 5 p.m. on _____, 20___. To proceed to Closing, Buyer must, in the Due Diligence Period, give Seller and Seller's counsel notice that Buyer irrevocably elects to proceed to Closing (a "Notice to Proceed") [and deliver to Escrowee an additional \$ _____ by wire transfer as an increase of the Deposit].

Effect of Notice to Proceed. Only if Buyer timely gives a Notice to Proceed, then: (1) this Contract shall remain in full force and effect; (2) the Deposit shall not be refundable except as this Contract states; (3) the parties shall proceed to Closing as this Contract requires; and (4) this Contract shall not be subject to any due diligence contingency.

Failure to Proceed. If Buyer does not give Seller a Notice to Proceed in the Due Diligence Period, then at the end of the Due Diligence Period: (1) this Contract shall automatically end; (2) neither party shall have any further liability except any that expressly survives termination; and (3) the parties shall instruct Escrowee to refund the Deposit to Buyer.

Seller would prefer a negative option, requiring Buyer to affirmatively terminate in the Due Diligence Period, failing which Buyer's Deposit would be at risk if Buyer did not close. The author believes this position creates an inappropriate trap for Buyer, and Buyer has the better of the argument. Some Buyers might prefer a negative option, or not worry about it. For Buyer's counsel, this matter represents an important client decision. If a Contract provides for a Due Diligence Period, Buyer will often wait until the last day to decide whether to proceed, or to announce that newly discovered characteristics of the Property undercut some of the assumptions in Buyer's financial model and hence require a price adjustment. Typical last-minute brinksmanship with Seller means that notice procedures can become crucially important to Buyer's giving any notice in a timely and proper manner. This may be one circumstance where a Contract should provide for notices by email, even if the Contract generally does not allow them. Email notices are not yet standard in any context in New York Contracts.

Although a Due Diligence Period typically gives Buyer a free look, sometimes the parties limit Buyer's right to terminate based on due diligence. For example, Buyer might have the right to terminate only if its environmental investigations show the existence of problems that will cost more than a specified amount to cure. Buyers sometimes have the right to extend the Due Diligence Period if Buyer's initial investigations indicate the need for further environmental assessment. The parties commonly negotiate such an extension right, often with a Deposit increase. Unless the Contract sets an earlier deadline to exercise that extension right, Buyer will ordinarily exercise it in the last few days of the Due Diligence Period. Seller should assume Buyer will usually find some basis to do so, hence may seek an increase in the Deposit in exchange for the extension.

1.5. Property.

The “Property” consists of Block ____, Lot ____, on the Tax Map of _____ County,⁷ as more fully described in **Exhibit A**, including the building commonly known as _____, _____, New York, and the additional elements of the Property described below.

1.6. Purchase Price.

The “Purchase Price” is \$_____. The parties allocate⁸ no Purchase Price to Building Equipment or intangible property. They have nominal value. The Purchase Price is allocated solely to the Land and Improvements.

1.7 Scheduled Closing Date; Extension.

The “Scheduled Closing Date” means _____, 20____. Each party may, from time to time, extend the Scheduled Closing Date by up to __ days in aggregate for each party (each extension, a “Closing Extension”). To elect a Closing Extension, the electing party must give notice [at least two business days]⁹ [on or] before the Scheduled Closing Date, as previously extended.¹⁰

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- 7 New York generally identifies real property by Section, Block, and Lot. Property lines can vary from tax map lines. In New York City’s outer boroughs, section references are typically omitted and replaced by a reference to the county. New York City makes real property information readily available and accessible online. All documents recorded in New York City (except a few categories like mechanics’ liens and building loan agreements) since 1966 can be accessed online through the Automated City Register Information System (“ACRIS”). Though sometimes temperamental and user-hostile, ACRIS is a terrific resource and free to all. Viewing requires no password or credentials. Users can find ACRIS through this web address: <https://goo.gl/ily2a>. Other property information, including current and historic tax maps, can be obtained through the New York City Department of Finance at: <https://goo.gl/Hw9B1M>. The Department of Buildings offers certificates of occupancy, filed permits, violations, landmark status, and other property-level information here: <https://goo.gl/Q5orY>. Information on zoning, land use, landmarks, some environmental conditions, and other matters can be obtained through the City Planning Department at: <https://goo.gl/kugxgg>. A group of not-for-profits and government agencies has created www.oasisnyc.net, which collects vast amounts of New York City property data online. Outside New York City (and even in New York City’s smallest borough, Staten Island), online real property information is not always as freely available.
- 8 Typically, the parties do not allocate Purchase Price for an ordinary sale of commercial property. If a Contract covers multiple properties, the parties might allocate among them. Particularly for a hotel or other transaction with substantial FF&E or an operating business, the parties may allocate among real property and other elements. Component analysis represents a specialty area of appraisal practice, seeking to take advantage of tax opportunities available in this area. It raises tax issues and requires tailored language in the Contract. Great minds may think they can avoid transfer tax by reallocating Purchase Price to personal property—but that will often attract sales tax, typically higher than any real property transfer tax. To implement an agreed allocation, subject to consultation with tax counsel, use this language:

Purchase Price Allocation. The parties shall allocate the Purchase Price, and report this transaction, as follows:

Land	\$
Building	\$
Building Equipment	\$
Goodwill	\$

- 9 For these extension rights to have value, they should be exercisable at the last minute. They may also call for giving notices by email, to avoid logistical issues about compliance with ordinary Contract notice procedures such as overnight delivery. If the parties agree to notices by email, then the Contract should require prompt confirmation of any such notice by a more traditional means of notice, though the confirmation could be given shortly after the notice deadline.
- 10 In a hot Seller’s market, Buyer might not have the right to a free Closing Extension. In that case, the parties could use the language below. For Seller, an Extension Fee may constitute ordinary income, whereas additional Purchase Price may constitute capital gain. If Buyer extends, Seller may want to: (1) have Buyer bear the risk of changes in circumstances (e.g., Loss, Tenant or Lease issues, or nonculpable changes in representations and warranties) after the original Closing Date; (2) require adjustments as of an earlier date; (3) require Buyer to live with any estoppel certificates that have gone stale in the extension; and (4) waive any restriction on Seller’s speaking with other possible Buyers.

Closing Extension. Buyer may extend the Scheduled Closing Date, on written notice to Seller, to _____. To extend, Buyer also must, before the original Scheduled Closing Date, pay an additional, nonrefundable fee of \$_____ (the “Extension Fee”) in wired funds [outside escrow] [to Escrowee] [as an increase of the Deposit] [as an increase in the Purchase Price]

1.8. Title Company.

The "Title Company" means _____.¹¹

2. CLOSING

This transaction shall close (the "Closing") on the Scheduled Closing Date. The "Closing Date" means the actual date of Closing. The Closing shall take place through Escrowee.¹² The "Time-of-Essence Closing Date" means [the date ___ days after] the Scheduled Closing Date as extended by valid Closing Extensions. On the Time-of-Essence Closing Date, TIME IS OF THE ESSENCE for Buyer's obligations under this Contract. Neither party needs to notify the other of the Time-of-Essence Closing Date.¹³ If Buyer fails to perform its obligations on the Time-of-Essence Closing Date, then it shall be in default. No notice or opportunity to cure is required after Buyer's default on the Time-of-Essence Closing Date.¹⁴

3. PROPERTY

The "Property" means all of Seller's right, title, and interest in:

[to be disbursed to Seller at Closing or on Buyer's default]. The Extension Fee shall [not] be credited to the Purchase Price at Closing. If no Closing occurs, Seller may keep the Extension Fee, except that if Seller's default caused the failure to close, then Buyer shall receive back the Extension Fee.

- 11 Buyer typically pays for title insurance. Buyer, or occasionally its counsel, will choose Title Company. Buyer can obtain a substantial discount by having Title Company issue lender's and owner's policies simultaneously. New York is a filed rate state. Almost all title companies are members of the Title Insurance Rate Service Association, Inc. (www.tirsa.org), which files the same rates for virtually the entire industry. Title insurers may not vary from their filed rates (New York Insurance Law § 2339). Thus, title insurance companies compete on service and other factors. New York legislators from time to time express outrage at the magnitude of, and apparent lack of competition in, New York title insurance rates. The outraged legislators seem oblivious to the role New York law plays in keeping title insurance rates high. Similar levels of insight, knowledge, understanding, and sophistication often guide any New York real estate legislation.
- 12 New York-style sit-down Closings have become the exception, sometimes used for either very large, complex transactions or very small, simple ones. Anything in between almost always closes through escrow. If the parties contemplate a sit-down Closing, add language like this:
- Time and Place of Closing.** The Closing shall take place at 10 a.m. on the Closing Date at the office of [Joshua Stein PLLC, 501 Madison Avenue, Suite 402, New York, New York 10022]. Buyer may, by notice to Seller at least 10 days before the Scheduled Closing Date, require Closing to take place at the [Manhattan] offices of counsel to Buyer's lender. The previous sentence does not imply this Contract is subject to financing.
- 13 Some practitioners hesitate to make time of the essence. This Contract seeks to mitigate that concern by giving both parties an extension as of right. New York has a large body of law on time of the essence closings, often requiring Seller to give Buyer a separate reasonable notice (after default) specifying a time of the essence date. "It is fundamental that time is never of the essence of a contract for the sale of real property unless (1) the contract specifically so states or (2) special circumstances surrounding its execution so require." *Schoen v. Grossman*, 230 N.Y.S.2d 771 (N.Y. Sup. 1962). The language in text seeks to sidestep that body of law and resulting drama. It may succeed. For example, in *Grace v. Nappa*, 415 N.Y.S.2d 793 (N.Y. 1979), a contract stated time was of the essence "as against both the Seller and Purchaser." The Court of Appeals allowed the Buyer to recover its deposit when Seller failed to deliver an estoppel certificate from its mortgagee at closing. The Court said that, where contracting parties state that time is of the essence for their performance on a specific date, each party must tender its performance on that date. Buyer may also suggest these measures, neither customary: (1) time of the essence should apply to both parties; or (2) the Contract should excuse any delay attributable to delays affecting wire transfers within the banking system, once transmitted. For an international Buyer, such delays could become substantial as a result of anti-moneylaundering and similar regulations.
- 14 In contrast, this Contract gives Seller notice and opportunity to cure in the general section on Seller Default to mitigate the risk of creative theories for why any default was Seller's fault and not Buyer's. Typically, though not always, a Seller's performance is easier to deliver than a Buyer's. A careful Seller may also insist that, as a condition to Buyer's obligation to close, Seller needs to perform only certain fundamental obligations (e.g., delivery of a deed, vacant possession, and good title) so that any other issues about Contract compliance cannot excuse Buyer's performance and must instead be resolved in post-Closing litigation.

3.1. Land, Buildings, Etc.

The land described in **Exhibit A** (the “Land”), with all buildings and improvements on the Land (the “Improvements”) and all of these appurtenant to the Land: (1) development rights, easements, gores, licenses, privileges, rights of way, strips, and zoning floor area; and (2) rights to any land lying in the bed of any street, road, or avenue, open or proposed, adjoining or benefiting the Land.

3.2. Building Equipment.

All air conditioning, elevator, heating, ventilation, in-wall networking infrastructure, including coaxial, copper, Ethernet, fiber, and optical cables and other conduits used to transmit information and all other building equipment, fixtures, and machinery attached to the Improvements on the Contract Date (the “Building Equipment”), all in their “as is” condition on the Closing Date. Seller may¹⁵ remove any or all personal property of Seller or of any tenant or subtenant of the Property (a “Tenant”), including artwork, computer servers, equipment (except Building Equipment), files, furniture, other property used for business activities at the Property (whether fixed, installed, or movable), and _____. [Seller need not repair any minor or cosmetic damage caused by that removal.]¹⁶

3.3. Intangibles.

All of these for the Property, as listed in **Exhibit ____** (the “Disclosure Schedule”)¹⁷: (1) Service Contracts except any this Contract requires Seller to terminate; (2) any employment contracts and employee obligations that Buyer elects (or that any union contract requires Buyer) to assume; (3) guaranties and warranties for Building Equipment; (4) elevator permits; (5) approvals, certificates, licenses, and permits (the “Permits”) issued by any governmental authority (a “Government”); (6) books and records, data, operating manuals, plans, and specifications for the Premises and its component systems that Seller owns and are in Seller’s possession or control, except any related to any business operated in the Property; and (7) other intangible property that Seller delivers to Buyer under this Contract.

3.4. Leases.

All the Leases.¹⁸

4. DUE DILIGENCE¹⁹

Before the Contract Date, Buyer has completed all due diligence to its satisfaction. All work and testing that Buyer performed while conducting its due diligence (or performs after the Contract Date) is subject to “Confidentiality” as this Contract states. Before the Contract Date, Seller confirms it has made these items available to Buyer, or its designated representatives, in each case to the extent in Seller’s actual possession and control (the “Due Diligence

15 Buyer may prefer “shall,” particularly for problematic forms of personal property, such as medical equipment or records.

16 The bracketed language is suitable for sales of development sites.

17 Seller should begin to prepare this schedule, and collect copies of all documents mentioned here, before Seller lists the Property for sale. Broker will often direct that effort. Seller or Broker might establish an online data room where prospective Buyers can view disclosure materials, subject to confidentiality restrictions and with user tracking to gauge interest and activity levels. A careful Seller will go a step further than full disclosure, and instead try to conduct its own due diligence to identify and resolve in advance any likely issues or problems with the Property. This prevents the need to: (1) negotiate Contract terms to deal with them; or (2) handle issues when they arise later and Buyer no longer feels any competitive fervor. As a practical matter, most Buyers will find most issues, so Seller can’t hide the ball anyway. Full disclosure, preceded by full due diligence, gives Seller an insurance policy against some surprises.

18 “Leases” are defined elsewhere in this Contract and listed on the Disclosure Schedule.

19 Until recently, Sellers of prime New York City property had enough leverage to require Buyers to sign Contracts without a Due Diligence Period. At time of writing, however, financing and Buyers have become scarcer and asking prices remain overexuberant and out of date. So Buyers are doing better. New York City’s overgrown regulatory schemes for real estate—such as over 30,000 landmarked properties, an extraordinarily complex zoning scheme, and a politicized approval process for major projects—mean Buyers, especially for development projects, need as long a Due Diligence Period as they can get. See an earlier footnote for sample language on a Due Diligence Period.

Information”): (1) assignable Permits, guaranties, Leases, pending certiorari actions, pending litigation and proceedings, plans, Service Contracts, specifications, warranties, and any document the Disclosure Schedule identifies; and (2) copies of written environmental assessments and reports, including any Phase 1 environmental assessment report (a “Phase 1”), and other environmental assessments, reports, and studies Seller obtained for the Property as listed in the Disclosure Schedule (all items in this clause (2), the “Environmental Information”).

5. CONDITION OF TITLE

5.1. At Closing.

At Closing, Seller shall cause Title Company to be willing to issue a standard owner’s title policy with a Standard New York Endorsement in the full Purchase Price insuring fee simple title to the Land and Improvements is vested in Buyer free and clear of all liens and encumbrances subject only to Permitted Exceptions (a “Title Policy”),²⁰ which willingness may be conditioned on Buyer’s payment of Title Company’s premiums and fees (a “Title Commitment”). “Permitted Exceptions” are defined in **Exhibit ___**. Buyer’s failure to pay Title Policy premiums or fees shall not excuse Buyer from Closing, if Title Company is otherwise willing to insure title as this Contract requires. If Title Company is not willing to do so, then Buyer shall be entitled to a refund of the Deposit, unless Title Company’s unwillingness results from Buyer’s acts or omissions, including Buyer’s failure to pay Title Policy premiums or fees.

5.2. Replacement Title Company.

If Title Company is unwilling to issue a Title Commitment, but Seller procures a national title insurance company (i.e., Fidelity National Title Group, First American, Old Republic, or Stewart), licensed in New York, that is willing to do so at no additional premium, then Seller may require use of that other title insurance company, which shall then be “Title Company.”²¹

6. TITLE CLEARANCE

6.1. Updated Title Report.

Within [10] days after the Contract Date, Buyer shall obtain from Title Company a current title report or update for the Land and Improvements (with any later update, a “Title Search”). Within five business days after Buyer receives any Title Search, Buyer shall give Seller and Seller’s counsel a copy of it and notice of any title exceptions to which Buyer objects,²² excluding Permitted Exceptions (each exception to which Buyer timely objects, a “Title Problem”). If Buyer does not give Seller a copy of the Title Search and notice of Title Problems in that time, Buyer shall be deemed to have approved everything the Title Search discloses.

6.2. Mandatory Removal Items.

Seller shall cause Title Company to omit from its Title Commitment these Title Problems (the “Mandatory Removal Items”), regardless of amount: (1) any caused by Seller’s voluntary acts or omissions after the Contract Date²³; (2)

20 Typically, the Title Policy will consist of an ALTA 2006 Form of Owner’s Policy. In New York the policy will also include a “Standard New York Endorsement.” That endorsement: (1) protects against some unfiled mechanics’ liens; and (2) adds an exception for water and sewer charge liens. Zoning and usury endorsements are unavailable in New York. The value of an ALTA-9 or “Comprehensive” endorsement usually exceeds its cost, which is 10 percent of the full premium on a mortgagee policy.

21 Many, but not all, New York Contracts give Seller this option. Buyer may express concern that a sloppy replacement title insurer will saddle Buyer with future issues. Seller may express concern that a Buyer-friendly title insurer will create fake issues to help Buyer wiggle out of the Contract. As a practical matter, the author has never seen either circumstance arise or any Seller actually exercise (or come anywhere close to exercising) its rights under this sentence.

22 There is no reasonableness standard here. As a practical matter, Seller should make sure the Permitted Exceptions capture all possible exceptions that Buyer should accept.

23 Seller may want to carve out any actions required by law. Such an exception is not standard. Legally required actions might not be “voluntary” anyway.

mechanics' liens arising from work done at the Property by or for Seller²⁴; (3) mortgages encumbering the Property but not assigned as this Contract states; and (4) unpaid real estate taxes or assessments, subject to allocation under this Contract.

6.3 Capped Removal Items.

Seller shall also cause Title Company to remove from its Title Commitment all Title Problems, except Mandatory Removal Items, that Seller can reasonably cure by spending money (the "Capped Removal Items"). If, however, the aggregate cost to cure all Capped Removal Items would reasonably be estimated to exceed \$_____ (the "Cure Cost Cap"),²⁵ then Seller shall by prompt notice to Buyer either, in Seller's sole discretion: (1) cancel this Contract; or (2) agree to cure all Capped Removal Items regardless of cost. If Seller cancels this Contract under the previous sentence, Escrowee shall promptly return Buyer's Deposit and the parties shall have no more obligations under this Contract, except any that expressly survive termination. Buyer may defeat that cancellation by closing subject to all Capped Removal Items [without adjustment of] [with a credit equal to the Cure Cost Cap [(to the extent it exceeds Seller's reasonably documented expenditures to date to remove Capped Removal Items)] against]²⁶ the Purchase Price. All uncured Capped Removal Items shall then become "Permitted Exceptions."

6.4. Tenant Liens.

Notwithstanding anything else in this Contract, "Title Problems" do not include, and Seller has no obligations on, any mechanics' liens resulting from work done by or for any Tenant ("Tenant Liens"). Seller shall use commercially reasonable efforts (except litigation or expenditure of more than: (a) \$_____ to remove any one Tenant Lien or (b) \$_____ in aggregate) to cause every Tenant to remove every Tenant Lien. Seller shall have no liability if a Tenant fails to do so. Seller shall promptly give Buyer a copy of any notice it gives or receives on any Tenant Lien.²⁷

6.5. Timing.

Seller shall be entitled to reasonable extensions of time, including beyond the Scheduled Closing Date, [but in no event beyond _____²⁸], to perform its obligations on Title Problems. Seller need not cure any Title Problem if, at Closing, Title Company is willing to, without additional premium, issue a Title Policy: (1) insuring against any loss arising from that Title Problem; (2) omitting it; or (3) affirmatively insuring Buyer against enforcement or collection. Buyer need not accept any Title Policy that affirmatively insures against any nonmonetary Title Problem if Buyer's institutional lender reasonably objects to affirmative insurance.²⁹ Seller has no obligation to clear title except as this Contract states.³⁰

24 Buyer may also want Seller to take responsibility for liens that Tenants caused. Resolution of that issue will depend on circumstances, i.e., the overall nature of the transaction and leverage of the parties.

25 The Cure Cost Cap is typically around one percent of the Purchase Price, rarely higher, sometimes lower for larger transactions. Although one might expect a higher number, the Cure Cost Cap activates only if unexpected problems arise. In theory, if the cost to cure title problems exceeds a low threshold, Seller might want the right to rethink the sale. Hence Sellers typically insist on low numbers. In more than 30 years of practicing real estate law in New York, the author has not yet encountered a Capped Removal Item, but every New York Contract deals with this hypothetical contingency.

26 Based on market conditions, the pendulum swings between the bracketed options.

27 This paragraph is optional and nonstandard and will depend on circumstances.

28 Buyer will not want an open-ended extension of time, especially if Buyer is acquiring replacement property in a Section 1031 tax-deferred exchange.

29 The preceding sentence is nonstandard and inconsistent with the idea that commercial Contracts are not contingent on financing. Some Buyers worry about affirmative insurance.

30 Ordinarily, Seller has no responsibility for physical conditions, including encroachments and anything a survey or inspection would show, regardless of materiality. Permitted Exceptions in this Contract include a wide variety of physical conditions. Buyer just needs to carefully examine the Property before the Contract Date or in any Due Diligence Period, and either buy it or not, pricing it accordingly. In New York City, for existing Improvements, the parties often work from an existing survey in Title Company's files and update it by visual inspection. Buyer might order a new survey if the Property is in an area that is unusually crowded or has undergone significant change recently. Sometimes Buyer will request language like this:

7. MORTGAGE ASSIGNMENT³¹

To the extent that as of the Contract Date any mortgages encumber the Property and their aggregate amount secured does not exceed the Purchase Price (the “Seller Mortgage”), Seller shall [use commercially reasonable efforts to] cause the mortgagee(s) to assign the Seller Mortgage and the secured debt at Closing, using the assignor’s standard assignment documents, to an assignee that: (1) Buyer designates in writing at least ____ days before Closing; and (2) acquires the Seller Mortgage in exchange for a payment equal to the amount it secures.³² Any mortgages actually assigned at Closing constitute “Permitted Exceptions” and Buyer shall receive credit for the secured amounts. At Closing, Seller shall deliver, and the “Closing Documents” shall include, an affidavit under Real Property Law Section 275(3).³³ For any assignment, Buyer shall: (1) reimburse Seller’s reasonable attorneys’ fees and other out-of-pocket costs incurred to obtain that assignment; and (2) pay promptly on request any fees, including an application fee, assignment fee, and reasonable attorneys’ fees, charged by the assignor. Nothing in this paragraph implies that Buyer’s obligations under this Contract are subject to financing. Any existing mortgages not assigned to Buyer’s designee are Mandatory Removal Items.

8. CLOSING PAYMENT

8.1. Closing Payment.

At Closing, Buyer shall pay the Purchase Price, plus or minus net Closing adjustments, minus the Deposit [and Hold-back] [and the total amount secured by any Seller Mortgage] (the “Closing Payment”), by wire transfer to Escrowee of immediately available federal funds. As soon as the Closing Conditions are met, Escrowee shall notify the parties and release the Deposit and the Closing Payment in accordance with this Contract and the Closing Statement. To the extent the Closing Statement requires disbursements to Seller, Escrowee shall make them to Seller or as Seller directs in writing. Interest earned on the Closing Payment while Escrowee holds it shall belong to Buyer free of any

Survey. Buyer, at Buyer’s expense, may have the Land surveyed, or an existing survey updated, by a registered New York surveyor within ___ days after the Contract Date. If the survey or update shows anything, except a Permitted Exception, that materially impairs the Property’s development potential, marketability, operations, utility, or value (a “Survey Problem”), then within ___ business days after [the Contract Date] [Buyer receives the survey or update], [and in any case before the end of the Due Diligence Period,] Buyer shall give Seller and Seller’s counsel a copy of it and notice of any Survey Problem to which Buyer objects. Any Survey Problem shall constitute a “Capped Removal Item.” If Buyer does not timely give Seller a copy of the survey (or update) and notice of all Survey Problems, Buyer shall be deemed to have approved everything the survey or update discloses.

Seller will typically reject the above concept, saying: (1) Buyer can and should do its homework before signing the Contract (unless the Contract already provides for a Due Diligence Period); (2) even if a Survey Problem does appear, it shouldn’t be treated as a Title Problem potentially requiring Seller to spend money; and (3) instead, a Survey Problem above a materiality threshold might just entitle Buyer to walk away with its Deposit.

- 31 New York imposes a mortgage recording tax on secured principal debt. To the extent of unpaid principal, Seller’s mortgagee can assign its mortgage to Buyer’s mortgagee. Buyer can achieve mortgage tax savings on that assigned amount of principal. Borrowers should try to get their lenders to agree in advance to cooperate with future assignments. Though routine for commercial transactions, these assignments are not legally required. The mortgage recording tax rate varies. In the five boroughs of New York City, mortgage recording tax for substantial commercial mortgage loans is generally 2.8 percent—often the largest transaction cost at Closing. Buyer’s financial model may assume Buyer will achieve the tax savings an assignment would yield. If Buyer does not achieve those savings, Buyer may want to adjust the Purchase Price. To Buyer, it may not suffice for Seller to try or even try really hard to achieve a mortgage assignment. Sellers, in contrast, typically try to treat an assignment as a matter of grace and kindness—a magnanimous favor for a Buyer that, as always, is a mere wretched supplicant. Seller may try to get Buyer to pay for accommodating a mortgage assignment, such as by giving Seller 50 percent of Buyer’s tax savings. For an overview of mortgage recording tax in New York see Joshua Stein, “Stein on New York Commercial Mortgage Transactions,” Ch. 6-9 and Ch. 13 (LexisNexis Matthew Bender 2008).
- 32 If the Seller Mortgage exceeds the Purchase Price, this language requires adjustment. That circumstance has not occurred much in recent New York City real estate history.
- 33 To assign a mortgage, someone (typically, the outgoing borrower, i.e., Seller) must deliver an affidavit saying: (1) Buyer’s lender is not acting as nominee for the outgoing borrower and (2) the mortgage still secures a bona fide obligation (New York Real Property Law § 275(3)). Those statements can instead go in the mortgage assignment. Practice often dictates a separate document, either to “keep things straight” or because New York practice favors having as many documents as possible at any Closing. If the parties contemplate a mortgage assignment, the Closing Documents should include a Section 275 Affidavit.

claim by Seller. Escrowee shall release that interest on demand, or release it to Seller for credit against the Purchase Price as Buyer directs in writing. Escrowee shall report it as Buyer's income.

8.2. Closing Conditions.

Seller shall have no interest in or claim to the Closing Payment unless these conditions (the "Closing Conditions") have all been met:³⁴ (1) Escrowee has received the Closing Payment; (2) Title Company has issued a Title Commitment consistent with this Contract; (3) Title Company has confirmed that the approved Closing Statement, signed by Buyer and Seller or their counsel (the "Closing Statement") provides for payment of all escrow fees, title insurance premiums, New York State and City transfer taxes (those taxes, together, the "Transfer Taxes"), and all other sums payable to or through Title Company for Closing; and (4) counsel to Buyer and Seller have confirmed to Escrowee in writing (including by email) that Escrowee is authorized to close if all other Closing Conditions are met (a "Closing Authorization"). Unless and until the Closing Conditions have all been met, Escrowee shall hold the Closing Payment solely on Buyer's account and subject to Buyer's instructions.

8.3. Closing Conditions Not Met.

If, on the Scheduled Closing Date, the Closing Conditions have not been met, Escrowee shall: (1) if Buyer or its counsel instructs, promptly return the Closing Payment to Buyer, at the wire transfer address from which it came, or as Buyer otherwise instructs in writing; and (2) disregard and ignore any claim of any third party, including Seller, to the Closing Payment.

9. CLOSING DOCUMENTS AND ACTIONS

At Closing, the parties shall execute and deliver to one another, or to Title Company as needed to issue the Title Policy, [four] original counterparts of these documents and deliveries (the "Closing Documents").³⁵ To the extent **Exhibit** ___ includes a form of any Closing Document, that form governs. Otherwise, Closing Documents shall all be in ordinary and customary form, imposing no obligations beyond those in this Contract. The Closing Documents consist of these documents and the parties shall take these actions at Closing, provided that the other party also performs its obligations:

9.1. Assignments.

Seller shall deliver assignments of leases in recordable form,³⁶ intangibles, and contracts constituting part of the Property.

9.2. Authority Documents.

Each party shall deliver documents evidencing its internal approvals and authorizations in form sufficient so Title Company can issue the Title Policy.

34 This Contract seeks to provide for escrow mechanics in a way that eliminates a separate escrow agreement. Many New York attorneys still want a separate escrow agreement, even with the language offered here.

35 Seller's counsel typically prepares Closing Documents. It is preferable and not much extra work to attach forms to the Contract. Failure to do that creates some risk of disputes. In the author's experience any such disputes are easily resolved.

36 New York custom requires delivery of not only a deed, but also a separate assignment of lessor's interest in leases. This document serves two genuine functions: (1) it confirms the transaction includes the leases and any arrearages; and (2) it documents Buyer's assumption of the leases, sometimes a condition to release of Seller's liability as landlord under the leases. Both these functions could be achieved through a couple of paragraphs in other documents. The assignment of lessor's interest in leases also serves two other less sensible purposes: (1) if Buyer wants to enforce a preexisting Lease, the courts might not accept a deed as evidence of Buyer's succession as landlord; and (2) everyone does it this way so no one wants to risk doing it differently.

9.3. Bill of Sale.

Seller shall deliver a bill of sale for any personal property included in this sale.³⁷

9.4. Broker.

[Seller] shall pay Broker and deliver a suitable receipt.

9.5. Bulk Sale.

Seller need not deliver any evidence of compliance with any bulk sale statute. That does not limit Seller's Indemnity on bulk sale compliance.]³⁸

9.6. Bulk Sale.

At least 15 business days before the Scheduled Closing Date, Buyer shall give Seller a completed New York State Department of Taxation and Finance ("Tax Department") Form AU-196.10.³⁹ Seller shall review and reasonably approve (or specify reasonable objections to) that form within five business days after receipt. After resolution of the form, Buyer shall deliver it to the Tax Department as required.⁴⁰ To the extent the Tax Department requires, Buyer shall: (1) withhold part of the Purchase Price at Closing; and (2) deliver the withheld amount to the Tax Department.]

9.7. Closing Statement and Authorization.

Consistent with the requirements of this Contract, the parties or their counsel shall sign and deliver to Escrowee a Closing Statement and a Closing Authorization.

9.8. Deed.

Seller shall deliver a duly executed and acknowledged bargain and sale deed without covenant (the "Deed"), to convey Seller's title in and to the Land and Improvements to Buyer.⁴¹

9.9. Estoppels.

[Seller need not deliver any estoppel certificates.]⁴² [At Closing, Seller shall deliver estoppel certificates, in substantially the forms attached to each Lease, and if no form is attached then substantially in the form in **Exhibit ___**, from

37 Sometimes the parties use a bill of sale to formalize the transfer of any personalty. The use of a bill of sale may increase the likelihood of sales tax, and hence is disfavored, except for a transaction where sales tax cannot be avoided (e.g., sale of a hotel).

38 This paragraph of text describes customary practice on bulk sales compliance. The next paragraph of text includes suggested language on how the parties are statutorily supposed to deal with bulk sales compliance. Include only this paragraph or the next, not both. Few Buyers and Sellers actually comply with the statutory procedure, in part because the process requires them to give the Tax Department a copy of the Contract. That submission hardly seems necessary if the State just wants to confirm Seller owes no unpaid sales tax. If a transaction involves a hotel or other operating business, or if Seller is not a pure real estate entity, Buyer may worry more than otherwise about unpaid sales tax and may insist on a bulk sale filing or a larger Holdback.

39 Those determined to file can find Form AU-196.10 at: <https://goo.gl/nlvO0l>. To prevent possible issues, if the parties do plan to file, they might attach the agreed-upon Form AU-196.10 as a Contract exhibit.

40 If the parties comply with bulk sales requirements, Buyer must file a completed Form AU-196.10 with the Tax Department at least 10 days before closing. The parties must also submit a copy of their Contract. For more information on bulk sales and filing requirements refer to Tax Department, Taxpayer Services Division, "Guidelines for Bulk Sales Transactions," publication TSB-M-83(6)S, April 7, 1983 and Tax Department, Tax Bulletin TB-ST-70, June 24, 2013.

41 A conveyance of real property implies no covenants "whether the conveyance contains any special covenant or not" (New York Real Property Law § 251). New York requires no particular form of deed. New York Real Property Law § 258 offers a menu of deed forms: full covenants, no covenants, covenant against grantor's acts, quitclaim, bargain and sale, executor's, and referee's, along with some other simple real estate documents. Some Contracts require a bargain and sale deed with covenant against grantor's acts. Given the general reliance on title insurance rather than Sellers' covenants, it is common to provide for no covenants at all.

42 Buyer will typically require estoppel certificates from many Tenants, plus nondisturbance agreements from at least some Tenants, all partly to satisfy Buyer's lender.

at least these Tenants: _____.] [If any Tenant refuses to sign an estoppel certificate, then Seller may substitute a certificate of Seller to the same effect. Seller's assurances in that certificate shall constitute additional "Property Representations" for this Contract, including limits on Seller's liability.]⁴³

9.10. FIRPTA.

Seller shall deliver documents needed to comply with Internal Revenue Code § 1445.

9.11. Holdback.

Escrowee shall hold \$_____ of the Purchase Price (the "Holdback") as a reserve for Buyer's claims for breach of Property Representations and to cure any such breach. On the day after the Survival Date, Escrowee shall automatically release the Holdback to Seller, unless Escrowee has received notice from Buyer [of a claim to it] [that Buyer has commenced an action against Seller, with a copy of the Complaint].⁴⁴

9.12. Mortgage Assignment.

For any assignment of a Seller Mortgage to Buyer's mortgagee, Seller shall deliver a Section 275 Affidavit, signed by Seller or a responsible party.

9.13. Owner's Affidavit.

Seller shall deliver an ordinary and customary owner's affidavit as Title Company requests.⁴⁵

9.14. Possession.

Seller shall deliver possession of the Property to Buyer, in its "as is" condition on the Closing Date, subject to any Leases and other matters this Contract allows.

9.15. [Power of Attorney.

If Seller signs any Closing Documents by power of attorney, then Seller shall deliver a power of attorney in recordable form, satisfactory to Title Company.]⁴⁶

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- 43 Buyers may refuse to rely on Seller's warranty certificate in lieu of missing estoppel certificates, especially for major Tenants. Warranty certificates raise significant issues on: (1) warrantor and its credit; (2) an escrow, larger Holdback, or other credit support; (3) inappropriateness of knowledge qualifiers; and (4) typical issues with any representations and warranties.
- 44 A Holdback is optional but common. Some Sellers prefer it to a personal guaranty, even if capped. If a Holdback exists, Seller: (1) must still pay Transfer Tax on the full Purchase Price; and (2) should expect a claim, bogus or not, against the Holdback shortly before its scheduled release. Sometimes a Contract goes into detail on procedures for those claims.
- 45 Sometimes called an "Owner's Affidavit," "Affidavit of Title," or "Common Exceptions Affidavit," this document might cover: (1) real estate taxes and water and sewer rents, if any uncertainty or recent payments exist; (2) tenants in possession; (3) work performed by the City of New York to remedy some hazardous conditions; (4) judgments against other parties with similar names; and (5) due authorization. Counsel should consider whether the representations suggested in the previous sentence are appropriate and consistent with Seller's Contract obligations. A Title Company sometimes errs on the side of overinclusiveness. For example, it might seek assurances on ownership, matters of public record, or other matters that Title Company should independently determine. Seller's counsel will usually delete the excessive language. Seller may refuse to deliver an affidavit on unrecorded mechanics' liens, as the Lien Law covenant in the deed should protect Buyer and allow issuance of title insurance.
- 46 The market is ordinarily skeptical of Powers of Attorney. The New York Power of Attorney statute (New York General Obligations Law Article 5, Title 15) includes a suggested form, recently "improved" (and rendered almost incomprehensible) as a result of sad history involving abuse of elderly property owners. Fortunately, that law doesn't apply to commercial transactions. Any power of attorney should be recordable and circulated to all deal participants, including Title Company, early on. If any entity anticipates its signers will not be available at closing, the preferred and more typical practice is for that entity to appoint an authorized signatory, backstopped by suitable resolutions. That arrangement, too, requires prior coordination with all participants, to try to assure no one comes up with some last-minute basis to object to the signer's authority. New York attorneys often hesitate to sign documents in any capacity on behalf of their clients, even if specifically authorized.

9.16. Purchase Price.

Escrowee shall release the Purchase Price, including the Deposit, to Seller or as the Closing Statement states.

9.17. Property Representations Datedown.

Seller shall deliver to Buyer a certificate that the Property Representations remain true and correct in all material respects on the Closing Date, or specifying any inaccuracies that have arisen. Any such certificate is for Buyer's information only. It does not limit Buyer's obligations or give Buyer any rights, except to the extent it: (1) is inaccurate; or (2) discloses a circumstance, such as Loss or Seller's breach of this Contract, that gives either party rights.⁴⁷

9.18. Tenant Files; Books and Records.

To the extent in Seller's actual possession or control, Seller shall deliver to Buyer at [or promptly after] Closing: (1) original Leases; (2) original assumed Service Contracts; and (3) all books, records, and other documents for the Property, including: (1) assignable Permits; (2) inspection reports; (3) surveys; (4) plans and specifications; (5) transferable guarantees and warranties; (6) maintenance and operating records; and (7) Lease and Tenant correspondence files.

9.19. Tenant Notices.

Seller shall sign and give Buyer notices of Closing for all Tenants, directing Tenants to pay rent to Buyer as of Closing, or as Buyer directs.

9.20. Transaction Costs.

Buyer shall pay all title insurance premiums and all recording and filing taxes, fees, and charges, except Seller shall pay: (1) all fees and charges to remove Title Problems that this Contract requires Seller to remove; and (2) all Transfer Taxes⁴⁸ on the Deed.⁴⁹ If Buyer obtains a mortgage, Buyer shall pay all mortgage recording tax on that mortgage, subject to any savings by assigning any Seller Mortgage. Each party shall pay its own legal costs.

9.21. Transfer Tax Forms.

The parties shall fill out and sign all Transfer Tax returns, ACRIS filings, and other forms and certificates necessary to record the Deed,⁵⁰ all consistent with standard practice (collectively, the "ACRIS Documents").⁵¹ Buyer shall arrange

47 Contracts often require datedown certificates for representations and warranties. But what happens if Seller can't give a datedown certificate because circumstances have changed? Contracts typically don't answer that question. This one tries to do that.

48 New York City and State both impose Transfer Tax on most real property conveyances. The City tax amounts to 1.425 percent of consideration if consideration is up to \$500,000, and otherwise 2.625 percent. New York City Admin. Code § 11-2102. The State tax equals "two dollars for each five hundred dollars of consideration or fractional part thereof" or about 0.40 percent of taxable consideration. New York Tax Law § 1402. The two taxes often vary in unexpected ways. They add up to some of the highest transfer taxes in the United States, but not the absolute highest.

49 By statute and custom, Seller pays Transfer Tax. If Seller doesn't pay, Buyer has secondary liability. If Buyer pays, that payment constitutes additional consideration, as if Buyer had paid Seller's credit card bill, attracting more Transfer Tax. The parties can save a penny or two by decreasing the Purchase Price and having Buyer pay Transfer Taxes. Do the math. Transfer Tax mitigation can constitute a major element in structuring a complex transaction. An ordinary outright purchase and sale offers few opportunities for such mitigation. For example, a sale of all equity of the Property owner doesn't work. A prepackaged Chapter 11 reorganization sometimes does the trick and also mitigates mortgage recording tax. But it raises its own issues and is not common.

50 Where consideration is at least \$400,000, recording the Deed requires the parties to attach to the tax return a copy of the Contract or Closing Statement. Rules of the City of New York, Title 19, Chapter 23, § 23-09 (Filing of Returns). Most deal participants attach the Closing Statement.

51 ACRIS stands for Automated City Register Information System, an online recording system. Recordation of any document entails preparation of a New York City Transfer Tax form, a New York State Transfer Tax form, an affidavit on smoke detectors, a form on where to send water and sewer bills, an affidavit in lieu of registration statement (or a registration statement, if the property is a multiple dwelling), and a New York State Real Property Transfer Report. ACRIS generates these forms using information entered through a cumbersome online system. That online system offers a limited menu of options and alternatives, which do not always

at its expense for Title Company to prepare all ACRIS Documents (for the parties' review and approval, consistent with this Contract) at least five business days before the Scheduled Closing Date.⁵² Each party authorizes and directs its counsel to sign on its behalf all ACRIS Documents it needs to sign.

9.22. Other.

The parties shall deliver any other ordinary and customary closing documents as either party reasonably requests on reasonable notice. No such document shall impose obligations or liability beyond those under this Contract.

10. ADJUSTMENTS AND REVENUES

At Closing, effective as of 11:59 p.m. as of the day immediately before Closing (the "Cut-Off Time") the parties shall adjust: (1) utilities, based on meter readings where feasible; (2) real estate taxes, based on the current assessment and bill; (3) salaries and benefits, including vacation pay; (4) BID assessments; (5) Service Contracts except any this Contract requires Seller to terminate at Closing; (6) periodic municipal permit and inspection fees; (7) open inspection fees; (8) water, sewer, and frontage; (9) rent already collected for the current month and prepaid for any later month; and (10) all other items customarily prorated at closings.⁵³ Regardless of when incurred or received, all Property revenues and expenses accrued before or through the Cut-Off Time shall be for Seller's account; all Property revenues and expenses accrued after the Cut-Off Time shall be for Buyer's account. Any adjustment errors reported in writing within six months after the Closing Date shall be corrected. After that, adjustments shall be final. Any Tenant's post-Cut-Off Time payments shall be applied first against the month in which the Closing Date occurs (prorated), then to the month before the Closing Date, then to later periods, and finally against that Tenant's oldest payables until all pre-Closing Date obligations of that Tenant have been paid, adjusted to the Closing Date. This paragraph shall survive Closing.

11. SECURITY DEPOSITS⁵⁴

To the extent Seller actually holds or controls any unapplied cash security deposit under a Lease, Seller shall at Closing: (1) assign to Buyer all unapplied cash security deposits and, if held in a financial institution, give Buyer written instructions to the security deposit holder to transfer the deposits to Buyer; or (2) keep all unapplied security deposits and give Buyer credit for their aggregate amount. Any security deposit assigned or credited in accordance

match an actual transaction, but that's just too bad. ACRIS then prepares the necessary forms, a total of about two dozen pages. The parties must then sign, scan, and upload as appropriate. Attorneys can sign ACRIS Forms for their clients if authorized to do so.

52 Title Company will often prepare ACRIS Documents for a nominal fee. The parties must provide or check the underlying information. These tax documents now require disclosure of some principals, including entity identification numbers and social security numbers. Failure attracts a \$1,000 fine. New York City Admin. Code § 11-102.1. Recent newspaper investigations revealed that bad guys have used New York City real estate to conceal bad money. Privacy-minded Buyers now need a new layer or two of ownership entities. They should engage counsel, including tax counsel, early for that purpose. Ever-changing federal disclosure requirements may also apply, but they are beyond the scope of this article.

53 Some older purchase and sale agreements mention vault charges as an adjustment item or Permitted Exception. That reference is outdated. Vault charges, repealed in 1997, were a tax assessed against buildings where the basement extended under the sidewalk, a "vault." New York City has not assessed vault charges since June 1, 1998, or earlier. The death of the vault charge represents a rare example of New York taxes shrinking rather than growing. An earlier example occurred a year or two before that, when the State eliminated its transfer gains tax—a separate tax equal to 10 percent of the alleged gain a Seller achieved when selling. This tax was colloquially known as the Cuomo Tax in honor of Governor Mario Cuomo, who proposed it in one of the State's periodic budget crises. It was assessed on top of federal, state, and city income taxes and state and city transfer taxes. It entailed a pre-clearance filing and interaction with the State tax department before every substantial commercial real estate closing. As a third example, New York City imposes an unusual commercial rent tax, the scope of which has diminished over time but has come under scrutiny as commercial vacancies continue to rise.

54 For some apartment buildings, if no record exists of a security deposit, then New York General Obligations Law § 7-108(2)(d) allows Buyer to require Seller to establish an escrow equal to one month's rent for each apartment. Seller might instead reasonably agree to Indemnify Buyer for that liability, backed by a Holdback for an extended time. The parties may want to take it into account in negotiating the Contract.

with this Contract shall include accrued interest, subject to landlord's one percent administration charge⁵⁵ allocated through the Cut-Off Time. Seller shall Indemnify Buyer for any security deposit claims made by Tenants that vacated before Closing. If any security deposit is a letter of credit, then promptly after Closing the parties shall cooperate to transfer it to Buyer at Seller's expense.⁵⁶ [Before Closing, Seller shall not, without Buyer's consent, apply any security deposits except where: (1) Seller has obtained a nonappealable judgment of possession; (2) Tenant has vacated in accordance with its Lease; (3) the Lease requires application of the security deposit; or (4) Tenant has surrendered and vacated its space.]

12. REFUNDS

12.1. Tax Refunds.

Seller shall retain ownership and full exclusive control of all pending real estate tax and assessment reduction proceedings, and ownership of any resulting refunds, subject to rights of pre-Closing Date Tenants, for tax years through and including that which includes the Closing Date (the "Closing Year"). The parties shall adjust under this Contract any tax refunds for the Closing Year. Seller shall, on request, keep Buyer reasonably informed of Seller's negotiations and settlements with tax authorities. Seller shall not settle on terms that would increase future assessments in exchange for reductions in periods for which Seller controls the proceedings. This paragraph shall survive Closing until all open tax reduction proceedings have been fully resolved and all refunds properly applied. Except pending proceedings listed in the Disclosure Schedule, Seller shall not, without Buyer's reasonable consent, start any tax reduction proceeding for the Closing Year or any later year.⁵⁷

12.2. Other Refunds.

To the extent that any refund of or credit against BID assessments, water rates and charges, sewer taxes and rents, or any other utility is made after the Cut-Off Time and applies to any period before then, Buyer shall pay it to Seller, subject to adjustment: (1) at the Cut-Off Time; (2) for reasonable out-of-pocket costs Buyer incurred to obtain it; and (3) for any payments made or owed to Tenants because of that refund. If any refund is paid to Buyer, Buyer shall Indemnify Seller for Buyer's failure to pay it to Seller or Tenants. If after the Closing Date Buyer starts or continues any action to pursue any refund, Buyer shall Indemnify Seller for any Tenant claims on that refund. This paragraph shall survive Closing.

13. SELLER'S COVENANTS

Nothing in this Contract prevents Seller from acting to prevent property damage, personal injury, or loss of life in an emergency or to comply with any law, code, or regulation (a "Law"), as reasonably necessary under the circumstances. If Seller takes any action under the previous sentence it shall promptly notify Buyer. Subject to the last two sentences and Seller's compliance with Leases and this Contract, Seller shall until Closing:

13.1 Development.

Not: (1) seek to change the Property's zoning classification; (2) enter into any zoning lot declaration or zoning lot development agreement⁵⁸; (3) amend the Property's certificate of occupancy; or (4) materially renovate or materially alter the Property except commercially reasonable repairs;

55 New York General Obligations Law § 7-103(2) codifies Landlord's one percent administration charge if Landlord keeps a security deposit in an interest-bearing account. The rest of the interest belongs to Tenant. The drafters probably did not anticipate today's low interest environment. Buyers and Sellers can avoid trivial disputes by: (1) resisting the temptation to charge administrative fees beyond interest earned; or (2) keeping security deposits in non-interest-bearing accounts, when legally allowed.

56 If substantial letters of credit exist, this sentence may not suffice.

57 Property owners generally protest Real Estate Taxes every year, unless tax counsel advises it would be futile. If Seller has not yet filed protest documents for an upcoming deadline, Buyer may ask Seller to agree to do so.

58 These agreements move development potential from one parcel to another, in an arcane and often tricky administrative world that may be unique to New York City. A Buyer for development may want Seller to cooperate even before Closing to help Buyer achieve

13.2. Employees.

Not change the number of employees or compensation of any employee, except as any union contract requires;

13.3. Governmental Notices.

Promptly give Buyer a copy of any written notice from any Government affecting or relating to the Property that would bind Buyer after Closing;

13.4. Insurance.

Maintain commercially reasonable property insurance substantially consistent with past practice;⁵⁹

13.5. Leases and Service Contracts.

Not: (1) enter into or amend any Service Contract, Lease,⁶⁰ or other agreement that would bind Buyer unless terminable without penalty on no more than 30 days' notice; or (2) terminate any Lease (or evict any Tenant) without Buyer's consent, not to be unreasonably withheld;

13.6. Operation.

Operate and manage the Property substantially as in the past or, to the extent the Building is vacant, in a reasonable manner for a vacant or partially vacant building, but need not incur capital expenditures; and

13.7. Vendors.

Pay when due any contractors or material suppliers hired by or for Seller to improve the Property.⁶¹

14. ENVIRONMENTAL CLAIMS

Buyer and anyone related to Buyer waive any right it or they might have to initiate litigation, join Seller or its Related Parties (the "Seller Parties") in any litigation, or to seek contribution or Indemnity from any Seller Party and release all Seller Parties from any claims or liability, arising from or related to any: (1) environmental condition of the Property regardless of when it arose; (2) obligation to remediate any environmental condition; or (3) obligation to defend against any action by any party that arises out of the Property's environmental condition. [Notwithstanding the previous sentence, Buyer and its related parties do not release any claims or liabilities to the extent they arise from claims made by any Government against Buyer as a result of Seller's actions and omissions while it owned the Property, but in any event excluding claims arising from: (1) environmental conditions that migrated to the Property from other property or that Seller did not otherwise cause; and (2) matters disclosed as a result of excavation done by or for Buyer.]⁶² This paragraph shall survive Closing or any termination of this Contract.⁶³

a transfer of development rights. Such a Buyer will also often need other development-related cooperation before Closing. For example, New York Real Property Actions & Proceedings Law § 881 and the New York City Building Code establish mechanisms for property owners to require their neighbors to cooperate with development projects. A Buyer for development may want to start those arrangements even before Closing. That could require Seller cooperation.

59 For vacant Improvements, Seller may find it expensive to comply with this obligation and prefer a quick Closing. Seller should check with its insurance advisers in any case. Buyer may want more detail on existing insurance coverage, although it is what it is and it probably won't affect either party's actions or decisions regarding the Contract.

60 Seller may require flexibility to operate and lease before Closing. That's particularly true of deals with long due diligence schedules or distant closing dates. Seller will want to be able to continue to lease the Property, perhaps with leasing guidelines. To the extent Buyer insists that the Property stay vacant, Seller may ask Buyer to bear that loss. The author can provide sample language on these issues.

61 This covenant is not actually necessary if the Deed contains a Lien Law clause, but Contracts often include it anyway.

62 Bracketed language reflects an occasional compromise.

63 This paragraph reflects Seller's preferred outcome on the issue. Buyer may feel otherwise, especially if Seller is creditworthy and actually used the Property for industrial or potentially hazardous purposes (e.g., steel mill, gas station, dry cleaner).

15. ENVIRONMENTAL REPORTS

15.1. Phase 1; Approved Consultants.

Seller shall give Buyer and its agents, consultants, and representatives reasonable access to the Property to perform a Phase 1, but only if Buyer finishes on-site work for the Phase 1 within ___ days after the Contract Date. Any Phase 1 shall be conducted by an environmental consultant (an "Approved Consultant") that: (1) is reasonably satisfactory to Seller (or is AKRF, CBRE-IVI, EBI, or Langan); and (2) has all necessary licenses to conduct its business in New York.

15.2. Phase 2 Environmental Assessment.

Only to the extent Buyer's Phase 1 completed within ___ days after the Contract Date discloses a potential environmental condition and, based on specific concerns identified with reasonable detail in the Phase 1, recommends a Phase 2 environmental assessment report (a "Phase 2"), Buyer may, within 15 days after receiving the Phase 1, engage an Approved Consultant to perform a Phase 2 at the Property, limited to the concerns raised in the Phase 1. Buyer shall cause that Approved Consultant to comply with all Contract requirements on Testing and complete its Phase 2 within ___ days after being engaged.⁶⁴

15.3. Deliveries.

Buyer shall promptly give Seller a copy of: (1) the Phase 1; (2) any Phase 2; and (3) any other information that would otherwise constitute Environmental Information Buyer obtains or that its consultants produce after the Contract Date.⁶⁵

15.4. No Contingency.

Nothing in any Phase 1 or Phase 2 affects either party's obligations on the Closing Date.⁶⁶

16. TESTING

16.1. Invasive Testing.

Buyer may request, by giving Seller at least 10 days prior notice (a "Testing Notice"), that Buyer or its Approved Consultant perform borings, soil tests, material sampling, and other testing that requires Buyer to disturb the Property ("Invasive Testing"). All Invasive Testing requires Seller's consent, which consent Seller shall not unreasonably withhold. Notwithstanding the previous sentence, Seller consents to Invasive Testing reasonably necessary for a Phase 2 to the extent that this Contract otherwise allows a Phase 2, but Buyer must still give Seller a Testing Notice and otherwise comply with this Contract. Buyer shall repair any actual damage, intentional or unintentional, caused by Buyer or its contractors, including filling any holes in the basement as a result of Invasive Testing, all in a way that fully complies with Law and is reasonably satisfactory to Seller. Notwithstanding anything to the contrary in this Contract, if no Closing occurs and Buyer is entitled to receive back the Deposit, then the Deposit shall not be released to Buyer until Buyer has performed its obligations under the previous sentence. [If, in Testing, Buyer disturbs or causes to be released any asbestos containing material then Buyer shall immediately, at its sole cost and expense, take all remedial and corrective action necessary to respond to that release.]

64 The need for a Phase 2 often triggers delays in due diligence periods. The language in text attempts to limit those delays.

65 Seller might not want to know. If environmental tests disclose environmental problems, Seller cannot then give a "no knowledge" representation to later potential Buyers. Test results could trigger clean-up obligations. A Seller will often take that risk, on the basis that: (1) the next Buyer will probably find the same problem; and (2) knowledge is power.

66 Buyer may feel otherwise, and seek a right to walk if environmental problems exceed a certain level.

16.2. Noninvasive Testing.

Buyer may request, by giving Seller a Testing Notice, that Seller consent to Buyer's performance of noise and air quality studies and other testing that does not require Buyer to disturb the Property ("Noninvasive Testing"). Seller shall not unreasonably withhold consent to Noninvasive Testing.⁶⁷

16.3. Requirements for All Testing.

Any Invasive Testing or Noninvasive Testing (together, "Testing") must comply with Seller's reasonable requirements, including evidence of reasonable insurance coverage by Buyer and its vendors.⁶⁸ The Testing Notice shall specify the scope of Buyer's proposed Testing. No one except an Approved Consultant shall perform Testing. Seller may require that Testing occur only after business hours and may have its representative present during any Testing. The timing of Testing shall be subject to Seller's reasonable approval. Buyer's obligations on Testing shall survive any termination of this Contract.

16.4. No Additional Rights.

Nothing in Buyer's Testing rights or Inspection Rights: (1) implies this Contract is subject to due diligence; or (2) expands or creates any right of Buyer to terminate this Contract except as this Contract states.

17. INSPECTIONS

Buyer and its actual and prospective lenders and investors, advisers, agents, appraisers, contractors, and inspectors may from time to time inspect the Property before Closing,⁶⁹ including a final inspection within two business days before the Scheduled Closing Date (the "Inspection Rights"). Inspection Rights do not include Testing. Each inspection and any continuation on a later date shall require reasonable prior notice to Seller, be separately arranged through Seller, and comply with Seller's reasonable instructions. Buyer shall exercise Inspection Rights without unreasonably disrupting Seller's activities at the Property. Buyer shall not communicate with any Tenant before Closing.

⁶⁷ Buyer would prefer to include a blanket consent in the Contract.

⁶⁸ Seller will also want to be indemnified against claims arising from the Testing. Rather than require a separate indemnification agreement, this Contract covers it in the section on Indemnification.

⁶⁹ Some Sellers might prefer to limit the number of times Buyer may inspect. Some Buyers diligently identify issues with every inspection.

18. PROPERTY REPRESENTATIONS AND WARRANTIES⁷⁰

Seller makes these representations and warranties on the Property (“Property Representations”) only as of the Contract Date except as stated, in all cases subject to the Disclosure Schedule and Permitted Exceptions:⁷¹

18.1. Adverse Events.

Seller has received no written notice from any Government of any condemnation, proposed landmark or historical designation, retroactive assessment of real estate taxes, rezoning proceeding, road widening, or possible subjection of the Property to any form of Rent Regulation.

18.2. Building Equipment.

At Closing, all Building Equipment will be free and clear of liens.

18.3. Due Diligence Information.

To Seller’s actual knowledge, all information on the Disclosure Schedule is complete and accurate in all material respects. Seller has given Buyer complete and accurate copies of all documents on the Disclosure Schedule.⁷²

18.4. Employees.⁷³

The Disclosure Schedule correctly identifies all: (1) building employees; (2) their union membership status; (3) union contracts; and (4) building employee benefit plans that would bind Buyer after Closing.

70 This model contains a reasonable and relatively standard selection of representations and warranties, typically limited to knowledge. Buyer could easily demand more, but the market standard contemplates due diligence rather than reliance on Seller for most Property-related issues. On the other hand, Buyer often fears Seller is trying to hide the ball in every possible way. These Property Representations say nothing about code violations. New York City has a panoply of agencies that regularly inspect buildings and issue violations. It seems they can, if they want, always find at least one violation—if for nothing else, then for failure to post some newly required sign or warning. Agencies file their violation notices in various registries, separate from the land records, many available online. Housing Preservation and Development (<https://goo.gl/hZroQp>) and the Department of Buildings (<https://goo.gl/Q5orY>) are starting points for a search. Once filed, a violation can be hard to remove from City records even if it has been physically corrected. A cottage industry exists to deal with these violations. The parties will often agree: (1) Seller must pay open fines and penalties for violations entered before the Contract Date; (2) Buyer bears the risk of new violations after the Contract Date, because otherwise Buyer would call the City to send hordes of inspectors to the Property; and (3) after Closing it’s up to Buyer to physically correct any conditions that violate City codes. Item 3 makes particular sense for a sale of a development site, less sense for a fully priced sale of stabilized income property. Buyer will typically order a full violations search before signing a Contract or during due diligence. If anything substantial shows up, it may create a business issue. Buyer may wish to broaden the definition of Title Problems to include violations entered (or discovered) after the Contract Date. Seller will typically refuse. Buyer can also easily instigate tenant complaints. Violations are part of the real estate culture and a fact of life in the big city. They travel with an “as is” conveyance. Buyer might insist that Seller make some limited efforts to remedy violations, similar to the Contract language on Tenant Liens or Title Problems. Buyer might also ask Seller to represent and warrant it has received no notice from the City of any violations that were not filed in City records. Sellers worry that they may have missed something, thus exposing themselves to a claim, and revert to first principles of caveat emptor. Regardless of any violations filed against the Property, Buyer will need to determine, without Seller’s help, whether the Property complies with Law.

71 In New York, caveat emptor is ordinarily the rule. Sellers have no obligation to disclose any information on the property except when actively concealing a defect, see, e.g., *17 E. 80th Realty Corp. v. 68th Associates*, 569 N.Y.S.2d 647 (1991) (seller installed a dummy ventilation system); makes an affirmative misrepresentation, see *Tahini Invs., Ltd. v. Bobrowsky*, 99 A.D.2d 489 (1984) (industrial waste site purportedly used only as horse farm); makes a partial disclosure, see *Junius Constr. Corp. v. Cohen*, 257 N.Y. 393 (1931) (seller concealed existence of unopened street that, if opened, would impair value); or has a fiduciary duty to disclose, see *Moser v. Spizzirro*, 31 A.D.2d 537 (1968). To the extent the Contract requires Property Representations to remain true at Closing, they effectively become covenants. A careful Seller will insist on expressing covenants as covenants, and not by assuming a back-door obligation to remake Property Representations.

72 This paragraph in particular will worry Sellers because of its potentially broad scope.

73 If the labor force at the Property is unionized, Buyer should not necessarily agree to assume union contracts. Buyer should consider the union contracts (and any ability to take free of them) in due diligence. That process requires labor counsel. Buyer should not rely

18.5. Insurance.

The Disclosure Schedule correctly states the coverage amounts under Seller's existing property insurance policies (the "Property Insurance"). The Property Insurance is in full force and effect. Seller has paid all Property Insurance premiums due to date. Seller has received no written notice of any intention to limit, cancel, or not renew (or that Seller is not in compliance with) any Property Insurance.⁷⁴

18.6. Leases.

The Disclosure Schedule correctly identifies all: (1) leases, lease amendments, and other occupancy agreements, and their amendments, that would bind Buyer after Closing (the "Leases"); (2) security deposits and letters of credit actually in possession of Seller or its managing agent; and (3) prepayments and arrearages, in each case by more than 30 days, of rent under Leases.⁷⁵ Each Lease embodies the entire agreement between Seller and the respective Tenant.

18.7. Liens.

As of Closing, every contractor, engineer, laborer, material supplier, or Government that has performed work on or furnished labor or materials for Seller or its agent, contractor, employee, or subcontractor to improve or benefit the Property has been paid in full.⁷⁶ Nothing in this Contract obligates Seller to remove any Tenant Lien.

18.8 Litigation and Claims.

No pending litigation, proceeding, or suit to which Seller is a party, or of which Seller has knowledge, would, if adversely determined, adversely affect [the Property or] Seller's ability to perform under this Contract.⁷⁷

on its intuition. New York City has extremely strong building service unions and some unusual union-related laws, which can create expensive surprises.

For example, the Displaced Building Service Workers Protection Act (New York City Admin. Code § 22-505) requires Buyer to: (1) hire Seller's building employees for a 90-day transition period; (2) give those retained employees a written review after the retention period; and (3) offer continued employment to any employees who achieved satisfactory reviews. If successor owners wrongfully terminate employees, victims have a private cause of action. Potential remedies include back pay and benefits, reinstatement, reimbursement of attorneys' fees, and, though not part of the act, potential negative press and political backlash. The statute does not apply to unionized buildings. A similar effort by the New York City Council to help out labor unions was recently invalidated in federal court. See *Association of Car Wash Owners v. City of New York*, No. 15 Civ. 8157 (S.D.N.Y. 2017) (invalidating "Car Wash Accountability Law," which required nonunion car washes to post a higher bond than union car washes; federal labor law prohibits City from favoring labor unions).

- 74 Rather than state the coverage amount, either party may prefer that Seller deliver copies of its insurance policies for inspection. That's potentially burdensome. Seller will need to maintain its insurance through Closing. Failure could create significant exposure if a casualty occurs. Maintenance of insurance could become expensive and difficult for vacant Improvements.
- 75 Buyer might also ask Seller to represent and warrant current monthly rent due under Leases, especially if not ascertainable from the face of the Leases. This assurance should come instead in Tenant estoppel certificates.
- 76 Under New York Lien Law § 13, mechanic's liens are generally valid and have priority as of the date materials are delivered to or work performed on the Property. Vendors have eight months from completion of their contract to record a lien on commercial property. That leaves open the theoretical possibility that Buyer will inherit unforeseen liens. Buyers should protect themselves against liens by including in the Deed a Lien Law § 13(5) statutory covenant by which Seller agrees to hold consideration in trust for the payment of costs of improvements. The standard New York title insurance endorsement also offers protection.
- 77 The bracketed language is not standard, but a Buyer may request it.

18.9. No Other Agreements.

This Contract represents Seller's sole commitment to sell or otherwise dispose of the Property.⁷⁸ [Except in any Lease or recorded document,] Seller has not granted any option, right of first refusal, right of first offer, or other right to purchase all or part of the Property.⁷⁹

18.10 Notices.

Seller has not sent or received written notice of any of these under any Lease: (1) uncured monetary or other material default (but communications about ordinary maintenance and Lease administration, even if any disagreement exists, do not constitute notices of default); (2) claim, counterclaim, defense, offset, or set-off; or (3) action, investigation, proceeding, or suit.⁸⁰ The continued effectiveness, status, or term of any Lease or Tenant is not, however, a condition to Closing, except as this Contract expressly states.

18.11. Personal Property.

Seller has good title, free of liens, to any personal property included in this transaction or that this Contract allows Seller to leave in place.⁸¹

18.12. Refunds.

To the extent any Lease requires or required, Seller remitted to each Tenant its share of any real estate tax refund Seller received in the seven years before the Contract Date.⁸²

18.13 Rent Regulation.

All rents disclosed on the Disclosure Schedule for any dwelling unit subject to the New York City Emergency Rent and Rehabilitation Law or the New York City Rent Stabilization Law (either, "Rent Regulation") do not exceed maximum collectible rents. No Tenant of a dwelling unit subject to Rent Regulation is entitled to a senior citizen exemption. Seller is not a party to any proceeding in which a Tenant of a dwelling unit subject to Rent Regulation has alleged any rent overcharge or diminution of services. Seller has [substantially] complied with all outstanding Rent Regulation orders of any Government affecting the Property. If any dwelling units in the Property are subject to rent stabilization, then Seller is a member in good standing with the Rent Stabilization Association.⁸³

78 New York is a "race-notice" state. A later party will have paramount title if it: (1) gives valuable consideration; (2) has no notice of earlier conflicting claims; and (3) records before any conflicting claimant. New York Real Property Law § 291. A title search will disclose prior recorded interests. To bolster its priority against prior competing claimants, prudent Buyers might ask for a representation that Seller has not conveyed an unrecorded interest in the Property to a third party, for whatever that might be worth.

79 Seller should consider any existing agreements in place, whether under Leases or within Seller's partnership or limited liability company agreement.

80 If Seller agrees to remake this representation as of Closing, then Seller is at the mercy of every Tenant that might decide to make a claim or file a complaint, perhaps after getting wind of the pending sale. That exposure seems particularly troublesome for residential tenants, less so for commercial Tenants whose status is a material inducement to Buyer.

81 Buyer may ask Seller to say it owns fee simple title to the Land and Improvements, i.e., the real property being sold. Buyer should not be surprised if Seller rejects that position. Buyer is responsible for its own diligence and should do a title search and buy title insurance. Seller's title representation could make Seller a title insurer of last resort. Some practitioners believe Seller should represent it owns the Land and Improvements, as a surviving representation. That would be off market, but a representation on ownership of personal property is quite ordinary, in part because of the unavailability of title insurance on personal property.

82 Sellers have been known to forget to give Tenants their share of tax refunds going back many years. This can add up to a large number. Buyers need to dig into this question in due diligence. If significant exposure exists, it can become a business issue. Because the general contractual statute of limitations is six years, Tenants probably can't look back further than that. A carefully written Tenant estoppel certificate, without a knowledge qualifier on this issue, can help. Careful Buyers should demand such an estoppel certificate. The issue may justify a (larger) Holdback.

83 This language applies only to apartment buildings subject to rent control or rent stabilization (two different price control regimes) in municipalities such as New York City, which has purportedly had a housing emergency since World War II. Partly as a result of Rent Regulation, New York residential landlord-tenant relations in affected buildings largely consist of a permanent state of war. A huge

18.14. RPIE.

Exhibit ___ includes accurate and complete copies of all New York City Real Property Income and Expense Statements (each, an “RPIE”) Seller filed in the two years before the Contract Date.⁸⁴ Seller shall timely and accurately file any RPIE required to be filed before Closing. If Seller or a prior owner failed to file any RPIE when required,⁸⁵ then Seller shall: (1) pay all resulting additional taxes, fines, penalties, and interest; and (2) cooperate with Buyer, including by making its books, records, and accounts reasonably available so Buyer can file an RPIE for any year for which Seller did not. This paragraph shall survive Closing for 30 months,⁸⁶ notwithstanding any other survival period in this Contract.

18.15. Service Contracts.

The Disclosure Schedule correctly identifies all material unrecorded advertising, broadband, brokerage, computer, employment, franchise, insurance, leasing, license, maintenance, management, marketing, service, supply, telecommunication, utility, and other agreements affecting the Property that would bind Buyer after Closing (collectively, “Service Contracts”).⁸⁷

18.16. Tax Reduction Proceedings.

No tax reduction proceedings are open.

19. BREACH OF PROPERTY REPRESENTATIONS⁸⁸

The Property Representations shall survive Closing but only until the Survival Date. Buyer must start any action alleging any breach of a Property Representation by the Survival Date, **TIME BEING OF THE ESSENCE**. Any action

bureaucracy devotes itself to protecting residential tenants, sometimes even when they have not yet complained. As a result of all this, any transaction involving a rent-regulated apartment building requires special due diligence. That includes confirming: (1) Seller has properly registered its rents with the State Division of Housing and Community Renewal; (2) Seller has not improperly increased any rents; (3) if Seller has claimed rent increases based on capital improvements or other escape hatches, those claims were properly calculated and approved as law requires; (4) Seller has offered renewal leases as required; and (5) no open rent protests exist. Buyer must notify the City Department of Housing Preservation and Development within 30 days after a transfer. Many assurances on Rent Regulation require complex factual calculations going back over many years and offering ample room for surprises and claims. Buyer will also want to confirm any nonstandard services Seller offers to tenants, even if paid for by separate agreement. This paragraph is by no means comprehensive. It offers only a tiny preview of the issues, diligence, and special language for buildings subject to Rent Regulation. Rent Regulation is beyond the scope of this model Contract, a massive body of law of its own. Buyer needs to engage special counsel who understand Rent Regulation rules. Seller should do the same. The parties may learn that some assurances suggested in text are inappropriate, as Buyer can review public records to perform its own due diligence.

84 New York City law requires the owner of some income-producing real property to file, by June 1, a report of income and expenses for the previous calendar year. The City uses this information to determine the property’s tax assessment. New York City Admin. Code § 11-208.1. For rental property with four or more units, the City seeks to capture in real estate taxes about a third of the owner’s gross revenue. This makes new development of such buildings uneconomic or extremely difficult without substantial tax abatements. The City’s seven decades of Rent Regulation also do not help, even though Rent Regulation no longer applies to new construction. Today the City is shocked—shocked!—at its lack of affordable rental housing.

85 Seller may want to limit this obligation to the period of Seller’s ownership.

86 The City has two years to assess these fines and penalties. New York City Admin. Code § 11-208.1.

87 Consider proper treatment of any third-party management agreement. Buyer will typically want to terminate it but, again, must consider the Displaced Building Service Workers Protection Act. The parties should provide for an orderly transition. Some Service Contracts may provide for automatic renewal. New York General Obligations Law § 5-903 invalidates some service contracts with automatic renewals.

88 Some Contracts also include language to address changed representations—representations that were true but become false before closing. That concept is largely misplaced in purchase and sale transactions, which are fundamentally “as is” deals. If the representations change because of Seller’s actions or omissions that violate the Contract, this Contract already allocates that risk to Seller. If the representations change without fault (a Loss occurs, a Tenant defaults, etc.) that should not, in and of itself, trigger Buyer rights or Seller obligations. Representations are not covenants. Changes in facts are not equivalent to Title Problems. Stuff happens. Seller must deliver clear title but not a pristine building. The circumstances of that building may change between the time of Contract and the time of Closing. Buyer owns that risk except when Seller violates the Contract.

started later is irrevocably time-barred. Seller has no obligation to cure any breach of any Property Representation. Notwithstanding anything else in this Contract or any Closing Document, Seller's aggregate liability, based on all theories of liability whatsoever, for any breaches of the Property Representations (the "Representation Liability") [except any intentionally fraudulent misrepresentations] shall be limited to, and shall not exceed, the sum of \$_____ (the "Representation Liability Cap") in aggregate.⁸⁹ If the Representation Liability based on breaches known to Buyer before Closing would exceed the Representation Liability Cap, then either party may cancel this Contract in its sole and absolute discretion. Buyer may defeat any cancellation by Seller, by closing subject to (and accepting) all Property Representation breaches then known with no adjustment of the Purchase Price. [If, before or after Closing, Buyer obtains actual knowledge⁹⁰ of any Property Representation breach, Buyer shall be deemed to have irrevocably waived any right it may have to make a claim against Seller for that breach after Closing.]⁹¹

20. TRANSACTIONAL REPRESENTATIONS

Each party represents and warrants that as of the Contract Date and Closing Date, each of these statements (the "Transactional Representations") is, and will be, true.⁹² This paragraph and the Transactional Representations shall survive Closing.⁹³

20.1. Authorization.

It has duly authorized this transaction and duly executed and delivered this Agreement.

20.2. Bankruptcy.

It has not filed any petition seeking or acquiescing in any arrangement, composition, dissolution, liquidation, readjustment, reorganization, or similar relief under any Law on bankruptcy or insolvency, nor has any such petition been filed against it. No general assignment of its property has been made for benefit of creditors. No liquidator, master, receiver, or trustee has been appointed for it or, in the case of Seller only, the Property.

20.3. Brokers.

It has dealt with no broker, finder, or like agent for this transaction except Broker (the "Brokerage Representation").

89 Liability is sometimes capped as high as 10 percent of the Purchase Price, often backed by a Holdback in the same amount.

90 In New York, "sandbagging" (i.e., knowing about a problem but closing anyway and suing later) is permitted to a degree. If, before Closing, Buyer learns that Seller is in breach of its representations and warranties because Seller disclosed that breach to Buyer, then, after Closing, Buyer is not entitled to indemnification for that breach unless the Contract expressly preserves Buyer's right to make a claim. Buyers who pursue breach claims under those facts are not required to prove reliance. Careful Sellers will probably reject that exposure. If Buyer learns of a breach without Seller's disclosure, either through its own diligence or from a third party, then its claim for breach may survive Closing regardless of what the Contract says. *Galli v. Metz*, 973 F.2d 145 (1992). The author disfavors sandbagging. The time to address legitimate concerns about conditions of the property is at or before Closing or, for strategic reasons, not at all.

91 The bracketed language has a ring of fairness to it, but a Buyer will often not accept it. One often adds a threshold or deductible for each claim or group of claims or all claims; an overall cap on liability for Property Representations (but not Transactional Representations); and procedures for notice and opportunity to cure. In the author's experience, these negotiations (and the negotiations and limitations suggested in text) cost more than any value they create. Nevertheless they are common, especially in transactions over \$10 million. Buyers often insist on unlimited and unconditional liability for any intentionally fraudulent misrepresentation. On the other hand, given the difficulty in proving intent, even prudent Buyers may live without a carveout for intentional fraud. The outcome of these issues can also depend on market conditions.

92 If the Transactional Representations aren't true, then what? For example, suppose the signer had no authority to sign. Do the Transactional Representations fix that? Or do they fall, along with the rest of the Agreement? In some sense, Transactional Representations may have theatrical or checklist value only.

93 The Transactional Representations should not expire at the Survival Date. Similarly, any floors, caps, baskets, or similar measures to dilute liability should apply only to Property Representations.

20.4. Enforceability.

This Agreement, and all documents this Agreement requires it to deliver, are enforceable against it in accordance with their terms, subject to general principles of equity and to bankruptcy, insolvency, moratorium, reorganization, and other similar laws now or later limiting rights of creditors or debtors generally.

20.5. ERISA.

It is not: (1) a “party in interest” under Section 3(14) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) for any “employee benefit plan” or other “plan” (as defined in ERISA § 3(3)); or (2) a “disqualified person” (as defined in Internal Revenue Code § 4975(e)(2)) for any “employee benefit plan” or other “plan” that has any interest in that “party in interest” (Buyer or Seller, as the case may be).

20.6. No Consent.

Except as this Contract states, no consent or approval by any third party or Government is needed for it to sign or close under this Contract.

20.7. Noncontravention.

Neither its execution nor delivery of this Contract nor its consummation of or compliance with this Contract will conflict with or breach any term of, or constitute a default under, any agreement, by-law, charter, decree, Law, order, or other instrument of any kind that binds it or any of its constituent members.

20.8. Nonforeign.

Seller is not a “foreign person” under the Foreign Investment in Real Property Tax Act. This representation is made only by Seller.

20.9. Permitted Counterparty.

It is a person with whom a United States citizen, entity organized under any United States state or federal Law, or person having its principal place of business within the United States may legally transact business.⁹⁴

20.10. Solvency.

Consummation of the transactions this Agreement contemplates will not render it insolvent. As of the Contract Date and the Closing Date, it has sufficient capital or net worth to meet its current obligations.

20.11. Status.

It is: (1) duly formed, validly existing, and in good standing under the Law of an American state; (2) if legally required, qualified to do business in New York; and (3) not a charitable, religious, or not-for-profit organization.⁹⁵

⁹⁴ Seller should not rely on this assurance and should perform its own due diligence. Requirements in this area change over time, generally becoming tighter, and depend on federal law. The sample language expresses a broad-brush concept. Sometimes parties list specific statutes that define prohibited counterparties. This creates an appearance of great seriousness and comprehensiveness and adds many more words and legal citations. But it inevitably misses something. Here is sample language along those lines:

It is not a person with whom the other party is restricted from doing business under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq.; the Trading With the Enemy Act, 50 U.S.C. App. § 5; the USA Patriot Act of 2001; any executive order promulgated under any of those laws; any implementing regulations issued by the U.S. Department of Treasury Office of Foreign Assets Control (including regulations regarding the List of Specially Designated Nationals and Blocked Persons); or any other applicable law of the United States.

⁹⁵ New York law requires charitable and most religious organizations to obtain Attorney General consent before engaging in some business transactions. Buying and selling real estate sometimes triggers the consent requirement, though the statutory test is not always applied in an intuitive manner. See New York Not-for-Profit Corporation Law § 510.

20.12. Tax Matters.

The Internal Revenue Service has not notified it that it is subject to backup withholding. Its taxpayer identification number as stated in Exhibit B is its correct taxpayer identification number.

21. INDEMNITIES

Each party shall Indemnify the other as follows:

21.1. Indemnify.

When a party (an "Indemnitor") agrees to "Indemnify" another party (an "Indemnitee") for any matter, that means Indemnitor shall indemnify, defend, and hold harmless Indemnitee (and its direct and indirect affiliates, agents, directors, employees, members, officers, partners, principals, representatives, shareholders, and others related to or acting for it, its "Related Parties") from and against any and all causes of action, claims, costs, damages, expenses, liabilities, losses, and obligations, including reasonable attorneys' costs, disbursements, and fees, arising from that matter and in enforcing this indemnity, whether or not Indemnitor's obligation to Indemnify results from a third party claim or Indemnitee's direct claim against Indemnitor.⁹⁶ Indemnitor shall, however, have no liability for consequential, punitive, indirect, or special damages or matters caused by Indemnitee's negligent acts, omissions, or willful misconduct.

21.2. Buyer.

Buyer shall Indemnify Seller against all liability and claims arising from: (1) events and occurrences that first occurred or took place on or at the Property after the Cut-Off Time; (2) injury, death, or property damage arising from exercise of Buyer's Inspection Rights or any Testing; or (3) Buyer's breach of its Brokerage Representation.⁹⁷

21.3. Seller.

Seller shall Indemnify Buyer against all liability and claims arising from: (1) any event or occurrence that first occurred or took place on or at the Property before the Cut-Off Time, unless caused by Buyer's Testing or exercise of Inspection Rights or any environmental matters; (2) Seller's unpaid sales taxes because of any failure to comply with any bulk sale statute; or (3) Seller's breach of its Brokerage Representation.⁹⁸

22. "AS IS, WHERE IS"

Except as this Contract otherwise states:

22.1. Seller.

Seller: (1) shall sell the Property strictly "as is, where is" in its "as is" condition on the Closing Date; (2) makes no representation or warranty, express or implied, on the Property, including its compliance with Law or agreements, restrictions and Permits, condition, development potential, drainage, electromagnetic radiation, encroachments, engineering, environmental characteristics or condition, expenses, flooding, hazardous substances, history, income, landmark status, lead paint, management, operations, physical characteristics, patent or latent defects, plans and specifications, plumbing, radon, revenues, roof, size, subsurface conditions, suitability for development or otherwise, sewer service, systems, Tenants, title, uses (past or present), value, variances, violations (whether or not officially entered of record) and zoning; and (3) shall not be bound in any manner by any oral or written budget estimates,

⁹⁶ In New York as in other jurisdictions, absent clear language to the contrary, contractual indemnity language does not obligate either party to reimburse the other's expenses for direct claims absent a third-party claim. *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 549 N.Y.S.2d 365 (N.Y. 1989).

⁹⁷ Typically, Contracts have separate indemnities on brokerage.

⁹⁸ These Indemnifications are not limited to the Survival Date. The Survival Date limits only claims for breach of Property Representations, which Seller's Indemnities do not cover.

income reports, operating expense reports, projections, or other information on the Property made or furnished (or claimed to have been made or furnished) by Seller or any other person. If any Lease terminates or expires, or any Tenant defaults or vacates, before the Closing Date, that shall not limit Buyer's obligations on the Closing Date or give Buyer any rights or remedies, except to the extent, if any, that this Contract expressly states.

22.2. Buyer.

Buyer: (1) has examined, inspected, and investigated to its satisfaction the Property and all Laws affecting it and releases, waives, and agrees not to assert any claim against Seller under any theory of warranty, express or implied, about Seller, the Property, or this Contract; and (2) is not relying on Seller in any way.⁹⁹

23. CASUALTY AND CONDEMNATION

23.1. Loss.

If either party becomes aware of any casualty or actual or anticipated condemnation or taking affecting the Property (a "Loss"),¹⁰⁰ whether or not a Material Loss, then it shall promptly notify the other.

23.2. Loss Proceeds.

"Loss Proceeds" means: (1) net proceeds of Seller's property insurance, when and as received, except proceeds of business interruption insurance; and (2) any award paid or payable (whether or not a separate award) to Seller after the Contract Date because of or as compensation for any condemnation, including: (a) any award for the Building; (b) the full amount, including interest, paid or payable by the condemning authority for any estate subject to condemnation; and (c) any other sums payable because of that condemnation.

23.3. Material Loss.

A "Material Loss" means any Loss that would: (1) reduce the floor area allowed on the Land by more than _____ square feet; (2) increase by more than \$_____ the cost to redevelop the Property for [residential or commercial purposes]; (3) materially impair access to the Land; (4) diminish the value of the Land by more than \$____; or (5) cost more than \$_____ to repair.¹⁰¹ If the parties cannot agree on whether a material loss has occurred, then they shall resolve that dispute through binding arbitration, using a mutually acceptable arbitrator instructed to apply New York law without regard to conflict of laws principles.¹⁰² If a Material Loss occurs¹⁰³ then, no later than 10 days after Buyer first becomes aware of it, Buyer may elect, on notice to Seller, to terminate this Contract and receive back the Deposit from Escrowee. If Buyer fails to give that notice within that time, then Buyer shall proceed to Closing as if the Loss were not a Material Loss.

99 New York courts generally enforce broad waivers like this one, at least in commercial transactions. See, e.g., *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317 (1959) (breach of contract action dismissed where parties disclaimed reliance on representations) and *Mahn Real Estate Corp. v. Shapolsky*, 178 A.D.2d 383 (1st Dep't 1991) (action to recover contract deposit dismissed where experienced investors contractually disclaimed reliance on some representations).

100 New York General Obligations Law § 5-1311 (the uniform vendor and purchaser risk act, as adopted in New York) says Seller bears all risk of "material" (undefined) Loss only until Buyer takes possession or closes. If a material loss occurs Buyer can terminate or enforce the Contract with a Purchase Price abatement. *Lucenti v. Cayuga*, 48 N.Y.2d 530 (1979). Most New York Contracts do nevertheless address the topic at length. That generally works where a Buyer/developer plans to demolish the existing structure, although Buyer may still want wiggle room on a condemnation. New York law does not address insurance deductibles or assignment of insurance proceeds if Buyer closes after a Loss. Buyer might want to define a Loss to include any change in zoning or other land use law that limits the Property's development potential. This is not standard, but represents a reasonable ask if Buyer plans to redevelop.

101 The definition of Material Loss will vary depending on the circumstances of the transaction, such as whether Buyer plans to demolish.

102 Some Contracts establish a process to evaluate a Loss, with a third-party engineer to resolve disputes. Given the low frequency of Losses in the Contract period, these measures seem excessive. Of course, in the rare case where they become relevant, the parties may very much appreciate them.

103 If the Material Loss occurs after Buyer exercises an extension right, or fails to timely close, then Seller might reasonably insist that Buyer bear all risk of Loss.

23.4. Immaterial Loss.

If a Loss that is not a Material Loss occurs: (1) that shall not excuse Buyer's obligations on the Closing Date; (2) Seller shall assign to Buyer, using documentation reasonably satisfactory to Buyer, Seller's right, title, and interest in Loss Proceeds; (3) the parties shall proceed to Closing without credit against or abatement of the Purchase Price; (4) Buyer may at its own expense participate in any discussions, claims adjustments, or settlements with any condemning authority or insurance carriers on that Loss; (5) Seller shall not restore or repair any damage except any work that is: (a) emergency or legally required; (b) scaffolding and other protective devices and measures required by Seller's insurance carriers or for Seller to safeguard the Property; or (c) approved by Buyer in writing; and (6) at Closing Buyer shall reimburse any reasonable amount Seller expends for any work this sentence permits.

24. ASSIGNMENT¹⁰⁴

Except as this paragraph allows, Buyer may not assign this Contract. Any transfer of a 50 percent or more direct or indirect equity interest in Buyer or transfer of any interest in Buyer to a person that in so doing acquires the power to direct or cause direction of Buyer's management and policies shall constitute an assignment of this Contract. Buyer may, by written notice to Seller's counsel at least 10 days before the Scheduled Closing Date, designate an entity, controlled by Buyer or Buyer's principals or members of their immediate families, to take title and enter into the Closing Documents, but only if (1) that entity assumes and agrees to perform all obligations of Buyer under this Contract and the Closing Documents through documentation reasonably satisfactory to Seller's counsel; (2) the original Buyer acknowledges that its obligations remain fully effective; and (3) that designation does not delay Closing or increase any Seller's transaction costs under this Contract. On request, Buyer shall give Seller reasonable information on its designee, including: (1) financial information; (2) identities of principals and investors; (3) relationship to Buyer; and (4) any other information Seller reasonably requests to confirm the designee's ability to perform.

25. TAX-FREE EXCHANGE

Either party (an "Exchangor") may, by giving the other (the "Accommodator") written notice at least 10 days before the Scheduled Closing Date, require Accommodator to cooperate with Exchangor as reasonably necessary so the Closing will constitute a tax-free exchange for Exchangor under Internal Revenue Code Section 1031 (an "Exchange"), as follows:¹⁰⁵

25.1. Conditions.

Accommodator shall accommodate the Exchange only if it meets these conditions (the "Exchange Conditions"): (1) Exchangor pays for all arrangements; (2) the Exchange does not extend the Closing Date; (3) Accommodator incurs no incremental expense, liability, or obligation and suffers no adverse consequence; (4) Accommodator need not take title to any real property except the Property, and if Buyer so directs, Seller shall deliver the deed to the Property directly to Buyer's designee; (5) all arrangements and documentation affecting Accommodator do not interfere with Closing and are approved by Accommodator's counsel, acting reasonably; and (6) Exchangor reimburses Accommodator for all costs and expenses, including reasonable attorneys' fees and disbursements, Accommodator

¹⁰⁴ Purchase and sale contracts typically are not assignable, though there is no reason for the restriction except potential delay.

Emotionally, Seller does not want to facilitate a profitable flip, because it means Seller sold too cheap, which is embarrassing and painful. State Transfer Tax applies to the profit on a flip. City Transfer Tax does not. Smart Buyers and Sellers have not yet figured out how to structure every Property sale as a flip of an existing Contract.

¹⁰⁵ In addition to the usual reasons to structure any purchase and sale as an Exchange, if Seller's replacement property is located outside New York, then the exchange may entirely avoid New York City's general corporation tax (or a similar tax on unincorporated entities) on Seller's gain, even if Seller recognizes gain on the replacement property fairly soon after Closing. It is yet another example of the crucial role that tax issues play in any New York real estate transaction. New York City's tax collectors may have their eye on this "loophole" or "tax planning opportunity."

incurs in reviewing, negotiating, approving, and otherwise accommodating the Exchange.¹⁰⁶ Exchangor shall Indemnify Accommodator against any tax and other liability caused by or arising out of the Exchange.

25.2. Assignment to Qualified Intermediary; Other Cooperation.

For any Exchange that meets the Exchange Conditions, Exchangor may assign its rights, but not its obligations, under this Contract to a Qualified Intermediary and Accommodator shall otherwise reasonably cooperate with Exchangor to implement the Exchange. If for any reason whatsoever, Exchangor does not consummate the Exchange, Accommodator shall have no liability to Exchangor.¹⁰⁷ The remainder of this Contract shall continue in full force and effect. Notwithstanding any assignment of this Contract to a Qualified Intermediary, the original Buyer and Seller shall have the rights to give all notices and enforce this Contract as against one another.

25.3. Qualified Intermediary.

If either party elects to participate in an Exchange, the "Qualified Intermediary" shall be _____.¹⁰⁸

25.4. Additional Documentation.

The parties shall enter into any reasonable additional documentation that either party reasonably requests to evidence, facilitate, and implement the Exchange, but only if it meets the Exchange Conditions.

26. LIMITATION OF LIABILITY

Notwithstanding anything else in this Contract:

26.1. Seller's Liability.

Except for any liability arising after Closing: (1) Seller's liability under this Contract shall under no circumstance extend beyond its interest in the Property; and (2) no judgment or decree arising from Seller's breach of this Contract may be enforced against any assets beyond its interest in the Property. Seller's interest in the Property includes: (1) Loss Proceeds; and (2) if Seller sells the Property to a third party in violation of this Contract, then Seller's sale proceeds.

26.2. Buyer's Liability.

If Buyer defaults in its obligation to close, then as its sole remedy, Seller shall keep the Deposit as liquidated damages, free of any claim by Buyer. Both parties recognize and agree that Seller's actual damages for Buyer's failure to close would be difficult or impossible to measure. Buyer's liability under this Contract, absent a Closing, shall not exceed the Deposit.¹⁰⁹

26.3. No Recourse.

No Related Party shall have any liability under this Contract under any theory whatsoever.

¹⁰⁶ Exchangor may object to reimbursing attorneys' fees, because: (1) they should be nominal; and (2) Exchanges are a common, typical, and expected part of purchase and sale transactions. Conversely, Accommodator may consider it a magnanimous act (a gift bestowed on a wretched Exchangor) to accommodate an Exchange, and might require Exchangor to advance Accommodator's costs and expenses before Accommodator incurs them.

¹⁰⁷ If the Exchange or this Contract fails to close, Exchangor will need to pay substantial income taxes that otherwise could have been deferred or perhaps even avoided altogether. That exposure may lead Exchangor to reject the exculpation proposed here. As a compromise, the Contract may allow Exchangor to recover damages up to a cap if the other party fails to perform in some fundamental manner (e.g., Seller fails to show up at Closing with a Deed).

¹⁰⁸ If both parties need to conclude an Exchange, they should try to agree on one Qualified Intermediary. This simplifies the Closing and prevents mistakes.

¹⁰⁹ Though this limitation is typical, it might not make sense where Seller's obligations are disproportionately burdensome, e.g., if Seller must make improvements or amend a lease in a way that Seller would find unacceptable if Buyer walked away. Any such discussion will represent a deal-specific business issue.

27. SELLER DEFAULT

A “Seller Default” exists if: (1) Seller fails to convey the Property at Closing when all conditions to Seller’s obligations have been met or would reasonably have been met in the ordinary course but for Seller’s failure to perform; (2) Seller fails to perform any other material obligation under this Contract and does not cure that failure within [30]¹¹⁰ days after written notice from Buyer, or any other cure period as this Contract states; or (3) any Property Representation was materially false when made, and that falsity: (a) would result in damage to Buyer greater than the Representation Liability Cap, taking into account all inaccuracies in any Property Representation, Seller failed to cure those inaccuracies within 60 days after notice from Buyer, and Buyer does not proceed to Closing, or (b) was intentionally fraudulent. If a Seller Default occurs, then Buyer may, as Buyer’s sole and exclusive remedy, elect any one of these remedies:¹¹¹

27.1. Termination.

Terminate this Contract by giving notice to Seller, in which case Escrowee shall refund the Deposit to Buyer and, after that refund, no party shall have any rights or obligations under this Contract except any expressly stated to survive termination, and the refund of the Deposit shall be Buyer’s sole remedy;¹¹²

27.2. Close and Claim.

Close in accordance with this Contract[, reserving Buyer’s rights and claims against Seller]; or

27.3. Specific Performance.

Subject to the requirements of this Contract, bring an action against Seller to seek specific performance of Seller’s obligations in accordance with this Contract (“Specific Performance”).

28. DISPUTES

If a dispute arises from or relating to this Contract or the parties’ relationship, then:

28.1. Commercial Division.

If that dispute is heard in the Commercial Division, New York State Supreme Court, then the parties consent and agree to application of the Court’s accelerated procedures, Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division, Section 202.70(g), Rule 9).¹¹³

110 This is a very long cure period and is designed to protect Seller from bogus claims of default.

111 If Buyer will buy the Property as replacement property for a Section 1031 tax-deferred exchange, Buyer may want to beef up its remedies against Seller, including, e.g., liquidated damages, a tax indemnity, and injunctive relief, with an acknowledgment of the need for that. Sellers will generally laugh at any of these ideas. Perhaps the parties should sign (a more limited contract dealing only with post-Closing obligations) and close simultaneously to avoid the issue. Or the parties might structure the transaction as a brief option in favor of Buyer, allowing Buyer to mitigate risk by tying up multiple properties.

112 In addition to the Deposit, some Contracts allow Buyer to recover its out-of-pocket expenses, up to a low cap, upon a Seller Default.

113 If monetary thresholds are met and the parties agree, the parties may take advantage of New York’s so-called rocket docket. Meeting the monetary thresholds should not be an issue in most commercial real estate transactions. Monetary thresholds in the five boroughs are generally: (1) New York County (Manhattan), \$500,000; (2) Kings County (Brooklyn), \$150,000; and (3) Queens County, \$100,000. Uniform Rules for NYS Trial Courts, Part 202, § 202.70(a). Richmond County (Staten Island) and Bronx County have no Commercial Division. Accelerated adjudication means truncated discovery, abbreviated pre-trial hearings, and a waiver of some procedural safeguards, including objections based on personal jurisdiction, forum non conveniens, jury trial, punitive and exemplary damages, and interlocutory appeals. Uniform Rules for NYS Trial Courts, Part 202, § 202.70(g), Rule 9. Contractual agreement to apply the accelerated rules is not yet standard. The rocket docket is new, with little reported litigation.

28.2. Confidentiality.

The parties shall promptly enter into and submit to the court, with a request to be so ordered, a Stipulation and Order for the Production and Exchange of Confidential Information in the form promulgated by the New York City Bar Association Committee on State Courts of Superior Jurisdiction.¹¹⁴

28.3. Forum and Venue.

The exclusive venue for that dispute shall be any state or federal court in [New York] County, New York.

28.4. Jury Trial.

The parties waive jury trial.

28.5. Legal Costs.

The substantially prevailing party shall be reimbursed by the other for its reasonable legal fees, disbursements, and court costs incurred in the dispute.¹¹⁵

29. AMENDMENTS AND WAIVERS

This Contract may not be amended, terminated, or waived orally.

30. NOTICES AND COUNSEL

30.1. Addresses.

The addresses of the parties and their counsel are as set forth in Exhibit B. Each party can change its address by notice.

30.2. Generally.

The parties or their attorneys¹¹⁶ may in writing give any notice, demand, or instruction, confirm or extend any date, agree to any amendment or grant any approval or consent, for this Contract. No proof of an attorney's authority is required, whether or not this Contract identifies that attorney. Any notice necessary or appropriate under this Contract shall be effective only when hand-delivered or delivered by overnight courier, such as Federal Express, to the recipient and its attorney.¹¹⁷

31. FURTHER ASSURANCES

Each party shall on request promptly execute and deliver any further documents, and take all further actions, as are reasonably necessary and consistent with this Contract to further achieve the parties' intentions as this Contract states them. No such document or action shall expand or diminish either party's obligations.

114 The New York City Bar Association's model Stipulation and Order for the Production and Exchange of Confidential Information is available at: <https://goo.gl/jHE0P5> (last visited July 22, 2017).

115 If one party is less creditworthy, consider removing the attorneys' fees clause or requiring credit support. Typically, Seller owns valuable Property but Buyer is a single-purpose entity with no assets beyond the possibility of recovering its Deposit. So a "mutual" attorneys' fees clause isn't really mutual. Some clients have strong views for or against attorneys' fees clauses.

116 An unfortunate New York case said attorneys cannot give notice on behalf of their clients unless the documents say so. *Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 67 N.Y.2d 792 (1986). Although *Siegel* addressed forfeiture notices under a lease, nothing limits its more general application except the fact that it has been broadly ignored.

117 The parties may want to provide for notices by email, especially for last-minute extensions of the Scheduled Closing Date or any notices on Buyer's decision process at the end of any Due Diligence Period. Any such arrangement might best require a prompt confirmatory notice (whether before or after the deadline) by a more traditional means of notice. None of this is standard at time of writing.

32. CONFIDENTIALITY AND PUBLICITY

32.1. Confidential Information.

Both parties shall preserve the confidentiality of this Contract, its terms, any information Seller delivers or has delivered about the Property, any information that Buyer obtains through Inspection Rights or Testing, the identity of any principal of either party, and occurrence of the Closing (all, collectively, the "Confidential Information").¹¹⁸ Confidential Information does not, however, include any information available in the public records, from other sources without breach of any confidentiality obligation, or that Buyer and its consultants create without use of nonpublic information from Seller. The parties shall disclose no Confidential Information to any third party, except those officers, directors, employees, investors, agents, advisers, consultants or representatives of that party as are reasonably necessary to consummate this transaction, but only if the disclosing party directs them in writing to keep the Confidential Information confidential consistent with this Contract. The parties may, subject to compliance with this paragraph, disclose Confidential Information to: (1) Escrowee and Title Company; (2) actual or prospective investors and institutional lenders; and (3) professional advisors. Any breach of confidentiality by a recipient under the previous sentence shall constitute a breach by the party that shared Confidential Information with that person. The parties may disclose Confidential Information as Law requires (after giving the other party reasonable prior notice, to the extent reasonably possible) or to enforce this Contract.

32.2. Publicity.

Neither party shall issue any press release, tombstone, or other public advertisement or announcement of the Closing. If any reporter communicates with any party about this Contract, the Closing, the Deed, the Purchase Price, or any related matter, that party shall decline comment. [After Closing, Buyer may announce that the Closing occurred, [by issuing a press release in the form of Exhibit ___] [but that announcement requires Seller's prior reasonable approval.] This paragraph shall survive Closing [until the Survival Date].¹¹⁹

33. ESCROWEE PROTECTIONS¹²⁰

33.1. Interest-Bearing Account.

Escrowee [shall, upon receipt of the Deposit] [acknowledges receipt of the Deposit and shall] hold it in escrow in an interest-bearing account in _____, with interest to be paid as this Contract states.

33.2. Release from Escrow; Disputes.

Escrowee shall release the Deposit from escrow upon joint written instructions by Buyer and Seller, at the Closing, or upon resolution of any Dispute. If any dispute or controversy arises between Buyer and Seller about the Deposit, or if Escrowee receives conflicting instructions of any kind (a "Dispute"), then Escrowee need not act unless the Dispute is settled by Court Order or receipt of written instructions from Buyer and Seller. If either party believes it is entitled to receive the Deposit, then that party shall notify Escrowee, with a copy to the other party. Escrowee shall promptly give the other party a copy of that notice. If the other party fails to object within 10 business days, then

¹¹⁸ Although most good brokers will keep deal information confidential, brokers are often the source of leaks. If a party is concerned about its broker leaking information, the party should address the matter with the broker, formally, informally, and repeatedly.

¹¹⁹ Buyer may want to announce the Closing, if only for buzz and glory. On the other hand, most Buyers and Sellers shy away from media attention. Aside from the general business press, New York City has several serious weekly or monthly publications that focus on real estate, including *Commercial Observer*, *Crain's New York Business*, *The Real Deal*, and *Real Estate Weekly*. All these publications want scoops. After any Closing, the press will see recorded documents (including cover page, disclosing consideration) online within a day or two and start making phone calls immediately. They may print whatever anyone tells them. If the parties prefer a more coordinated, controlled, and organized disclosure process, they should issue a press release immediately after Closing, before rumors and questions start. Preservation of privacy as suggested in text may in practice be an outmoded and impractical concept, at least as it relates to the fact of Closing and the Purchase Price.

¹²⁰ The Escrowee Protections seek to prevent a separate escrow agreement. The parties should ask Escrowee to review and approve them early in Contract negotiations.

Escrowee shall release the Deposit in accordance with the demand received. If the other party does object within that time, then Escrowee shall not release the Deposit except in accordance with a court order or written instructions by both parties. "Court Order" means a final determination of a court of competent jurisdiction on any issue actually litigated by the parties against each other which order is not subject to further appeal.

33.3. Indemnity.

Each party shall Indemnify Escrowee regarding its service as Escrowee, except as a result of Escrowee's negligence or intentionally wrongful acts, including for any claims brought against Escrowee by either party. Escrowee's obligations are ministerial only. Except for Escrowee's express obligations under this Contract, Escrowee is not a party to this Contract and shall not be charged with knowledge of any provision of this Contract in performing its obligations. Escrowee need not interpret or apply this Contract, determine whether its conditions have been met (except as expressly stated), or evaluate whether any party has performed.

33.4. Escrowee's Role.

Escrowee may resign at any time and terminate all its obligations under this Contract, by notice to the parties, but only if Escrowee deposits the Deposit with a successor Escrowee appointed by the parties, and who shall assume all of Escrowee's obligations under this Contract, or, absent such an appointment, in court on notice to both parties. Escrowee shall have no obligation to determine the validity or correctness of any document. It may rely on any document that it determines in good faith to be genuine. If Escrowee is counsel to a party, then Escrowee's service as escrowee shall not limit its ability to represent its client both in this transaction and in any litigation. Because Escrowee's duties are purely ministerial, Escrowee shall not constitute a necessary witness in any litigation between or among the parties. Submission of this paragraph shall conclusively evidence that fact.

33.5. Limit of Liability.

Even if Escrowee incurs liability under this Contract, Escrowee shall have no liability for punitive, indirect, special, or consequential damages. Escrowee's liability shall be limited to actual direct damages, including lost interest on the Deposit at the judgment rate, but no other damages, e.g., for the value of lost opportunities, for Escrowee's acts or omissions. Escrowee acts as an accommodation to the parties and receives no compensation or other consideration as Escrowee, except the indemnity in this paragraph. Escrowee shall be liable only for Escrowee's negligence and intentionally wrongful acts. Escrowee shall not be liable for any action taken or not taken in reliance on advice of counsel.

34. SURVIVAL

All covenants, obligations, representations, and warranties in this Contract that by their express or implied nature involve performance after Closing, or cannot be ascertained to have been fully performed until after Closing, shall survive Closing. This shall apply to all those covenants, obligations, representations, and warranties, even though for some of them, this Contract expressly provides for survival. Wherever this Contract refers to the "Survival Date," that means one year after the Closing Date. The Survival Date shall shorten any applicable statute of limitations in New York Civil Practice Law & Rules § 213 and govern any claim limited by the Survival Date, whether or not known or knowable on the Closing Date.¹²¹ Wherever this Contract states that an obligation shall survive Closing but does not limit that survival to a specific period, that obligation shall survive for the maximum period law allows.

¹²¹ The statute of limitations for actions arising from written contracts is generally six years. New York Civil Practice Law & Rules § 213(2). The parties may shorten that time by unambiguous contractual language. New York courts do not view that practice favorably and construe limiting language against the party that seeks to invoke it. *Hurlbut v. Christiano*, 405 N.Y.S. 2d 871 (1978). The court in *Hurlbut* found that this language did not shorten the statute of limitations in § 213(2): "[t]he parties hereto further agree that the representations and warranties set forth [in the contract] shall survive the closing for a period of three (3) years.» The court found that "the language of the agreement is clear and unambiguous and suggests nothing from which a shortened period of limitations can be inferred."

35. RECORDATION¹²²

Neither party shall record this Contract or any affidavit, memorandum, or other document about this Contract or the transaction it contemplates.

36. CONTRACT MEMO¹²³

When the parties sign this Contract, the parties shall execute, acknowledge, and deliver to Title Company with instructions to record at Buyer's expense a memorandum of contract in the form of Exhibit ___ (the "Contract Memo"). If this Contract terminates except because of Seller's default (and, if that termination entitled Buyer to a refund of the Deposit, Seller has made that refund), then Buyer shall, within three business days after Seller's request, execute and acknowledge any documents required to release, satisfy, and terminate the Contract Memo of record. [If Buyer fails to do that, then Buyer shall Indemnify Seller for any loss it suffers because the Contract Memo remains of record and unreleased, even if it does not legally provide constructive notice of this Contract, including any loss suffered as a result of inability to sell the Property while the Contract Memo was wrongfully of record.]

37. EXCLUSIVITY¹²⁴

So long as Buyer is not in breach [beyond applicable cure periods], Seller shall: (1) not actively market the Property or enter into or negotiate any agreement, letter of intent, or term sheet, binding or not, with anyone else for the Property; (2) not allow anyone else to perform any due diligence for the Property; (3) if it wishes, keep a record of the interest of, inquiry made by, or unsolicited offer received from any third party to purchase the Property; and (4) inform each such third party that the Property is in contract.

38. MISCELLANEOUS

This Contract, with exhibits, constitutes the parties' entire agreement. It supersedes all prior agreements or understandings on the Property, written or oral. This Contract, its performance, the parties' relationship, and any claim that may arise under this Contract, whether in contract, tort, or otherwise, shall all be governed, interpreted, and construed under New York law, disregarding any law on conflict of laws.¹²⁵ This Contract may be executed in multiple counterparts. Each is an original. All, taken together, shall constitute one instrument. Scanned, emailed, or other electronic signatures shall be binding as original. "Include" means "include without limitation." Delivery of a draft of this Contract does not bind anyone in any way. This Contract shall bind the parties only if and when both have executed and exchanged counterparts. Any consent not to be unreasonably withheld shall also not be unreasonably delayed or conditioned. Each party acknowledges receipt of sufficient consideration to make this Contract binding. This Contract does not give anyone any rights, except the named parties, including Escrowee.

122 Include this paragraph or the next, but not both.

123 A recorded Contract Memo is enforceable against later Buyers. Unrecorded contracts are invalid against later Buyers. A later Buyer may, however, be charged with constructive notice if that party had "knowledge of facts that would lead a reasonably prudent purchaser to make inquiry and he failed to do so. *Royce v. Rymkevitch*, 29 A.D.2d 1029 (1968). If the parties record a Contract Memo it must state an outside closing date and will remain effective for 30 days after that date. If Buyer is entitled to possession, the Contract Memo must say so. If the Contract Memo specifies that Buyer has made any payments under the Contract, the resulting lien is enforceable against third parties. New York Real Property Law § 294. Although the statute is quite clear on its face, New York courts sometimes welcome creative theories and claims, such as an argument that: (1) the statute isn't clear; (2) even if the Contract Memo expired, a later Buyer still knows about the earlier Contract so remains subject to it; or (3) in the interests of equity, a Contract Memo should remain effective longer than the statute says. Thus a careful Seller will still hesitate to record a Contract Memo in reliance on the statute and a careful Buyer may hesitate to proceed in the face of an expired Contract Memo. Recordation of a Contract Memo may trigger inquiries from reporters.

124 Buyer may want this paragraph, primarily for emotional reasons. It is difficult to enforce and could create spurious issues. Sellers will typically not volunteer it and, more often than not, will firmly resist. Sellers will argue that no Buyer is genuine until the Closing has occurred. Exclusivity language is not standard, but does often appear.

125 If a transaction involves only New York real property and only parties located in New York, why might any other state's law possibly apply? That is a great question. But most New York contracts do choose New York law. They often also include a consent to jurisdiction and a consent to venue, both with generic language rather than anything specific to New York.

IN WITNESS WHEREOF, Buyer and Seller have entered into this Contract as of the Contract Date.

[Names of Parties and Signature Blocks]

ESCROWEE'S CONFIRMATION

We shall act as Escrowee under the Contract. We are not otherwise a party to it. We shall not change our correct wire transfer address, below our signature without giving the parties at least 10 days prior written notice. [We have received and now hold the Deposit.]

_____ TITLE INSURANCE COMPANY	
By: _____	
Name:	
Title:	
ESCROWEE'S WIRE TRANSFER ADDRESS:	
Bank Name	
Bank Address	
SWIFT Code ¹²⁶	
ABA Number	
Credit to Account of	_____ Title Insurance Company
Account No.	_____
Reference	Title Order No. _____ (Att'n : _____)

AFTER SENDING ANY WIRE, PLEASE CONTACT ESCROWEE'S ACCOUNTING DEPARTMENT AT (212) _____ AND PROVIDE A FED REFERENCE NUMBER.

Attachments and Simultaneous Deliveries:¹²⁷

Deposit (to Escrowee)
Exhibit A—Property (Legal Description)¹²⁸
[Additional Exhibits]

EXHIBIT A: LEGAL DESCRIPTION

EXHIBIT B: ADDRESSES FOR NOTICES, TAXPAYER IDENTIFICATION NUMBERS, SELLER'S WIRE TRANSFER INFORMATION

126 For international incoming wire transfers only.

127 Confirm and conform exhibits and attachments before signing. This model omits some exhibits. The author can provide models for the missing exhibits on request.

128 The legal description is nearly always Exhibit A. The other exhibits vary. Add as appropriate.

EXHIBIT ___ : PERMITTED EXCEPTIONS

The "Permitted Exceptions" consist of: (1) any Permitted Exceptions under the Contract; (2) anything listed in the Disclosure Schedule or disclosed in any document listed in the Disclosure Schedule; and (3) all these items:¹²⁹

1. Any Leases (and rights of Tenants under Leases) in effect on the Contract Date (except modifications that violate the Contract) or entered into in compliance with the Contract.
2. Any facts or conditions a current survey or Property inspection would show.
3. Standard printed exclusions from coverage in the standard form of owner's title policy now in use in New York, with a Standard New York Endorsement.
4. Covenants, restrictions, encumbrances, and agreements in any instrument of record.
5. Sidewalk Notices, Building Department violations, Fire Department violations, and other municipal violations.
6. Zoning regulations and ordinances.
7. Installments of assessments not due and payable before the Cut-Off Time.
8. Financing statements, chattel mortgages, and liens on personal property filed (or most recently renewed) more than five years before the Closing Date or against property or equipment no longer located on the Property or owned by Tenants.
9. All presently existing and future liens of real estate taxes, assessments, water rates, water meter charges, water frontage charges, and sewer taxes, subject to adjustment in accordance with the Contract.
10. Rights of utility companies to lay, maintain, install and repair pipes, lines, poles, conduits, cable boxes and related equipment on, over and under the Property, but no such right (unless of record) imposes any monetary obligation on the Property owner.
11. Encroachments of stoops, areas, cellar steps, stairways, trim cornices, lintels, window sills, ladders, awnings, canopies, ledges, fences, hedges, coping and retaining walls projecting from the Property over any street or highway or over any adjoining property and encroachments of similar elements projecting from adjoining property over the Property.
12. Revocability or lack of right to maintain vaults, coal chutes, excavations, or subsurface equipment beyond the Property line.
13. Any Title Problems the Contract does not require Seller to clear or remove, including Tenant Liens.
14. Any mortgages assigned to Buyer's designee, to the extent the Contract states.
15. Variations between official tax map and legal description.
16. Any matter that is the responsibility of any Tenant under a Lease.
17. Any subsurface condition at or under the Property.
18. All matters disclosed in [Schedule ___ of Certificate of Title and Title Report No. _____ prepared by _____].¹³⁰

¹²⁹ Buyers sometimes try to qualify these Permitted Exceptions. For example, an item might be a Permitted Exception only if it "does not render title unmarketable" or "does not materially adversely affect use, occupancy, and development of the Property." Although this may sound very reasonable and fair, Sellers typically push back by telling Buyers to do their due diligence, evaluate what they find and then either buy or not buy the Property on an "as is" basis. It is what it is.

¹³⁰ Refer here to a recent title search (or "back title") that Seller gave Buyer. In the alternative, list here all recorded items from that search.

EXHIBIT __ : DISCLOSURE SCHEDULE¹³¹

A. DUE DILIGENCE INFORMATION (NOT OTHERWISE LISTED BELOW):

B. EMPLOYEE BENEFIT PLANS:

C. EMPLOYEES:¹³²

Employee Name	Address	Date of Hire	Employment Classification	Union Affiliation

D. ENVIRONMENTAL INFORMATION:

E. INSURANCE:

F. LEASES AND AMENDMENTS:

G. LEASE DEFAULTS:

H. LITIGATION, CLAIMS, AND HARASSMENT PROCEEDINGS:

I. RENT; PREPAID OR IN ARREARS:

J. RENT REGULATION STATUS OF DWELLING UNITS:¹³³

K. SECURITY DEPOSITS:

L. SERVICE CONTRACTS:

M. TAX REDUCTION PROCEEDINGS:

N. UNION CONTRACTS:

O. OTHER:

¹³¹ For any particular item, if none, state [None].

¹³² See earlier note on Displaced Building Service Workers Protection Act. Consult labor counsel as necessary.

¹³³ If Rent Regulation applies, consult specialty counsel and do not rely on this Contract.

EXHIBIT __: CLOSING DOCUMENTS¹³⁴

**THIS INSTRUMENT WAS PREPARED BY,
AND AFTER RECORDING PLEASE RETURN, TO:**

[Address]

Att'n: _____, Esq.

File No. _____

SPACE ABOVE LINE FOR RECORDER'S USE ONLY

_____, a _____ ("Grantor"), with an address at _____

to

_____, a _____ ("Grantee"), with an address at _____

BARGAIN AND SALE DEED WITHOUT COVENANT

_____, 20____

This instrument affects real and personal property situated, lying, and being in the [City] of _____, State of New York, known as follows:

Block(s):	_____
Lot(s):	_____
Street Address ¹³⁵ :	_____
County:	_____

BARGAIN AND SALE DEED WITHOUT COVENANT

THIS BARGAIN AND SALE DEED WITHOUT COVENANT is made as of _____, 20____ (the "Effective Date"), by _____, a _____ ("Grantor") having an address at _____, to _____, a _____ ("Grantee") having an address at _____.

Grantor, in consideration of \$10.00 and other good and valuable consideration paid by Grantee, does forever grant and release unto Grantee and its heirs, successors, and assigns:

THAT PLOT, PIECE, OR PARCEL OF LAND located in the County of _____, State of New York, more particularly described in Exhibit A (the "Land"), which Land is commonly known as _____, _____, New York;

¹³⁴ A recordable document needs a cover sheet and acknowledgment(s). Examples appear in the Deed (only). Title Company should review and approve draft Closing Documents. The parties may want to set up Closing Documents with a short page preceding the signature, to accommodate last-minute changes in text. In those cases, counsel should obtain final client approval and confirmation of the final document, to prevent anyone from raising issues later about exactly what was signed.

¹³⁵ Required only in New York City.

TOGETHER WITH all buildings and other structures, improvements, and fixtures, erected, installed, or located in, on, or at the Land, including _____ (the "Improvements"; with the Land, the "Property");

TOGETHER WITH all of Grantor's right, title, and interest in and to all: (1) easements, rights of way, and other rights appurtenant to the Property; (2) land lying in the bed of any street or highway, opened or proposed, abutting, in front of or adjoining the Land, to the center line of that street or highway; (3) strips or gores abutting or adjacent to the Land; and (4) appurtenances to the Property;

TO HAVE AND TO HOLD the Property and all of the foregoing unto Grantee and Grantee's heirs, successors, and assigns forever;

AND Grantor, in compliance with Lien Law Section 13, agrees that Grantor will receive the consideration for this conveyance and will hold the right to receive that consideration as a trust fund to be applied first to pay the cost of the improvement before using any part of it for any other purpose.¹³⁶

[This conveyance is made in the regular course of business actually conducted by Grantor.] [The Property does not constitute all or substantially all assets of Grantor.] [Grantor's shareholders have duly authorized Grantor's disposition of the Property in accordance with Business Corporation Law Section 909.]¹³⁷

IN WITNESS WHEREOF, Grantor has executed this deed as of the Effective Date.

[Signature Block]¹³⁸

Attachments:

- Acknowledgment
- Exhibit A - Legal Description

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) **ss:**

On the _____ day of _____ in the year 20___, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the instrument in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person on behalf of which the individual(s) acted, executed the instrument.

Notary Public

FIRPTA AFFIDAVIT

Section 1445 of the Internal Revenue Code states that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding of tax is not required on the disposition of a U.S. real property interest by _____ ("Seller") the undersigned certifies on Seller's behalf:

136 This strange language conforms to the statute.

137 Only if Seller is a New York corporation, insert one of these sentences. A corporate general partner or member does not trigger any requirement for this language. Deed representations constitute presumptive evidence that the corporation obtained the requisite approvals. New York Business Corporation Law § 909.

138 Some, but not all counties, require recorded documents to be signed in specific colored ink. Suffolk County on Long Island, for example, requires black ink, presumably because their scanning equipment dates back to the Age of Fax. Recorded documents should always be signed on white paper. Check with the Title Company.

1. Seller is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (all as defined in the Internal Revenue Code and Income Tax Regulations).
2. Seller's U.S. employer identification number is _____.
3. Seller's office address is: _____.

The undersigned understands this certification may be disclosed to the Internal Revenue Service by the transferee and any false statement could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete. I further declare I have authority to sign this document on behalf of Seller.

By: _____
 Name: _____
 Title: _____
 Date: _____

[Jurat]

GENERAL ASSIGNMENT AND ASSUMPTION AGREEMENT

THIS GENERAL ASSIGNMENT AND ASSUMPTION AGREEMENT (the "Agreement"), is made and entered into as of _____, 20__ (the "Effective Date"), between _____, a _____, having an office at _____ ("Assignor") and _____, a _____ having an office at _____ ("Assignee").

Assignor, for \$10.00, and other good and valuable consideration, the receipt and sufficiency of which Assignee acknowledges, assigns to Assignee all of Assignor's right, title, and interest in, to and under these items, all used or relating to operation, use, or occupancy of the real property known as and located at _____, Block ____, Lot ____, in the County of _____, State of New York (the "Property") and as more fully identified on Schedule 1¹³⁹: (1) all books, records, and files owned by Assignor; (2) all transferable licenses, approvals, certificates, and permits held by Assignor; and (3) all other items of intangible personal property (except items expressly excluded from the Property under the Purchase and Sale Agreement, dated as of _____, 20__ between Assignor and Assignee, the "Contract").

TO HAVE AND TO HOLD unto Assignee and its heirs, successors, and assigns for their use and benefit forever.

Assignee assumes all obligations under all items assigned by this instrument, accruing from and after the Effective Date.

This Agreement is made by Assignor without recourse and without any express or implied representation or warranty whatsoever except as the Contract states.

This Agreement shall bind and benefit Seller, Buyer, and their heirs, successors, and assigns.

Any inconsistency between this Agreement and the Contract shall be resolved in favor of the Contract.

This Agreement may be executed in multiple counterparts. Each shall be deemed an original. All, taken together, shall constitute one instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

[Signature Block]

¹³⁹ Prepare and attach.

PROPERTY REPRESENTATION DATEDOWN CERTIFICATE

As of _____, 20____ (the "Closing Date"), _____, a _____ ("Seller"), certifies to _____, a _____ ("Buyer") that:

Contract. Seller is "seller" under the Contract of Purchase and Sale entered into with Buyer, dated _____, 20____ (the "Contract").

Closing. Seller delivers this certificate (the "Certificate") to Buyer to meet a condition to Closing under the Contract. This Certificate constitutes a Closing Document.

Representations. Except for facts and conditions stated in this Certificate or in the Contract or changes in facts as permitted or contemplated by the Contract, as of the Closing Date, the Property Representations are true in all material respects.

Exceptions to Representations. If none, state "NONE."

NONE.

Limited Liability. Any liability of Seller under this Certificate is subject to the Contract, including any limitations of liability under the Contract or under this Certificate.

All capitalized terms used but not defined in this Certificate shall have meanings given to them in the Contract.

[Signature block]

BILL OF SALE

_____, a _____ ("Seller"), having an office at _____, in exchange for good and valuable consideration paid to _____, a _____, having an address at _____ ("Buyer"), the receipt and sufficiency of which Buyer acknowledges, sells, conveys, assigns, transfers, delivers and sets over to Buyer all title and interest in the Building Equipment and Intangibles that Seller is required to convey to Buyer under the Contract of Purchase and Sale between Seller and Buyer for the property known as and located at _____ (Block ____; Lot ____), and dated _____, 20____ (the "Contract").

TO HAVE AND TO HOLD unto Buyer and its successors and assigns to its and their own use and benefit forever.

This Bill of Sale is made by Seller without recourse and without any express or implied representation or warranty whatsoever, except as the Contract states.

The parties have allocated zero value to the property transferred by this Bill of Sale.

IN WITNESS WHEREOF, Seller has caused this Bill of Sale to be executed as of _____, 20____.

[Signature Block]

ASSIGNMENT AND ASSUMPTION OF LEASES¹⁴⁰

THIS ASSIGNMENT AND ASSUMPTION OF LEASES (this "Assignment"), is made and entered into as of _____, 20__ (the "Effective Date") by _____, a _____, having an office at _____ ("Assignor"), to _____, a _____, having an office at _____ ("Assignee").

Assignor, for good and valuable consideration, the receipt and sufficiency of which Assignee acknowledges, assigns to Assignee all of Assignor's right, title, interest, and obligations as landlord in, to, and under the leases, licenses, and occupancy agreements (together, the "Leases"), described in Exhibit A, in effect for space at the real property known as and located at _____, Block ____, Lot ____, County of _____, State of New York (the "Property").

This Assignment includes all: (1) security deposits that Assignor actually holds under the Leases on the Effective Date; (2) guaranties of any tenant's obligations under any Lease; and (3) arrearages and unpaid rent under the Leases (subject to adjustment under the Purchase and Sale Agreement, dated as of _____, 20__ between Assignor and Assignee, the "Contract").

Assignee assumes all obligations of landlord under the Leases that accrue from and after the Effective Date, including all claims made by any tenant to any security deposit to the extent paid, credited, or assigned to Assignee.

Assignor shall make, execute, acknowledge, and deliver any further acts, deeds, conveyances, assignments, notices of assignment, transfers, and assurances as Assignee from time to time reasonably requests, to effectuate, register, or record this Assignment, but only if Assignor does not incur any incremental cost or liability by doing so.

Assignor makes this Assignment without recourse and without any express or implied representation or warranty except to the extent the Contract states. Nothing in this Assignment limits the parties' obligations under the Contract.

This Assignment shall bind and benefit the parties and their successors and assigns. Any inconsistency between this Assignment and the Contract shall be resolved in favor of the Contract. This Assignment may be executed in multiple counterparts. Each shall be deemed an original. All, taken together, shall constitute one instrument.

IN WITNESS WHEREOF, Assignor and Assignee have caused this Assignment is executed as of the Effective Date.

[Signature Blocks for Assignor and Assignee]

**EXHIBIT A
LEASES**

TENANT	LEASE DATE	SECURITY DEPOSIT
1.		
2.		
3.		
4.		

¹⁴⁰ This is a recordable document and requires a cover page and acknowledgment(s).