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Texas Annotated Local Counsel Opinion

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This Texas Annotated Local Counsel Opinion is intended to provide a form local counsel opinion containing a series of detailed annotations drawing upon case law, statutory law, practical observations and drafting concepts for use by practitioners in connection with the preparation and negotiation of Texas local counsel opinions in commercial real estate loan transactions. As with any generic form, the practitioner must tailor the opinion draft and the opinion diligence to the specific context and structure of the given loan transaction and the specific facts and circumstances relating to the client. The form covers a multistate transaction collateralized by Texas real estate and governed, except as required by Texas law, by the laws of another state.

These annotations are provided for purposes of discussion and education and are not intended to constitute a legal opinion, establish any required standard of care or conduct, or provide a standard of what should be accepted in any particular loan transaction. While comprehensive, this opinion form and the annotations are not dispositive of every issue or factual circumstance that a practitioner will encounter in the negotiation of a local counsel opinion. It is our belief that this presentation can, at a minimum, provide the following:

1. assistance in the preparation and negotiation of Texas local counsel opinions, whether representing the Borrower, the Guarantor or the Lender; and
2. a valuable tool for the training of lawyers of any experience level.

The inspiration for this presentation includes the pending release of the Local Counsel Opinions Supplement (the "Local Counsel Supplement") to the Real Estate Finance Opinions Report of 2012 (the "2012 Report") prepared by the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Real Estate Lawyers, Attorneys' Opinions Committee, and the American College of Mortgage Attorneys, Opinion Committee. The 2012 Report can be found at 47 REAL PROP. TR. & EST. J. 213 (2012). The Local Counsel Supplement is expected to be published in the issue of the Real Property Estate and Trust Journal released in the fall of 2016.

We would like to acknowledge with gratitude the assistance of John M. Nolan, Edward A. Peterson, Carrie Nie and Ashley DeRon.

_____, 2016

The Secured Parties under the Credit Agreement (defined below) and
United States of America Bank, N.A.
in its capacity as Collateral Agent
One Bankers Building
New York, NY 10019

RE: The Loan ("Loan") evidenced by that certain Credit Agreement, dated of even date herewith (the "Credit Agreement"), by and among Widget Manufacturing, Inc. and certain other Loan Parties thereunder, as Borrowers (collectively, the "Borrower"), the lenders party thereto (individually and collectively, "Lender"), United States of America Bank, N.A., as Administrative Agent and Administrative Collateral Agent ("Agent"), American Capital Finance, LLC, Bank of France, Bank of Germany, and Swiss Investment Bank, as Joint Bookrunners and Joint Lead Arrangers (each such capitalized term as defined in the Credit Agreement), secured in part by real property located in the County¹.

Ladies and Gentlemen:

We have acted as special² local counsel to Borrower³ in the State in connection with the Loan. We have been requested by Borrower to render this Opinion Letter to Agent in connection

¹ This Texas Annotated Local Counsel Opinion (this "Opinion Letter") contemplates a hypothetical situation where Texas counsel is asked to render a legal opinion in connection with the financing of real estate located in Texas where the loan documents (other than all or portions of the deed of trust) are governed by the laws of a jurisdiction other than the State of Texas (a "Foreign Jurisdiction") and the Borrower is organized under the laws of a Foreign Jurisdiction. While this is a common fact pattern, it is by no means the only situation requiring the assistance of Texas local counsel. Variations include loans secured by real property located in Texas or in a Foreign Jurisdiction, evidenced by loan documents governed by Texas law, the laws of a Foreign Jurisdiction or a combination of both and the Borrower is organized under Texas law or the laws of a Foreign Jurisdiction.

² Use the "special" (or other limiting) classification where the role of the opinion giver's law firm (the "Firm") is in fact a limited engagement, such as engagement as local counsel, and the Firm is not acting as the primary (sometimes referred to as "lead") counsel for the Borrower. Typically, primary counsel has a direct relationship with the Borrower and is responsible for the review and negotiation of the Loan Documents and overall closing of the transaction. "Special" or "local" counsel generally serve the limited purpose of providing expertise in a jurisdiction in which primary counsel does not practice or opining as to a Borrower that is organized under Texas law (*see supra* note 1). The expectations of primary counsel (and the Borrower) with respect to local counsel vary depending on the particular laws and customs of a jurisdiction; therefore, it is important to confirm the scope of the local opinions expected early in the engagement and that such scope does not include any matters typically not rendered by Texas counsel but that might be rendered by counsel in Foreign Jurisdictions, such as zoning, building code compliance, mineral estate issues or title-related issues.

First, the typical opinion letter declares that it is provided "as counsel to the Borrower." This phrase indicates the existence of a lawyer-client relationship. When the Borrower engages lead counsel to provide services in connection with the Loan, that client relationship is reasonably clear. When local counsel is engaged to provide an opinion letter, the relationship may be remote – the engagement may come through lead counsel as the client's agent

with the Loan Documents. The law covered by the opinions set forth in this Opinion Letter is expressly limited to the Applicable Laws.⁴

I. **BACKGROUND**

1.1 **Documents Reviewed.** For purposes of rendering the opinions set forth in this Opinion Letter, we have examined copies⁵ of the following documents relating to the Loan, all of which were dated _____, 2016 (the "Effective Date"), unless otherwise specifically indicated herein:

- (a) Deed of Trust, Security Agreement, Assignment of Rents and Leases and Fixture Filing (the "Deed of Trust"), dated the Effective Date, executed by Widget Manufacturing, Inc. ("Grantor") to a trustee⁶ for the benefit of Agent, securing the

or representative, and local counsel may have no contact with the Borrower. In some cases, local counsel may be asked by the opinion recipient to provide an opinion about a local document or entity status as if on behalf of the Borrower. Regardless of how local counsel for a Borrower is brought into a matter to provide an opinion letter, local counsel should consider the Borrower as a client unless the transaction parties agree otherwise and local counsel should observe the rules applicable to the representation of a client. The formalities of establishing that relationship cannot be overlooked even in the face of a request for an opinion to be delivered in a very short time. William B. Dunn et al., Am. Bar Ass'n Section of Real Prop., Trust & Estate Law, Comm. on Legal Ops. in Real Estate Transactions et al., *Local Counsel Opinion Letters: A Supplement to the Real Estate Finance Opinion Report of 2012*, 51 REAL PROP. TR. & EST. J. (forthcoming Fall 2016).

³ Furthermore, opinion giver should only make this statement as to loan parties for whom the Firm has actually been engaged as legal counsel. For example, if a guaranty is governed by Texas law, Lender will require inclusion of the Guarantor in the local opinion. If the Firm does not actually represent the Guarantor, the opinion letter could still include and cover the Guarantor and the Guaranty but, in such a case, the relationship to the Guarantor should be expressly stated and disclosed using language similar to the following: **"We have been asked by our client, Borrower, to render certain opinions with respect to the Guaranty in connection with the Loan, as more specifically set forth in this Opinion Letter. As both Borrower and Lender are aware, Guarantor is not our client in connection with the Loan, the Guaranty or the Transaction and this Opinion Letter, and the opinions included in the Opinion Letter are not being rendered in the capacity as counsel to the Guarantor."** Lack of this language could potentially create an inference that the Firm represents a party that it in fact does not represent.

⁴ The law that the opinion letter covers may vary. Local counsel should consider modifying the definitions of the laws depending on the circumstances.

⁵ Local counsel typically does not receive executed counterparts of the Loan Documents prior to their delivery to the Lender; therefore, it is recommended that local counsel expressly provide that the Loan Documents reviewed by local counsel were copies and include an assumption that the copies reviewed by local counsel conform to an authentic original (see Section 3.1(e)).

⁶ On occasion, local counsel will be asked to serve as the trustee under the Deed of Trust, often because out of state parties are unaware of who is permitted to serve as a trustee in Texas. Because the trustee becomes a special agent for both Grantor and Beneficiary and must act with utmost fairness and impartiality in conducting a foreclosure, acting as the Trustee may cause unanticipated conflicts of interest and liabilities and may be at odds with the actual terms of the local counsel engagement. It is well established under Texas law that a trustee under a deed of trust acts

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