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**SIDE LETTER AGREEMENTS:
THE REAL ESTATE LAWYER'S BFF (OR WORST ENEMY?)**

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Cumberland School of Law, Samford University
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I. SCOPE OF ARTICLE

Many (perhaps even most) real estate transactions (regardless of their complexity) finalize in a completed closing and conveyance on or before the closing date specified in a purchase and sales contract. In such “clean transactions,” money is exchanged at the closing in exchange for a conveyance deed, and no further obligations between a buyer and seller are contemplated or necessary to complete the closing process. However, in many real estate transactions, particularly where the real estate closing is part of an asset purchase agreement or also involves the transfer of ownership of personal property that must be inventoried, delivered or distributed, minute accounting details and “true-up” financial reconciliations are often a necessary part of a fully completed real estate transaction. Various detailed and particularized actions may not be completed in time for a sales contract closing date and can be the subject of a supplemental written agreement between the parties to memorialize their specific and respective obligations and performances so that a scheduled closing ceremony will not be delayed. Such supplemental written agreements are often set out in a separate “Side Letter Agreement,” “Post-Closing Agreement,” or “Comfort Letter.” The scope of this article is to set out some thoughts and recommendations of the author concerning such supplemental written agreements as an aid to real estate practitioners.

II. PURPOSE OF A SIDE LETTER AGREEMENT

The question can be asked, why use a Side Letter Agreement if a purchase and sale agreement (or Asset Purchase Agreement) is already in proper form, has been signed by the parties to be charged, and is already in escrow with a title company? A brief

summary of some uses for a Side Letter Agreement might include:

A. Clarification. Side letter agreements are often used to confirm additional details that are not known when the principal documents are finalized, or to clarify certain points; for example, setting out the steps that a party must take to satisfy to an “all reasonable endeavors obligation” not otherwise defined in the main document.

B. Supplementation. A side letter agreement may also evidence a binding contract between two of the parties to a multi-party transaction, whether or not disclosed to all other parties. Side letters are often used in the formation of investments funds, creating various additional obligations or granting exemptions between the fund and a particular limited partner. Such side letters are disclosed to all limited partners in the fund.

C. Variation. When dealing with any last minute changes, it is often easier to set-out the relevant details in a side letter agreement than to make manuscript changes to the main contract and have them initialed. Side letters are also an efficient means of document documenting any changes that have been agreed to in relation to a party’s standard terms and conditions.¹

D. “Day of Closing” Tallies. A side letter agreement can be particularly useful when a significant amount of tangible personalty is to be tallied or inventoried, later to be the subject of a Bill of Sale to be delivered at closing; or when a “cash drawer” accounting is to be tabulated as of the date of the closing in order to confirm the proration of

¹ <http://us.practicallaw.com/resource/6-508-4548>, September 28, 2011, Patricia Wade and Sarah Stafford Ashurst, LLP.

applicable credits or monies later to be paid within a (generally) short period of time post-closing. A side letter agreement may also be useful if a schedule of repairs and/or modifications to the real property asset to be conveyed needs to be finalized post-closing so that the scheduled closing on the main purchase and sale contract can be completed on time.

III. A SIDE LETTER AGREEMENT SHOULD BE LIMITED IN RANGE AND IMPORT

A side letter agreement should be limited in range and import, and seek to avoid any interpretation (in case of later dispute) that the side letter agreement sets out terms, conditions or details that attempt to amend or vary certain specific terms or conditions of a signed purchase and sale agreement.

For an example of a case where side letter agreements became the subject of bitter controversy, the case of *Universal Health Services, Inc., et al v. Renaissance Women's Group, PA*, 121 S.W.3d 742 (Tex. 2003) is illustrative. Full copy attached as Exhibit "2" to this paper. *Universal Health* involved a suit on a commercial lease and accompanying supplemental letter agreements. A physicians group contracted to lease office space for ten years in a building which also housed a hospital where the physicians would practice medicine. But two years into the lease term, the building owners decided to close the hospital for financial reasons and notified the physicians group of their intentions. The *Women's Group* doctors sued, alleging that the building owners were contractually bound by the lease and supplemental letter agreements to operate the hospital for the entire remaining term of the lease (being approximately eight years). The primary points of argument for the physicians group were to the effect that the specific languages

in the three supplemental letter agreements obligated Universal Health Services to operate the hospital building for the entire lease term, or alternatively, created an ambiguity that the trial court jury correctly resolved in their favor. After a jury trial, appellate activity and argument, the Texas Supreme Court determined that the supplemental letter agreements were not ambiguous, and as a matter of law, did not obligate the building owners to operate the hospital for the entire remainder term of the lease.

The original 1995 letter agreement states:

“Renaissance and Thompson and Litzinger contemplate participating in the project to be known as Renaissance Women's Center of Austin (the “Project”) which will be composed of a women's hospital located on the first floor of the Project and medical offices and a clinic licensed to the physicians located on the second floor of the Project.”

The letter agreements went on to provide that:

“[by] the signatures of Renaissance and Thompson and Litzinger below, Renaissance and Thompson and Litzinger agree that the validity and binding effect of the lease are subject to the following terms and conditions...”

Later in the letter agreement it states that it will remain binding “...throughout the term of the lease”.

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