

# Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions

*By the Opinions Committee, Business Law Section of the State Bar of California*

The Opinions Committee (the “Committee”) of the Business Law Section of the State Bar of California (the “California State Bar Business Law Section”) has prepared and issued this sample opinion (the “Venture Opinion”)<sup>1</sup> in consultation with the Corporations Committee (the “Corporations Committee”) of the California State Bar Business Law Section, and with the approval of the Executive Committee of the California State Bar Business Law Section. The editors and contributors to the Venture Opinion are the following:

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1. The statements and views in the Venture Opinion and accompanying footnotes are those of the collective membership of the Committee and not necessarily those of the State Bar of California. The Venture Opinion is made available with the understanding that neither the State Bar of California nor the Committee is engaged in rendering legal or other professional services in publishing it. If legal advice or other expert assistance is required, the services of a competent, professional person should be sought.

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## INTRODUCTION

In 2009, the Opinions Committee of the Business Law Section of the State Bar of California published a commentary on customary practice with respect to third-party legal opinions given in venture capital financing transactions (the “2009 *Venture Capital Report*”).<sup>2</sup> This sample opinion (the “Venture Opinion”), along with the accompanying footnotes, augments the 2009 *Venture Capital Report* by providing an illustration of what an opinion letter given in a venture capital financing transaction might look like.

The Venture Opinion builds upon several prior exemplars: the Committee’s Sample California Third-Party Legal Opinion for Business Transactions (the “Transactional Opinion”),<sup>3</sup> the “*Boston Form*” based upon the ABA Legal Opinion Principles,<sup>4</sup> and the form legal opinion of the National Venture Capital Association.<sup>5</sup> Unlike the Venture Opinion, both the Transactional Opinion and the *Boston Form* use an unsecured loan as their transactional model. In addition to building on these prior forms, the Venture Opinion is based on various other opinion reports of the California State Bar Business Law Section<sup>6</sup> and other bar associations,

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2. Opinions Comm. of the Bus. Law Section of the State Bar of Cal., *Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions*, 65 BUS. LAW. 161 (2009) [hereinafter *2009 Venture Capital Report*].

3. OPINIONS COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS (rev. Aug. 2014) [hereinafter TRANSACTIONAL OPINION], available at [apps.americanbar.org/buslaw/tribar](http://apps.americanbar.org/buslaw/tribar) (under the “State and Other Bar Reports” subsection).

4. Donald W. Glazer & Stanley Keller, *A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles*, 61 BUS. LAW. 389 (2005) [hereinafter *Boston Form*].

5. MODEL LEGAL OPINION OF THE NATIONAL VENTURE CAPITAL ASSOCIATION (rev. June 2013) [hereinafter NVCA FORM], available at <http://goo.gl/VljFz> (under the “Model Legal Documents” tab). The original NVCA Form pre-dates the publication of both the 2009 *Venture Capital Report* and the Transactional Opinion.

6. See, e.g., CORPS. COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., LEGAL OPINIONS IN BUSINESS TRANSACTIONS (EXCLUDING THE REMEDIES OPINION) (May 2005) (2007 printing) [hereinafter 2007

such as the Committee on Legal Opinions of the American Bar Association's Section of Business Law<sup>7</sup> and the TriBar Opinion Committee.<sup>8</sup> The Venture Opinion provides an illustration of an opinion letter, based on the principles articulated in the 2009 *Venture Capital Report*, that is directly relevant to venture financings<sup>9</sup> of the type frequently consummated in California and elsewhere, including examples of opinions on capitalization, stock issuances, and "no registration."

The Committee chose as the transaction model for the Venture Opinion a private offering, not involving general solicitation or general advertising, of Series B Preferred Stock by a Delaware corporation<sup>10</sup> under transaction documents governed by California law.<sup>11</sup> The Venture Opinion is annotated and contains alternative language for use when the company is incorporated in California. Because

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Business Transactions Report]; BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINIONS: 2007 UPDATE (2007) [hereinafter 2007 REMEDIES REPORT]; P'SHPS & LTD. LIAB. COS. COMM. OF THE BUS. LAW SECTION OF THE STATE BAR OF CAL., REPORT ON LEGAL OPINIONS CONCERNING CALIFORNIA LIMITED LIABILITY COMPANIES (Feb. 2000) [hereinafter CALIFORNIA LLC REPORT].

7. See, e.g., ABA Comm. on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter *Principles*]; ABA Comm. on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) [hereinafter *Guidelines*]; Subcomm. on Sec. Law Opinions, Comm. on Fed. Regulation of Sec., ABA Section of Bus. Law, *No Registration Opinions*, 63 BUS. LAW. 187 (2007) [hereinafter *No Registration Report*]; Task Force on Sec. Law Opinions, Comm. on Fed. Regulation of Sec., ABA Section of Bus. Law, *Special Report: Negative Assurance in Securities Offerings (2008 Revision)*, 64 BUS. LAW. 395 (2009) [hereinafter *Negative Assurance Report*].

8. See, e.g., TriBar Opinion Comm., *Report: Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter 1998 *TriBar Report*]; TriBar Opinion Comm., *The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483 (2004) [hereinafter *TriBar Remedies Opinion Report*]; TriBar Opinion Comm., *Report on Duly Authorized Opinions on Preferred Stock*, 63 BUS. LAW. 921 (May 2008) [hereinafter 2008 *TriBar Preferred Stock Report*].

9. Following the convention of the 2009 *Venture Capital Report*, as used in the Venture Opinion and the accompanying footnotes, the term "Venture Financing" refers to an equity investment in a privately held company by professional investors, and is not restricted to the financing of technology companies as the term "Venture" might imply. 2009 *Venture Capital Report*, *supra* note 2, at 163; see also *infra* note 11 (the Venture Financing addressed in the Venture Opinion is a private offering not involving general solicitation or general advertising).

10. As noted in the 2009 *Venture Capital Report*:

Although at one time venture-backed companies often incorporated in California and then re-incorporated in Delaware immediately before an initial public offering, today venture-backed companies usually incorporate in Delaware at the outset.

2009 *Venture Capital Report*, *supra* note 2, at 166.

11. The Venture Opinion does not address issues raised by newly adopted Rule 506(c) under Regulation D, 78 Fed. Reg. 44771 (July 25, 2013) (effective September 23, 2013). Rule 506(c) permits general solicitation and general advertising in offerings meeting specified requirements. The Committee cannot predict whether venture firms will rely on Rule 506(c) for Venture Financings in the future to avoid registration under the Securities Act of 1933, as amended [hereinafter Securities Act]. The Committee notes that traditionally venture capital firms have preferred to include only professional investors known to them in the offerings they lead. See also *infra* notes 36 (which further discusses Rule 506(c)) & 70 (last sentence refers to a proposed update to the *No Registration Report*, *supra* note 7, to address the changes in Regulation D).

In addition, the Venture Opinion does not address "crowdfunding" as authorized under Title III of the Jumpstart Our Business Startups Act of 2012, Pub. L. No. 112-106, 126 Stat. 306 [hereinafter JOBS Act] creating new section 4(a)(6) of the Securities Act and addressed in recently proposed regulations of the U.S. Securities and Exchange Commission, 78 Fed. Reg. 66427 (proposed Oct. 23, 2013). Due to the \$1,000,000 limitation on proceeds raised in a crowdfunding offering and limitations on the amount per investor that may be included in such an offering, Venture Financings are not likely to be conducted using the "crowdfunding" exemption from registration.

the Venture Opinion uses a Delaware corporation as the issuer, opinion preparers should consider in each case whether they have the competence to give, when requested, opinions under the Delaware General Corporation Law.<sup>12</sup> Finally, the opinion recipients are identified in the Venture Opinion as the purchasers of the company's Series B Preferred Stock under the stock purchase agreement. A Series B Preferred Stock financing highlights, among other things, the serial nature of most Venture Financings.

As noted in the Transactional Opinion, no single form of legal opinion can be viewed as the "sole" or even in most cases the "best" or "preferred" form for use in Venture Financings or any other business transaction. The Venture Opinion, therefore, is illustrative and should not be treated as prescriptive.

The Venture Opinion should be interpreted in accordance with the customary practice of California lawyers in giving opinions (and advising those who receive opinions) as articulated in the various opinion reports of the California State Bar Business Law Section and other professional associations, such as the American Bar Association's Section of Business Law and the TriBar Opinion Committee.

A clean version of the Venture Opinion, without footnotes, follows the annotated form and is attached as Exhibit A.

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12. The fact that venture (and other) transactions commonly involve Delaware corporations presents an issue for non-Delaware lawyers asked to give legal opinions in these transactions. The 2007 Business Transactions Report states:

[A] lawyer should not be asked to render opinions on matters that are outside his or her area of professional competence. Where an opinion is appropriate but beyond the competence of the opinion giver, then the opinion giver should associate competent counsel to render the opinion.

2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 20 (footnote omitted); *see infra* note 51. The practice of non-Delaware lawyers has long been to give opinions on routine matters such as the corporate status of Delaware corporations and the due authorization by Delaware corporations of agreements when they regularly represent Delaware corporations and follow developments in Delaware corporation law. The practice of non-Delaware lawyers has been not to give opinions on more difficult questions of Delaware corporation law or on Delaware contract law (although some California lawyers, like lawyers elsewhere, also give routine opinions on Delaware limited liability companies even though those opinions require some consideration of Delaware contract law). *See, e.g.,* 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 91–92; TriBar Opinion Comm., *Third-Party "Closing" Opinions: Limited Liability Companies*, 61 BUS. LAW. 679, 681–83 (2006) (discussing coverage by non-Delaware lawyers of Delaware contract law for purposes of providing closing opinions on Delaware limited liability companies).

No easy line can be drawn between "routine" and "more difficult" questions of Delaware corporation law. Opinion preparers must decide whether they are competent to give requested opinions. The Committee believes that the matters addressed in the Venture Opinion are matters on which California lawyers who regularly advise Delaware corporations and who follow developments in Delaware corporation law are typically competent to cover. If, however, the opinion preparers recognize that an opinion they have been asked to give involves an issue with respect to which they do not feel competent, they should consider obtaining an opinion letter from Delaware counsel, addressed directly to the opinion recipient, that covers that issue and in their own opinion letter either expressly rely on Delaware counsel's opinion or include an express exception or assumption regarding that issue. *See* 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 35–38 (discussing foreign law and the retention of local counsel); *see also infra* note 51. A preliminary call to competent Delaware counsel to discuss the requested opinion may help the opinion preparers decide whether to retain Delaware counsel to address the issue in question.

SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR  
VENTURE CAPITAL FINANCING TRANSACTIONS<sup>13</sup>

[Date<sup>14</sup>]

To the Purchasers on the date hereof<sup>15</sup> of  
[Company Name] Series B Preferred  
Stock Listed on Exhibit A to the Series  
B Preferred Stock [and Warrant] Purchase Agreement

Ladies and Gentlemen:

We have acted as counsel for [Company Name], a Delaware corporation (the “Company”),<sup>16</sup> in connection with the sale and issuance on the date hereof by the Company to you of \_\_\_\_\_ shares of the Company’s Series B Preferred Stock (the “Shares”) [and the sale of warrants to purchase \_\_\_\_\_ shares of the Company’s [Type of Securities] (the “Warrants”), each] pursuant to the Series B Preferred Stock [and Warrant] Purchase Agreement (the “Purchase Agreement”), dated as of \_\_\_\_\_, 20\_\_\_\_ among the Company and the persons listed on Exhibit A attached thereto (the “Purchasers”). This opinion letter is delivered to you pursuant to Section \_\_\_\_\_ of the Purchase Agreement.<sup>17</sup> Each capitalized

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13. Consistent with the Transactional Opinion, the Venture Opinion is often referred to as an “opinion letter” even though, in addition to legal opinions, it contains a factual confirmation (which is presented in Section D (“Confirmation”). As with the Transactional Opinion, the Venture Opinion does not specifically state that it is to be interpreted in accordance with the customary practice of lawyers giving opinions in California; however, regardless of whether such a statement is included in the opinion letter, the opinion letter should be interpreted in light of such customary practice. Some opinion preparers, nonetheless, include a reference to customary practice in their opinion letters to make clear how the opinion letter is to be interpreted. One increasingly accepted method of referring to customary practice is to refer to the *Principles*, *supra* note 7. This could be done by including, either at the beginning or at the end of the opinion letter, a statement such as:

This opinion letter shall be interpreted in accordance with the Legal Opinion Principles published by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law, 53 Bus. Law 831 (1998)[, a copy of which is attached].

*See* TRANSACTIONAL OPINION, *supra* note 3, at 1 n.1; ABA MERGERS & ACQUISITIONS COMM., VOLUME II, MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY: EXHIBITS, ANCILLARY DOCUMENTS, AND APPENDICES 61 (2010) (recommends including reference to the *Principles*). As is suggested by the bracketed language, if the *Principles* are incorporated, some firms attach a copy of the *Principles* to the opinion letter.

14. By its nature, a third-party legal opinion letter speaks only as of its date. Accordingly, it does not cover subsequent changes in law or fact. *See Principles*, *supra* note 7, at 833.

15. Inclusion of the words “on the date hereof” is intended to make clear that the opinion letter is only for the benefit of Purchasers at the closing occurring on that date. Typically, in a Venture Financing, if a stock purchase agreement contemplates additional closings, it will require delivery of a new opinion letter at each closing.

16. Although at one time venture-backed companies were often incorporated in California and then reincorporated in Delaware immediately before an initial public offering, today venture-backed companies located in California usually incorporate in Delaware at the outset. *See 2009 Venture Capital Report*, *supra* note 2, at 166.

17. It is common to state the context in which the opinion letter is being delivered. The Venture Opinion refers to the provision (which is typically included in a stock purchase agreement) that makes delivery of an opinion letter a condition to closing. *See* TRANSACTIONAL OPINION, *supra* note 3, at 2 n.5.

term that is defined in the Purchase Agreement and that is used but not defined in this opinion letter has the meaning given to it in the Purchase Agreement.

### A. DOCUMENTS EXAMINED<sup>18</sup>

We have examined the following documents:<sup>19</sup>

- (i) the Purchase Agreement;
- (ii) the Investors' Rights Agreement, dated as of \_\_\_\_\_, 20\_\_ (the "Investors' Rights Agreement");
- (iii) the Right of First Refusal and Co-Sale Agreement, dated as of \_\_\_\_\_, 20\_\_ (the "Co-Sale Agreement");
- (iv) the Voting Agreement, dated as of \_\_\_\_\_, 20\_\_ (the "Voting Agreement");
- (v) the [form of] Warrant[s] [to be] issued to the Purchasers pursuant to the Purchase Agreement;
- (vi) the Schedule of Exceptions to the Purchase Agreement (the "Schedule of Exceptions");
- (vii) the Certificate of Incorporation of the Company, as amended to date, certified by the Delaware Secretary of State as of \_\_\_\_\_, 20\_\_ and certified to us by an officer of the Company as being complete and in full force and effect as of the date of this opinion letter (the "Restated Charter"),<sup>20</sup>

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18. Like the Transactional Opinion, the Venture Opinion follows the order set out in the 2007 Business Transactions Report: (1) introductory matters, for example, the date, the identity of the opinion recipient, the role of the opinion giver giving the opinion letter, and the purpose for which the opinion letter is given; (2) a general or specific recitation of the documents and other factual and legal matters reviewed by the opinion preparers, including in some instances a statement of reliance on various factual assumptions; (3) the legal conclusions expressed in the opinion letter, and any qualifications to the legal conclusions; (4) matters peculiar to the particular opinion letter, for example, references to opinion letters of local counsel in other jurisdictions and specific limitations on the use of the opinion letter; and (5) the signature of the opinion giver. See TRANSACTIONAL OPINION, *supra* note 3, at 3 n.6 (citing the 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 21).

For the reasons set forth in the Transactional Opinion, the Venture Opinion departs from the foregoing framework in one significant respect: it separates factual confirmations—whether or not traditionally expressed with the legal conclusions—from the legal conclusions by placing them in a separate section, Section D ("Confirmation"), immediately following the numbered opinion paragraphs. See TRANSACTIONAL OPINION, *supra* note 3, at 3 n.6.

19. Practice varies on whether to list documents that the opinion preparers have reviewed. See TRANSACTIONAL OPINION, *supra* note 3, at 3 n.7, and for an extended discussion regarding the description of an opinion giver's factual examination, see 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 24–32.

20. The Delaware term "Certificate of Incorporation" is used throughout the Venture Opinion because the assumed transaction is the Venture Financing of a Delaware corporation. The appropriate California term—"Articles of Incorporation"—should be used if the Company is incorporated in California and all references herein changed accordingly. For a sample Certificate of Incorporation for a Delaware corporation, see CERTIFICATE OF INCORPORATION OF THE NATIONAL VENTURE CAPITAL ASSOCIATION (Aug. 2013), available at <http://goo.gl/VljFz> (under the "Model Legal Documents" tab).

Alternative language for use if the Company is incorporated in California follows:

- (viii) the Bylaws of the Company, certified to us by an officer of the Company as being complete and in full force and effect as of the date of this opinion letter;
- (ix) records certified to us by an officer of the Company as constituting the records of proceedings and actions of the board of directors [and the stockholders]<sup>21</sup> of the Company relevant to the opinions set forth below;<sup>22</sup>
- (x) a Certificate of Status—Foreign Corporation with respect to the Company, issued by the California Secretary of State on \_\_\_\_\_, 20\_\_\_\_,<sup>23</sup>
- (xi) a Good Standing Certificate with respect to the Company, issued by the Delaware<sup>24</sup> Secretary of State on \_\_\_\_\_, 20\_\_\_\_,<sup>25</sup>
- (xii) a certificate of the [Chief Executive Officer, Chief Financial Officer, or other appropriate officer]<sup>26</sup> of the Company identifying certain agreements and instruments to which the Company is a party or by which

the Articles of Incorporation of the Company, as amended to date, certified by the California Secretary of State as of \_\_\_\_\_, 20\_\_\_\_ and certified to us by an officer of the Company as being complete and in full force and effect as of the date of this opinion letter (the “Restated Charter”);

21. The Delaware term “stockholder” is used throughout the Venture Opinion because the assumed transaction involves a Delaware corporation. The appropriate California term—“shareholder”—should be used if the Company is incorporated in California and all references in the Venture Opinion changed accordingly.

22. Although some opinion preparers may review the corporate minute books, others may rely on a secretary’s certificate confirming adoption of the relevant resolutions. See TRANSACTIONAL OPINION, *supra* note 3, at 4 n.8.

23. If the Company is incorporated in California, this provision is not applicable.

24. Alternative language for use if the Company is incorporated in California follows:

a Certificate of Status—Domestic Coporation with respect to the Company, issued by the California Secretary of State on \_\_\_\_\_, 20\_\_\_\_;

When the Company is a California corporation, some opinion preparers also obtain a good standing letter from the Franchise Tax Board to confirm that no suspension of the corporation’s charter for non-payment of taxes is imminent. The Committee believes that, absent some particular concern about tax delinquencies, a Franchise Tax Board letter need not be obtained to give a good standing opinion on a California corporation. The Secretary of State’s good standing certificate reflects whether as a result of a tax delinquency the corporation’s charter has been suspended or forfeited. See TRANSACTIONAL OPINION, *supra* note 3, at 4 n.9 (citing the 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 42).

25. For a general description of the certificates of public officials customarily relied on, see 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 26–28. As the 2007 Business Transactions Report concludes, at least in routine cases, customary practice requires neither that every certificate be dated the date of the opinion letter nor that the opinion letter state that the opinions it contains are based solely on the certificates listed, without telephonic or other update.

26. The Transactional Opinion refers to the delivery of this certificate by the Company’s “Chief Financial Officer, General Counsel, or other appropriate officer.” See TRANSACTIONAL OPINION, *supra* note 3, at 5 n.12. The Committee notes that most early stage companies engaging in Venture Financings do not have a General Counsel and that opinion preparers ordinarily rely on a certificate of the Chief Executive Officer or Chief Financial Officer. Nothing would preclude the General Counsel of a company with the relevant knowledge from delivering a certificate of the type described in connection with a Venture Financing.

- the Company's properties or assets are bound (the "Certificate Relating to Agreements");<sup>27</sup>
- (xiii) a copy of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being a true and complete copy of the original ("Scheduled Agreements");<sup>28</sup>
  - (xiv) a certificate of the [Chief Executive Officer, Chief Financial Officer, or other appropriate officer]<sup>29</sup> of the Company as to certain factual matters relevant to the opinions expressed below;<sup>30</sup> [and]
  - (xv) the Capitalization Records (as defined in Section E ("Certain Qualifications") below). [; and]
  - [(xvi) the Certificate of Transfer Agent (as defined in Section E ("Certain Qualifications") below).]

Each of the documents identified in items (i) through [(iv) OR (v)] above is sometimes referred to below as a "Transaction Document."<sup>31</sup>

The shares of Common Stock issuable upon conversion of the Shares are referred to herein as the "Conversion Shares"<sup>32</sup> [,] the shares of Series B Preferred

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27. When the Purchase Agreement includes a schedule of certain agreements of the Company, the opinion preparers instead often refer to the agreements and instruments identified on the relevant schedule. See TRANSACTIONAL OPINION, *supra* note 3, at 5 n.12; see also NVCA FORM, *supra* note 5, at 2 n.7 ("Consideration should be given to which contracts should be covered in light of the cost constraints of many venture financings.").

28. The Venture Opinion uses the term "Scheduled Agreements" to describe the list of contracts that are addressed in the opinion letter, rather than the term "Material Agreements"—the term used in the Transactional Opinion—to avoid any suggestion that the list of contracts corresponds to those that might be viewed as objectively "material" under some standard, such as that included in Item 601(b)(10) of Regulation S-K promulgated by the U.S. Securities and Exchange Commission. Regardless of whether the term "Material" is used, the Committee believes that, by referring to a list of agreements, opinion givers are not implicitly giving an opinion that the agreements on the list comprise all "material" agreements to which the Company is a party (regardless of how "material" might be defined).

29. See *supra* note 26.

30. This certificate addresses factual matters relevant to the Company and the opinion giver. These may include such matters as the absence of dissolution proceedings and the absence (or identification) of pending litigation. Some opinion preparers do not refer to this certificate and instead rely on the general statement about the making of "further legal and factual examination" to cover any such matters. See TRANSACTIONAL OPINION, *supra* note 3, at 5 n.13. Finally, some opinion preparers draft this certificate (as well as other similar opinion-related certificates) to be signed by an officer on behalf of the Company. Other opinion preparers draft the certificate to be signed by an officer in his or her own name. The Committee believes that these approaches are all appropriate.

31. Opinion preparers should take care that the Company's Certificate of Incorporation is not included in the definition of Transaction Documents. See NVCA FORM, *supra* note 5, at 1 n.2 ("Inclusion of the certificate of incorporation would be both illogical (e.g., in the case of the due execution and delivery opinion) and troublesome (e.g., in the case of the enforceability opinion)."); see also 2009 *Venture Capital Report*, *supra* note 2, at 170–72 (an extended discussion of the business issues that underlie historical—and inappropriate—requests for an opinion to the effect that the provisions of the Certificate of Incorporation "work").

32. See NVCA FORM, *supra* note 5, at 3 n.12 ("Because shares may be issued in the future under antidilution clauses or otherwise, as a matter of customary practice [an opinion regarding the duly authorized, validly issued, fully paid and nonassessable status of conversion shares] is understood

Stock issuable upon exercise of the Warrants are referred to below as the “Warrant Shares,” and the shares of Common Stock issuable upon conversion of the Warrant Shares are referred to below as the “Warrant Conversion Shares].”

We have also examined such other documents and made such further legal and factual examination and investigation as we deem necessary for purposes of giving the following opinions.<sup>33</sup>

## B. CERTAIN ASSUMPTIONS<sup>34</sup>

We have assumed, for purposes of the opinions set forth below, that:

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to mean that sufficient authorized shares are available on the date of the opinion letter, not that sufficient authorized shares necessarily will be available on the conversion date. To make the limited nature of the opinion clear, some opinion preparers include an express assumption regarding the availability of sufficient authorized shares in the future.”). The Venture Opinion addresses this issue expressly in the assumptions below (see Section B (“Assumptions”), paragraphs (e) and (f)). It does not address the issue in the opinions themselves or in the definition of terms but these approaches are also acceptable.

33. Some opinion givers include a statement to the effect that they have not conducted a search of the docket of any court or other tribunal. According to the 1998 *TriBar Report*, no such disclaimer is necessary (and no such search is required in connection with a “no litigation” confirmation). See TRANSACTIONAL OPINION, *supra* note 3, at 6 n.14 (citing the 1998 *TriBar Report*, *supra* note 8, at 664; 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 64 n.195); see also Section D (“Confirmation”) (concerning the “no litigation” confirmation). Also, some opinion givers omit the last paragraph, thus intending to imply that the list of documents reviewed constitutes the exclusive scope of their document review. Merely deleting the last paragraph, however, is not generally understood to be sufficient to limit the responsibility of the opinion preparers to review other pertinent documents. When such a limitation is intended, additional language should be added that makes clear that the opinions being given are based solely on a review of the listed documents. 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 25–26 (“If no specific limitation is included, a list of documents is not generally understood to constitute a limitation on the general responsibility of the opinion giver to follow customary diligence in rendering the opinion.”).

34. The 1998 *TriBar Report* takes the view that assumptions of general applicability need not be stated. For example (and without limitation), the following assumptions, relating to facts that “are common to transactions generally and are customarily assumed as a matter of course,” are understood to be applicable whether or not stated as long as they are not known to be false or reliance on them in the particular circumstance is not unreasonable: (a) that individuals have legal capacity, (b) that copies of documents furnished to the opinion preparers conform to the originals, (c) that the original documents furnished to the opinion preparers are authentic, (d) that the signatures on executed documents are genuine, and (e) that the agreement that is the subject of the enforceability opinion is binding on the other parties to it. See TRANSACTIONAL OPINION, *supra* note 3, at 6 n.15 (citing the 1998 *TriBar Report*, *supra* note 8, at 615).

Similarly, as a matter of customary practice, opinion givers may assume, without so stating, that those who have approved an agreement have satisfied their fiduciary obligations and have disclosed any interest in the transaction, see TRANSACTIONAL OPINION, *supra* note 3, at 6 n.15 (citing 1998 *TriBar Report*, *supra* note 8, at 629); see also *infra* note 89, and that contracts covered by the “no breach” opinion that by their terms are governed by the law of a jurisdiction whose law is not being covered in the opinion letter are being interpreted in accordance with their plain meaning, see TRANSACTIONAL OPINION, *supra* note 3, at 6 n.15 (citing 1998 *TriBar Report*, *supra* note 8, at 660). Nevertheless, many California opinion givers expressly state some or all of these assumptions, see TRANSACTIONAL OPINION, *supra* note 3, at 6 n.15 (citing 1998 *TriBar Report*, *supra* note 8, at 610). For a discussion of the practice of some opinion givers of stating expressly that no fiduciary opinion is being given, see *infra* note 89. See also *TriBar Remedies Opinion Report*, *supra* note 8, at 1484 (for a discussion of the appropriateness of the use of unstated assumptions).

The Committee notes that the recent decision in *Fortress Credit Corp. v. Dechert*, 934 N.Y.S.2d 119 (App. Div. 2011), may lead some opinion givers to state expressly some or all of the assumptions of

- (a) The information provided by the Company to the Purchasers in connection with the offer and sale of the Shares is accurate and complete;<sup>35</sup>
- (b) The Company's representations to us [that the Company and its agents have made no offer to sell the Shares by means of any general solicitation or in connection with the publication of any advertisement relating to such an offer and] that no offer or sale of the Shares has been made or will be made in any state outside of [California] where such offer or sale would be contrary to applicable law are accurate and complete;<sup>36</sup>

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general applicability. This stems from the fact that the court in that case noted, as one of the bases for dismissing the action, that the opinion letter in question included an assumption regarding the genuineness of the documents reviewed. Although the result in the case no doubt was correct, the Committee believes that, in the absence of facts suggesting that the opinion preparers knew that the documents were not genuine, the case should ultimately have been decided the same way whether or not an express assumption had been included in the opinion letter. However, for many of the same reasons that some opinion givers are inclined to include an express reference to the *Principles* in their opinion letters (see, e.g., *supra* note 13), some opinion givers state some or all of the general assumptions. The Committee believes that, whether or not assumptions of general application are stated, an opinion letter should be read as if they were stated—and the opinion preparers should not be responsible for affirmatively investigating their accuracy. The Committee notes that a “laundry list” approach to assumptions (and to qualifications/exceptions)—that is, utilizing a standard list of assumptions, qualifications, or exceptions that may include assumptions, qualifications, or exceptions that do not apply to the actual terms of the agreement(s) being considered—can impair the value of an opinion letter as a communications tool. See *TriBar Remedies Opinion Report*, *supra* note 8, at 1486.

In addition to assumptions of general application, opinion givers sometimes include express assumptions about matters that are not generally applicable to all opinions but are necessary for the particular opinions being given. Inclusion of these assumptions is required if they are to be relied on, and their inclusion shifts to the recipient the burden of confirming the matters assumed or taking the risk that they are not accurate. See *1998 TriBar Report*, *supra* note 8, at 616.

35. If the Venture Financing includes any unaccredited investors and relies on Regulation D as the exemption from registration under the Securities Act, this assumption may be necessary to support the Regulation D exemption, although it relates much more directly to Rule 10b-5, as to which no opinion or “negative assurance” is typically given in Venture Financings. See *2009 Venture Capital Report*, *supra* note 2, at 188. In Venture Financings that rely on the statutory private placement exemption provided by section 4(a)(2) of the Securities Act and not on Regulation D, or that rely on Regulation D but do not include any unaccredited investors, this assumption is not needed to address a specific disclosure requirement of Regulation D. However, a court may consider the accuracy and completeness of information provided to the Purchasers as a factor in deciding whether a section 4(a)(2) exemption is available.

The opinion preparers representing the Company in a Venture Financing may assist in the preparation of disclosure documents (such as a private placement memorandum) used in connection with the transaction, but the core of the contents of the documents and their completeness and accuracy are the responsibility of the Company, its board of directors, and its officers, who are in a much better position than the opinion preparers to know the relevant facts about the Company. This assumption makes clear that the Venture Opinion does not cover the accuracy or adequacy of the disclosure provided by the Company to the Purchasers.

36. Prior to its amendment in 2013, Rule 506 under the Securities Act was not available for offerings utilizing general solicitation or general advertising. However, pursuant to section 201(a) of the Jobs Act, the U.S. Securities and Exchange Commission revised Rule 506 to provide, among other things, that the prohibition against general solicitation and general advertising in Rule 502(c) would not apply to offers or sales of securities made in compliance with new Rule 506(c). 78 Fed. Reg. 44771 (July 25, 2013). One of the requirements of Rule 506(c) is that the issuer take reasonable steps to verify that each purchaser is an accredited investor. As indicated in *supra* note 11, the Venture Opinion does not address Rule 506(c) offerings. See *infra* note 70.

- (c) The representations and warranties made by the Company and all prior purchasers of the Company's securities given in connection with the sale of such securities are accurate and complete;<sup>37</sup>
- (d) The Company is not disqualified from relying on the exemption from the registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), provided by Rule 506 thereunder by reason of the provisions of paragraphs (d) or (e) of Rule 506;<sup>38</sup> [; and]
- (e) At the time of conversion of the Shares into Common Stock [and/or Warrant Shares into Common Stock] a sufficient number of shares of Common Stock will be authorized and available for issuance under the Company's certificate of incorporation as then in effect to satisfy (i) the conversion of all Shares (and all other then outstanding shares of the Company's Preferred Stock) into Common Stock at the then effective respective conversion rates of such shares and (ii) the exercise, conversion and exchange rights of all other then outstanding securities of the Company that are then, directly or indirectly, issuable or exchangeable for, or convertible into, Common Stock at their then effective rates of issuance, exchange or conversion.<sup>39</sup> [; and]
- [(f) At the time of exercise of the Warrants, a sufficient number of Warrant Shares will be authorized and available for issuance under the Company's certificate of incorporation as then in effect to satisfy the Company's obligations under the Warrants to issue all of such Warrant Shares.]<sup>40</sup>

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37. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 82 ("To be certain that the exemption from federal registration or California qualification is available in a particular transaction, the opinion giver must determine that the transaction is not part of other offers or sales of securities that, taken together, would not qualify for the exemption. These requirements often involve mixed questions of law and fact. The opinion giver will typically rely upon officers' certificates and may review the Company's minute book and stock book in an effort to substantiate the factual basis for the determination of whether there are other transactions that may have to be 'integrated' with the current offering." (footnotes omitted)).

See the introductory clause to opinion 9 that seeks to cover the facts described in the 2007 Business Transactions Report and that tracks the form of the "no registration opinion" suggested in the NVCA FORM. See NVCA FORM, *supra* note 5 (opinion 8).

38. Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, required the U.S. Securities and Exchange Commission to adopt new requirements for offerings made in reliance on the Rule 506 exemption, including Venture Financings. Rule 506, as revised, now requires: (i) that no persons related to the offering (as identified in Rule 506(d)(1)) be "bad actors" (as defined in Rule 506(d)) and (ii) that written disclosure of prior bad actor events (as identified in Rule 506(e)) be provided to each purchaser a reasonable time prior to sale. The Committee believes that opinion givers may appropriately rely on an express assumption regarding the absence of "bad actors." The Committee does not take a position on whether the absence of "bad actors" may be addressed by expressly assuming the accuracy of the representations set forth in certificates or other documents. See *generally* No Registration Report, *supra* note 7, at 191-92 (sample opinion, while predating the bad actor rules, relies on reference to representations in agreements to establish facts).

39. See *supra* note 32.

40. See *supra* note 32.

## C. OPINIONS

Based on the foregoing, and subject to the qualifications set forth in Section E (“Certain Qualifications”) below, [and except as specifically set forth in the Schedule of Exceptions,]<sup>41</sup> we are of the opinion that:

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41. Opinion literature has long recognized that the benefit an opinion provides a recipient must be balanced against the costs of preparing the opinion. *See, e.g.*, 2007 REMEDIES REPORT, *supra* note 6, app. 4, at 4–9. Most early stage venture-backed companies have limited resources that place a practical limit on the diligence the opinion preparers can perform without exceeding the Company’s budget for legal fees in the transaction. In these transactions, the Schedule of Exceptions to the representations and warranties in the Purchase Agreement—a document that, in a traditional Venture Financing, is not likely to be lengthy—often discloses matters such as potentially defective securities issuances, failures to have made required filings, and failures to have followed procedural requirements in approving organizational documents or contracts. These disclosures may be made out of a belief that they evidence a real problem; they may also be made simply because the Company is unwilling or unable to invest the time or incur the expense of determining whether a real problem exists. In either case, an opinion recipient’s counsel should discuss with its client the potential legal consequences of the matters disclosed in the Schedule of Exceptions so that the client can make an informed decision as to whether to assume the risk and proceed with the Venture Financing.

The subject matter of certain representations and warranties for which exceptions are taken may also be the subject of requested opinions (as in opinions on the validity of stock issuances, breaches of existing agreements, or the obtaining of consents or approvals) or confirmations (such as the absence of litigation). As a result, exceptions similar to those taken in the Schedule of Exceptions may be relevant to the opinions given. While the opinion preparers may choose to restate in the opinion letter itself some or all of the exceptions in the Schedule of Exceptions to the extent the opinion preparers find them relevant (and to set them out either as exceptions, qualifications, or assumptions, as appropriate), opinion preparers in Venture Financings often include an exception or qualification in the opinion letter substantially similar to that included in the bracketed text when the Schedule of Exceptions includes matters that might otherwise be addressed by express exceptions, qualifications, or assumptions. Considerations such as cost, or the desire to avoid highlighting in an opinion letter matters that could provide a “road map” for a plaintiff or governmental agency to pursue legal action against the Company based on the disclosed problem, are reasons for this practice in the Venture Financing context, though not all opinion givers follow this practice and not all recipients accept opinion letters containing the bracketed language. The Committee believes that this practice can be appropriate in the context of Venture Financings when the exceptions or qualifications are clearly identified in the Schedule of Exceptions, and when their effect as possible limitations on the relevant opinions is or should be apparent. The fact that items constituting exceptions or qualifications are set forth outside the opinion letter in a document to which the letter refers and to which the recipient and its counsel have access should not of itself require restatement of those exceptions or qualifications in the opinion letter when their potential relevance to the topics addressed in the opinion letter should be understood by both opinion giver and recipient.

Regardless of how exceptions, qualifications, and assumptions are stated, the opinion preparers should not give an opinion that, while technically correct, they recognize will mislead the opinion recipient with regard to its subject matter. *See, e.g.*, 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 10 (fraudulent and misleading opinions); *id.* at 20 (“[A] lawyer should not render an opinion based on factual assumptions if the lawyer knows that the assumptions are false or that reliance on those facts is unreasonable.”). For example, if the opinion preparers discover that a board meeting at which the directors approved the issuance of shares was not in fact a valid meeting despite minutes to the contrary, a disclosure of the “possible invalidity of the board meeting” in the Schedule of Exceptions may not be sufficient to permit giving a “validly issued” opinion regarding the issuance of those shares. By contrast, where the facts at issue are not clear (such as where there is inadequate record keeping, but the opinion preparers believe the actual facts would support the giving of a particular opinion), noting the state of the record in the Schedule of Exceptions is appropriate and would appropriately qualify the opinion given.

Some opinion preparers broaden the bracketed text by including a reference to the Purchase Agreement itself in addition to the reference to the Schedule of Exceptions. This practice may have the unfortunate consequence of making it difficult for the opinion recipient to determine what facts or other

1. The Company is a corporation validly existing<sup>42</sup> and in good standing under the laws of the State of Delaware.<sup>43</sup> The Company is qualified to transact intrastate business<sup>44</sup> and is in good standing under the laws of the State of California.
2. The Company has the corporate power<sup>45</sup> to enter into and

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disclosures the opinion giver is relying upon for purposes of giving opinions (e.g., factual statements that may be set forth in exceptions to affirmative or negative covenants or other provisions, exhibits, or schedules in the Purchase Agreement). Even if the opinion giver were to limit the broader reference to include only *representations* in the Purchase Agreement, the opinion recipient may find it difficult to determine if the opinion giver is inappropriately attempting to rely on more in the Purchase Agreement than just the *factual* representations in the Purchase Agreement. See, e.g., DONALD W. GLAZER, SCOTT FITZGIBBON & STEVEN O. WEISE, *GLAZER AND FITZGIBBON ON LEGAL OPINIONS* § 4.2.1, at 121 (3d ed. 2008) [hereinafter *GLAZER & FITZGIBBON*] (“Opinion preparers also sometimes base opinions on representations of the company in the agreement. Representations, however, often are framed not as statements of fact, which may be relied on to support an opinion, but as conclusions of law, which may not.”).

Finally, the Committee notes that the bracketed text may be less appropriate (as the cost/benefit analysis may be less compelling) for opinion letters delivered in transactions for later stage venture-backed companies when the amount being raised justifies more diligence and a larger budget for legal fees.

42. Practice has moved toward giving the “validly existing” opinion and away from the “duly incorporated” opinion. See NVCA FORM, *supra* note 5, at 1 n.1; 1998 *TriBar Report*, *supra* note 8, at 642–43.

43. Alternative language for use if the Company is incorporated in California follows:

The Company is a corporation validly existing and in good standing under the laws of the State of California.

If the Company is incorporated in California, the second sentence of this opinion (regarding qualification to transact business in California) is not necessary. For the distinction between the “validly existing” opinion and the “duly incorporated” opinion in California, see TRANSACTIONAL OPINION, *supra* note 3, at 8 n.17 (citing the 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 40). For the distinction between the “validly existing” opinion and the “duly incorporated” opinion in Delaware, see 1998 *TriBar Report*, *supra* note 8, at 641–47.

44. This language tracks the California Corporations Code. CAL. CORP. CODE § 2105(a) (West 1990 & Supp. 2012).

45. Consistent with the Transactional Opinion, this opinion does not include: (1) an opinion that “the Company has the corporate power *and authority* to . . .,” and (2) reference to the power of the Company to “*own and operate its assets*.” See TRANSACTIONAL OPINION, *supra* note 3, at 8–9 n.18 (“Historically, the corporate power opinion included a reference to ‘authority’ in addition to ‘power.’ Because of concerns that a reference to ‘authority’ could lead to a more expansive interpretation of the ‘corporate power’ opinion, current practice appears to be moving away from including ‘authority.’ However, the ‘corporate power’ opinion is generally understood to have the same meaning whether or not ‘authority’ is included and, to the extent that the word ‘authority’ is included, it is generally understood to be limited to ‘corporate authority’ even without the modifier ‘corporate’ immediately preceding the word ‘authority.’ In addition, the corporate power opinion has historically included an express opinion that the subject corporation has the corporate power to own and operate its assets. Current practice seems to be evolving away from this form of opinion in favor of limiting the ‘corporate power’ opinion to the Company’s power to carry on its business as it is currently conducted.” (citing the 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 44)).

The Committee notes that venture capital investors may have an interest in whether the business that is to be conducted by the Company is *ultra vires*. For example, venture capital investors often provide seed funding to a newly formed (or relatively new) corporation with a proposed business plan but little or no established operations. Thus, in Venture Financings, “[o]pinion recipients sometimes ask that this opinion be broadened, for example, to cover the Company’s corporate power to conduct its business.” NVCA FORM, *supra* note 5, at 1 n.3. In this regard, if the corporate power opinion is written to include the Company’s power to carry on its business and is not limited to the Company’s business as currently conducted, the Committee believes that the opinion giver should consider including other qualifying conditions in the opinion. If the business of the Company is described in a document that

perform<sup>46</sup> its obligations under each of the Transaction Documents.<sup>47</sup>

3. The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Company<sup>48</sup> and have been duly

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has been delivered to the investors, the opinion should make explicit reference to that document. For example, “The Company has the corporate power to conduct its business as proposed to be conducted in its Business Plan dated \_\_\_\_\_, 20\_\_\_\_,” or “The Company has the corporate power to conduct its business as described in Section \_\_\_\_ of the Purchase Agreement.” Alternatively, the opinion may be based on an officer’s certificate or disclosure document describing the Company’s business as currently and proposed to be conducted. In either case, the opinion requires a review of the Company’s Certificate of Incorporation (or Articles of Incorporation if the Company is incorporated in California) to confirm the absence of any limitations on corporate power. See TRANSACTIONAL OPINION, *supra* note 3, at 8–9 n.18 (citing the 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 44).

46. The opinion on corporate power to “perform” covers both the obligations in the Transaction Documents that the Company is required to meet at closing and the obligations that the Company is required to perform in the future. See 1998 *TriBar Report*, *supra* note 8, at 657–58 & n.139 (general discussion of obligations to be performed in the future). Opinion preparers must determine whether the corporation law of the state in which the Company was incorporated or the Company’s Restated Charter or Bylaws prohibit the Company from performing its obligations under the Transaction Documents both at and after the closing. For example, is the Company agreeing to conduct a banking business that would not be permitted under its articles of incorporation? See, e.g., CAL. CORP. CODE § 202 (West 1990 & Supp. 2012).

47. Some opinion givers include a supplemental reference to the sale and issuance of the securities that are the subject of the Venture Financing:

The Company has the corporate power to enter into and perform its obligations under the Transaction Documents, including without limitation, the sale and issuance of the Shares [and the Warrants], and the issuance of the Conversion Shares[, Warrant Shares and the Warrant Conversion Shares]. (emphasis added).

The Committee believes that the supplemental reference to “the sale and issuance of the Shares . . .” is redundant (a view that is consistent with the NVCA FORM). See NVCA FORM, *supra* note 5.

In analyzing whether the Company has the corporate power to “perform its obligations,” opinion givers sometimes have concerns regarding circumstances that may arise in the future: for example, the law could change or the certificate of incorporation could be amended to prohibit future stock issuances or sufficient authorized but unissued shares might not be available when Conversion Shares, Warrant Shares, and Warrant Conversion Shares are to be issued. Nevertheless, the opinion preparers are entitled to rely on customary practice that the opinion letter speaks only as of its date and thus may ignore possible changes in the law or subsequent amendments to the certificate of incorporation. See GLAZER & FITZGIBBON, *supra* note 41, § 2.2.1, at 572. In addition, the opinion preparers may rely on the assumptions that in the Venture Opinion are stated expressly (Section B (“Assumptions”), paragraphs (e) and (f)) for the sufficiency of available common and preferred shares when Conversion Shares, Warrant Shares, and Warrant Conversion Shares are issued.

48. This opinion follows the formulation recommended in the 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 45–48. Regardless of whether the word “performance” is included in the opinion, it covers the corporate authorizations the Company is required to obtain under the corporation law of the state where it is incorporated to execute, deliver, and perform its obligations under the Transaction Documents. 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 45.

This opinion is understood, as a matter of customary practice, to mean that the Company has taken the corporate action required to authorize its officers to bind the Company contractually to perform its obligations under the Transaction Documents. As a matter of customary practice, the opinion is understood not to provide assurance that the Company has taken the corporate action required to authorize performance after the closing of obligations in the Transaction Documents, such as an obligation to issue shares in the future at a price based on a future market price, when that action can be taken only at some future date.

Finally, by covering “corporate action on the part of the Company,” the opinion by its terms makes clear that, in general, it is not covering authorizations or approvals that do not constitute corporate action but that are required by a law other than the applicable corporation law (i.e., usually the law of

executed and delivered by the Company.<sup>49</sup>

the state in which the Company is incorporated). For example, the opinion does not cover board approval of the future filing of a registration statement under a registration rights agreement even though board approval of the filing (or at least signing of the registration statement by a majority of directors) is required by the Securities Act. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 45 (“The phrase ‘duly authorized by all necessary corporate action on the part of the Company’ may be preferable to ‘duly authorized’ alone, as the latter might be construed to imply authorization under law other than the GCL or by a governmental regulatory body . . . , although the Committee does not believe that any such inference is justified or appropriate.”). However, if the Company is a Delaware corporation and it may be subject to the requirements of section 2115 of the California Corporations Code (which provides for the application of specified provisions of California corporation law to certain internal affairs of foreign corporations that have a sufficient nexus to California to justify their application), CAL. CORP. CODE § 2115 (West 1990 & Supp. 2012), the Committee believes that a due authorization opinion in an opinion letter that covers California law and does not expressly limit the opinion’s coverage to the Delaware corporation law also addresses any authorization requirements imposed by section 2115 on a “quasi-California” Delaware corporation. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 47–48 (“If [section 2115 applies], the opinion giver [of a duly authorized opinion] will need to be aware of the provisions of the Corporations Code specified in Section 2115 as possibly being applicable to the “quasi-foreign” corporation.”); CERTIFICATE OF INCORPORATION OF THE NATIONAL VENTURE CAPITAL ASSOCIATION iii–iv (rev. Aug. 2013), available at <http://goo.gl/VljFz> (under the “Model Legal Documents” tab) (for a legal analysis of the interaction between Delaware corporation law and section 2115); *infra* note 75 (for further discussion of the interaction of Delaware corporation law and section 2115). That said, under customary practice the opinion giver may assume, without so stating, that the requirements for application of section 2115 have not been met unless the opinion giver believes that assumption is not reliable given the apparent locus of the Company’s business or identity of its stockholders.

49. The last clause of this opinion means that the relevant agreements have been executed and delivered by duly authorized officers or agents:

The “duly executed” opinion involves a review of the minutes or reliance upon an officers’ certificate to establish that the officers executing the documents on behalf of the Company have been validly elected, that they are or were officers of the Company at the time of execution, and that they were in fact authorized to execute the documents on behalf of the Company. While the “duly executed” opinion also addresses the genuineness of the signatures of the signing officers, such genuineness is expressly or implicitly assumed.

Giving an opinion that a document has been “duly delivered” generally means that the opinion giver is present at the delivery of the signed agreement or otherwise satisfied as to the implementation of procedures for actual delivery.

2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 46. As a matter of customary usage, therefore, “execution” means the signing of relevant documents by an authorized person, and “delivery” means the transmission of those documents to the appropriate parties at consummation of the transaction, thus completing these elements of contract formation. Under this customary usage, “execution” alone—without “delivery”—would not result in the formation of a contract. The Committee is cognizant of section 1933 of the California Code of Civil Procedure, CAL. CIV. PROC. CODE § 1933 (West 2007) (“The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.”), but believes, as a matter of customary usage, that “executed,” standing alone in an opinion, merely means that appropriate persons have signed the agreement on behalf of the Company. See TRANSACTIONAL OPINION, *supra* note 3, at 9 n.19 (citing 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 45–48).

Closings today often are effected by an electronic exchange of signature pages. When the opinion preparers do not witness the physical execution of the signature pages, they are permitted, as a matter of customary practice, to assume, without so stating, that all signatures are genuine. See GLAZER & FITZGIBBON, *supra* note 41, § 4.3.3, at 152 (a partial listing of implied assumptions that need not be expressly stated under customary practice); see also *supra* note 34. In addition, customary practice permits the opinion preparers to assume, without so stating, that an electronic exchange of signature pages, coupled with express or implied authorization to attach them to the relevant documents, is an appropriate procedure to constitute actual delivery. Some opinion preparers are not comfortable relying on customary practice, however, and instead obtain an officer’s certificate regarding execu-

4. The Company's authorized capitalization consists of (a) \_\_\_\_\_ shares of Common Stock, of which \_\_\_\_\_ shares are issued and outstanding, and (b) \_\_\_\_\_ shares of Preferred Stock, of which (i) \_\_\_\_\_ shares have been designated as Series A Preferred Stock, all of which are issued and outstanding, and (ii) \_\_\_\_\_ shares have been designated as Series B Preferred Stock, none of which have been issued.<sup>50</sup> The issued and outstanding shares of Common Stock and Preferred Stock of the Company have been duly authorized<sup>51</sup> and validly issued<sup>52</sup> and are fully paid<sup>53</sup>

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tion and delivery of the relevant documents and describe their reliance in the opinion letter as follows:

In rendering the opinion set forth in Section C ("Opinions"), paragraph 3 concerning the Company's execution and delivery of the Transaction Documents, we have not necessarily observed their execution by the Company but have relied exclusively upon representations regarding the Company's execution and delivery of the Transaction Documents made to us in a certificate and our review of copies, facsimiles or .pdf files of executed signature pages delivered to us by representatives of the Company or their agents.

The Committee believes that either approach is acceptable.

50. See 1998 *TriBar Report*, *supra* note 8, at 651–52 (general discussion of the authorized capital opinion under Delaware law); 2008 *TriBar Preferred Stock Report*, *supra* note 8 (under Delaware law); 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 65–66 (extended discussion of the authorized capital opinion as it relates to California corporations); C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 BUS. LAW. 393 (2014).

51. See 1998 *TriBar Report*, *supra* note 8, at 648–49 (extended general discussion of the duly authorized opinion); 2008 *TriBar Preferred Stock Report*, *supra* note 8 (amplification regarding duly authorized opinions on preferred stock). Note that the duly authorized opinion confirms that the Company has the power under the corporation law of the state where the Company is incorporated and the Company's charter documents to create stock with the rights, powers, and preferences of the shares in question. 2008 *TriBar Preferred Stock Report*, *supra* note 8, at 923–24; 2009 *Venture Capital Report*, *supra* note 2, at 171; see also 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 66–69 (extended discussion of the duly authorized opinion as it relates to California corporations). For issues presented under Delaware law that California lawyers may not have the competence to advise on, see *supra* note 12. See generally 2008 *TriBar Preferred Stock Report*, *supra* note 8, at 923 n.12 ("The applicable state corporation statute may be the statute of the state in which the opinion preparers practice or it may be the statute of another state, such as Delaware. Non-Delaware lawyers are usually willing to give the duly authorized opinion on preferred stock issued by Delaware corporations when difficult issues are not presented."); C. Stephen Bigler & Jennifer Veet Barrett, *Words that Matter: Considerations in Drafting Preferred Stock Provisions*, BUS. L. TODAY (Jan. 2014), <http://goo.gl/BkT58Z>; C. Stephen Bigler & Jennifer Veet Barrett, *Drafting a Mandatory Put Provision for Preferred Stock After ThoughtWorks*, BUS. L. TODAY (Jan. 2012), <http://goo.gl/7UTU93>; MODEL LEGAL DOCUMENTS OF THE NATIONAL VENTURE CAPITAL ASSOCIATION (2014), available at <http://goo.gl/VlJfZ> (under the "Model Legal Documents" tab) (complete set of venture capital documents under Delaware law updated as of the date of publication of this Venture Opinion).

52. See 1998 *TriBar Report*, *supra* note 8, at 648–49 (extended general discussion of the validly issued opinion); 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 69–71 (extended discussion of the validly issued opinion as it relates to California corporations); see also NVCA FORM, *supra* note 5, at 3 n.10 ("Because the opinion on the valid issuance of the outstanding shares will require a review of each issuance of shares, in many situations it will not be cost justified. For a description of the work customarily required to be performed to give this opinion, see [2008 *TriBar Preferred Stock Report*, *supra* note 8].").

53. In Venture Financings in which a third-party opinion letter is given, investors routinely request an opinion that the outstanding securities of the Company are fully paid and nonassessable. As a matter of customary diligence, opinion preparers usually confirm that the Company has received the consideration required by the corporate action authorizing the issuance by obtaining an officer's certificate. See 1998 *TriBar Report*, *supra* note 8, at 650–51 (extended discussion of the fully paid and

and nonassessable.<sup>54</sup>

nonassessable opinion); 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 72–74 (extended discussion of the fully paid and nonassessable opinion as it relates to California corporations); *see also* Section E (“Certain Qualifications”), paragraph (8) below for reference to reliance in the opinion letter on such an officer’s certificate.

54. In the past, opinion letters in Venture Financings sometimes have covered three additional items: (a) the reservation of shares for future issuance (a “Reservation of Shares Opinion”), (b) the number of outstanding stock options and the number of shares reserved for grant or issuance under stock option plans (an “Outstanding Options Opinion”), and (c) the absence of certain preemptive rights (a “No Outstanding Preemptive Rights Opinion”). These opinions (whether taking the form of an opinion or a confirmation) have not been included in the Venture Opinion for the reasons that follow:

#### **Reservation of Shares**

In Venture Financings, opinion givers in the past have stated that the Company has taken the action necessary to reserve the number of shares required to be issued under the Purchase Agreement, upon conversion of convertible securities and upon the exercise of options or warrants. Consistent with the conclusions of the 2007 Business Transactions Report, the Committee believes that such “reservation of shares” opinions should not be requested:

[Because the California GCL does not] provide any legal effect to the “reservation” of shares . . . [t]he opinion is almost entirely factual (i.e., establishing the existence of resolutions “reserving” shares for future issuance). Because reservations have no legal effect under the GCL, lawyers generally resist giving this opinion as it is potentially misleading and opinion recipients ordinarily are satisfied by a representation by the Company or by an officer’s certificate on this point. An alternative is for the opinion to address only the question of whether the board of directors of the Company has duly adopted a resolution “reserving” such shares and whether that resolution remains in force.

2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 74. Similar concerns about misleading opinions arise under Delaware law. *See* NVCA FORM, *supra* note 5, at 3 n.12 (second paragraph addresses concerns under Delaware law).

Although the Committee believes that the reservation of shares should be addressed only in the Company’s representations and warranties in the Purchase Agreement, if an opinion giver decides to provide an opinion on this point, then it might give an opinion that the board of directors has adopted a resolution reserving a specified number of shares for issuance. *See* NVCA FORM, *supra* note 5, at 3 n.12. For example, in Section A (“Documents Examined”) above, the following language could be included:

Resolutions adopted by the Board of Directors of the Company and copies of which are attached hereto as Exhibit A reserving (a) the Shares to be issued pursuant to the Purchase Agreement, (b) [the Warrant Shares to be issued upon exercise of the Warrants, (c)] the Conversion Shares [and Warrant Conversion Shares] to be issued upon conversion of the Shares [and Warrant Shares, respectively], and (d) shares of Common Stock of the Company for issuance under the Company’s [Stock Plan Name] (the “Resolutions”).

Similarly, in Section C (“Opinions”), the following language could be included:

The Board of Directors of the Company has adopted the Resolutions.

#### **Outstanding Options**

Likewise, even though sometimes given in the past, an opinion regarding the number of shares issuable upon exercise of outstanding options and reserved for future issuance under option plans or pools ordinarily should not be requested. For an extended discussion, *see* 2009 *Venture Capital Report*, *supra* note 2, at 172–73. *Compare* NVCA FORM, *supra* note 5, at 3 n.10 (under Delaware law) (“Opinion recipients sometimes ask an opinion giver to state that, to the opinion giver’s knowledge, the Company has no outstanding options, warrants or other rights to acquire Company stock other than as disclosed in the Transaction Documents. Many law firms are unwilling to give this opinion because it constitutes negative assurance on a factual matter they rarely are in a position to confirm. When, however, the opinion is given, the opinion letter should describe what the opinion preparers have done to support it.”).

#### **No Outstanding Preemptive Rights**

In Venture Financings, opinion givers in the past have often given an opinion regarding the absence of certain preemptive rights. The 2009 *Venture Capital Report* discouraged this practice, a

5. The Shares have been duly authorized<sup>55</sup> for issuance and, when issued and paid for in accordance with the provisions of the Purchase Agreement, will be validly issued, fully paid and nonassessable<sup>56</sup> The Conversion Shares have been duly authorized for issuance and, when and if issued upon conversion of the Shares in accordance with the Restated Charter,<sup>57</sup> will be validly issued, fully paid and nonassessable. [The Warrant Shares have been duly authorized for issuance and, when and if issued upon exercise of the Warrants in accordance with the provisions of the Warrants, will be validly issued, fully paid and nonassessable. The Warrant Conversion Shares have been duly authorized for issuance and, when and if issued upon conversion of the Warrant Shares in accordance with the Restated Charter,<sup>58</sup> will be validly issued, fully paid and nonassessable.]
6. Each of the Purchase Agreement, Investors' Rights Agreement, [and] Co-Sale Agreement [and Warrant]<sup>59</sup> is a valid and binding obligation

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view the Committee confirms. For an extended discussion, see *2009 Venture Capital Report*, *supra* note 2, at 175–77. In contrast, with respect to Delaware corporations, a limited opinion on preemptive rights may be possible if requested. See *NVCA FORM*, *supra* note 5, at 3 n.13 and accompanying text (under Delaware law).

55. The Committee believes that an opinion recipient should not request either (1) a separate opinion to the effect that “the rights, preferences and privileges [of the stock being purchased in the transaction] are as set forth in the Restated Charter,” or (2) a quasi-remedies opinion that provisions in the Restated Charter will be “enforceable.” See *2009 Venture Capital Report*, *supra* note 2, at 170–72; *2008 TriBar Preferred Stock Report*, *supra* note 8, at 924.

56. In Venture Financings in which a third-party opinion letter is given, investors routinely request an opinion that the securities they are purchasing are fully paid and nonassessable. See *1998 TriBar Report*, *supra* note 8, at 650 & n.136; *2007 BUSINESS TRANSACTIONS REPORT*, *supra* note 6, at 72–74. Because many Venture Financings have historically involved a real-time exchange of checks or wire transfers, stock certificates, signature pages of the Transaction Documents, and other closing documents (such as the third-party opinion of Company counsel), a practice of expressly assuming in the opinion letter that the Shares have been paid for in accordance with the terms of the Purchase Agreement has evolved. In giving the opinion set forth in this sentence, the opinion preparers still must determine that the consideration for the Shares called for by the Purchase Agreement is consistent with that set forth in the resolutions of the board authorizing the stock issuance and the corporation law of the state in which the Company was incorporated.

57. See *supra* note 32. Also, note that, if the Restated Charter includes a “pay-to-play” provision applicable to future financings, operation of the “pay-to-play” mandatory conversion feature raises questions as to the validity of the issuance of the Conversion Shares. See *infra* note 90.

58. See *supra* note 32.

59. This opinion does not cover all documents defined as the Transaction Documents. The Voting Agreement is intentionally omitted. The Committee believes that an opinion of Company counsel regarding the enforceability of a voting agreement against the Company is of little or no value to the recipient and should not be requested. See *2009 Venture Capital Report*, *supra* note 2, at 182–85. Moreover, the enforceability of some provisions typically contained in a voting agreement, particularly so-called “drag-along” provisions, is not free from doubt even as against the stockholders to whom they apply (and whose obligations are not ordinarily covered by an opinion of Company counsel in a Venture Financing). *Id.* at 185. Other agreements ancillary to the sale of the securities in a Venture Financing (commercial agreements, intellectual property licenses, and “management rights letters”) are also not generally an appropriate subject of a third-party opinion. For an extended discussion, see *2009 Venture Capital Report*, *supra* note 2, at 187–88. See also Section E (“Certain Qualifications”), paragraph 12.

of the Company enforceable<sup>60</sup> against the Company in accordance with its terms.<sup>61</sup>

60. The 2007 Remedies Report addresses the meaning and scope of this opinion. According to that report, the remedies opinion is customarily understood to mean that “(i) a contract has been formed, (ii) a remedy will be available in the event of a breach of the undertakings in the contract (or the undertakings will otherwise be given effect), and (iii) remedies in the contract will be given effect, unless, in the case of (ii) or (iii), expressly or implicitly excluded.” 2007 REMEDIES REPORT, *supra* note 6, at 3. In establishing whether a contract has been formed, the opinion preparers will need to confirm or assume the predicates of formation, many of which, as a matter of customary practice, they are permitted to assume without so stating (for example, the capacity of individuals) and others of which are covered in other opinions that typically accompany a remedies opinion, such as (in the case of parties who are entities) the opinions addressing power and due authorization. See TRANSACTIONAL OPINION, *supra* note 3, at 11–12 n.23. As to what a remedies opinion does not mean, see *supra* note 55 (remedies opinion on the certificate of incorporation (Delaware) or the articles of incorporation (California) is not appropriate).

The 2007 Remedies Report goes on to note:

[T]his report . . . concludes that the long-standing supposed continental divide over the meaning and scope of the remedies opinion—the “New York view” that it covers “each and every” provision of a contract versus the “California view” that it covers only the “essential provisions”—should no longer be of concern in opinion practice. Instead, the focus should be on customary practice. Customary practice comprises customary diligence (particularly the legal diligence customarily undertaken in giving a remedies opinion), customary competence, and customary usage (the customarily understood meaning of terms used in third-party legal opinions).

2007 REMEDIES REPORT, *supra* note 6, at 1.

Giving a legal opinion in general—and giving an enforceability opinion in particular—requires that the opinion preparers conduct factual and legal due diligence. A good discussion of customary factual diligence cited by the 2007 Remedies Report can be found in Article II of the 1998 *TriBar Report*. 1998 *TriBar Report*, *supra* note 8, at 608–19. Customary legal diligence, addressed in Appendix 8 of the 2007 Remedies Report, begins with a review by competent opinion preparers of the agreement or agreements covered by the opinion. 2007 REMEDIES REPORT, *supra* note 6, app. 8. If a question arises about the enforceability of a particular provision, the opinion preparers must determine whether the opinion covers the issue. If it does, they must determine whether the issue can be resolved. If the issue cannot be resolved, they should include an appropriate exception in the opinion. See 2007 REMEDIES REPORT, *supra* note 6, app. 8, at 7–8.

61. Absent express qualifications or assumptions, a remedies opinion covers the enforceability of the choice-of-law clause in each agreement covered by the opinion. See *TriBar Remedies Opinion Report*, *supra* note 8, at 1495 (“The remedies opinion addresses the enforceability of the provision in most agreements that chooses the law of a particular jurisdiction as the governing law.”). When California law is chosen (i.e., an “inbound” choice of law), that choice is effective under California’s choice-of-law rules in most commercial transactions involving at least \$250,000. CAL. CIV. CODE § 1646.5 (West 2004). However, consistent with the trend toward Delaware incorporation is a trend toward the selection of Delaware law as the law governing the stock purchase agreement and other transactional documents in a Venture Financing. An opinion giver faced with a request for a remedies opinion on agreements that choose another state’s law as their governing law must decide how to respond. Although the Committee notes that some opinion givers are of the view that no remedies opinion should be given when the documents in question select the law of a state other than California as the governing law, the Committee believes that, in general, practice “now greatly favors permitting the primary opinion giver to give an opinion to the effect that, if the law of the State of California were held to apply to the agreement, notwithstanding the choice of law of another jurisdiction, the agreement would be enforceable.” 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-1 (endnote 1); see also 2007 REMEDIES REPORT, *supra* note 6, app. 4, at 12 (also supporting the use of this so-called “as if” approach). If such an opinion is given (assuming, for illustrative purposes, that the relevant Transaction Documents are governed by Delaware law), the lead-in to the enforceability opinion would be modified to read substantially as follows:

7. All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Company with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law (as defined in Section E (“Certain Qualifications”) below)<sup>62</sup> required to execute and deliver the Transaction

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If a court were to apply the law of California to the interpretation and enforcement of the [transaction documents], rather than the law of Delaware as provided therein, each of the [transaction documents] would be . . . .

In addition, although not required in such an event, many lawyers modify the statement about the law covered by this opinion (which appears at the beginning of Section E (“Certain Qualifications”) of the Venture Opinion) by adding to it the following:

We note that the [transaction documents] provide that they are to be governed by the law of the State of Delaware. Except with respect to those portions of the [transaction documents] that are governed by the Delaware General Corporation Law, our opinion in Section C (“Opinions”), paragraph 6 above regarding the validity, binding effect and enforceability of the [transaction documents] is given as though each of the [transaction documents] were governed by Internal California Law. As used herein, “**Internal California Law**” means the internal laws of the State of California applicable to a contract made by California residents in the State of California that selects California law as the governing law of such contract, without regard to any laws or equitable principles regarding choice of law, conflict of laws or public policies that might make any other law(s) applicable.

See also NVCA FORM, *supra* note 5, at 1 n.5. The Committee notes that the foregoing language differs slightly from the language recommended in the 2009 *Venture Capital Report* but no difference in meaning is intended. Rather, the additional sentence at the end is intended merely to provide further clarification of the meaning of an “as if” remedies opinion. See 2009 *Venture Capital Report*, *supra* note 2, at 167.

The “as if” remedies opinion does not cover the enforceability of the choice-of-law clause because it assumes that the choice-of-law clause is not enforced. See *TriBar Remedies Opinion Report*, *supra* note 8, at 1497 n.70 (“[The “as if” remedies] opinion has the same meaning as any other remedies opinion except that it does not address the enforceability of the chosen law provision.”). Although not requested, some opinion givers state expressly that an “as if” remedies opinion does not address the enforceability under California law of the choice-of-law clause in the agreements being covered.

If under California law sufficient contacts or bases exist to support the parties’ choice of law, and the opinion giver is giving a specific opinion on the choice-of-law clause, a form for such an opinion (where a law other than that of California is chosen) follows:

In a proceeding in a court of the State of California for the enforcement of the [transaction documents], and based on [describe contacts or bases for choosing law of chosen state], the court should give effect to Section \_\_\_\_ [choice-of-law provision] of the [transaction document], except to the extent (i) that any provision of the [transaction document] is determined by the court to be contrary to a fundamental policy of the state whose law would apply in the absence of that Section, and (ii) that state has a materially greater interest in the determination of the particular issue than does the state whose law is chosen.

See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 88–91; 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-1 to B-6; see also TriBar Opinion Comm., *Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*, 68 BUS. LAW. 1161 (2013). This opinion could be given as a supplement to the “as if” remedies opinion. It also could be given as a standalone opinion, without any remedies opinion, if the opinion recipient does not request a remedies opinion. See 2007 REMEDIES REPORT, *supra* note 6, at 90–91.

62. In the case of a “consents and approvals” opinion, the opinion preparers may rely on the qualifications in Section E (“Certain Qualifications”), which, among other things, exclude from the coverage of the opinion securities laws and many other laws (Section E (“Certain Qualifications”), first paragraph, last two sentences).

Documents<sup>63</sup> and for the sale and issuance of the Shares [and Warrants] under the Purchase Agreement as of the closing have been obtained or made.<sup>64</sup>

8. The execution and delivery by the Company of the Transaction Documents, and<sup>65</sup> the sale and issuance of the Shares [and Warrants] under

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63. Opinion 7 generally follows the formulation of the “consents and approvals” opinion appearing in the 2007 Business Transactions Report but without the securities law exclusions, which are unnecessary in light of Section E (“Certain Qualifications”), first paragraph, last two sentences, of the Venture Opinion. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 61; see also *supra* note 62 (discussing exclusion of coverage of securities laws) & *infra* note 65 (discussing requests for “performance” opinions). If the opinion giver decides to give an opinion on consents and approvals required for the Company’s performance of future obligations, the opinion preparers should consider whether or not the Company’s future obligations under the Transaction Documents are sufficiently clear that they can identify all of the consents and approvals the Company needs to perform those obligations. See *infra* note 65 (which is equally applicable to this opinion 7).

64. The Committee has intentionally not included an exception for notice filings required by Regulation D under the Securities Act. Except for the “no registration” opinion (see opinion 9), the Venture Opinion does not cover securities laws. See *infra* note 78. The Venture Opinion expressly excludes coverage of securities laws (except for opinion 9), but that express exclusion would be implied even if not expressly stated. Compare NVCA FORM, *supra* note 5, at 2 n.8 (“Securities law approvals and filings are understood as a matter of customary practice not to be covered by this opinion unless referred to specifically. Some lawyers, however, choose to make this explicit by including [the articulated exception regarding the notice filings pursuant to Regulation D of the Securities Act and the California Corporate Securities Law of 1968, as amended], or a statement indicating that the only opinion covering securities laws is [the no registration opinion]. Such an exclusion does not mean that other laws customarily understood to be excluded are covered.”).

The Committee notes that, although not necessary, some firms regularly include an express exclusion for federal and state securities laws at the end of the “no approvals and consent” opinion such as the following:

except that we express no opinion as to federal or state securities laws.

The Committee believes that this approach is acceptable and that the inclusion of such an express exclusion does not mean that other opinions that do not include the exclusion are intended to cover such laws.

65. The formulation of this opinion (and opinion 7) often refers to “performance of the Company’s obligations,” “the consummation of the transactions,” or “sale and issuance of the Shares [and Warrants]” under the Purchase Agreement. Although some bar association reports have taken the view that these formulations “may” be different (suggesting, of course, that they also may not be), the Committee believes that in most contexts they are different, and that “performance” adds a future element to the opinion when the Company has obligations to be performed after the closing, while “consummation” or “sale and issuance of the Shares [and Warrants]” covers only matters through the closing of the transaction. See GLAZER & FITZGIBBON, *supra* note 41, § 15.5, at 572; 1998 TriBar Report, *supra* note 8, at 662–63; *supra* note 63 (discusses similar issue regarding “consents and approvals” opinion 7). As it relates to opinion 8(d), coverage of “performance,” although common, requires the opinion preparers to consider compliance with many laws (i.e., those Covered Laws (as defined in Section E (“Certain Qualifications”) below) of either (or both) California and Delaware) because the Transaction Documents often require the Company to perform numerous obligations after the closing. In contrast to the “due authorization” opinion, which “only” requires a review of the Company’s constituent documents, minute books, and similar corporate records and the applicable corporation law (i.e., Delaware or California or both), opinion 8 (and opinion 7) covers many more potentially applicable laws. As discussed elsewhere (see, e.g., *supra* notes 41 & 48), to reduce the opinion preparers’ factual and legal diligence in a Venture Financing when legal budgets are limited and time is critical, opinion givers often use a narrower formulation that does not add a future element to the opinion. The formulation of the “no violation” opinion in the Venture Opinion focuses on the execution and delivery of the Transaction Documents and the performance of the obligations the Company is required to perform at the closing: the sale and issuance of the Shares at the closing and,

the Purchase Agreement as of the closing, do not<sup>66</sup>:

- (a) violate the Restated Charter or the Bylaws;
- (b) result in a breach of or constitute a default by the Company under any Scheduled Agreement, but excluding (i) financial covenants and similar provisions therein requiring financial calculations or determinations to ascertain compliance or (ii) provisions relating to the occurrence of a “material adverse event” or “material adverse change” or words or concepts to similar effect;<sup>67</sup>
- (c) violate any judgment, order or decree applicable to the Company of any court or arbitrator identified in Section \_\_\_\_\_ of the Schedule of Exceptions;<sup>68</sup> or

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where applicable, the sale of the Warrants at the closing (or, the functional equivalent: “the consummation of the transactions”) under the Purchase Agreement. If the opinion giver agrees to give a “no violation” opinion on the Company’s performance in the future of specific obligations, it normally should address the Company’s performance of those obligations in a separate opinion (as is done with respect to securities laws in Section C (“Opinions”), paragraph 9). See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 61–62.

Finally, if the opinion giver agrees to give an opinion on the “performance” of all of the Company’s obligations under the Transaction Documents, the opinion will cover not only “performance” by the Company of its obligations under the Transaction Documents as of the closing but also the performance of its obligations after the closing, for example, post-closing issuances of Shares and Warrants in installments pursuant to the Transaction Documents. The analysis required to support an opinion covering the performance of future obligations can be difficult. See generally GLAZER & FITZGIBBON, *supra* note 41, §§ 13.2.3, 16.3.7, at 548–52, 602–07; 1998 *TriBar Report*, *supra* note 8, at 657–58 (general discussion of coverage of obligations to be performed in the future); see also 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 48–56 (discussing the diligence required to deliver a “no violation” opinion that covers the performance of future obligations under the Transaction Documents). As the foregoing reports and treatise generally state, certain assumptions and limitations on coverage of the opinion are understood as a matter of customary practice to apply, whether or not expressly stated in the opinion. See GLAZER & FITZGIBBON, *supra* note 41, § 13.2.3, at 548–52 (opinion only covers facts at the time of delivery but, if an agreement obligates the Company to take actions in specified circumstances, an exception is necessary if those actions are prohibited; further, the opinion only covers required actions, not voluntary ones).

66. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 48–57 (an explanation of the opinions listed in opinion 8 of the Venture Opinion).

67. For a discussion of the agreements covered by this opinion, see *supra* notes 26 and 27 and Section A (“Documents Examined”), paragraphs (xii) and (xiii). Consistent with the Transactional Opinion, this opinion should cover an agreed list of reviewed agreements and not a vaguely defined universe (e.g., “all agreements known to us”), which is less precise and, therefore, more susceptible to later disputes. See TRANSACTIONAL OPINION, *supra* note 3, at 13 n.26. Further, as suggested by the 2007 Business Transactions Report, the Venture Opinion expressly excludes financial covenants and similar provisions. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 51–52 n.161 (extended discussion of lawyers’ evaluation of financial covenants in the context of third-party nonconvention opinions).

68. As noted in the Transactional Opinion, the Committee believes that the trend in practice is toward use of the above formulation of this opinion, although the following formulation is not uncommon. If used, this alternative formulation should be accompanied by a statement as to what constitutes “knowledge”:

violate any judgment, order or decree of any court or arbitrator applicable to the Company and known to us;

See TRANSACTIONAL OPINION, *supra* note 3, at 14 n.27; see also Section B (“Certain Qualifications”), paragraph 2.

The NVCA FORM, *supra* note 5, at 2 provides two alternative formulations of this opinion, both of which are consistent with the above formulation:

(d) violate any Covered Law (as defined in Section E (“Certain Qualifications”) below) to which the Company is subject.<sup>69</sup>

9. Based on, and assuming the accuracy of, the representations of each of the Purchasers in the Purchase Agreement, the offer and sale of the Shares<sup>70</sup> [and the Warrants] and, assuming [the Warrants were exercised by the Purchasers in accordance with their terms on the date of this opin-

violate any court order, judgment or decree, if any, listed in Schedule \_\_\_\_\_ to this opinion letter  
violate any court order, judgment or decree, if any, listed in Schedule \_\_\_\_\_ to the Purchase Agreement

69. See generally TRANSACTIONAL OPINION, *supra* note 3, at 14 n.28. This opinion is limited to the law of the jurisdiction(s) whose law is expressly covered by the opinion letter. As a matter of customary usage, it is understood not to cover local laws and certain regulatory laws (such as securities laws). 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 55–57; 2007 REMEDIES REPORT, *supra* note 6, app. 10, at 13. In addition, customary usage limits the coverage of the opinion to laws a lawyer would reasonably recognize to apply to transactions of the type covered by the opinion and excludes from the coverage of the opinion laws, such as securities and tax laws, that even when applicable are understood to be covered only when referred to expressly. 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 56 n.168; *Principles*, *supra* note 7. Consequently, although language stating that only laws “typically applicable” to transactions of the type addressed by the opinion letter is unnecessary, some lawyers include language to that effect in their opinion letters. To resolve any doubt as to the law covered by the opinion, the Venture Opinion uses the term “Covered Law” and defines it to incorporate the foregoing understandings. Finally, the “no violation” opinion should be understood to mean that neither the execution and delivery by the Company of the Transaction Documents nor sale and issuance of the Shares [and Warrants] under the Purchase Agreement will result in a fine, penalty, or other similar sanction against the Company under Covered Law. See 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 55. The opinion does not cover the enforceability of the Transaction Documents. Rather, that is a matter covered by the remedies opinion in opinion 6.

70. For an extended discussion of the meaning and scope of opinions regarding the availability of an exemption from the registration requirements of the Securities Act, and qualification requirements under state law (a “No Registration Opinion”), see 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 78–83. In this regard, the *No Registration Report* is also instructive:

[A no registration opinion] is based on the assumption that [1] the Purchase Agreement contains representations by the issuer relating to the offering of the securities, including the absence of “general solicitation” and “general advertising” and prior sales of similar securities that could be integrated with the offering covered by the opinion; . . . [2] that the Purchase Agreement includes agreements by the issuer to limit future offers of the same or similar securities and, in certain cases, to provide information to holders of the securities; . . . [and] [3] that the purchasers are agreeing not to resell the securities except pursuant to an effective registration statement under the Securities Act or an exemption, such as Rule 144.

[Further,] [t]he opinion giver . . . must be satisfied as to the eligibility of the purchasers to acquire the securities pursuant to the exemption from registration being relied on. For example, an offering being made in reliance on Rule 506 of Regulation D may be structured so as to require all of the purchasers to be “accredited investors.” The opinion giver may rely on representations in the Purchase Agreement, a placement agent’s certificate, investor questionnaires or other procedures in confirming the eligibility of the purchasers. Ordinarily, the text of the opinion letter itself will not refer to any of the above matters.

*No Registration Report*, *supra* note 7, at 187–88. Note that the *No Registration Report* was published prior to the adoption of Rule 506(c), which now permits “general solicitation” and “general advertising” in offerings made in compliance with that Rule. See *supra* note 36. The Securities Law Opinions Subcommittee of the ABA Business Law Section’s Committee on Federal Regulation of Securities is currently considering an update to the *No Registration Report* to address the changes in Regulation D.

ion letter and] the Shares [and the Warrant Shares] were converted on the date of this opinion letter in accordance with the conversion provisions of the Restated Charter, the issuance of [the Warrant Shares and] the Conversion Shares [and Warrant Conversion Shares]<sup>71</sup> do not require registration under Section 5 of the Securities Act [or qualification under the California Corporate Securities Law of 1968, as amended].<sup>72</sup>

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71. In many Venture Financings, No Registration Opinions are requested and given with respect to the issuance of Common Stock (or other securities) upon conversion of a convertible security or the exercise of Warrants (as has been done above in opinion 9). A No Registration Opinion can be problematic to the extent it covers Warrant Shares, Conversion Shares, or Warrant Conversion Shares because further consideration may or may not be payable for the underlying shares when they are issued. Because the transaction to which the Venture Opinion is directed involves the issuance of Warrants, the Venture Opinion adopts the approach described in a note to the NVCA Form, i.e., that an opinion on Shares issuable upon exercise of warrants (as well as options and other rights) may be given based on an express assumption that the warrants, options, or other rights were exercised and the underlying shares issued at the closing of the transaction. See NVCA FORM, *supra* note 5, at 4 n.16 (“When warrants, options or other rights to acquire Company stock are exercisable upon the payment of cash, the no registration opinion can raise difficult issues because the exemption under Section 3(a)(9) of the Securities Act would not be available (other than possibly if the warrants, options or other rights are exercised on a net exercise basis) and the availability of another exemption, such as under Section 4(2) of the Securities Act, would depend on the facts at the time of exercise. Accordingly, many firms will not give a no registration opinion on the issuance of shares upon the future exercise of warrants, options or other rights. Some firms, however, will give the opinion based on an express assumption that the warrants, options or other rights were exercised and the underlying shares issued at the closing [of the Venture Financing that is the subject of the opinion].”).

Although not including an opinion on the issuance of shares upon the exercise of warrants, the NVCA Form does include an opinion on the issuance of shares upon the conversion of a convertible security. That opinion, modified to adopt the definitions and style of the Venture Opinion, is as follows:

Based on, and assuming the accuracy of, the representations of each of the Purchasers in the Purchase Agreement, the offer and sale of the Shares does not, and the issuance of the Conversion Shares upon conversion of the Shares in accordance with the conversion provisions of the Restated Charter will not (assuming no commission or other remuneration is paid or given directly or indirectly for soliciting the conversion), require registration under Section 5 of the Securities Act [or qualification under the California Corporate Securities Law of 1968, as amended].

See NVCA FORM, *supra* note 5, at 3–4; see also *No Registration Report*, *supra* note 7, at 188 (“In cases where the securities being sold are convertible into Common Stock . . . some lawyers refer in the opinion letter to the conditions of the Section 3(a)(9) exemption from registration, for example by expressly assuming that no commission or other remuneration will be paid or given directly or indirectly for soliciting conversion. Others, regarding these conditions to be so well understood that they need not be stated or for other reasons, do not refer to these conditions.”).

72. Consistent with the 2009 *Venture Capital Report*, the Committee believes that opinion givers should not ordinarily give opinions on the blue sky laws of states other than those states where the opinion givers regard themselves as competent to do so. See *supra* note 12 (competency should be the relevant test for lawyers, not licensing in a particular state). Nevertheless, in the past, some California lawyers have given those opinions based solely upon a review of unofficial compilations of foreign state blue sky laws, qualified as follows:

With respect to the securities laws of \_\_\_\_\_, we have based our opinion solely upon our examination of such laws and the rules and regulations of the authorities administering such laws, all as reported in [an unofficial compilation]. Neither special rulings of such authorities nor opinions of counsel in that jurisdiction have been obtained.

See 2009 *Venture Capital Report*, *supra* note 2, at 180–81.

## D. CONFIRMATION

We are not representing the Company in any action or proceeding that is pending, or overtly threatened in writing by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Transaction Documents or the performance by the Company of its obligations thereunder.<sup>73</sup>

## E. CERTAIN QUALIFICATIONS

Our opinions are limited to the federal law of the United States, the law of the State of California,<sup>74</sup> and the Delaware<sup>75</sup> General Corporation Law<sup>76</sup> but in each

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73. This no litigation confirmation conforms to its counterpart in the Transactional Opinion. For an extended discussion of its meaning and customary diligence to support it, see TRANSACTIONAL OPINION, *supra* note 3, at 14–15 n.29; 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 62–64.

74. If the law of a state other than California is selected to govern the Transaction Documents, an “as if” remedies opinion might be given and additional language would be required at this point in the opinion letter. See *supra* note 61.

75. Many of the opinions in the Venture Opinion will cover the Delaware General Corporation Law as a consequence of the issuer being a Delaware corporation. See 2009 *Venture Capital Report*, *supra* note 2, at 166. In particular, the following opinions, among others, will require the opinion preparers to consider the Delaware General Corporation Law: (i) corporate status in opinion 1, (ii) corporate power to perform each of the Transaction Documents in opinion 2, (iii) all necessary corporate action has been taken in opinion 3, (iv) the authorized and outstanding capitalization of the Company in opinion 4, (v) shares of common and preferred stock are duly authorized, validly issued, fully paid, and nonassessable in opinion 5; (vi) consents and approvals under the Delaware General Corporation Law in opinion 7, and (vii) no violation of the Restated Charter, Bylaws, or laws applicable to the Company in opinion 8. Under the internal affairs doctrine, which provides that the corporation law of the state in which a corporation is incorporated regulates the corporation’s internal affairs, the Delaware General Corporation Law will govern many of the matters covered by the opinions given in a Venture Financing.

Section 2115 of the California Corporations Code (“Section 2115”), however, provides that specified provisions of California corporation law apply to certain internal affairs of foreign corporations that have sufficient nexus to California to justify their application. CAL. CORP. CODE § 2115 (West 1990 & Supp. 2012). Generally, for a foreign corporation to be subject to Section 2115, more than half of its holders of voting securities must have addresses in California and the average of the property, sales, and payroll factors used in California state tax determinations applicable to a foreign corporation must exceed 50 percent. While the Delaware Supreme Court has held that the application of Section 2115 to a Delaware corporation is unconstitutional, see *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005), California has no definitive authority to the same effect. Opinion givers are therefore cautioned to consider the potential application of Section 2115 and its impact on the opinions in the Venture Opinion. See 2009 *Venture Capital Report*, *supra* note 2, at 166 n.8 (describes recent case law developments regarding Section 2115); *supra* note 48 (for further discussion of the interaction of Delaware corporation law and Section 2115).

In a Venture Financing, opinion preparers often use one of two approaches to resolve legal issues under Section 2115. One approach is to revise the transaction documents and the Company’s constituent corporate documents to comply with both California and Delaware law. This approach, however, may not always be possible because certain rights and remedies insisted on by investors may be effective under Delaware law but not California law (e.g., “pay to play” charter provisions, see *infra* note 90). In such situations, a second approach is to include a qualification or exception in Section E (“Certain Qualifications”) of the opinion letter for the possible invalidity of those rights and remedies under Section 2115.

Of course, if the Company is incorporated in California, the California Corporations Code would apply in its entirety, and Section 2115 would not be relevant.

76. By customary usage, the statement “[w]e express no opinion herein as to the application or effect of the law of any other jurisdiction” is understood even if not stated. See TRANSACTIONAL OPINION,

case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Transaction Documents. We express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein], we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading controls, or investment company laws.<sup>77</sup> We express no opinion on any securities laws except as expressly stated in Section C (“Opinions”), paragraph 9.<sup>78</sup> The law covered by this opinion letter is referred to herein as the “Covered Law.”

Our opinions are subject to the following additional qualifications:

- (1) Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.<sup>79</sup>
- (2) Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Company in connection with the Transaction Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy

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*supra* note 3, at 15 n.30 (citing 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 86–91; 1998 *Tri-Bar Report*, *supra* note 8, at 631).

77. If the Company is a regulated entity, such as an investment company subject to regulation under the Investment Company Act of 1940, as amended, the law addressed by the opinion letter would include federal and California laws regulating the Company, unless those laws are expressly excluded (as is done in the Venture Opinion). Moreover, even if the Company is not a regulated entity, the opinion giver may be unwilling to cover certain laws. For instance, an opinion giver may expressly exclude compliance with laws affecting the insurance, utility, telecommunications, or banking industries from its opinion letter. If the opinion recipient wants an opinion that the opinion giver is not in a position to give, special counsel often will be engaged to give it. See TRANSACTIONAL OPINION, *supra* note 3, at 15–16 n.30 (citing 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 34).

78. This sentence is included to avoid misunderstanding. As a matter of customary practice, securities laws are understood not to be covered in an opinion letter unless, as in opinion 9, they are addressed expressly. See *Principles*, *supra* note 7, at 832 (II.D); NVCA FORM, *supra* note 5, at 2 n.8. The Committee has intentionally omitted an exception for securities law filings from the “consents and approvals” opinion because of this qualification. See *supra* note 64.

79. For a discussion of the bankruptcy and equitable principles exceptions, see TRANSACTIONAL OPINION, *supra* note 3, at 16 n.32; 2007 REMEDIES REPORT, *supra* note 6, app. 10, at 3–9.

of any such statement should be drawn from the fact of our representation of the Company.<sup>80</sup>

- (3) We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (i) broadly or vaguely stated rights, (ii) the benefits of statutory, regulatory or constitutional rights, (iii) unknown future defenses, and (iv) rights to one or more types of damages.
- (4) [The enforcement of Section \_\_\_\_\_ of [the \_\_\_\_\_ Agreement], relating to the payment of attorneys' fees and costs, is subject to the effect of Section 1717 of the California Civil Code.]<sup>81</sup>
- (5) [We express no opinion regarding the enforceability of [Section \_\_\_\_\_] of the [\_\_\_\_\_ Agreement], which purports to fix the venue of proceedings related to the [\_\_\_\_\_ Agreement].]<sup>82</sup>
- (6) [We express no opinion regarding the enforceability of [Section \_\_\_\_\_] of the [\_\_\_\_\_ Agreement], which purports to waive the parties' rights to a jury trial.]<sup>83</sup>
- (7) [We express no opinion regarding the enforceability of [Section \_\_\_\_\_] of the [\_\_\_\_\_ Agreement], which purports to submit disputes to arbitration.]<sup>84</sup>

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80. Note that this paragraph should be deleted if "to our knowledge," "known to us," or similar language is not included in any of the opinions or confirmations being given. See TRANSACTIONAL OPINION, *supra* note 3, at 17 n.33; 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 15–17 (discussion of confirmations of fact). See also TRANSACTIONAL OPINION, *supra* note 3, at 17 n.33; 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 6, at 32–34 (discussion of limitations on the basis of knowledge).

81. See TRANSACTIONAL OPINION, *supra* note 3, at 17 n.35 (citing 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-24 to B-25 (endnote 21 discusses attorney's fee provisions)).

82. See TRANSACTIONAL OPINION, *supra* note 3, at 17 n.36 (citing 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-13 to B-14 (endnote 13 discusses forum selection clauses and consents to jurisdiction)).

83. See TRANSACTIONAL OPINION, *supra* note 3, at 17 n.37 (citing 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-15 to B-16 (endnote 15 discusses jury trial waivers)).

84. See TRANSACTIONAL OPINION, *supra* note 3, at 18 n.39 (citing 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-22 to B-24 (endnote 20 discusses arbitration provisions)). The Committee notes that many recent judicial decisions have considered challenges to the enforceability of arbitration clauses. Both federal and California case law make clear that public policy strongly favors enforcement of arbitration agreements. In the past, California courts often held that particular arbitration clauses were unenforceable because they were unconscionable. See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 87 (Cal. 2000); *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The Federal Arbitration Act generally provides that an agreement to arbitrate is enforceable, except on grounds that may exist for the revocation of any contract, such as unconscionability or fraud. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court concluded that the Arbitration Act preempted state law where the unconscionability was based on the terms of an arbitration clause itself and, therefore, held that the Arbitration Act preempted the holding in *Discover Bank*. Subsequently, the U.S. Supreme Court held that where the pro-arbitration policy of the Arbitration Act conflicts with the enforcement of another federal law (such as the antitrust law) under the terms of a particular arbitration agreement, the policies of the other law must give way so long as the other law does not otherwise provide. See, e.g., *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). Applying *Concepcion*, California courts have upheld arbitration clauses and have not allowed class arbitrations in the absence of an agreement permitting class arbitration. See *Truly Nolen of Am. v. Superior*

- (8) The opinions above relating to the fully paid status of all of the issued shares of capital stock of the Company are based, without independent verification, on the representation in the Officers' Certificate to the effect that the Company has received the consideration in the amount and form approved by the Company's Board of Directors prior to the issuance of each outstanding share of capital stock of the Company.<sup>85</sup>
- (9) With respect to the equity capitalization opinion set forth in Section C ("Opinions"), paragraph 4,<sup>86</sup> please note that we do not maintain any of the Company's stock records. Such records are maintained by [a third-party stock transfer agent ("Agent")] [the Company] and we do not

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Court, 208 Cal. App. 4th 487 (2012); see also *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013) (under the Arbitration Act, courts applying state unconscionability principles cannot mandate procedural rules that are inconsistent with fundamental attributes of arbitration; however, a court applying an unconscionability analysis may consider the value of benefits provided to employees by state statutes in determining whether a particular arbitral scheme provides an accessible, affordable process for resolving wage disputes); see also *Iskarian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) (class action waivers in labor contracts are enforceable due to preemption of state law public policy by the Arbitration Act; however, waivers of California's Private Attorney General Act ("PAGA"), permitting aggrieved persons to bring actions to enforce civil penalties for state Labor Code violations, are unenforceable as a violation of public policy; and the Arbitration Act does not preempt state law that provides for unenforceability of waivers of the rights of aggrieved persons to bring court actions as deputized actors for the state under the PAGA). As a result of the U.S. Supreme Court decisions, the Committee believes that as a general rule opinion givers need not include an exception for the enforceability of arbitration clauses in agreements among sophisticated parties in Venture Financings. Nevertheless, many opinion givers are not comfortable giving opinions on the enforceability of arbitration clauses because they believe that: (1) the law is not completely settled, (2) they do not closely follow developments in the law in this area, or (3) although arbitration clauses may be generally enforceable, they are unsure whether certain provisions of the arbitration clause are enforceable such that unenforceability of the particular provision might render the entire arbitration clause unenforceable because the unenforceable provision "permeates" the entire arbitration provision. In the case of such uncertainty, opinion givers may consider including this qualification (and may find that in many cases opinion recipients are willing to accept it).

<sup>85</sup>. See *supra* note 53.

<sup>86</sup>. The 2009 *Venture Capital Report* provides two forms of qualification for the capitalization opinion: one form when the opinion giver maintains the Company's stock records and a second form when the Company or a third party maintains the Company's stock records. See 2009 *Venture Capital Report*, *supra* note 2, at 168–69. Because opinion givers in many cases do not maintain the Company's stock records, the Venture Opinion uses only the second form of qualification. If the opinion giver maintains the Company's stock records, the first form of qualification may be appropriate and that qualification, modified to adopt the definitions and style of the Venture Opinion, is as follows:

In giving the equity capitalization opinion set forth in Section C ("Opinions"), paragraph (4), we have relied without further investigation on (a) the Restated Charter, (b) the Bylaws, (c) minute books relating to meetings and written actions of the incorporator(s), Board of Directors, and stockholders of the Company, and stock records consisting of [description], that [are in our possession] [have been delivered to us by the Company for the purposes of rendering this opinion], and (d) statements in a certificate the Company has delivered to us relating to the equity capitalization of the Company (collectively, the "Capitalization Records"). We have not undertaken to verify the accuracy and completeness of that information, other than by reviewing the Capitalization Records. Accordingly, our opinion on the number and character of issued and outstanding securities means that, based upon the examination referred to above, the Capitalization Records are consistent with the information as to the number and character of outstanding securities that is set forth in Section C ("Opinions"), paragraph (4).

See 2009 *Venture Capital Report*, *supra* note 2, at 169.

have any control over the procedures used by [Agent] [the Company] for issuing and transferring shares of the Company's capital stock. Accordingly, in giving the equity capitalization opinion, we have relied without further investigation on (a) the Restated Charter, (b) the By-laws, (c) minute books relating to meetings and written actions of the incorporator(s), Board of Directors, and stockholders of the Company [in our possession] [delivered to us by the Company for the purposes of giving this opinion], (d) our review of the stock records of the Company maintained by [Agent] [the Company], consisting of [description], (e) statements in a certificate the Company has delivered to us relating to the equity capitalization of the Company, and (f) the attached Certificate of Transfer Agent issued by [Agent] [the Company] as of [date] (collectively, the "*Capitalization Records*"). We have not undertaken to verify the accuracy and completeness of that information other than by reviewing the Capitalization Records. Accordingly, our opinion on the number and character of issued and outstanding securities means that, based upon the examination referred to above, the Capitalization Records are consistent with the information as to the number and character of outstanding securities that is set forth in Section C ("Opinions"), paragraph 4.<sup>87</sup>

- (10) We express no opinion as to the enforceability of any indemnification or contribution provisions in the Transaction Documents (or other provisions having an effect similar to any of these types of provisions) to the extent that the enforceability of such provisions is limited [by United States federal or state laws concerning the issuance or sale of securities or] by public policy or statutory provisions or that such indemnification or similar provisions purport to indemnify a party against, or release a party from liability for, its own fraudulent or illegal actions or [gross] negligence.<sup>88</sup>

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87. The Committee believes that the current trend is against giving "Outstanding Options Opinions" and "No Outstanding Preemptive Rights Opinions" and, therefore, neither has been included in the Venture Opinion. See *supra* note 54. Nevertheless, to the extent those opinions are given, the further qualifications articulated in the 2009 *Venture Capital Report* are appropriate:

Accordingly, our opinion on the number and character of issued and outstanding securities means that, based upon the examination referred to above, the Capitalization Records are consistent with the information as to the number and character of outstanding stock[, options, warrants, conversion privileges, or other rights] that is set forth in Section C ("Opinions"), paragraph 4.

2009 *Venture Capital Report*, *supra* note 2, at 169.

88. 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-26 to B-31 (endnotes 23 and 25 discuss indemnities). Both the U.S. Securities and Exchange Commission and federal court decisions have taken the position that corporate indemnification for liabilities arising under the Securities Act is against public policy. Such limitations may apply regardless of whether indemnification is permissible under applicable state laws. See, e.g., 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-31 ("The public policy against permitting one party to shift liability for breaches of the securities laws to another party, the conflicting judicial policies applicable to indemnities by buyers in securities purchase transactions, and the absence of decisive relevant case law make it difficult to render an opinion re-

- (11) [We express no opinion as to whether the members of the Company's Board of Directors or officers have complied with their fiduciary duties in connection with their approval of the Transaction Documents or the effect, if any, of any Covered Law regarding (a) the fiduciary duties of majority stockholders, or (b) the rights of minority stockholders with respect to the transactions contemplated by the Transaction Documents or the corporate or other approvals of those transactions.]<sup>89</sup>
- (12) We express no opinion with respect to, or as to the effect of, any provisions imposing obligations to vote the Company's capital stock in a certain manner or to comply with any drag-along provisions, including without limitation those provisions set forth in the Voting Agreement.<sup>90</sup>

This opinion letter may be relied on solely by the Purchasers for use in connection with their purchase and sale of the Shares [and Warrants] pursuant to the Purchase Agreement. This opinion letter may not be relied on by any other party or for any other purpose without our prior written consent.<sup>91</sup>

Very truly yours,  
[Law Firm]

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garding the enforceability of such contractual provisions. Thus, it is customary practice to include an exception in a remedies opinion relating to the enforceability of those provisions.”).

The first bracketed language in the qualification may be deleted if Section E (“Certain Qualifications”), first paragraph, last sentence limits the coverage of securities laws to only Section C (“Opinions”), paragraph 9 (the “no registration opinion”).

Note that the sample language does not exclude negligence; opinion givers should confirm that the provision is sufficiently clear that it covers negligent acts of the indemnified party in which case the brackets around “gross” should be removed. See 2007 REMEDIES REPORT, *supra* note 6, app. 10, at B-26 to B-28.

89. Some lawyers believe that an opinion regarding compliance by the directors, officers, or principal stockholders with their fiduciary duties is appropriate as a stand-alone opinion or is implicit in the duly authorized opinion, the validly issued opinion (Section C (“Opinions”), paragraphs 4 and 5), or the enforceability opinion (Section C (“Opinions”), paragraph 6). The Committee believes that such a belief is inconsistent with customary practice. Prior published opinion reports make clear that compliance with fiduciary duties is covered by an opinion letter only if addressed expressly and that no such opinion should be implied. To avoid misunderstanding, some opinion givers may choose to state expressly that the opinions they are giving do not cover compliance with fiduciary duties. See 2009 *Venture Capital Report*, *supra* note 2, at 189; see also *supra* note 34.

90. Regarding voting agreements see *supra* note 59. If the Transaction Documents provide for a special mandatory conversion feature, often known as a “pay-to-play” provision, the opinion giver should also consider whether a qualification is appropriate. See *supra* notes 57 & 75 (third paragraph). The analysis (and conclusion) may differ depending upon whether the Company is a California or Delaware corporation. See 2009 *Venture Capital Report*, *supra* note 2, at 185–87.

91. Consistent with the Transactional Opinion, the Venture Opinion takes the traditional approach to reliance by permitting only those to whom it is addressed to rely on it. See TRANSACTIONAL OPINION, *supra* note 3, at 19 n.41 for an extended discussion.

**EXHIBIT A**  
**SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR**  
**VENTURE CAPITAL FINANCING TRANSACTIONS (UNANNOTATED)**

[Date]

To the Purchasers on the date hereof of  
[Company Name] Series B Preferred  
Stock Listed on Exhibit A to the Series  
B Preferred Stock [and Warrant] Purchase Agreement

Ladies and Gentlemen:

We have acted as counsel for [Company Name], a Delaware corporation (the “Company”), in connection with the sale and issuance on the date hereof by the Company to you of \_\_\_\_\_ shares of the Company’s Series B Preferred Stock (the “Shares”) [and the sale of warrants to purchase \_\_\_\_\_ shares of the Company’s [Type of Securities] (the “Warrants”), each] pursuant to the Series B Preferred Stock [and Warrant] Purchase Agreement (the “Purchase Agreement”), dated as of \_\_\_\_\_, 20\_\_ among the Company and the persons listed on Exhibit A attached thereto (the “Purchasers”). This opinion letter is delivered to you pursuant to Section \_\_\_\_\_ of the Purchase Agreement. Each capitalized term that is defined in the Purchase Agreement and that is used but not defined in this opinion letter has the meaning given to it in the Purchase Agreement.

**A. DOCUMENTS EXAMINED**

We have examined the following documents:

- (i) the Purchase Agreement;
- (ii) the Investors’ Rights Agreement, dated as of \_\_\_\_\_, 20\_\_ (the “Investors’ Rights Agreement”);
- (iii) the Right of First Refusal and Co-Sale Agreement, dated as of \_\_\_\_\_, 20\_\_ (the “Co-Sale Agreement”);
- (iv) the Voting Agreement, dated as of \_\_\_\_\_, 20\_\_ (the “Voting Agreement”);
- (v) the [form of] Warrant[s] [to be] issued to the Purchasers pursuant to the Purchase Agreement;
- (vi) the Schedule of Exceptions to the Purchase Agreement (the “Schedule of Exceptions”);
- (vii) the Certificate of Incorporation of the Company, as amended to date, certified by the Delaware Secretary of State as of \_\_\_\_\_, 20\_\_ and certified to us by an officer of the Company as being complete and in full force and effect as of the date of this opinion letter (the “Restated Charter”);

- (viii) the Bylaws of the Company, certified to us by an officer of the Company as being complete and in full force and effect as of the date of this opinion letter;
- (ix) records certified to us by an officer of the Company as constituting the records of proceedings and actions of the board of directors [and the stockholders] of the Company relevant to the opinions set forth below;
- (x) a Certificate of Status—Foreign Corporation with respect to the Company, issued by the California Secretary of State on \_\_\_\_\_, 20\_\_;
- (xi) a Good Standing Certificate with respect to the Company, issued by the Delaware Secretary of State on \_\_\_\_\_, 20\_\_;
- (xii) a certificate of the [Chief Executive Officer, Chief Financial Officer, or other appropriate officer] of the Company identifying certain agreements and instruments to which the Company is a party or by which the Company’s properties or assets are bound (the “Certificate Relating to Agreements”);
- (xiii) a copy of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being a true and complete copy of the original (“Scheduled Agreements”);
- (xiv) a certificate of the [Chief Executive Officer, Chief Financial Officer, or other appropriate officer] of the Company as to certain factual matters relevant to the opinions expressed below; [and]
- (xv) the Capitalization Records (as defined in Section E (“Certain Qualifications”) below). [; and]
- [(xvi) the Certificate of Transfer Agent (as defined in Section E (“Certain Qualifications”) below).]

Each of the documents identified in items (i) through [(iv) OR (v)] above is sometimes referred to below as a “Transaction Document.”

The shares of Common Stock issuable upon conversion of the Shares are referred to herein as the “Conversion Shares [,” the shares of Series B Preferred Stock issuable upon exercise of the Warrants are referred to below as the “Warrant Shares,” and the shares of Common Stock issuable upon conversion of the Warrant Shares are referred to below as the “Warrant Conversion Shares].”

We have also examined such other documents and made such further legal and factual examination and investigation as we deem necessary for purposes of giving the following opinions.

## **B. CERTAIN ASSUMPTIONS**

We have assumed, for purposes of the opinions set forth below, that:

- (a) The information provided by the Company to the Purchasers in connection with the offer and sale of the Shares is accurate and complete;
- (b) The Company's representations to us [that the Company and its agents have made no offer to sell the Shares by means of any general solicitation or in connection with the publication of any advertisement relating to such an offer and] that no offer or sale of the Shares has been made or will be made in any state outside of [California] where such offer or sale would be contrary to applicable law are accurate and complete;
- (c) The representations and warranties made by the Company and all prior purchasers of the Company's securities given in connection with the sale of such securities are accurate and complete;
- (d) The Company is not disqualified from relying on the exemption from the registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), provided by Rule 506 thereunder by reason of the provisions of paragraphs (d) or (e) of Rule 506; [; and]
- (e) At the time of conversion of the Shares into Common Stock [and/or Warrant Shares into Common Stock] a sufficient number of shares of Common Stock will be authorized and available for issuance under the Company's certificate of incorporation as then in effect to satisfy (i) the conversion of all Shares (and all other then outstanding shares of the Company's Preferred Stock) into Common Stock at the then effective respective conversion rates of such shares and (ii) the exercise, conversion and exchange rights of all other then outstanding securities of the Company that are then, directly or indirectly, issuable or exchangeable for, or convertible into, Common Stock at their then effective rates of issuance, exchange or conversion. [; and]
- [(f) At the time of exercise of the Warrants, a sufficient number of Warrant Shares will be authorized and available for issuance under the Company's certificate of incorporation as then in effect to satisfy the Company's obligations under the Warrants to issue all of such Warrant Shares.]

### C. OPINIONS

Based on the foregoing, and subject to the qualifications set forth in Section E ("Certain Qualifications") below, [and except as specifically set forth in the Schedule of Exceptions,] we are of the opinion that:

1. The Company is a corporation validly existing and in good standing under the laws of the State of Delaware. The Company is qualified to transact intrastate business and is in good standing under the laws of the State of California.

2. The Company has the corporate power to enter into and perform its obligations under each of the Transaction Documents.
3. The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Company and have been duly executed and delivered by the Company.
4. The Company's authorized capitalization consists of (a) \_\_\_\_\_ shares of Common Stock, of which \_\_\_\_\_ shares are issued and outstanding, and (b) \_\_\_\_\_ shares of Preferred Stock, of which (i) \_\_\_\_\_ shares have been designated as Series A Preferred Stock, all of which are issued and outstanding, and (ii) \_\_\_\_\_ shares have been designated as Series B Preferred Stock, none of which have been issued. The issued and outstanding shares of Common Stock and Preferred Stock of the Company have been duly authorized and validly issued and are fully paid and nonassessable.
5. The Shares have been duly authorized for issuance and, when issued and paid for in accordance with the provisions of the Purchase Agreement, will be validly issued, fully paid and nonassessable. The Conversion Shares have been duly authorized for issuance and, when and if issued upon conversion of the Shares in accordance with the Restated Charter, will be validly issued, fully paid and nonassessable. [The Warrant Shares have been duly authorized for issuance and, when and if issued upon exercise of the Warrants in accordance with the provisions of the Warrants, will be validly issued, fully paid and nonassessable. The Warrant Conversion Shares have been duly authorized for issuance and, when and if issued upon conversion of the Warrant Shares in accordance with the Restated Charter, will be validly issued, fully paid and nonassessable.]
6. Each of the Purchase Agreement, Investors' Rights Agreement, [and] Co-Sale Agreement [and Warrant] is a valid and binding obligation of the Company enforceable against the Company in accordance with its terms.
7. All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Company with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law (as defined in Section E ("Certain Qualifications") below) required to execute and deliver the Transaction Documents and for the sale and issuance of the Shares [and Warrants] under the Purchase Agreement as of the closing have been obtained or made.
8. The execution and delivery by the Company of the Transaction Documents, and the sale and issuance of the Shares [and Warrants] under the Purchase Agreement as of the closing, do not:

- (a) violate the Restated Charter or the Bylaws;
  - (b) result in a breach of or constitute a default by the Company under any Scheduled Agreement, but excluding (i) financial covenants and similar provisions therein requiring financial calculations or determinations to ascertain compliance or (ii) provisions relating to the occurrence of a “material adverse event” or “material adverse change” or words or concepts to similar effect;
  - (c) violate any judgment, order or decree applicable to the Company of any court or arbitrator identified in Section \_\_\_\_\_ of the Schedule of Exceptions; or
  - (d) violate any Covered Law (as defined in Section E (“Certain Qualifications”) below) to which the Company is subject.
9. Based on, and assuming the accuracy of, the representations of each of the Purchasers in the Purchase Agreement, the offer and sale of the Shares [and the Warrants] and, assuming [the Warrants were exercised by the Purchasers in accordance with their terms on the date of this opinion letter and] the Shares [and the Warrant Shares] were converted on the date of this opinion letter in accordance with the conversion provisions of the Restated Charter, the issuance of [the Warrant Shares and] the Conversion Shares [and Warrant Conversion Shares] do not require registration under Section 5 of the Securities Act [or qualification under the California Corporate Securities Law of 1968, as amended].

#### **D. CONFIRMATION**

We are not representing the Company in any action or proceeding that is pending, or overtly threatened in writing by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Transaction Documents or the performance by the Company of its obligations thereunder.

#### **E. CERTAIN QUALIFICATIONS**

Our opinions are limited to the federal law of the United States, the law of the State of California, and the Delaware General Corporation Law but in each case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Transaction Documents. We express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein,] we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, tax, pension, labor, employee benefit, health care, margin, privacy, insolvency, fraudulent

transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading controls, or investment company laws. We express no opinion on any securities laws except as expressly stated in Section C (“Opinions”), paragraph 9. The law covered by this opinion letter is referred to herein as the “Covered Law.”

Our opinions are subject to the following additional qualifications:

- (1) Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.
- (2) Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Company in connection with the Transaction Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Company.
- (3) We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (i) broadly or vaguely stated rights, (ii) the benefits of statutory, regulatory or constitutional rights, (iii) unknown future defenses, and (iv) rights to one or more types of damages.
- (4) [The enforcement of Section \_\_\_\_\_ of [the \_\_\_\_\_ Agreement], relating to the payment of attorneys’ fees and costs, is subject to the effect of Section 1717 of the California Civil Code.]
- (5) [We express no opinion regarding the enforceability of [Section \_\_\_\_\_] of the [\_\_\_\_\_ Agreement], which purports to fix the venue of proceedings related to the [\_\_\_\_\_ Agreement].]
- (6) [We express no opinion regarding the enforceability of [Section \_\_\_\_\_] of the [\_\_\_\_\_ Agreement], which purports to waive the parties’ rights to a jury trial.]
- (7) [We express no opinion regarding the enforceability of [Section \_\_\_\_\_] of the [\_\_\_\_\_ Agreement], which purports to submit disputes to arbitration.]
- (8) The opinions above relating to the fully paid status of all of the issued shares of capital stock of the Company are based, without independent verification, on the representation in the Officers’ Certificate to the

effect that the Company has received the consideration in the amount and form approved by the Company's Board of Directors prior to the issuance of each outstanding share of capital stock of the Company.

- (9) With respect to the equity capitalization opinion set forth in Section C ("Opinions"), paragraph 4, please note that we do not maintain any of the Company's stock records. Such records are maintained by [a third-party stock transfer agent ("Agent")] [the Company] and we do not have any control over the procedures used by [Agent] [the Company] for issuing and transferring shares of the Company's capital stock. Accordingly, in giving the equity capitalization opinion, we have relied without further investigation on (a) the Restated Charter, (b) the Bylaws, (c) minute books relating to meetings and written actions of the incorporator(s), Board of Directors, and stockholders of the Company [in our possession] [delivered to us by the Company for the purposes of giving this opinion], (d) our review of the stock records of the Company maintained by [Agent] [the Company], consisting of [description], (e) statements in a certificate the Company has delivered to us relating to the equity capitalization of the Company, and (f) the attached Certificate of Transfer Agent issued by [Agent] [the Company] as of [date] (collectively, the "*Capitalization Records*"). We have not undertaken to verify the accuracy and completeness of that information other than by reviewing the Capitalization Records. Accordingly, our opinion on the number and character of issued and outstanding securities means that, based upon the examination referred to above, the Capitalization Records are consistent with the information as to the number and character of outstanding securities that is set forth in Section C ("Opinions"), paragraph 4.
- (10) We express no opinion as to the enforceability of any indemnification or contribution provisions in the Transaction Documents (or other provisions having an effect similar to any of these types of provisions) to the extent that the enforceability of such provisions is limited [by United States federal or state laws concerning the issuance or sale of securities or] by public policy or statutory provisions or that such indemnification or similar provisions purport to indemnify a party against, or release a party from liability for, its own fraudulent or illegal actions or [gross] negligence.
- (11) [We express no opinion as to whether the members of the Company's Board of Directors or officers have complied with their fiduciary duties in connection with their approval of the Transaction Documents or the effect, if any, of any Covered Law regarding (a) the fiduciary duties of majority stockholders, or (b) the rights of minority stockholders with respect to the transactions contemplated by the Transaction Documents or the corporate or other approvals of those transactions.]

- (12) We express no opinion with respect to, or as to the effect of, any provisions imposing obligations to vote the Company's capital stock in a certain manner or to comply with any drag-along provisions, including without limitation those provisions set forth in the Voting Agreement.

This opinion letter may be relied on solely by the Purchasers for use in connection with their purchase and sale of the Shares [and Warrants] pursuant to the Purchase Agreement. This opinion letter may not be relied on by any other party or for any other purpose without our prior written consent.

Very truly yours,  
[Law Firm]

