

Release Agreement (TN)

by Jennifer G. Cooper, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, with Practical Law Commercial Transactions

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A generic form of release agreement under Tennessee law for use when parties to a commercial contract are terminating or have terminated the contract (or a portion of it) and have agreed to deliver a mutual release of claims. This Standard Document has integrated notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

When a commercial contract is expiring or if it is terminated before its natural expiration, the parties sometimes enter into a termination agreement to:

- Settle actual or potential claims.
- Tie up loose ends.

In many of these situations, it is likely that one or both of the parties:

- Has claimed one or more breaches by the other party.
- Is concerned that the facts and circumstances leading to termination may give rise to a breach claim by the opposing party.

Therefore, when entering into a termination agreement, contracting parties often include a release of claims in the termination agreement. However, sometimes, the termination agreement contains:

- A specified future termination date (such as the last day of the month or the end of the contract year).
- Conditions to effectiveness of termination (for example, payment of a termination fee or one or more obligations that has not been satisfied when the termination agreement is executed).

When termination does not become effective until a future date, the parties are unlikely to execute and deliver a release that is effective before termination. Instead, they commonly agree to:

- Execute and deliver releases on the future termination date.
- Condition the effectiveness of the release included in the termination agreement on the satisfaction of specified conditions or covenants (such as delivery of a termination payment).

Before using a conditional release, the parties should consider whether the conditional release is enforceable under applicable state law (see Drafting Note, Conditional Releases). In Tennessee, a conditional release is enforceable (see *AngleFix Tech, LLC v. Wright Med. Tech.*, 2016 WL 6770671, at *2 (W.D. Tenn. Nov. 15, 2016); *Coldwell Banker Realty House v. Morrell*, 1988 WL 55013, at *2 (Tenn. Ct. App. June 3, 1988)).

This Standard Document is a generic form of stand-alone release agreement that can be used when parties either:

- Have entered into a termination agreement but desire to execute and deliver releases at a future date.
- Desire to exchange releases when a commercial contract (or a portion of it) expires or is terminated without entering into a termination agreement.

For a sample termination agreement, see [Standard Document, Termination Agreement](#).

Assumptions

This Standard Document assumes that:

- **This agreement is governed by Tennessee law.** If the law of another state applies, this agreement may have to be modified to comply with the laws of the applicable jurisdiction.
- **This agreement is being used in a business-to-business transaction.** This Standard Document may not be suitable for use in connection with a consumer contract or a government contract, which may involve legal and regulatory requirements and practical considerations that are beyond the scope of this resource.
- **There are two parties to the underlying agreement and both are legal entities.** The parties must make adjustments if:
 - either contracting party is an individual person; or
 - there are more than two parties to the release agreement.
- **The releases are being given in connection with the termination of a contractual arrangement.** This form of release agreement is for use when a commercial contract is expiring or is being terminated and the parties decide to execute and deliver mutual releases relating to the underlying contract. The parties must substantially revise this agreement if they are settling a pending litigation or a non-litigated dispute unrelated to a contractual termination. For a sample release and settlement agreement, see [Standard Document, Settlement Agreement and Release](#).
- **The release agreement is limited to certain key terms.** This Standard Document does not include certain terms that are commonly included in a termination agreement (for example, operative

termination language and modifications to surviving provisions of the underlying agreement). If the parties desire to address these and other terms, they should instead consider entering into a dedicated termination agreement (see [Standard Document, Termination Agreement](#)).

- **The parties to the agreement are US entities and the transaction takes place in the US.** If any party is organized or operates in, or any part of the transaction takes place in a foreign jurisdiction, this agreement may need to be modified to comply with applicable laws in the relevant foreign jurisdiction.
- **This agreement is not industry- or transaction-specific.** This Standard Document does not account for any industry-specific or transaction-specific laws, rules, or regulations that may apply to certain transactions, products, or services. For a sample release used in the employment context, see [Standard Document, Separation and Release of Claims Agreement \(TN\)](#).

Bracketed Items

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafter's discretion.

Defined Terms

This Standard Document assumes that certain defined terms included in optional or alternative language selections (such as Affiliates, Law, Person, and Representatives) are defined in either the termination agreement or the underlying contract. If used, conform them to the defined terms used in the appropriate agreement.

RELEASE AGREEMENT

This Release Agreement, dated [as of] [DATE] (the "**Release Agreement**"), between [PARTY 1 NAME], a[n] [STATE OF ORGANIZATION] [TYPE OF ENTITY], [located/having its principal place of business] at [ADDRESS] ("**DEFINED TERM FOR PARTY 1**"), and [PARTY 2 NAME], a[n] [STATE OF ORGANIZATION] [TYPE OF ENTITY], [located/having its principal place of business] at [ADDRESS] ("**DEFINED TERM FOR PARTY 2**"), and together with [DEFINED TERM FOR PARTY 1], the "**Parties**", and each, a "**Party**".

DRAFTING NOTE: PREAMBLE

Date

Release agreements are usually dated the same date on which they are executed. The general rule is that a release must take effect upon either:

- The execution of the release agreement.
- The satisfaction of a condition contained in the release agreement. In a conditional release, there is a fact that must be true, or an event that must have occurred, before a party's obligations or rights are triggered. For example, a release may provide that certain obligations are extinguished when the party that would otherwise have the obligations completes performance of certain other actions or goal.

(Restatement (Second) of Contracts § 284 (1981) (Second Restatement); see *Coldwell Banker Realty House*, 1988 WL 55013, at *2 (concluding that the release agreement would only become effective upon the receipt of a release fee)).

Parties should also consider whether there are any anticipated events that are not included as conditions to the release agreement and should draft the conditional release agreement to address these anticipated events (see *CapStar Bank v. Perry*, 2018 WL 3389712, at *9 n.4 (M.D. Tenn. July 12, 2018) (noting that the parties' conditional release agreement stated that the parties' anticipated the sale of a business but that the mutual release was expressly not contingent upon that outcome)).

A future effective date does not function as a condition because conditions are limited to events, facts, or

performance that may or may not occur. The passing of time cannot be a condition because it is certain to occur. (For more information on contractual conditions, see [Practice Note, Representations, Warranties, Covenants, Rights, and Conditions: Conditions.](#))

A mere promise to discharge an existing obligation in the future only creates a new duty that can itself be released by the parties. The promise is not a release. (Restatement (Second) of Contracts § 284, cmt. a (1981)).

Parties

All current parties to the underlying agreement should be included as parties to the release agreement. If any of the current parties are an assignee or successor-in-interest to a former party or if a party has changed its name since it executed the underlying agreement, the relevant facts should be identified in the preamble of the agreement.

For example, if ABC Suppliers, Inc. was an original party to the agreement but has since merged into XYZ Products, Inc., the preamble should specify XYZ as a party (instead of ABC) and should identify XYZ as "successor-in-interest to ABC Suppliers, Inc." If any of the current parties to the underlying agreement became parties at a later point in time, the parties should consider adding a recital (see [Drafting Note, Recitals](#)) that briefly describes the circumstances of their joinder.

WHEREAS, the Parties have entered into a [NAME OF UNDERLYING AGREEMENT], dated [as of] [DATE OF UNDERLYING AGREEMENT] ([as [amended, amended and restated, supplemented, or otherwise modified from time to time in accordance with its provisions/such agreement has been amended by [LIST OF PRIOR AMENDMENTS]]],) the "**Agreement**"; [and]

[WHEREAS, [DESCRIPTION OF CIRCUMSTANCES LEADING TO TERMINATION]; [and]]

[WHEREAS, the Parties have entered into a Termination Agreement, dated [as of] [DATE OF TERMINATION AGREEMENT] ([as [amended, amended and restated, supplemented, or otherwise modified from time to time in accordance with its provisions/such agreement has been amended by [LIST OF PRIOR AMENDMENTS]]],) the "**Termination Agreement**"; [and]]

WHEREAS, [under the terms of the Termination Agreement, the Parties are required to execute and deliver this Release Agreement/the Parties desire to execute and deliver mutual releases on the terms and conditions set out herein].

NOW, THEREFORE, in consideration of the premises set out above and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

DRAFTING NOTE: RECITALS

Recitals are not legally required and generally are not part of the operative, binding portion of the contract (*In re Estate of Hillis*, 2016 WL 761236, at *6 (Tenn. Ct. App. Feb. 25, 2016)). They are primarily used to provide information about the basic background and purpose of the agreement.

However, the recitals may have a “material influence” when construing a contract (*In re Estate of Hillis*, 2016 WL 761236, at *7). If the parties have defined any terms in the recitals that are used in the operative sections of the agreement, the parties should be aware that these definitions can have legal consequences. Whenever possible, Tennessee courts reconcile the recitals with the contract’s operative clauses (*Circle C Constr., LLC v. Nilsen*, 484 S.W.3d 914, 918 (Tenn. 2016)). If the recitals in a contract are clear and the operative part is ambiguous, the recitals govern the contract’s construction. If the recitals and operative clauses are clear, but inconsistent with each other, the operative clauses normally control. (*In re Estate of Hillis*, 2016 WL 761236, at *7.)

Recitals are commonly used in release agreements to recite the history of the contractual relationship and the circumstances of the parties’ agreement to terminate the agreement and exchange mutual releases. Recitals are especially helpful if:

- The circumstances leading to termination or the decision to exchange releases are complicated.
- The underlying agreement is part of a more complex transaction involving other related agreements.

Including recitals that provide some background details can help someone reviewing the agreement in the future (which is especially useful for a person who has had no previous involvement with the parties or the contractual arrangement).

The parties should draft recitals in a way to avoid ambiguity. For example, the parties should not include any language in the recitals that:

- Purports to add legally binding obligations, such as a covenant that is not already part of a surviving operative provision of the underlying contract or an operative provision of the termination agreement.
- Contradicts the wording contained in a surviving operative provision of the underlying contract or an operative provision of the termination agreement.

The optional second recital should be included if the parties desire to describe the circumstances leading to the agreement to terminate and exchange releases. This description should be drafted in broad, general terms. If not, a court may hold that the recitation of specific claims (or types of claims) narrows the scope of the release, even if the release is otherwise drafted broadly (see Drafting Note, Mutual Release).

Under Tennessee’s rules for contract construction:

- In contracts, where there are both general and specific provisions relating to the same thing, the specific provision controls (*Cocke County Bd. of Highway Comm’rs v. Newport Utilities Bd.*, 690 S.W.2d 231, 237 (Tenn.1985)).
- Similarly, general provisions of a release are subordinate to specific provisions relating to the same thing (see *Maggart v. Almany Realtors, Inc.*, 259 S.W. 3d 700, 705 (Tenn. 2008); *Peatross v. Shelby Cnty.*, 2009 WL 2922797, at *4 (Tenn. Ct. App. Sept. 10, 2009)).

The parties should include the optional third recital if the parties have entered into a termination agreement and the release agreement is being executed and delivered under the terms of the termination agreement.

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1. Definitions. Capitalized terms used and not defined in this Release Agreement have the respective meanings assigned to them in the [Termination] Agreement.]

DRAFTING NOTE: DEFINITIONS

Optional Section 1 should be included if the release agreement incorporates by reference any defined

terms used in the underlying agreement or the termination agreement.

2. [[Termination Payment/Certain Rights and Obligations].

As material consideration for the covenants, agreements, and undertakings of the Parties under this Release Agreement:

- (a) [[Within [NUMBER] days following the date first written above/Promptly following the full execution of this Release Agreement/Contemporaneously with the execution of this Release Agreement], [DEFINED TERM FOR PARTY [1/2]] shall pay [DEFINED TERM FOR PARTY [2/1]] an amount equal to [NUMBER] dollars (\$[NUMBER]), [DESCRIPTION OF OR PURPOSE FOR PAYMENT]] (the “**Termination Payment**”).]
- (b) [OTHER CONDITION TO EFFECTIVENESS OF RELEASE]]

DRAFTING NOTE: TERMINATION PAYMENT OR OTHER OBLIGATIONS IN A CONDITIONAL RELEASE

This optional provision can be used if:

- The parties have not entered into a termination agreement requiring a termination payment or other termination obligation.
- The effectiveness of the release is being conditioned on one party making a termination payment or rendering any other type of performance, in a jurisdiction that permits conditional releases (see Drafting Note, Conditional Releases).

This Standard Document includes sample language for a termination payment and a placeholder for other types of obligations that may serve as conditions to the effectiveness of the release. Because these obligations are highly transaction-specific, the parties must draft this language to address the facts and circumstances of the particular termination arrangement. If they include only a termination payment, Section 2 can be titled “Termination Payment” (or another more appropriate heading for a different stand-alone provision). The alternative title “Certain Rights and Obligations” should be used if multiple provisions are included.

If a termination payment and other types of provisions are included, parties may consider

including language addressing the return of the termination payment if one of the remaining conditions is not met. For example, one might include a provision stating:

If this Agreement is declared null and void due to the non-occurrence of the condition provided in Section 2(b), any funds that [DEFINED TERM FOR PARTY [1/2]] has paid to [DEFINED TERM FOR PARTY [2/1]] as the Termination Payment provided in Section 2(a) shall be returned to [DEFINED TERM FOR PARTY [1/2]] within five business days following service of a notice declaring this Agreement null and void due to the non-occurrence of the condition provided in Section 2(b).

If any conditions modify or amend any surviving provisions of the terminated agreement, they should be drafted clearly and concisely to avoid creating any ambiguity. For more information on drafting contract amendments and modifications, see [Standard Document, Amendment Agreement \(TN\)](#).

The parties should include the optional defined term for termination payment if they reference the termination payment in another section of the release agreement (for example, in Section 3(a)).

3. Mutual Release.

(a) In consideration of the covenants, agreements, and undertakings of the Parties under [the Termination Agreement and] this Release Agreement, [effective upon [the payment by [DEFINED TERM FOR PARTY MAKING TERMINATION PAYMENT] of the Termination Payment/the satisfaction of the Parties' obligations under Section 2/[DESCRIPTION OF OTHER CONDITION TO THE EFFECTIVENESS OF THE RELEASE]],] each Party, on behalf of itself and its respective present and former parents, subsidiaries, [A/a]ffiliates, officers, directors, shareholders, managers, members, successors, and assigns (collectively, "**Releasors**") hereby releases, waives, and forever discharges the other Party and its respective present and former, direct and indirect, parents, subsidiaries, [A/a]ffiliates, employees, officers, directors, shareholders, managers, members, agents, [R/r]epresentatives, permitted successors, and permitted assigns (collectively, "**Releasees**") of and from any and all actions, causes of action, suits, losses, liabilities, rights, debts, dues, sums of money, accounts, reckonings, obligations, costs, expenses, liens, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands, of every kind and nature whatsoever, whether now known or unknown, foreseen or unforeseen, matured or unmatured, suspected or unsuspected, in law, admiralty, or equity (collectively, "**Claims**"), which any of such Releasors ever had, now have, or hereafter can, shall, or may have against any of such Releasees for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of time through the date of this Release Agreement arising out of or relating to the Agreement, except for any [surviving obligations under the Agreement and]Claims relating to rights and obligations preserved by, created by, or otherwise arising out of [the Termination Agreement or] this Release Agreement.

DRAFTING NOTE: MUTUAL RELEASE

The scope of the release is critical when drafting a release agreement. A release of claims is a contractual undertaking in which one party (releasor) agrees to extinguish all claims and causes of action the releasor has against the other party (releasee) that fall within the stated scope of the release.

When parties exchange releases on the expiration or termination of a contractual agreement, the release can be:

- Extremely broad in scope and cover all claims that a releasor has or may have against the releasee that are in existence and within the parties' contemplation even if they are unrelated to the agreement that is being terminated (known as a general release) (see *Quality Recycling Servs., Inc. v. Page Intern., Inc.*, 2012 WL 2577514, at *5 (W.D. Tenn. July 3, 2012)).
- Broad in scope and cover all claims that a releasor has or may have in connection with the underlying agreement (known as a specific or limited release).
- More narrowly structured and limited to certain specified claims or types of claims (also known as a specific or limited release) (see *Cross v. Earls*, 517 S.W.2d 751, 752–53 (Tenn. 1974)).

When terminating a commercial contract, the parties rarely agree to grant general releases, especially if they are engaged in any business or other activities outside the scope of the terminated agreement. This provision contains a broadly drafted, mutual specific release of all claims, known or unknown, that either party has or may have against the other party in connection with the underlying agreement, except for obligations that:

- Survive the expiration or termination of the underlying agreement, to the extent not otherwise terminated or modified in any termination agreement or the release agreement.
- Are contained in the termination agreement (if one has been executed).
- Are contained in the release agreement.

In some instances, the parties may limit the scope of this specific release to particular claims or to certain areas of performance under the terminated agreement. Parties should ensure that the scope of the release is consistent with the remainder of the release agreement. In some states, including Tennessee, courts may limit a broadly worded release to the scope of a narrower recitation of particular

claims (for example, if any particular claims are described in the recitals to the release agreement).

In Tennessee:

- A general release covers all existing claims between and contemplated by the parties.
- A limited release confined to particular matters or causes releases only claims described in the terms of the release.

(*First Tennessee Bank Nat. Ass'n v. C.T. Resorts Co., Inc.*, 1995 WL 511884, at *6–7 (Tenn. Ct. App. Aug. 30, 1995) (quoting *Cross v. Earls*, 517 S.W.2d 751, 752 (Tenn. 1974))).

Therefore, a claim a party was ignorant of when the release was given or a claim that had not matured when the release was executed is generally not covered by the release, especially when the releasor's ignorance of the claim is because the releasee concealed the claim (*Marlett v. Thomason*, 2007 WL 1048950, at *6 (Tenn. Ct. App. Apr. 5, 2007)). A party may release claims arising after the signing of the release if the language of the release expressly so provides. (*Sherman v. Am. Water Heater Co., Inc.*, 50 S.W.3d 455, 459-60 (Tenn. Ct. App. 2001)).

When interpreting which claims are discharged by a release, courts examine the parties' intent as expressed in the instrument (*Peatross*, 2009 WL 2922797, at *4 (summarizing Tennessee cases applying the "intent" approach)). Courts consider what was within the contemplation of the parties when the release was executed as demonstrated by:

- The facts and circumstances surrounding the execution of the documents.
- The situations of the parties.
- The business to which the agreements relate.
- The subject matter of the agreements.

(*Richland Country Club, Inc. v. CRC Equities, Inc.*, 832 S.W.2d 554, 557 (Tenn. Ct. App. 1991); *Evans v. Tillett Bros. Const. Co., Inc.*, 545 S.W.2d 8, 11-12 (Tenn. Ct. App. 1976); *Peatross*, 2009 WL 2922797, at *4.)

Moreover, courts attempt to construe the release to give effect to each and every part of the instrument where possible (*Evans*, 545 S.W.2d at 11). Therefore, courts may limit a broadly worded clause within a release to the scope of a narrower recitation

elsewhere within the release to give effect to all the release's terms (see, for example, *Maggart*, 259 S.W.3d at 705 (reasoning that if the broadly worded release provisions were meant to release all claims, there would have been no need for a more specific release regarding specific claims)). Any ambiguous language in a release is construed against the drafter (*Grand Valley Lakes Prop. Owners Ass'n, Inc. v. Cary*, 897 S.W.2d 262, 267 (Tenn. Ct. App. 1994)).

The bracketed language addressing conditions to effectiveness of the release should only be used if the parties have agreed to enter into a conditional release. Before revising Section 3(a) to include any conditions to effectiveness, the parties should consider whether a conditional release is enforceable under applicable state law (see Conditional Releases).

For information on mutual releases in the context of settling a pending lawsuit, see [Standard Document, Settlement Agreement and Release](#). For information on mutual releases between employers and terminated employees, see [Standard Document, Separation and Release of Claims Agreement \(TN\)](#).

Releasors and Releasees

When drafting the release, the parties may agree to limit the universe of persons and entities included in the category of releasors and releasees. Contracting parties should note that non-signatories to the release cannot be bound by its terms unless the appropriate contracting party has the authority, under applicable corporate and agency law, to bind its affiliates and any other specified releasors (see *Siddle v. Crants*, 2010 WL 424906, at *10–11 (M.D. Tenn. Jan. 25, 2010)). In some states, even if the signatory releasor does not have that authority, the releasee has the right to claim against the signatory releasor if a non-signatory were to bring a damages action against the releasee. It is unclear whether Tennessee courts would follow this approach. Therefore, the parties may want to include an indemnity and duty-to-defend provision if they intend to make one party responsible for the claims of non-signatories.

If the universe of releasees includes any non-parties to the release agreement, the appropriate carve-out in Section 8(l) should be included to preserve the third-party-beneficiary status of all non-party releasees.

When considering whether to use the defined terms for “Affiliates” and “Representatives” (which are likely to have been defined in the underlying agreement that is being terminated), the parties should consider whether these defined terms are sufficiently broad (or overly broad) for purposes of the release.

Nonwaivable Claims

Certain types of claims cannot be waived or require explicit language in the release to be waived. They include:

- Claims relating to nonwaivable statutory or public policy protections, often in the employment context (see, for example, *Maggart v. Almany Realtors, Inc.*, 2007 WL 2198204, at *5-7 (Tenn. Ct. App. July 26, 2007)).
- Claims for injuries that resulted from post-release occurrences in some cases, such as where the injuries resulted from the releasee’s gross negligence (see *Adams v. Roark*, 686 S.W.2d 73, 75 (Tenn. 1985)).
- In many jurisdictions, claims that the release itself was fraudulently induced.
- In some jurisdictions, other types of fraud claims (such as claims that the releasee acted fraudulently in performing the underlying contract being terminated).

Regarding fraud, the key distinction is between:

- Acting fraudulently to induce the execution of the release.
- A party’s fraudulent acts in performing under the terminated contract.

The general rule does not permit waiver of claims that the release itself was fraudulently induced, except in the states (for example, Texas) that permit a waiver if the language of the release includes an explicit reference to these types of claims. Under Tennessee law, a release that is procured by false and fraudulent representations is voidable or void and may be set aside by the party defrauded (see *Huddleston v. Harper*, 2015 WL 3964791, at *8 (Tenn. Ct. App. June 30, 2015)). Although the Tennessee Court of Appeals has reserved the opportunity for a specific and explicit release of fraudulent inducement to be enforceable, Tennessee courts have not

conclusively addressed whether a specific waiver of such claims or defenses would be enforceable (*Shelby Elec. Co., Inc. v. Forbes*, 205 S.W.3d 448, 455-56 n.4 (Tenn. Ct. App. 2005) (“[W]e need not determine whether a specific waiver of those defenses would be enforceable under Tennessee law”).

The rule is more permissive for claims that a releasee acted fraudulently in its relationship with the releasor under the terminated contract. Some states (for example, Delaware) require the release to explicitly reference the waiver of these types of fraud claims. Other states (including New York and Texas) do not require any explicit references. In these states:

- A release of known and unknown claims permits the waiver of known and unknown fraud claims if they are otherwise within the scope of the released claims.
- If the parties are concerned about preserving fraud claims, they should carve out all claims relating to fraudulent acts of the releasees from the scope of the release.

In Tennessee, the rule is more like Delaware. Tennessee courts appear to require an explicit and specific release of claims for fraudulent behavior (*Holliday v. Patton*, 2014 WL 1281558, at *4 (Tenn. Ct. App. Mar. 31, 2014) (holding that a release waiving “any and all claims, liabilities and causes of action” was insufficient to waive claims of fraud or the defense of fraud)).

In all cases, when drafting release language, parties must research applicable state law and ensure that the wording of the release adequately reflects their intent to include or exclude waivers of fraud claims.

To support the enforceability of the agreement if the release of a particular claim is deemed unenforceable, a severability clause (see Section 8(h)) is included in this release agreement.

Conditional Releases

The general rule, which is reflected in Section 284 of the Second Restatement (although not followed in all states), is that a release of obligations can take effect immediately or on the occurrence of a condition.

In Tennessee and other states that follow this rule (for example, California and Delaware), the parties

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can execute and deliver a release and condition the effectiveness of the release on the satisfaction of an obligation (see *Less, Getz & Lipman, P.L.L.C. v. Rainbow Entm't, Inc.*, 1998 WL 100597, at *7 (Tenn. Ct. App. Mar. 10, 1998)). When terminating a contract, parties may, for example, condition the effectiveness of the release on the receipt of a termination payment (or other similar type of obligation) (see, for example, *Coldwell Banker Realty House*, 1988 WL 55013, at *2).

However, in some states, a release is not given effect unless it contains an explicit and unequivocal statement of a present promise to release the other party. In these states, parties should:

- Avoid including any conditions to the effectiveness of the release.
- Instead ensure that payment of the termination fee or other agreed condition is satisfied on or before execution and delivery of the release agreement.

If the parties desire a conditional release, which is enforceable under Tennessee law, they can include the optional language at the beginning of Section 3(a), which should be revised to reflect the agreed condition or conditions. This language should not be used if the release becomes effective immediately on execution and delivery of the release agreement.

(b) Each Releasor understands that it may later discover Claims or facts that may be different from, or in addition to, those that it or any other Releasor now knows or believes to exist regarding the subject matter of the release contained in this Section 3, and which, if known at the time of signing this Release Agreement, may have materially affected this Release Agreement and such Party's decision to enter into it and grant the release contained in this Section 3. Nevertheless, the Releasors intend to fully, finally, and forever settle and release all Claims that now exist, may exist, or previously existed, as set out in the release contained in this Section 3, whether known or unknown, foreseen or unforeseen, or suspected or unsuspected, and the release given herein is and will remain in effect as a complete release, notwithstanding the discovery or existence of such additional or different facts. The Releasors hereby waive any right or Claim that might arise as a result of such different or additional Claims or facts.

DRAFTING NOTE: INTENTION TO RELEASE UNKNOWN CLAIMS; WAIVER OF RIGHTS

The first three sentences in Section 3(b) contain:

- An acknowledgment from the releasing party that it intends to release all **known** and **unknown** claims, even though the releasor may not have granted the release if it knew of certain additional facts or of all unknown claims.
- A waiver of all claims and rights that the releasor may hold because of any additional facts and unknown claims.

The parties should consider including this language in any release that covers unknown claims, whether general or specific, for evidence of the parties' intentions to fully release all unknown claims.

A general release normally covers all claims between the parties which existed and were contemplated by the parties when they executed the release (*Cotton v. City of Franklin*, 494 Fed. Appx. 518, 522

(6th Cir. 2012); see also *Sherman v. Am. Water Heater Co., Inc.*, 50 S.W.3d 455, 459 (Tenn. Ct. App. 2001)). A general release without the language of Section 3(b) may **not** extend to claims which a party either:

- Does not know to exist in his or her favor at the time of executing the release.
- Does not suspect to exist in his or her favor at the time of executing the release.

Even where parties expressly release "unknown" claims, Tennessee courts have been unwilling to interpret such releases as precluding a claim of which the parties were truly ignorant at the time of its execution (see *Marlett*, 2007 WL 1048950, at *7 (quoting *Forry Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 262–63 (6th Cir. 1988)); see also *Hill v. A.O. Smith Corp.*, 801 F.2d 217, 223 (6th Cir. 1986) (concluding that an issue of material fact existed as to whether a

release of any and all claims, known or unknown, in connection with a feed storage structure's foundation precluded claims for a separate unknown and unrelated problem of the storage structure)).

Where a party has notice of potential claims or potential damages, a court is likely to enforce a release of "unknown" claims (see *Kinnard v. Shoney's, Inc.*, 100 F. Supp.2d 781, 793 (M.D. Tenn. 2000) (releasor had evidence of releasee's alleged fraudulent conduct prior to signing release) and *Miller v. East Tennessee Trucks, Inc.*, 754 S.W.2d 73, 74 n.1 (Tenn. Ct. App. 1988) (release containing "known or unknown claims" language "covers all claims between the parties which are in existence and within their contemplation at the time of its execution"))).

Special considerations apply if a general or specific release covering unknown claims is given by California releasors, may be enforced in California or in accordance with California law (whether or not California law is selected by the parties to govern the agreement), or is intended to cover claims that may arise under and/or be governed by California law. In these instances, the agreement must be tailored to include language compliant with California law. For sample language to include and explanatory material, see [Standard Document, Release Agreement \(CA\): Section 3\(b\)](#) and accompanying Drafting Note.

Covenant Not to Sue

A covenant not to sue is a promise not to sue on any specified claims or causes of action. In some contract terminations, besides including a release of claims, the parties include a covenant not to sue on any claims or causes of action covered by the release. The key difference between a release and a covenant not to sue is that a release is a waiver and discharge that extinguishes all of the releasor's covered claims and rights of action against the releasee, while a

covenant not to sue does not extinguish these claims but restricts the promisor from taking any legal action to enforce its rights (see *Holder v. Martin*, 407 S.W.2d 461, 463-64 (Tenn. 1966) and *Kreutzmann v. Bauman*, 609 S.W.2d 736, 738 (Tenn. Ct. App. 1980)).

Usually, there is no added benefit to including a covenant not to sue in the release agreement when terminating a contractual arrangement because the release (which goes further by extinguishing the releasor's claims) similarly protects the party benefitting from the provision against incurring legal liability for the subject claims and causes of actions. Courts in some states have expressly held that the difference between these two provisions is completely artificial. However, state law differs on some aspects of this issue.

The doctrinal and practical distinctions between releases and covenants not to sue are now "largely, if not completely, obsolete in light of Tennessee's adoption of the comparative fault doctrine and its codification of the Uniform Contribution Among Tortfeasors Act" (*Bowen v. Paisley*, 2014 WL 2708499, at *3 (M.D. Tenn. June 16, 2014)). Nevertheless, it is unclear whether all of Tennessee's rules related to the construction and enforcement of release agreements would apply as well to a covenant not to sue (*Bowen*, 2014 WL 2708499, at *4-5). Therefore, cautious practitioners still often include both a release and covenant not to sue within their contracts.

In Tennessee, the parties should consider whether they may obtain some additional benefit by including a covenant not to sue in addition to the release. For a sample covenant-not-to-sue provision (often used in tolling agreements in the insurance context instead of a release, to limit parties from suing during a discrete period of time), see [Standard Document, Standstill Agreement and Covenant Not to Sue \(Tolling Agreement\)](#).

4. Representations and Warranties. Each Party hereby represents and warrants to the other Party that:

- (a) It has the full right, [corporate] power, and authority to enter into this Release Agreement, to grant the release contained herein and to perform its obligations hereunder.
- (b) The execution of this Release Agreement by the individual whose signature is set out at the end of this Release Agreement on behalf of such Party, and the delivery of this Release Agreement by such Party, have been duly authorized by all necessary [corporate] action on the part of such Party.

(c) This Release Agreement has been executed and delivered by such Party and (assuming due authorization, execution, and delivery by the other Party hereto) constitutes the legal, valid, and binding obligation of such Party, enforceable against such Party in accordance with its terms[, except as may be limited by any applicable bankruptcy, insolvency, reorganization, moratorium, or similar laws and equitable principles related to or affecting creditors' rights generally or the effect of general principles of equity].

(d) It (i) knows of no Claims against the other Party relating to or arising out of the Agreement that are not covered by the release contained in Section 3 and (ii) has neither assigned nor transferred any of the Claims released herein to any [Person/person or entity] and no [Person/person or entity] has subrogated to or has any interest or rights in any Claims.

DRAFTING NOTE: REPRESENTATIONS AND WARRANTIES

The standard representations and warranties in Section 4 address:

- Due authorization.
- Due execution.
- Enforceability.

The representations and warranties contained in Section 4(d) are commonly used in release

agreements to provide the releasee comfort that the release suffices to comprehensively extinguish all claims within its intended scope.

For more information on representations and warranties, see [Standard Clauses, General Contract Clauses: Representations and Warranties](#).

EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES SET FORTH IN [SECTION [NUMBER] OF] THE AGREEMENT[, IN [SECTION [NUMBER] OF] THE TERMINATION AGREEMENT] AND IN THIS SECTION 4 OF THIS RELEASE AGREEMENT, (A) NEITHER PARTY HERETO NOR ANY PERSON ON SUCH PARTY'S BEHALF HAS MADE OR MAKES ANY EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY WHATSOEVER, EITHER ORAL OR WRITTEN, WHETHER ARISING BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE, ALL OF WHICH ARE EXPRESSLY DISCLAIMED, AND (B) EACH PARTY HERETO ACKNOWLEDGES THAT, IN ENTERING INTO THIS RELEASE AGREEMENT, IT HAS NOT RELIED UPON ANY REPRESENTATION OR WARRANTY MADE BY THE OTHER PARTY, OR ANY OTHER PERSON ON SUCH OTHER PARTY'S BEHALF, EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION 4.

DRAFTING NOTE: DISCLAIMER AND NON-RELIANCE ACKNOWLEDGEMENT

The last paragraph of Section 4 provides that each party:

- As the maker of representations and warranties, disclaims all representations and warranties except for those expressly made by the party in the underlying agreement, the termination agreement (if any) and this section of the release agreement (known as a disclaimer of representations and warranties).
- As the recipient of representations and warranties, acknowledges that, in entering

into the release agreement, it has not relied on any representation or warranty except for those expressly contained in this section of the release agreement (known as a non-reliance acknowledgement).

For more information on disclaimers of representations and warranties and non-reliance acknowledgements, see [Standard Clauses, General Contract Clauses: Representations and Warranties: Section 1.3](#).

5. Indemnification.

(a) [Each Party/[DEFINED TERM FOR PARTY [1/2]]] (as “**Indemnifying Party**”) shall defend, indemnify, and hold harmless [the other Party/[DEFINED TERM FOR PARTY [2/1]]], and its officers, directors, managers, employees, agents, [Affiliates/affiliates], permitted successors and permitted assigns (collectively, “**Indemnified Party**”), against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including [reasonable] attorneys’ fees, fees and the costs of enforcing any right to indemnification under this Release Agreement, and the cost of pursuing any insurance providers, [incurred by an Indemnified Party/awarded against an Indemnified Party [in a final [non-appealable] judgment]] (collectively, “**Losses**”), arising out of or resulting from any claim of a third party [or Party] alleging: (i) [material] breach by Indemnifying Party or its [Personnel/employees, consultants, or other personnel] of any representation, warranty, covenant, or other obligation set out in this Release Agreement; or (ii) [gross] negligence or more culpable act or omission of an Indemnifying Party or its [Personnel/employees, consultants, or other personnel] (including any recklessness or willful misconduct) in connection with the performance of its obligations under this Release Agreement.

(b) Notwithstanding anything to the contrary in this Release Agreement, the Indemnifying Party is not obligated to indemnify, defend, or hold harmless [the other Party/[DEFINED TERM FOR PARTY [2/1]]] and the other Indemnified Parties against any Losses arising out of or resulting[, in whole or in part,] from an Indemnified Party’s: (i) willful[, / or] reckless [or negligent] acts or omissions; or (ii) bad faith failure to [materially] comply with any of its obligations set out in this Release Agreement.

(c) An Indemnified Party seeking indemnification under this Section 5 shall give the Indemnifying Party: (i) prompt Notice (as defined below) of the relevant claim; provided, however, that failure to provide such notice shall not relieve the Indemnifying Party from its liability or obligation hereunder except to the extent of any material prejudice directly resulting from such failure; and (ii) reasonable cooperation[, at the Indemnifying Party’s expense,] in the defense of such claim. The Indemnifying Party shall have the right to control the defense and settlement of any such claim; provided, however, that the Indemnifying Party shall not, without the prior written approval of the Indemnified Party, settle or dispose of any claims in a manner that affects the Indemnified Party’s rights or interests. The Indemnified Party shall have the right to participate in the defense at its own expense.

(d) THIS SECTION 5 SETS FORTH THE ENTIRE LIABILITY AND OBLIGATION OF EACH INDEMNIFYING PARTY AND THE SOLE AND EXCLUSIVE REMEDY OF EACH INDEMNIFIED PARTY FOR ANY DAMAGES COVERED BY THIS SECTION 5.]

DRAFTING NOTE: INDEMNIFICATION

This release agreement includes an optional general indemnification provision, which can be:

- Mutual or unilateral (depending on which party (or both) is likely to suffer damages resulting from the other party’s potential breaches or other wrongful acts).
- Limited to third-party claims or also cover direct claims.

Parties should consider including Section 5 if:

- Early termination of the underlying agreement is likely to trigger third-party claims (and they have not entered into a termination agreement with an indemnification provision).

- The release agreement includes a substantial executory obligation as a condition to the effectiveness of the release.
- Applicable state law may not award attorneys’ fees as damages suffered by the releasee if the releasor were to sue on a released claim, see [Standard Clauses, General Contract Clauses: Litigation Costs and Expenses \(TN\)](#). In Tennessee, if a contract does not specifically or expressly provide for attorneys’ fees, the recovery of fees is not authorized (see *Bowen*, 2014 WL 2708499, at *6 (quoting *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 309 (Tenn. 2009))).

The parties should review those included in the definition of Indemnified Party to determine if it is appropriate based on the particular circumstances. Section 5(a) identifies indemnified parties who are not parties to the release agreement. If a related person has indemnification rights but is not a party to the contract, the parties should exclude the related indemnified parties from the scope of Section 8(l) to preserve each non-party's third-party beneficiary rights under Section 5.

For more information on drafting and negotiating indemnification provisions, see:

- [Practice Note, Indemnification Clauses in Commercial Contracts \(TN\)](#).
- [Standard Clauses, General Contract Clauses: Indemnification \(TN\)](#).
- [Practice Note, Relationship between Representations, Warranties, Covenants, Rights, and Conditions](#).

6. Confidentiality. [Subject to the terms and conditions of Section 7(a), each/Each] Party acknowledges the confidential nature of the terms and conditions of this Release Agreement [(including the fact that a termination payment is being made and the amount of the Termination Payment)] (collectively, the **"Confidential Information"**) and agrees that it shall not (a) disclose any of such Confidential Information to any [Person/person or entity], except to such Party's [Representatives/[A/a]ffiliates, employees, advisors, and other representatives] who need to know the Confidential Information to assist such Party, or act on its behalf, to exercise its rights or perform its obligations under this Release Agreement, or (b) use the Confidential Information, or permit it to be accessed or used, for any purpose other than to exercise its rights or perform its obligations under this Release Agreement. Each Party shall be responsible for any breach of this Section 6 caused by any of its [Representatives/[A/a]ffiliates, employees, advisors, or other representatives]. [Notwithstanding the foregoing, if any Confidential Information is permissibly disclosed under Section 7(a), such information will no longer be deemed "Confidential Information" for the purposes of this Section 6.]]

DRAFTING NOTE: CONFIDENTIALITY

The parties should include optional Section 6 if:

- The terms of the release agreement are intended to be kept confidential.
- The parties have not entered into a termination agreement with a confidentiality clause that would cover these terms.

If the parties include optional Section 7(a), they should also include:

- The bracketed language at the beginning of the first sentence.
- The last sentence.

For more information about confidentiality provisions in Tennessee, see [Practice Note, Confidentiality and Nondisclosure Agreements](#).

7. Publicity and Announcements.

(a) Neither Party shall (orally or in writing) publicly disclose or issue any press release, make any other public statement, or otherwise communicate with the media, concerning the termination of the Agreement, the existence of this Release Agreement or the subject matter hereof, without the prior written approval of the other Party [(which shall not be unreasonably withheld or delayed)], except to the extent that such Party [(based on the reasonable advice of counsel)] is required to make any public disclosure or filing regarding the subject matter of this Release Agreement (i) by applicable [Law/law][, / or] (ii) under any rules or regulations of any securities exchange on which the securities of such party [or any of its [A/a]ffiliates] are listed or traded[or (iii) in connection with enforcing its rights under this Release Agreement].]

DRAFTING NOTE: PUBLIC ANNOUNCEMENTS

Optional Section 7(a) (known as a public announcements clause or a publicity clause) ensures that the fact of the contract's termination and the terms of the release agreement are publicized only in an appropriate form, at an appropriate time, and in an agreed manner. It may be appropriate for inclusion in the release agreement if the parties have not entered into a termination agreement with a public announcements provision. This clause restricts each party from issuing press releases or other public announcements about the termination agreement, or otherwise communicating with the media about it, without the prior consent of the other party. The public announcements clause should be considered alongside optional Section 6, Confidentiality, if it is used.

Contracting parties commonly provide exceptions to the public announcements clause, including disclosures made to comply with:

- Legal requirements.
- Rules or regulations of a securities exchange on which a party's shares are listed (for a public company).

In some publicity clauses, the parties also include an exception to allow public announcements required to enforce a party's rights under the release agreement.

If the parties have agreed in advance on the form of announcement for the termination transaction, consider whether to set out the agreed wording in an exhibit to the release agreement. For more information on public announcements clauses, see [Standard Clauses, General Contract Clauses: Public Announcements](#).

(b) [[During the [NUMBER] year period beginning on the full execution of this Release Agreement,] [n/N]either Party shall make, publish, or communicate to any [Person/person or entity] or in any public forum any comments or statements (written or oral) that [intentionally seek to] denigrate or disparage, or are detrimental to, the reputation or stature of the other Party or its businesses, or any of its employees, [directors and officers/managers[, / and] members[, and officers]][, and existing and prospective customers, suppliers, investors, and other associated third parties].]]

DRAFTING NOTE: NON-DISPARAGEMENT

In some situations, a deteriorating relationship may have led to the decision to terminate the underlying agreement, exchange releases, or both. In other cases, one or both of the parties may be apprehensive about what the other party may say or disclose when questioned about the terminated arrangement. To address these concerns, parties to a termination agreement sometimes include a non-disparagement clause.

Business entities may want to consider limiting the non-disparagement clause to certain key individuals, for example, managers, to avoid problems with enforcement since it may be difficult to calculate

or prove damages on a breach of contract claim for breach of the non-disparagement provision (see, for example, *Reitz v. City of Mt. Juliet*, 2017 WL 3879201, at *2-3 (Tenn. Ct. App. Aug. 31, 2017) (no authority for damages found)). Therefore, it is not unusual for parties to include a liquidated damages provision for violations of the non-disparagement provision (see, for example, *Kovacevich v. Vanderbilt University*, 2010 WL 1492581, at *6 (M.D. Tenn. April 12, 2010)). For more information on liquidated damages, see [Standard Clause, General Contract Clauses: Liquidated Damages \(TN\)](#).

This optional non-disparagement clause may be appropriate if the factual circumstances support its

inclusion and the parties have not entered into a termination agreement with a non-disparagement clause. If optional Section 7(b) is used, the parties should determine whether to limit the restriction to a discrete period of time or leave it open-ended

(in which case, the applicable statute of limitations would likely apply).

If the parties do not include Section 7(b), the subsection reference “(a)” in Section 7(a) should be deleted.

8. Miscellaneous.

(a) Any notices, requests, consents, claims, demands, waivers, summons, or other legal process, or similar types of communications hereunder (each, a “**Notice**”) must be in writing and addressed to the relevant Party at the address set out on the first page of this Release Agreement (or to such other address that may be designated by the receiving Party from time to time in accordance with this Section 8(a)). All Notices must be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), or certified or registered mail (in each case, return receipt requested, postage prepaid). A Notice is effective only (i) on receipt by the receiving Party and (ii) if the Party giving the Notice has complied with the requirements of this Section 8(a).

DRAFTING NOTE: NOTICES

Section 8(a) is a short-form notices provision that does not permit the delivery of formal notice by facsimile or email (to protect the receiving party from being bound by a notice that it does not actually see). It should be

revised if the parties agree to accept facsimile or email notices. For more information on notices provisions (including a sample long-form clause) see [Standard Clause, Boilerplate Clauses \(TN\): Section 5](#).

(b) This Release Agreement and all related documents [including all exhibits attached hereto], and all matters arising out of or relating to this Release Agreement, whether sounding in contract, tort, or statute] are governed by, and construed in accordance with, the laws of the State of Tennessee, United States of America [(including [its statutes of limitations] [, without giving effect to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Tennessee]. Any legal suit, action or proceeding arising out of or [based upon/relating to] this Release Agreement must be instituted in the federal courts of the United States of America or the courts of the State of Tennessee, in each case located in the City of [CITY] and County of [COUNTY], and each Party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. [Service of process, summons, notice, or other document by certified mail in accordance with Section 8(a) will be effective service of process for any suit, action, or other proceeding brought in any such court.]

DRAFTING NOTE: GOVERNING LAW AND CHOICE OF FORUM

When selecting governing law for a release agreement relating to a contractual termination, contracting parties typically choose the same governing law

and choice of forum that applies to the termination agreement (if one was entered into) or the underlying agreement (if there is no termination agreement).

For more information on the optional language in brackets, see [Standard Clause, General Contract Clauses: Choice of Law \(TN\): Drafting Notes](#):

- [Extra-Contractual Matters](#).
- [Statutes of Limitations](#).
- [Choice of Law Rules](#).

For more information on drafting and negotiating choice of law and forum provisions, see [Practice Note, Choice of Law and Choice of Forum: Key Issues and Standard Clauses, General Contract Clause: Choice of Law \(TN\) and General Contract Clauses: Choice of Forum \(TN\)](#).

(c) This Release Agreement, and each of the terms and provisions hereof, may only be amended, modified, waived, or supplemented by an agreement in writing signed by each Party.

(d) Neither Party may assign, transfer, or delegate any or all of its rights or obligations under this Release Agreement without the prior written consent of the other party[, which consent shall not be unreasonably withheld or delayed]; provided, however, that either Party may assign this Release Agreement to [an [affiliate/Affiliate]][,] [a successor-in-interest by consolidation, merger, or operation of law or to a purchaser of all or substantially all of the Party's assets]]. No assignment will relieve the assigning party of any of its obligations hereunder. Any attempted assignment, transfer, or other conveyance in violation of the foregoing will be null and void. This Release Agreement will inure to the benefit of and be binding on each of the Parties and each of their respective permitted successors and permitted assigns.

DRAFTING NOTE: ASSIGNMENT; SUCCESSORS AND ASSIGNS

This provision restricts the parties' ability to assign their rights or delegate their obligations under the release agreement by requiring the prior written consent of the non-transferring party.

Anti-assignment clauses are frequently used because contracts are otherwise generally freely assignable. Exceptions to this general rule of free transferability, which may apply whether or not a contract contains an anti-assignment and anti-delegation clause, include assignments and delegations that either:

- Violate:
 - public policy (see, for example, *Can Do, Inc. Pension & Profit Sharing Plan & Successor Plans v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865, 869 (Tenn. 1996) (prohibiting the assignment of legal malpractice claims)); or

- the law (see, for example, T.C.A. § 4-51-117(a) (prohibiting the assignment of a lottery retailer contract)).

- Are personal in nature (see *Clark v. BP Oil Co.*, 930 F. Supp. 1196, 1205 (E.D. Tenn. 1996) and *Edgewood Lumber Co. v. Hull*, 223 S.W.2d 210, 215 (Tenn. Ct. App. 1949)).

Include the first bracketed language in the first sentence if a party wants to ensure the other party cannot withhold or delay its consent unreasonably. Include the proviso at the end of the first sentence to specify exceptions to the prohibition on assignments for assignments to affiliates or to successors-in-interest.

For more information on anti-assignment and anti-delegation provisions, see [Practice Note, Assignability of Commercial Contracts and Standard Clauses, General Contract Clauses: Assignment and Delegation \(TN\)](#).

(e) This Release Agreement may be executed in counterparts, each of which is deemed an original, but all of which constitute one and the same agreement. [Delivery of an executed counterpart of this Release Agreement electronically or by facsimile shall be effective as delivery of an original executed counterpart of this Release Agreement.]

DRAFTING NOTE: COUNTERPARTS

The parties should include the optional second sentence of Section 8(e) if they agree to accept delivery of executed counterparts by facsimile or

PDF attachment to an e-mail. For more information on counterparts provisions, see [Standard Clauses, General Contract Clauses: Counterparts](#).

(f) For purposes of this Release Agreement, (i) the words “include,” “includes” and “including” are deemed to be followed by the words “without limitation”; (ii) the word “or” is not exclusive; (iii) the words “herein,” “hereof,” “hereby,” “hereto” and “hereunder” refer to this Release Agreement as a whole; (iv) words denoting the singular have a comparable meaning when used in the plural, and vice-versa; and (v) words denoting any gender include all genders. The Parties drafted this Release Agreement without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted.

(g) The headings in this Release Agreement are for reference only and do not affect the interpretation of this Release Agreement.

(h) [If any term or provision of this Release Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Release Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction[; provided, however, that if any fundamental term or provision of this Release Agreement (including [LIST OF APPLICABLE FUNDAMENTAL TERMS]), is invalid, illegal, or unenforceable, the remainder of this agreement shall be unenforceable]. [Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the parties hereto shall negotiate in good faith to modify this Release Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.]]

DRAFTING NOTE: SEVERABILITY

The parties should consider including optional Section 8(h) if there is any concern about the enforceability of certain claims under the release.

However, if the parties view any of the potentially unenforceable provisions as a necessary component of the release agreement, they should either:

- Exclude the severability clause.
- Carve out the fundamental term from the application of the severability clause.

For more information on severability provisions, see [Standard Clauses, General Contract Clauses: Severability \(TN\)](#).

(i) [Each of the Parties shall[, and shall cause its respective [Affiliates/affiliates] to], from time to time at the request [and sole expense of the other Party/of the other Party, without any additional consideration], furnish the other Party such further information or assurances, execute and deliver such additional documents, instruments, and conveyances, and take such other actions and do such other things, as may be [reasonably] necessary [or [appropriate/desirable]] [in the opinion of counsel to the requesting party] to carry out the provisions of this Release Agreement and give effect to the transactions contemplated hereby.]

DRAFTING NOTE: FURTHER ASSURANCES

The parties should consider including optional Section 8(i) if the release agreement contains any executory obligations. For more information on

further assurances provisions, see [Standard Clauses, General Contract Clauses: Further Assurances \(TN\)](#).

(j) This Release Agreement is the sole and entire agreement of the Parties regarding the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations, and warranties, both written and oral, regarding such subject matter.

(k) [[Each Party shall pay its own costs and expenses in connection with the drafting, negotiation, and execution of this Release Agreement (including the fees and expenses of its advisors, accountants, and legal counsel).

OR

[DEFINED TERM FOR PARTY [1/2]] agrees to pay or reimburse [DEFINED TERM FOR PARTY [2/1]] for all of its [reasonable] out-of-pocket costs and expenses incurred in connection with the drafting, negotiation, and execution of this Release Agreement (including the fees and expenses of its advisors, accountants, and legal counsel).]

DRAFTING NOTE: COSTS AND EXPENSES

The parties should consider including optional Section 8(k) if:

- The drafting and negotiation of the release agreement involved third-party advisors.
- The termination agreement or underlying agreement does not address allocation of transaction-related costs and expenses that would apply to the drafting, negotiation, and execution of the release agreement.

Use the first alternative if each party is covering its own costs and expenses and the second alternative if one party has agreed to fund or reimburse the other party's transaction costs (for example, as partial consideration for agreeing to the early termination of the underlying contract). Counsel should also consider whether to make payment or reimbursement a condition precedent to the effectiveness of the release if a conditional release is enforceable under applicable law. If required, revise Section 3(a) accordingly.

(l) Except as expressly set out in the second sentence of this Section 8(l), this Release Agreement benefits solely the Parties hereto and their respective permitted successors and permitted assigns, and nothing in this Release Agreement, express or implied, confers on any other [Person/person or entity] any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Release Agreement. The Parties hereby designate all Releasees [and Indemnified Parties] as third-party beneficiaries of Section 3 [and Section 5], [respectively,] having the right to enforce such Section[s].

DRAFTING NOTE: NO THIRD-PARTY BENEFICIARIES

Many agreements expressly state that no non-parties to the agreement have rights under the agreement. However, Section 3 and optional

Section 5 each grant certain rights to specified persons who are not parties to the release agreement. Usually, these related persons do not

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sign the release agreement. Therefore, the parties must carve out these third-party beneficiaries from the restriction under Section 8(l).

Tennessee follows the prevailing rule that a third party may sue on a contract made for the party's direct benefit where:

- The parties to the contract have not otherwise agreed.
- Recognition of the third-party's right to performance is appropriate to effectuate the parties' intent.

- The terms or circumstances indicate that performance of the promise is intended or will satisfy an obligation owed by the promisee to the third party.

(*Benton v. Vanderbilt Univ.*, 137 S.W.3d 614, 618 (Tenn. 2004).)

For more information on drafting and negotiating no third-party beneficiaries provisions, see [Standard Clauses, General Contract Clauses: Third-Party Beneficiaries](#).

IN WITNESS WHEREOF, the Parties have executed this Release Agreement [on/as of] the date first written above.

[PARTY 1 NAME]

By _____

Name:

Title:

[PARTY 2 NAME]

By _____

Name:

Title:

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