

Release Agreement (TX)

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A generic form of release agreement under Texas 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. The termination agreement may also contain:

- 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). While conditional releases are generally enforceable in Texas, conditions are generally not favored (*Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)). The parties to a contract may agree that the contract shall not become effective or binding until or unless some specified condition is performed or occurs, in which case there is no binding contract until the condition has been satisfied (see *Hohenberg Bros.*, 537 S.W.2d at 3 and *Perry v. Little*, 377 S.W.2d 765, 769 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.)).

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 Texas law.** If the law of another state applies, this agreement may have to be modified to comply with the laws of the applicable jurisdiction.
- **The provisions of this Standard Document that specifically deal with the waiver and release of liability are intended to be made more conspicuous than other provisions in a commercial agreement.** Because disclaimers or restrictions of liability can significantly affect a party's rights under an agreement, lawyers typically differentiate the text of this language from that of other provisions to avoid a court voiding it for failing to be conspicuous enough for the affected party to notice. Additionally, depending on the nature of the transaction and the parties entering into the agreement, some states, like Texas, require that these provisions be made more conspicuous in order to be valid. Any risk-shifting provisions that provide for a release or indemnification from liability for that party's future negligence must meet the Texas fair notice requirements of the express negligence doctrine and conspicuousness (for more information on the fair notice requirements, see Drafting Note, Mutual Release).
- **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 \(TX\)](#).

- **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 \(TX\)](#).

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 goals.

(Restatement (Second) of Contracts § 284 (1981); see also *Endeavor Energy Res., L.P. v. Staley*, 569 S.W.3d 319, 325 (Tex. App.—El Paso 2019, no pet.) (citing *In re OSG Ship Mgmt., Inc.*, 514 S.W.3d 331, 344 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (“a release is a writing providing that an obligation owed to one party is discharged immediately or on the occurrence of a condition.”); *Nat’l Union Fire Ins. Co. of Pittsburg, Pa. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 127 (Tex.App. — Houston [14th Dist.] 1997), order withdrawn (July 8, 1999), *aff’d sub nom., Keck, Mahin & Cate v. Nat’l Union Fire Ins. Co. of Pittsburg, Pa.*, 20 S.W.3d 692 (Tex.2000) (same).)

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]]

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[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 do not have any direct legal consequences. They are primarily used to provide information about the basic background and purpose of the agreement. In Texas, recitals in a contract generally do not control the operative clauses unless a court finds the operative clauses ambiguous. However, courts may look at them to determine the proper construction of the contract and the parties’ intention. (*Furmanite Worldwide, Inc. v. NextCorp, Ltd.*, 339 S.W.3d 326, 336 (Tex. App.—Dallas 2011, no pet.))

If the parties have defined any terms in the recitals that are used in the operative sections of the agreement, they should be aware that these definitions can have legal consequences. However, if the recitals are broader than the contract stipulations, the recitals will not extend the stipulations (*Furmanite*, 339 S.W.3d at 336).

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 Texas law, where specific and particular enumerations of persons or things are followed by general words, the general words are not construed in their widest meaning or extent. Instead, they are treated as limited and applying to persons or things of the same kind or class as those expressly mentioned. (*Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987) (citing *Stanford v. Butler*, 181 S.W.2d 269, 272 (Tex. 1944)).)

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/Upon receipt of the executed 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 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 \(TX\)](#).

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, AFFILIATES, 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, AFFILIATES, EMPLOYEES, OFFICERS, DIRECTORS, SHAREHOLDERS, MANAGERS, MEMBERS, AGENTS, REPRESENTATIVES, 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.

Under Texas law, release agreements like this standard document must comply with the fair notice requirement of conspicuousness, which provides that the releasing language must be conspicuously written so that a reasonable person against whom it is to operate should notice it (*McGinnis v. Union Pac. R. Co.*, 612 F. Supp. 2d 776, 797-98 (S.D. Tex. 2009), on reconsideration in part, 2009 WL 2900277 (S.D. Tex. Sept. 8, 2009); see also *Dresser Indus. Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508-09 (Tex.1993)). In other words, an agreement's release provisions must attract the attention of a reasonable person by its distinctiveness regarding the other language in the agreement. For example, language will be considered conspicuous if it is in:

- Capital letters.
- Bold type.

- Contrasting font color.
- Larger size font.

(See *Dresser Indus.*, 853 S.W.2d at 509-11; see also *Reyes v. Storage & Processors, Inc.*, 86 S.W.3d 344, 348-49 (Tex. App. —Texarkana 2002) aff'd 134 S.W.3d 190 (Tex. 2004).)

For more information on Texas fair notice requirements, see 14 Tex. Jur. 3d Contracts § 204.

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 even if they are unrelated to the agreement that is being terminated (known as a general release) (see, for example, *Transcor Astra Group S.A. v. Petrobras Am. Inc.*, 2022 WL 1275238, at *3 (Tex. Apr. 29, 2022) ("The agreement expressly states that the release should be 'construed as the broadest type of general release.'").
- Broad in scope and cover all claims that a releasor has or may have in connection with the underlying agreement (known as a specific release).

- More narrowly structured and limited to certain specified claims or types of claims (also known as a specific release).

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, 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 Texas, to release a claim effectively, the releasing instrument must “mention” the claim to be released, but the parties are not required to anticipate and identify each potential cause of action relating to the subject matter of the release. Although the “mention” requirement does not bar general, categorical releases, these types of releases are narrowly construed. Claims that are not clearly within the subject matter of the release are not discharged, even if those claims existed at the time the release was executed. (*McCullough v. Scarbrough, Medin & Associates, Inc.*, 435 S.W.3d 871, 885-86 (Tex. App. —Dallas 2014).)

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, which is generally enforceable under Texas law (see Conditional Releases).

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

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. However, 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.

As a safeguard, the parties should consider including an indemnity provision in the event the release is challenged, such that the releasor is required to indemnify the releasee from any future claims.

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 protections, often in the employment context (see, for example, *Farris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir. 2003)).

- In many jurisdictions, including Texas, 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 Texas law, a release that clearly expresses the parties' intent to disclaim reliance on representations about specific matters in dispute can bar a claim of fraudulent inducement (*Int'l Bus. Machines Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 229 (Tex. 2019) (citing *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60-61 (Tex. 2008) (holding that clause stating that no party is "relying upon any statement or any representation of any agent of the parties" refuted element of reliance in fraudulent inducement claim); see also *W. Loop Hosp., LLC v. Houston Galleria Lodging Associates, LLC*, 649 S.W.3d 461, 489-90 (Tex. App.—Houston [1st Dist.] 2022, pet. denied), reh'g denied (May 19, 2022)) (citing *Int'l Bus. Machines Corp.* and discussing the elements of fraud and fraudulent inducement), reh'g denied (May 19, 2022)). Texas courts review the surrounding circumstances, assessing five factors to determine whether a properly drafted disclaimer provision is enforceable. These factors are whether:

- The terms of the contract, and in particular the disputed provision, were negotiated, rather than boilerplate.
- The complaining party was represented by counsel.
- The parties dealt with each other at arm's length.
- The parties were knowledgeable in business matters.
- The release language is clear.

(*Forest Oil Corp.*, 268 S.W.3d at 60; see also *Texas Standard Oil & Gas, L.P. v. Frankel Offshore Energy,*

Inc., 394 S.W.3d 753, 774-75 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (stating that the five factors provided by *Forest Oil* are to be assessed by the court but not all need to be established to enforce a disclaimer).)

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. Texas, as well as certain other states (including New York), 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 (see *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 849-50 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); see also *Hart v. Traders & General Ins. Co.*, 189 S.W.2d 493, 494 (1945) (stating that generally, if the release is valid, it is a bar to any cause of action stemming from the matter discharged)).
- 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 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 either:

- Immediately.
- On the occurrence of a condition.

(Restatement (Second) of Contracts § 284(1) (1981).)

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

can execute and deliver a release and condition the effectiveness of the release on the satisfaction of an obligation (*Perry*, 377 S.W.2d at 769). 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).

However, in those states that do not follow the general rule, a release is not necessarily 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 Texas law, they can include the optional language at the beginning of Section 3(a), which should be revised to reflect the agreed on condition or conditions. This language should not be used if the release becomes effective immediately on execution and delivery of the release agreement.

With conditional releases in particular, drafters should make sure to use clear language regarding the nature of the release. While no specific words are required to connote the existence of a condition, Texas courts have found that terms such as “if,” “provided that,” and “on the condition that” indicate the parties’ intent to create a condition (see *Hohenberg Bros.*, 537 S.W.2d at 3).

(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. Otherwise, a general release without this language

may not extend to claims which a party does not know or suspect to exist in his or her favor at the time of executing the release.

In Texas, a valid release may encompass unknown claims and damages that develop in the future (*Keck, Mahin & Cate*, 20 S.W.3d at 698). Although the release must mention the claim to be effective, the parties do not need to identify each potential cause of action relating to the subject matter of the release (*Kalyanaram v. Burck*, 225 S.W.3d 291, 297 (Tex. App.—El Paso 2006, no pet.)).

Special considerations may apply if a party is contemplating enforcement of any general or specific releases covering unknown claims in

California, where the parties' choice of law selection may not be controlling on this issue under the current state of 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 (Restatement (Second) of Contracts § 285(1) (1981)).

In Texas:

- A **release** is a surrender of the cause of action, which may be gratuitous, or given for inadequate consideration.
- A **covenant not to sue** is merely a promise not to sue or pursue a claim or a cause of action.
- An agreement between the parties may encompass either or both of these concepts. The legal effect of the agreement will be determined primarily from the parties' intentions and not by the label which they may apply.

(*Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 810-11 (Tex. 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. In Texas, it is common to see a single document or provision in a contract titled "Release and Covenant Not to Sue" (see, for example, *Compton v. Texaco, Inc.*, 42 S.W.3d 354, 357-58 (Tex. App. —Houston [14th Dist.] 2001, pet. denied) and *Hayes v. Roux Laboratories, Inc.*, 443 S.W.2d 621, 621-22 (Tex. Civ. App. —Eastland 1969, no writ); see also *Blackmon v. Zachary Holdings, Inc.*, 2022 WL 3142364, at *3 (W.D. Tex. Aug. 5, 2022).).

The parties may still consider whether they may obtain some additional benefit by including a covenant not to sue in addition to the release since the intent of the parties will control regardless of what titles are used in the document (*Knutson*, 603 S.W.2d at 810-11). 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 \(Tolling Agreement\)](#).

Also see Drafting Note, Non-Disparagement, discussing the application of the Texas Citizens Protection Act (Tex. Civ. Prac. & Rem. Code §§ 27.001 to 27.011), which deals with the "right to petition" in certain circumstances. In these instances, the term "petition" has a broader definition than simply the right to sue in a judicial proceeding (Tex. Civ. Prac. & Rem. Code § 27.001(4) (also including administrative and other governmental proceedings)).

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,

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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 Clause, 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,] 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.

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- 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 Clause, General Contract Clauses: Litigation Costs and Expenses \(TX\)](#). The law in Texas is not clear on this point (see, for example, *Caspary v. Woodruff*, 2000 WL 35729203, at *1-2 and *11-12 (Tex. App. — Corpus Christi–Edinburg Aug. 31, 2000, pet. denied) and *5436, LLC v. CBS Corp.*, 2009 WL 3378379, at *14-15 (S.D. Tex. Oct. 16, 2009)).

In *Caspary*, a Texas appellate court allowed a party who was sued in violation of a covenant not to sue to recover attorneys' fees under an equitable theory (see *Caspary*, 2000 WL 35729203, at *1-2 and *11-12). The court affirmed the award of attorneys' fees, but explained that the trial court was wrong in awarding them as damages for breach of the covenant not to sue, and instead concluded that the award was authorized under Tex. Civ. Prac. & Rem. Code Ann. § 38.001, which the defendants had specifically invoked, and equitable principles.

In *5436, LLC*, however, a Texas federal court addressed the issue of recovery of attorneys' fees when a releasor sued and stated that it was unable to identify any Texas cases in which a party successfully recovered

attorneys' fees and other litigation expenses as damages for breach of a release agreement. The court held that the releasee (by assignment) was not entitled to recovery of attorneys' fees. (See *5436, LLC*, 2009 WL 3378379, at *14-15.)

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 \(TX\)](#).
- [Standard Clauses, General Contract Clauses: Indemnification \(TX\)](#).
- [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.

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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 Texas, see [Practice Note, Confidentiality and Nondisclosure Agreements \(TX\)](#).

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 Clause, 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. 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.

In Texas, if the facts of the situation warrant, the parties should consider the evolving scope of the Texas Anti-SLAPP Statute, also known as the Texas Citizens Participation Act (TCPA) and its application to commercial transactions (Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001 to 27.011). The TCPA creates a motion to dismiss a legal action which is based on or is in response to:

- The exercise of the right of free speech.
- The right to petition.
- The right of association.
- Conduct related to the communication of information to the public in connection with certain free speech-protected activities.

(Tex. Civ. Prac. & Rem. Code Ann. §§ 27.003 and 27.010(b).)

Courts have granted TCPA relief to consumer defendants in business service contracts that effectively voided the non-disparagement clauses contained in the contracts (see, for example, *Duchouquette v. Prestigious Pets, LLC*, 2017 WL 5109341, at *3 (Tex. App.—Dallas Nov. 6, 2017, no

pet.) (the court granting relief to defendants sued by a business for defamation over an unfavorable review posted online); see also Consumer Review Fairness Act, 15 U.S.C.A. § 45b).

In business-to-business transactions, case law and 2019 statutory amendments suggest that a fact-intensive analysis is called for, as the general application of non-disparagement clauses under the TCPA continues to develop. For example:

- In *Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC*, 549 S.W.3d 839, 848 (Tex. App. — Austin 2018), aff'd in part, rev'd in part sub nom. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127 (Tex. 2019)), the party contracted for a limited waiver of certain TCPA remedies when it agreed to limit its ability to commence litigation.
- In *MVS Int'l Corp. v. Int'l Advertising Solutions, LLC*, 545 S.W.3d 180, 205-06 (Tex. App.—El Paso 2017, no pet.), the court stated that because the appellants were not signatories to the agreement that contained a non-disparagement clause, it is not clear how they could have intentionally relinquished a known right, which is a general requirement for any waiver claim.

Accordingly, when appropriate, parties should consider including an express waiver of the TCPA.

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.

For more information about the TCPA, see [Practice Note, Anti-SLAPP Motions \(TX\)](#).

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 \(TX\): 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 Texas, United States of America [(including [its statutes of limitations] [and] [Tex. Bus. & Com. Code Ann. § 271.001 et seq.]], 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 Texas. 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 Texas, 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).

Parties may choose the substantive law of Texas to apply to the contract for both:

- Transactions that bear a reasonable relation to the state (Tex. Bus. & Com. Code Ann. § 1.301(a)).
- Qualified transactions under Chapter 271 of the Business and Commerce Code (Tex. Bus. & Com. Code Ann. §§ 271.001 to 271.011).

For a discussion of choice of law rules in Texas, including qualified transactions, see [Standard Clauses, General Contract Clauses: Choice of Law \(TX\): Drafting Note: Texas Choice of Law Statutes](#).

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

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

Parties should be aware that in contrast to forum selection, venue selection, which refers to the geographic location within the forum (often, the county, but sometimes, a particular court) with the authority to hear the case, is not enforceable in a private contract in Texas unless otherwise provided by statute (*Liu v. CiCi Enters., LP*, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.)). For example, parties may contractually agree to have the case heard in a specific Texas county if the suit arises from a “major transaction” (Tex. Civ. Prac. & Rem. Code Ann. § 15.020(b), (c)). With certain exceptions, a major transaction is a written agreement under which a person pays or receives consideration with an aggregate stated value of at least \$1 million (Tex. Civ. Prac. & Rem. Code Ann. § 15.020(a)). Best practice, however, is to include the geographic location.

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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 \(TX\)](#) and [General Contract Clauses: Choice of Forum \(TX\)](#).

(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 reorganization, merger, exchange of interests, 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, *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 389 (Tex. App.—Houston [14th Dist.] 1997) (prohibiting assignments of legal malpractice claims)); or
 - the law (see, for example, Tex. Ins. Code Ann. § 4152.206 (prohibiting the assignment of a contract between an insurer and its manager).
- Are personal in nature (see *In re FH Partners, L.L.C.*, 335 S.W.3d 752, 762-63 (Tex. App.—Austin 2011, no pet.)).

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 \(TX\)](#) and [Standard Clause, General Contract Clauses: Assignment and Delegation \(TX\)](#).

(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 Clause, 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 Clause, General Contract Clauses: Severability \(TX\)](#).

(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 Clause, General Contract Clauses: Further Assurances \(TX\)](#).

(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 sign the release agreement.

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

Texas follows the majority rule that a third person for whose benefit a promise has been made by another may maintain an action on the contract (*Republic Nat. Bank of Dallas v. Nat'l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.)). However, the parties generally must expressly provide that the agreement is made for the benefit of a non-signatory third party to allow

the third party to have rights under an agreement. Otherwise, Texas courts presume that the parties contracted for themselves, as there is a presumption against third party beneficiary agreements (*MCI Telecommunications Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999).)

For more information on drafting and negotiating no third-party beneficiaries provisions, see [Standard Clause, 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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