

# REPRESENTATIONS, WARRANTIES AND "AS IS" DISCLAIMERS

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## USEFUL MATERIALS

Annotations

8 A.L.R. 5<sup>th</sup> 312, *Construction and Effect of provision in Contract for Sale of Realty by Which Purchaser Agrees to Take property "As Is" or in Its Existing Condition.*

12 A.L.R. 5<sup>th</sup> 630, *Vendor's Obligation to Disclose to Purchaser of Land Presence of Contamination from Hazardous Substances or Wastes.*

24 A.L.R.3d 465, *Construction and Effect of Affirmative provision in Contract of Sale by Which Purchaser Agrees to Take Article "As Is," in the Condition in Which it Is, or Equivalent Term.*

73 A.L.R. 3<sup>rd</sup> 248, *Construction and Effect of UCC § 2-316(2) Providing that Implied Warranty Disclaimer Must be "Conspicuous".*

168 A.L.R. 389, *Implied Warranty of Quality, Fitness, or Condition as Affected by Buyer's Inspection Of, or Opportunity to Inspect Goods.*

160 A.L.R. 357, *Necessity of Buyer's Actual Knowledge of Disclaimer of Warranty of Personal Property.*

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13 TEX. JUR. 3D *Consumer and Borrower Protection* § 255 Failure to disclose—Affirmative misrepresentations and failure to disclose distinguished (2004).

41 TEX. JUR. 3D *Fraud and Deceit* §§13 Materiality; 21 "Puffing", 33 "As is"; waiver of reliance (2007).

65 TEX. JUR. 3D *Sales* §§ 223 Implied Warranties—Exclusion; Waiver and 309 "As is" sales (2006).

3 CRAIG B. GLIDDEN AND GREGORY ABBOTT, TEX. PRAC. GUIDE BUS. & COM. LITIG. 112-117 Ch. 19 *Contract Rights and Liabilities* § 19.201 Enforcement of "as is" contracts; § 19.202 Enforcement of "as is" contracts—determination whether to give effect to "as is" provisions (Thompson/West Supp. 2008).

17 WILLISTON ON CONTRACTS Ch. 50 *Contracts for the Sale or Lease of Land – Caveat Emptor, Warranties and Representations* § 50:40 Particular representations—Environmental matters (Supp. 2008).

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#### Seminars

Michael Baucum, *As-Is Update "Prudential 2008"*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE LAW COURSE (2008).

Larry W. Nettles, *Drafting Environmental Clauses*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE DRAFTING COURSE (2007).

Anne Newton, *"As Is" Provisions in Commercial Leases*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, ADVANCED REAL ESTATE DRAFTING COURSE (2008).

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**I. INTRODUCTION**

**A. Lay Understandings**

*"Darling, I have always told you some version of the truth."*<sup>1</sup> *"Caveat emptor."*<sup>2</sup> *"Prove yourself to be brave, truthful and unselfish."*<sup>3</sup> *"Silence is the virtue of fools."*<sup>4</sup> *"Silence is golden."*<sup>5</sup> *"Honesty is a good thing but it is not profitable to its possessor unless it is kept under control."*<sup>6</sup> *"Honesty is the best policy; but he who is governed by that maxim is not an honest man."*<sup>7</sup>

**B. Competing Public Policies**

Consumer protection.<sup>8</sup>

Freedom of contract.<sup>9</sup>

**C. Contract Approaches**

Risk shifting provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The most common methods by which risk is shifted in a contract are by the use of representations and warranties, insurance covenants, express assumption of liabilities, indemnity,<sup>10</sup> exculpation,<sup>11</sup> release<sup>12</sup> and limitation of liability provisions.

Every provision of a contract is either restating the rule that would be supplied by the court in the absence of the provision or is expressly shifting a risk from one party to the other.

Each contracting party's risk-related goals are (1) to accept no more risk than it can reasonably bear or insure, and (2) to transfer the balance of the risk to the other party. The following factors are involved in the ultimate determination as to how much risk a party receives or transfers: (1) which party is in the best position to control the extent of the occurrence of the risk?; (2) does one party have specialized knowledge of the type of risks most likely to occur and how to prevent or identify them?; (3) custom and practice in the particular industry (for example, sellers to buyers; landlords to tenants; owners to contractors; contractors to subcontractors); (4) the bargaining strength of the respective parties; and (5) statutory and common law public policies.

**II. REPRESENTATIONS, WARRANTIES AND COVENANTS**

**A. "Representations"**

BLACK'S LAW DICTIONARY defines "representation" as

A presentation of fact – either by words or by conduct – made to induce some to act, sep. to enter into a contract; esp., the manifestation to another that a fact, including a state of mind, exists [the buyer relied on the seller's representation that the roof did not leak].<sup>13</sup>

Representations are a means for the Buyer to gain information about the property. Representations can be a valuable supplement to a Buyer's investigation of the property, especially as to matters that are not readily ascertainable by a Buyer through normal investigations. Also, time constraints or other practical obstacles (such as evaluating the purchase of multiple properties) may dictate the use of representations and warranties as opposed to in-depth property inspections.

Representations and warranties are also a means of allocating risks between the parties as to matters occurring prior to the sale.

Prudence dictates that a buyer undertake its own investigation of the property as opposed to placing sole reliance upon a seller's representations and warranties.

**B. "Warranty"**

BLACK'S LAW DICTIONARY defines "warranty" as

*Contracts.* An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp., a seller's promise that the thing being sold is as represented or promised. A warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usu. only a collateral inducement, (2) an express warranty is usu. written on the face of the contract,

while a representation may be written or oral, (3) a warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation is material, and (4) a warranty must be strictly complied with, while substantial truth is the only requirement for a representation.<sup>14</sup>

### C. When a Representation Becomes a Warranty

The distinction between representations and warranties is many times unclear. The test as to whether a representation is a warranty or is a mere expression of an opinion turns on whether the seller asserts a fact of which the buyer was ignorant or merely expresses a judgment about something on which each might be expected to have an opinion.<sup>15</sup>

## III. MISREPRESENTATION, FRAUD, FRAUDULENT INDUCEMENT, DECEPTIVE TRADE PRACTICES, AND NEGLIGENT MISREPRESENTATION

### A. Misrepresentation

Of course, a seller will have liability for false representations.<sup>16</sup>

### B. Fraud and Fraudulent Inducement

To recover on a fraud claim, a plaintiff is required to prove that: (1) the defendant made a material misrepresentation; (2) the representation was false; (3) when the representation was made, the defendant knew it was false or the statement was recklessly asserted without any knowledge of its truth; (4) the defendant made the false representation with the intent that it be acted on by the plaintiff; (5) the plaintiff acted in reliance on the misrepresentation; and (6) the plaintiff suffered injury as a result.<sup>17</sup> Fraud by non-disclosure is simply a subcategory of fraud, because, where a party has a duty to disclose, the non-disclosure may be as misleading as a positive misrepresentation of facts.<sup>18</sup>

In addition to common law fraud, Texas has a statutory cause of action for fraud in a real

estate transaction. Under Texas Business and Commerce Code §27.01, a person that commits fraud in connection with a real estate transaction can be liable for damages, including attorneys' fees, expert fees and court costs.<sup>19</sup> As a general rule, these claims require evidence of intent, knowledge and injury *as a result of the conduct*. The allegations are most often levied against the developer, since the contractor is not likely to have made representations to the residence purchaser at all. In a condominium project, a difficulty a condominium association may have is that these claims are more personal to the unit owner and not "common" to two or more unit owners. Although not resolved by current Texas case law, defendant developers will argue that the condominium association lacks standing to assert these types of "personal" claims.

### C. Deceptive Trade Practices

In 1967, Texas adopted the law known as the Texas Deceptive Trade Practices Act ("DTPA"). Tex. Bus. & Code §§ 17.41 *et seq.* The DTPA lists an number of unlawful practices (referred to as the "laundry list") and creates a cause of action for consumers to sue those employing such practices. For example, the DTPA prohibits any

failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.<sup>20</sup>

After the passage of the DTPA, plaintiffs found that they had new and additional causes of action for conduct alleged as a false, misleading or deceptive act under the DTPA's "laundry list" of prohibited acts. In the 1970's and 1980's the DTPA created an imbalance that impeded the reasonable resolution of disputes arising from defects in residential construction, remodeling or repair. An example of this is the *Brighton Homes* case where the plaintiff homeowners were successful in obtaining a judgment for 7 times the cost of the house.<sup>21</sup>

The DTPA has been held to be applicable to a seller's failure to disclose information even if the information was discoverable by the buyer (for example, failing to disclose a recorded lien is a DTPA violation).<sup>22</sup>

The DTPA is an attractive cause of action for a because it allows recovery of attorneys' fees. It also provides for mental anguish damages if the plaintiff shows the defendant(s) acted "*knowingly*" or "*intentionally*." Finally, a plaintiff who proves the defendant acted "*knowingly*" or "*intentionally*" is entitled to treble (3x) damages under the DTPA. A defendant commits an act "*knowingly*" if he acts with actual awareness of the falsity, deception or unfairness of the act. DTPA at § 17.45(9). Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. A defendant acts "*intentionally*" if he acts with actual awareness of the falsity, deception or unfairness of the act, coupled with the specific intent that the consumer detrimentally rely on the falsity, deception or unfairness or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally. DTPA at § 17.45(13).

The DTPA has been amended to limit application of the DTPA. Section 17.49(f) and (g) of the DTPA, as amended, provides that the DTPA does not apply to contracts in the following instances:

(f) Nothing in the subchapter shall apply to a claim arising out of a written contract if: (1) the contract relates to a transaction, a project, or a set of transactions related to the same project involving total consideration by the consumer of more than \$100,000; (2) in negotiating the contract the consumer is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or an agent of the defendant; and (3) and the contract does not involve the consumer's residence.

(g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than \$500,000, other than a cause of action involving a consumer's residence (Author's Note: note that in this \$500,000 exception, there is no requirement that the consumer be represented by legal counsel).

§17.42 of the DTPA, as amended, permits parties to waive the remedies of the DTPA in certain circumstances. A consumer may waive the DTPA if: the waiver is in writing and signed by the consumer; the consumer is not in a significantly disparate bargaining position; and the consumer is represented by legal counsel in seeking or acquiring the goods or services. The waiver is not effective if the consumer's counsel was directly or indirectly identified, suggested or selected by a defendant or an agent of the defendant. The waiver must be conspicuous and in bold-face type of at least 10 points in size. It also must be identified by the heading "Waiver of Consumer Rights", or similar language, and include language substantially the same as that provided in § 17.4(c)(3).

#### **D. Negligent Misrepresentation**

A cause of action for negligent misrepresentation requires a plaintiff to show that: (1) a representation was made by a defendant in the course of his business, or in a transaction in which he had a pecuniary interest; (2) the defendant supplied "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.<sup>23</sup> As with a fraud claim, a misrepresentation claim will be less successful against the contractor since it does not often communicate directly with a buyer.

#### **IV. DUTY TO SPEAK**

##### **A. No Duty to Speak**

### 1. Silence.

As a general rule, in an arms'-length commercial business transaction, failure to disclose information does not constitute fraud unless there is a duty to disclose the information. Mere silence in regard to a material fact, as to which there is no legal obligation to disclose, will not avoid a contract, although it operates as an injury to the party from whom it is concealed.<sup>24</sup>

### 2. No Actual Knowledge as to Issue.

Sellers have no duty to raise a subject with a buyer, absent actual knowledge of a material adverse condition regarding the subject.<sup>25</sup> Sellers have no liability for failure to disclose what one should have known, but did not.<sup>26</sup>

### 3. Reasonable to Assume that Other Party Knows Fact.

An exception to the imposition of a duty to speak may exist if the ignorant party never asked the seller about the condition and it is reasonable to assume that the ignorant party knew the non-disclosed fact.<sup>27</sup>

### 4. No Reliance and Immateriality.

Non-disclosure is not actionable, if no reliance was in fact placed on the non-disclosed fact.<sup>28</sup>

## B. Duty to Speak

### 1. Confidential or Fiduciary Relationship.

As in many other jurisdictions, early Texas law was "buyer beware".<sup>29</sup> Sellers were under no duty to disclose information as to the property, unless there was a fiduciary relationship between the buyer and the seller. The historical rule in business transactions, absent other circumstances mentioned below, in order to find a duty to speak a confidential or fiduciary relationship must exist.<sup>30</sup>

### 2. Other Circumstances.

Silence may be equivalent to a false representation when the circumstances impose a duty to speak and the knowledgeable party deliberately remains silent.

### a. **When Other Party Does Not Have a Reasonable Opportunity to Discover a Material Fact**

A knowledgeable party is under a duty to disclose material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the buyer, or which a reasonable investigation and inquiry would not uncover.<sup>31</sup>

### b. **When Knowledgeable Party has Knowledge That Other Party Is Ignorant of Fact**

A duty to speak may be imposed under certain factual circumstances if the knowledgeable party also knows that the other party is ignorant of a material fact or has knowledge that the other party does not have an equal opportunity to discover the material fact.<sup>32</sup>

### c. **Partial Disclosure That Conveys a False Impression**

Several courts of appeals have held that a general duty to disclose information may arise in an arms'-length business transaction when a party makes a *partial disclosure* that, although true, conveys a false impression.<sup>33</sup>

### d. **Subsequent Knowledge that Prior Statement is False or Misleading**

A duty to disclose arises if a party knows, or should have known, its prior statement was false, or later learns that its prior statement was false.<sup>34</sup>

## V. REAL ESTATE SALES CONTRACTS AND LEASES

### A. **Typical Contractual Provisions**

#### 1. "Free Look"

It is standard practice for there to be incorporated into a sales contract a so-called "free" look period or investigation or feasibility period. Usually, in such circumstances the buyer is given a period after execution of the contract to conduct an investigation of the property and to terminate the deal, if the buyer

determines that the property is "unsuitable". Such investigations can range from an inspection of the records of the seller to an in depth phase II environmental inspection of the property. In most such cases the buyer's determination of suitability or unsuitability is in its "sole discretion". In order to avoid characterization of the contract as illusory and unenforceable a discernable consideration ("Option Fee") should be paid by the buyer to the seller for this right.

Usually the "look" is not "free", as independent consideration is required to support the termination right. Stipulation of an Option Fee for this termination right may be more to protect the buyer from the seller walking out on the deal than *vice versa*. In essence, a free look is akin to an option. Usually, free looks are granted for a nominal sum whereas options are granted for a significant amount. Earnest money serves a different function. However, if the seller's sole remedy for a buyer's breach of the contract is loss of the earnest money, then the contract is in reality an option.<sup>35</sup>

**2. Express Representations and Warranties**

**a. Typical Representations and Warranties**

Representations and warranties given in the sale of property usually cover 3 areas: (1) the status and authority of the seller; (2) the status of the property; and (3) the operation and maintenance of the property.

One means of limiting the seller's exposure is to limit the scope of representations and warranties to matters under the control of, and that can be verified by, the seller.

**b. Disclosure of Known Facts**

The seller usually takes exception from representations and warranties for known facts and circumstances, such as matters disclosed in environmental reports in the possession of the seller and delivered or made available to the buyer. It is prudent for the seller to make a list or even a copy of all records delivered or made available to the buyer.

**c. Knowledge Exceptions**

Often the seller limits its representations by "to the extent of seller's knowledge" or "to the seller's best knowledge". Such limitations also are subject to question: (a) What does "knowledge" mean?; (b) Does knowledge mean actual knowledge, implied knowledge, or constructive knowledge?; (c) Can a person have knowledge through negligent or blind ignorance?; (d) Does the seller have a duty to find out facts?; and (e) Is suspicion knowledge?

Actual knowledge and negligent ignorance are the same. Actual knowledge includes not only that information of which a party has express knowledge, but also that which would have been gained from a reasonably diligent inquiry and exercise of the means of information at hand.<sup>36</sup>

If a knowledge exception is used, then the term "knowledge" should be defined. The definition should cover the following elements:

(1) Whose knowledge? (e.g., does the term include the knowledge of the seller's employees, former employees, agents, affiliates, etc.?--if so, then what steps will be followed to assure the person making the representation that each of these parties has been contacted prior to making the representation "to the best of the seller's knowledge"?). In large companies it may be difficult to know what every employee knows.

(2) Is knowledge to be limited to actual knowledge? And if so, is reasonable inquiry of seller required or is blind ignorance permitted?

(3) Should the duty of inquiry be limited?

(4) Should the knowledge be limited to the current knowledge possessed at the time of execution of the contract?

(5) Is the seller under an obligation to notify the buyer of matters of which the seller becomes aware after giving the representation, or is the representation limited to the facts as they are known to exist as of giving of the representation?

Sometimes representations are couched in terms of "seller has received no notice" or "no

written notice". A person may have knowledge of a matter but may not have received notice from a third party.

Sometimes knowledge representations are qualified by a materiality standard. A materiality standard attempts to limit the seller's misrepresentations to having materially misstated a condition. The representation may be worded that seller represents that a particular condition exists "except to the extent that the same does not result in a material adverse effect". Like "knowledge", "materiality" should also be defined. This is most often accomplished by a reference to a dollar amount or percentage of tolerance.

Representations are sometimes qualified as to matters occurring during the seller's ownership--for example, as to environmental conditions.

### 3. Disclaimer of Representations and Warranties

Many times if a seller permits the buyer a "free look", the seller also insists upon selling the property "as is", that is without representations or warranties as to its condition. Even honest mistakes in making a representation can result in seller liability.

#### a. "As Is – Non-Reliance" Clause

The following is a typical "as is" clause in a commercial real estate sales transaction.

As a material part of the consideration for this Agreement, Seller and Purchaser agree that Purchaser is taking the Property "AS IS" with any and all latent and patent defects and that there is no warranty by Seller that the property is fit for a particular purpose. Purchaser acknowledges that it is not relying upon any representation, statement or other assertion with respect to the Property condition, but is relying upon its examination of the Property. Purchaser takes the Property under the express understanding there are no express or implied warranties (except for limited warranties of title set forth in the closing documents). Provisions of this Section 15 shall survive the Closing.<sup>37</sup>

The following is a typical "as is" clause in a commercial leasing transaction.

Tenant accepts the Premises "as is." *LANDLORD HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATIONS*

AS TO THE COMMERCIAL SUITABILITY, PHYSICAL CONDITION, LAYOUT, FOOTAGE, EXPENSES, OPERATION OR ANY OTHER MATTER AFFECTING OR RELATING TO THE PREMISES AND THIS AGREEMENT, EXCEPT AS HEREIN SPECIFICALLY SET FORTH OR REFERRED TO AND TENANT HEREBY EXPRESSLY ACKNOWLEDGES THAT NO SUCH REPRESENTATIONS HAVE BEEN MADE. LANDLORD MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY, MARKETABILITY, FITNESS OR SUITABILITY FOR A PARTICULAR PURPOSE OR OTHERWISE, EXCEPT AS SET FORTH HEREIN. ANY IMPLIED WARRANTIES ARE EXPRESSLY DISCLAIMED AND EXCLUDED. ...THE REPRESENTATIONS, WARRANTIES, COVENANTS, TERMS, CONDITIONS, AND WAIVERS SET FORTH IN THIS SECTION SHALL SURVIVE THE TERMINATION OF THE LEASE.<sup>38</sup>

Other examples of "as is" clauses in standard form real estate documents are found in the TAR Commercial Contract – Improved Property (TAR 1801) attached as **Exhibit 2** to this paper (See paragraph 7A of the form)("Buyer accepts the Property in its present condition....")<sup>39</sup> and in the Real Estate Sales Contract contained in the *Texas Real Estate Forms Manual* Ch. 8 Form 8-1 attached hereto as **Exhibit 3** (See paragraph C of Exhibit B to the form).<sup>40</sup>

The following release language was held to overcome claims by the releasing party that it had been fraudulently induced by the fraudulent representations and non-disclosures of the released party:

[The Swansons release all] causes of action of whatsoever nature, or any other legal theory arising out of the circumstances described above, from any and all liability damages of any kind known or unknown, whether in contract or tort.... [E]ach of us [the Swansons] expressly warrants and represents and does hereby state ... and represent ... that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment and each has been represented by Hubert Johnson as legal counsel in this matter. The aforesaid legal counsel has read and explained to each of us the entire contents of this release in full, as well as the legal consequences of this Release ....

An "as is" clause is not the equivalent of an effective indemnity or release, but may be some evidence to be considered by the jury in apportioning negligence liability between the seller and purchaser of property for injuries caused by condition of the property.<sup>41</sup>

An "as is" disclaimer in a sales contract will not shield the seller from liability to the buyer for contributing towards environmental cleanup response costs under CERCLA.<sup>42</sup>

**b. Merger Clause**

Merger clauses seek to limit the scope of representations and warranties by a seller or a landlord to the written representations and warranties contained in the contract or lease. The following is a typical clause, which is found in the *Texas Real Estate Forms Manual Real Estate Sales Contract*, a copy of which is attached as **Exhibit 3** to this paper:

Real Estate Sales Contract

...

M. Miscellaneous Provisions

2. *Entire Contract.* This contract, together with its exhibits, and any Closing Documents delivered at closing constitute the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no oral representations, warranties, agreements, or promises pertaining to the sale of the Property by Seller to Buyer not incorporated in writing in this contract.

Exhibit B

...

8. *No Other Representation.* Except as state above or in the notices, statements, and certificates set forth in Exhibit D, Seller makes no representation with respect to the Property.

9. *No Warranty.* Seller has made no warranty in connection with this contract.

**c. Assumption of Environmental Liability and Indemnity Agreements**

The allocation of environmental risks in a sales transaction through representations, warranties, and indemnities will generally result in a contractual assumption of liability. In cases where a condition is known to exist, a preferable method may be to provide for an express assumption of liability.<sup>43</sup> An environmental indemnity agreement may be employed to shift back to the seller a potential cleanup risk arising out of detected marginal contaminations below reportable levels, but significant enough to trigger agency action if the condition comes to the attention of the governmental agency.

**B. Standard Forms Approaches**

**1. TREC and TAR Forms**

The Texas Real Estate Commission ("TREC") has promulgated forms for use by Texas real estate licensees in the sale of residential, commercial unimproved and farm and ranch property. These forms are found on TREC's website. The Texas Association of Realtors ("TAR") also has published forms for use by its members in the sale or leasing of residential or commercial real property. Attached to this paper are extracts of portions of the following forms published by TREC or TAR: **Exhibit 1** TREC One to Four Family Residential Contract (Resale) and TAR Seller's Disclosure Notice; **Exhibit 2** TAR Commercial Contract – Improved Property (TAR 1801) 10-18-05 and TAR Commercial Property Condition Statement.

The TREC One to Four Family Residential Contract (Resale) utilizes a buyer inspection period (Paragraphs 7A and 23), a buyer option to terminate during the inspection period if buyer's inspections reveal unsatisfactory conditions, delivery by seller to buyer of a seller's disclosure notice in the form required by § 5.008 of the Texas Property Code, and an acknowledgement by buyer that it is accepting the Property in its "present condition" except for the completion by seller before closing of repairs specified in the contract.

The TAR Commercial Contract – Improved Property utilizes a similar framework: a buyer inspection during feasibility period (Paragraph C), a buyer option to terminate during the feasibility period (Paragraph 7B) with retention or payment to seller of an agreed sum ("independent consideration") (Paragraph 7B(1)), delivery by seller to buyer of a seller's disclosure notice (Commercial property Condition Statement), and an acknowledgement by buyer that it is accepting the Property in its "present condition" except for the completion by seller before closing of repairs specified in the contract (Paragraph 7A). This form does not contain any of the following risk assumption/risk transfer provisions: an "as is/nonreliance" clause; an environmental condition indemnity or release; or a DTPA waiver.

## 2. Texas Real Estate Forms Manual

The *Texas Real Estate Forms Manual* includes in Chapter 8 a form of Real Estate Sales Contract for use in the sale of real property, including the resale of a residence, commercial unimproved property and commercial improved property. An extract from this form and the *Manual's* commentary is attached to this paper as **Exhibit 3**.

The Real Estate Sales Contract also utilizes a similar framework as the TREC and TAR forms: a buyer inspection during an inspection period (Paragraph G2), a buyer option to terminate during the inspection period (Paragraph G3) with payment to seller of a nominal \$100 as consideration for the right to so terminate the contract (Paragraph J1a), delivery during the inspection period by seller to buyer of a copy various records (Paragraph G1 and Exhibit C to the contract), and a series of representations as to Seller's authority, the pendency or threat of litigation, Seller's receipt of notice of violation of law; notice of nonrenewal or expiration licenses, permits, and approvals; notice of condemnation, zoning, or land-use proceedings affecting the property; notice of inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials on the property or the migration of hazardous materials from the property (Exhibit B to the contract).

The *Manual's* contract also contains the following provisions not contained in the TAR form: a disclaimer as to the existence of oral representations or promises (Paragraph M2); an acknowledgement that there is no special relationship between seller and buyer (Paragraph M11); a waiver of the application of the DTPA to the transaction (Paragraph M14); an "as is" clause (Exhibit B, Paragraph B); and an environmental condition and liability indemnity including if such condition or liability arose before closing, whether the condition is known or unknown, even if the condition or liability arose or arises under CERCLA, RCRA, the Texas Solid Waste Disposal Act, or the Texas Water Code, and even if the liability arises out of Sellers negligence, products liability or strict liability (Exhibit B, Paragraph C).

The *Manual's* "as is" clause does not contain an

express disclaimer of buyer's right to rely upon parol statements and assurances by seller or its agents as to the condition or value of the property.

### C. **Enforceability of Disclaimers**

#### 1. **"As Is" Clause Negates Reliance on Seller's or Agent's Representations Outside the Contract**

As held in *Prudential Ins. Co. of America v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995), agreeing to take property in its "as is" condition and subject to latent and patent defects, in a case where buyer acknowledges that it is not relying upon any representation of seller with regard to condition or fitness of property, negates an essential element for recovery against seller for misrepresentations, the element of reliance. Buyer in such cases assumes the risk that buyer's appraisal of bargain is correct.<sup>44</sup> The court in *Prudential* stated the question and answer as follows:

We granted writ of error in this case to decide whether a buyer who agrees, freely and without fraudulent inducement, to purchase commercial real estate "as is" can recover damages from the seller when the property is later discovered not to be in as good a condition as the buyer believed it was when he inspected it before the sale. We hold he cannot.<sup>45</sup>

The following conditions for an effective as is sale (aka the "*Prudential Rule*"):

1. The seller must disclose all known defects. The "as is" clause will be unenforceable if the buyer is induced by knowing misrepresentation or concealment of a known fact.
2. The seller cannot obstruct the buyer's ability to inspect the property.<sup>46</sup>
3. The "as is" clause must be an important basis of the bargain. It cannot be an incidental provision or a part of the "boiler plate" of the contract.<sup>47</sup>
4. The buyer and seller must have relatively

equal bargaining positions, an arms-length transaction with a sophisticated buyer.<sup>48</sup>

*Centre II, Inc. v. Celotex Corp.*<sup>54</sup> did not shield the seller of contaminated property from concealed information:

**2. Circumstances Where Not Enforceable.**

Buyer is not bound by agreement to purchase something "as is" even though the buyer has contracted to purchase the property "as is" under the following circumstances:

**a. Fraudulent Representations**

Buyers are not bound to purchase property "as is" if the as is contract is induced by fraudulent representations.<sup>49</sup> "Puffing" or statements of opinion are not fraudulent misrepresentations, but statements of facts that the speaker knows or has reason to suspect to be incorrect can be a fraudulent representation if material to the transaction and relied upon by the recipient.<sup>50</sup> The court in *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.* found that the statement by Prudential's on-site manger, to the buyer, Goldman, in response to his inquiry as to whether there were any building defects, that the building had "no defects" and that it had only "one problem," the concrete floor in the mechanical room, were neither material to Goldman nor fraudulent, although untrue as the building turned out to have extensive asbestos.<sup>51</sup>

**b. Concealment**

Buyers are not bound to purchase property "as is" where the as is contract is induced by concealment of information by Seller.<sup>52</sup> The supreme court in *Prudential Ins. Co. of America v. Jefferson Associates, Ltd.* found that the seller's on-site manager's mistakenly telling the buyer's inspector that she did not have the plans and specifications for the building but only had the "as-built" plans which she gave him was a concealment sufficient to set aside the "as is" contract. The court found that, assuming Prudential concealed the plans and specifications from the buyer, the plans and specifications did not note on their face that the building materials specified for the building contained asbestos.<sup>53</sup>

The following "as is" provision reviewed by the court in *Warehouse Associates Corporate*

OTHER THAN THE WARRANTIES OF TITLE CONTAINED IN THE DEED, PURCHASER ACKNOWLEDGES THAT SELLER HAS NOT MADE, DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS, WARRANTIES, PROMISES, COVENANTS, AGREEMENTS OR GUARANTIES OF ANY KIND OR CHARACTER WHATSOEVER, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO (A) THE NATURE, QUALITY OR CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, (B) THE INCOME TO BE DERIVED FROM THE PROPERTY, (C) THE SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH PURCHASE MAY CONDUCT THEREON, (D) THE COMPLIANCE OF OR BY THE PROPERTY OR ITS OPERATION WITH ANY LAWS, RULES, ORDINANCES OR REGULATIONS OF ANY APPLICABLE GOVERNMENTAL AUTHORITY OR BODY ... (E) THE HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE PROPERTY, OR (F) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY, AND SPECIFICALLY THAT SELLER HAS NOT MADE, AND DOES NOT MAKE AND SPECIFICALLY DISCLAIMS ANY REPRESENTATIONS REGARDING SOLID WASTE, AS DEFINED BY THE U. S. ENVIRONMENTAL PROTECTION AGENCY REGULATIONS AT 40 C.F.R., PART 261, OR THE DISPOSAL OR EXISTENCE, IN OR ON THE PROPERTY, OF ANY HAZARDOUS SUBSTANCE, AS DEFINED BY THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, AS AMENDED, AND APPLICABLE STATE LAWS, AND REGULATIONS PROMULGATED THEREUNDER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY THE SELLER. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION [SIC] PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE PROPERTY WA OBTAINED FROM A VARIETY OF SOURCES AND THAT SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION. PURCHASER FURTHER ACKNOWLEDGES AND AGREES THAT THE SALE OF THE PROPERTY AT CLOSING SHALL BE MADE ON AN "AS IS, WHERE IS" CONDITION AND BASIS "WITH ALL FAULTS[.]

**c. Ability to Learn of Fact is Impaired by Seller's Conduct**

Buyers are not bound to purchase property "as is" if the buyer is entitled to inspect condition of

what is being sold but is impaired by seller's conduct.<sup>55</sup>

**d. Other Conditions Negating Effect of As Is Clause**

Where the nature of transaction and totality of circumstances surrounding agreement are

considered, such as whether clause is important part of basis of bargain rather than incidental or boilerplate provision and whether parties were not in relatively equal bargaining position, a court may decide not to give effect to the "as is" clause.<sup>56</sup>

FORMS

1. TREC Residential Sales Contract and TAR Seller's Disclosure Notice

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

ONE TO FOUR FAMILY RESIDENTIAL CONTRACT (RESALE)

7. PROPERTY CONDITION:

- A. ACCESS, INSPECTIONS AND UTILITIES: Seller shall permit Buyer and Buyer's agents access to the Property at reasonable times. Buyer may have the Property inspected by inspectors selected by Buyer and licensed by TREC or otherwise permitted by law to make inspections. Seller at Seller's expense shall turn on existing utilities for inspections.
- B. SELLER'S DISCLOSURE NOTICE PURSUANT TO §5.008, TEXAS PROPERTY CODE (Notice):  
(Check one box only)
  - (1) Buyer has received the Notice.
  - (2) Buyer has not received the Notice. Within \_\_\_\_\_ days after the effective date of this contract, Seller shall deliver the Notice to Buyer. If Buyer does not receive the Notice, Buyer may terminate this contract at any time prior to the closing and the earnest money will be refunded to Buyer. If Seller delivers the Notice, Buyer may terminate this contract for any reason within 7 days after Buyer receives the Notice or prior to the closing, whichever first occurs, and the earnest money will be refunded to Buyer.
  - (3) The Seller is not required to furnish the notice under the Texas Property Code.
- C. SELLER'S DISCLOSURE OF LEAD-BASED PAINT AND LEAD-BASED PAINT HAZARDS is required by Federal law for a residential dwelling constructed prior to 1978.
- D. ACCEPTANCE OF PROPERTY CONDITION: Buyer accepts the Property in its present condition; provided Seller, at Seller's expense, shall complete the following specific repairs and treatments:  
\_\_\_\_\_

- G. ENVIRONMENTAL MATTERS: Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards, or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the Property. If Buyer is concerned about these matters, an addendum promulgated by TREC or required by the parties should be used.

23. **TERMINATION OPTION:** For nominal consideration, the receipt of is hereby acknowledged by Seller, and Buyer's agreement pay Seller \$\_\_\_\_\_ (Option Fee) within 2 days after the effective date of this contract, Seller grants Buyer the unrestricted right to terminate this contract by giving notice of termination to Seller within \_\_\_\_\_ days after the effective date of this contract. If no dollar amount is stated as the Option Fee or if Buyer fails to pay the Option Fee within the time prescribed, this paragraph will not be a part of this contract and Buyer shall not have the unrestricted right to terminate this contract. If Buyer gives notice of termination within the time prescribed, the Option Fee will not be refunded, however, any earnest money will be refunded to Buyer. The Option Fee  will  will not be credited to the Sales Price at closing. **Time is of the essence for this paragraph and strict compliance with the time for performance is required.**

TEXAS ASSOCIATION OF REALTORS®  
**SELLER'S DISCLOSURE NOTICE**

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Section 5.008, Property Code requires a seller of residential property of not more than one dwelling unit to deliver a Seller's Disclosure Notice to a buyer on or before the effective date of a contract.<sup>57</sup> **This form complies with and contains additional disclosures which exceed the minimum disclosures required by the Code.<sup>58</sup>**

CONCERNING THE PROPERTY AT \_\_\_\_\_

THIS NOTICE IS A DISCLOSURE OF SELLER'S KNOWLEDGE<sup>59</sup> OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED BY SELLER AND IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE BUYER MAY WISH TO OBTAIN. IT IS NOT A WARRANTY<sup>60</sup> OF ANY KIND BY SELLER, SELLER'S AGENTS, OR ANY OTHER AGENT.

Seller  is  is not occupying the Property. If unoccupied (by Seller), how long since Seller has occupied the Property?  \_\_\_\_\_ or  never occupied the Property.

**Section 1. The Property has the items marked below. (Mark Yes (Y), No (N), or Unknown (U).)**

Item	Y	N	U
Cable TV Wiring			
Carbon Monoxide Det.			
Ceiling Fans			
Cooktop			
Dishwasher			
Disposal			
Emergency Escape Ladder(s)			
Exhaust Fans			
Fences			
Fire Detection Equip.			
French Drain			
Gas Fixtures			

Item	Y	N	U
Gas Lines (Nat/LP)			
Hot Tub			
Intercom Systems			
Microwave			
Outdoor Grill			
Patio/Decking			
Plumbing System			
Pool			
Pool Equipment			
Pool Maint. Accessories			
Pool Heater			
Public Sewer System			

Item	Y	N	U
Pump: <input type="checkbox"/> sump <input type="checkbox"/> grinder			
Rain Gutters			
Range/Stove			
Roof/Attic Vents			
Sauna			
Smoke Detector			
Smoke Detector - Hearing Impaired			
Spa			
Trash Compactor			
TV Antenna			
Washer/Dryer Hookup			
Window Screens			

Item	Y	N	U	Additional Information
Central A/C				<input type="checkbox"/> electric <input type="checkbox"/> gas number of units: _____
Evaporative Coolers				number of units: _____
Wall/Window AC Units				number of units: _____
Attic Fan(s)				if yes, describe: _____
Central Heat				<input type="checkbox"/> electric <input type="checkbox"/> gas number of units: _____
Other Heat				if yes describe: _____
Oven				number of ovens: _____ <input type="checkbox"/> electric <input type="checkbox"/> gas <input type="checkbox"/> other: _____
Fireplace & Chimney				<input type="checkbox"/> wood gas logs mock other: _____
Carport				<input type="checkbox"/> attached <input type="checkbox"/> not attached
Garage				<input type="checkbox"/> attached <input type="checkbox"/> not attached

Garage Door Openers				number of units:_____ number of remotes:_____
Satellite Dish & Controls				<input type="checkbox"/> owned <input type="checkbox"/> leased from _____
Security System				<input type="checkbox"/> owned <input type="checkbox"/> leased from _____
Water Heater				<input type="checkbox"/> electric <input type="checkbox"/> gas other: _____ number of units:_____
Water Softener				<input type="checkbox"/> owned <input type="checkbox"/> leased from _____
Underground Lawn Sprinkler				<input type="checkbox"/> automatic <input type="checkbox"/> manual areas covered:_____
Septic/On-Site Sewer Facility				if yes, attach information About On-Site Sewer Facility (TAR-1407)

Water supply provided by:  city  well  MUD  co-op  unknown  other:\_\_\_\_\_

Was the Property built before 1978?  yes  no  unknown

(If yes, complete, sign, and attach TAR-1906 concerning lead-based paint hazards).

Roof Type: \_\_\_\_\_ Age: \_\_\_\_\_ (approximate)

Is there an overlay roof covering on the Property (shingles or roof covering placed over existing shingles or roof covering)?

yes  no  unknown

Are you (Seller) aware of any of the items listed in Section 1 that are not in working condition, that have defects, or that are need of repair?  yes  no If yes, describe (Attach additional sheets if necessary): \_\_\_\_\_

**Section 2. Are you (Seller) aware of any defects or malfunctions in any of the following? (Mark Yes (Y) if you are aware and No (N) if you are not aware).**

Item	Y	N
Basement		
Ceilings		
Doors		
Driveways		
Electrical Systems		
Exterior Walls		

Item	Y	N
Floors		
Foundation/Slab(s)		
Interior Walls		
Lighting Fixtures		
Plumbing Systems		
Roof		

Item	Y	N
Sidewalks		
Walls/Fences		
Windows		
Other Structural Components		

If the answer to any of the items in Section 2 is yes, explain (attach additional sheets if necessary): \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Section 3. Are you (Seller) aware of any of the following conditions: (Mark Yes (Y) if you are aware and No (N) if you are not aware).**

Condition	Y	N
Aluminum Wiring		
Asbestos Components		
Diseased Trees: oak wilt _____		
Endangered Species/Habitat on Property		
Fault Lines		
Hazardous or Toxic Waste		
Improper Drainage		
Intermittent or Weather Springs		
Landfill		
Lead-Based Paint or Lead-Based Pt. Hazards		
Encroachments onto the Property		
Improvements encroaching on others' property		
Located in 100-year Floodplain		
Present Flood Insurance Coverage (If yes, attach TAR-1414)		
Previous Flooding into the Structures		
Previous Fires		
Previous Foundation Repairs		

Condition	Y	N
Previous Roof Repairs		
Other Structural Repairs		
Radon Gas		
Settling		
Soil Movement		
Subsurface Structure or Pits		
Underground Storage Tanks		
Unplatted Easements		
Unrecorded Easements		
Urea-formaldehyde Insulation		
Water Penetration		
Wetlands on Property		
Wood Rot		
Active infestation of termites or other wood-destroying insects (WDI)		
Previous treatment for termites or WDI		
Previous termite or WDI damage repaired		
Termite or WDI damage needing repair		
Previous Use of Premises for Manufacture of Methamphetamine		

If the answer to any of the items in Section 3 is yes, explain (attach additional sheets if necessary): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Section 4. Are you (Seller) aware of any item, equipment, or system in or on the Property that is in need of repair, which has not been previously disclosed in this notice?**

yes       no      If yes, explain (attach additional sheets if necessary):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Section 5. Are you (Seller) aware of any of the following (Mark Yes (Y) if you are aware. Mark No (N) if you are not aware).**

Y   N

- Room additions, structural modifications, or other alterations or repairs made without necessary permits or not in compliance with building codes in effect at the time.

- Homeowners' associations or maintenance fees or assessments. If yes, complete the following:  
 Name of association: \_\_\_\_\_  
 Manager's name: \_\_\_\_\_ Phone: \_\_\_\_\_  
 Fees or assessments are: \$ \_\_\_\_\_ per \_\_\_\_\_ and are:  mandatory  voluntary  
 Any unpaid fees or assessments for the Property?  yes (\$ \_\_\_\_\_)  no  
 If the Property is in more than one association, provide information about the other associations below or attach information to this notice.
- Any common area (facilities such as pools, tennis courts, walkways, or other) co-owned in undivided interest with others. If yes, complete the following:  
 Any optional user fees for common facilities charged?  yes  no If yes, describe: \_\_\_\_\_  
 \_\_\_\_\_
- Any notices of violations of deed restrictions or governmental ordinances affecting the condition or use of the Property.
- Any lawsuits or other legal proceedings directly or indirectly affecting the Property.
- Any death on the Property except for those deaths caused by: natural causes, suicide, or accident - unrelated to the condition of the Property.
- Any condition on the Property which materially affects the health or safety of an individual.
- Any repairs or treatments, other than routine maintenance, made to the Property to remediate environmental hazards such as asbestos, radon, lead-based paint, urea-formaldehyde, or mold.  
 If yes, attach any certificates or other documentation identifying the extent of the remediation (for example, certificate of mold remediation or other remediation).

If the answer to any of the items in Section 5 is yes, explain (attach additional sheets if necessary): \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Section 6. Seller  has  has not attached a survey of the Property.**

**Section 7. Within the last 4 years, have you (Seller) received any written inspection reports from persons who regularly provide inspections and who are either licensed as inspectors or otherwise permitted by law to perform inspections?  yes  no** If yes, attach copies and complete the following:

Inspection Date	Type	Name of Inspector	No. of Pages

*Note: A buyer should not rely on the above-cited reports as a reflection of the current condition of the Property. A buyer should obtain inspections from inspectors chosen by the buyer.*

**Section 8. Check any tax exemption(s) which you (Seller) currently claim for the Property:**

- Homestead  Senior Citizen  Disabled
- Wildlife Management  Agricultural  Disabled Veteran
- Other: \_\_\_\_\_  Unknown

**Section 9. Have you (Seller) ever received proceeds for a claim for damage to the Property (for example, an insurance claim or a settlement or award in a legal proceeding) and not used the proceeds to make the repairs for which the claim was made?**  yes  no If yes, explain:\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Section 10. Does the Property have working smoke detectors installed in accordance with the smoke detector requirements of Chapter 766 of the Health and Safety Code?\***  unknown  no  yes. If no or unknown, explain. (Attach additional sheets if necessary):\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

*\* Chapter 766 of the Health and Safety Code requires one-family or two-family dwellings to have working smoke detectors installed in accordance with the requirements of the building code in effect in the area in which the dwelling is located, including performance, location, and power source requirements. If you do not know the building code requirements in effect in your area, you may check unknown above or contact your local building official for more information.*

Seller acknowledges that the statements in this notice are true to the best of Seller's belief and that no person, including the broker(s), has instructed or influenced Seller to provide inaccurate information or to omit any material information.<sup>61</sup>

\_\_\_\_\_  
Signature of Seller Date  
Printed Name:\_\_\_\_\_

\_\_\_\_\_  
Signature of Seller Date  
Printed Name:\_\_\_\_\_

**ADDITIONAL NOTICES TO BUYER:**

(1) The Texas Department of Public Safety maintains a database that the public may search, at no cost, to determine if registered sex offenders are located in certain zip code areas. To search the database, visit [www.txdps.state.tx.us](http://www.txdps.state.tx.us). For information concerning past criminal activity in certain areas or neighborhoods, contact the local police department.

(2) If the property is located in a coastal area that is seaward of the Gulf Intercoastal Waterway or within 1,000 feet of the mean high tide bordering the Gulf of Mexico, the property may be subject to the Open Beaches Act or the Dune Protection Act (Chapter 61 or 63, Natural Resources Code, respectively) and a beachfront construction certificate or dune protection permit may be required for repairs or improvements. Contact the local government with ordinance authority over construction adjacent to public beaches for more information.

(3) If you are basing your offers on square footage, measurements, or boundaries, you should have those items independently measured to verify any report information.

(4) The following providers currently provide service to the property:

Electric: \_\_\_\_\_ Sewer: \_\_\_\_\_  
Water: \_\_\_\_\_ Cable: \_\_\_\_\_  
Trash: \_\_\_\_\_ Natural Gas: \_\_\_\_\_  
Local Phone: \_\_\_\_\_ Propane: \_\_\_\_\_

(5) This Seller's Disclosure Notice was completed by Seller as of the date signed. The brokers have relied on this notice as true and correct and have no reason to believe it to be false or inaccurate. YOU ARE ENCOURAGED TO HAVE AN INSPECTOR OF YOUR CHOICE INSPECT THE PROPERTY.



2. TAR Commercial Contract - Improved Property (TAR 1801) 10-18-05

TEXAS ASSOCIATION OF REALTORS®  
COMMERCIAL CONTRACT- IMPROVED PROPERTY

USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS® IS NOT AUTHORIZED.  
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...

7. PROPERTY CONDITION:

A. Present Condition: Buyer accepts the Property in its present condition<sup>62</sup> except that Seller, at Seller's expense, will complete the following before closing:\_\_\_\_\_.

...

B. Feasibility Period: Buyer may terminate this contract for any reason within \_\_\_\_\_ days after the effective date (feasibility period) by providing Seller with written notice of termination.<sup>63</sup>

If Buyer terminates under this paragraph 7B, the earnest money will be refunded to Buyer less \$\_\_\_\_ that Seller will retain as independent consideration for Buyer's unrestricted right to terminate. Buyer has tendered the independent consideration to Seller upon payment of the amount specified in paragraph 5A to the escrow agent. The independent consideration is to be credited to the sales price only upon closing of the sale....

...

C. Inspections, Studies, or Assessments:

(1) During the feasibility period, Buyer, Buyer, at Buyer's expense, may complete or cause to be completed any and all inspections, studies, or assessments of the Property (including all improvements and fixtures) desired by Buyer.

...

D. Property Information:<sup>64</sup>

(1) Delivery of Property Information: Within \_\_\_\_\_ days after the effective date, Seller will deliver to Buyer:

- (a) a current rent roll of all leases affecting the Property certified by Seller as true and correct;
- (b) copies of all current leases pertaining to the Property, including any modifications, supplements, or amendments to the leases;
- (c) a current inventory of all personal property to be conveyed under this contract and copies of any leases for such personal property;
- (d) copies of all notes and deeds of trust against the Property that Buyer will assume or that Seller will not pay in full on or before closing;
- (e) copies of all current service, maintenance, and management agreements relating to the ownership and operation of the Property;
- (f) copies of current utility capacity letters from the Property's water and sewer service provider;
- (g) copies of all current warranties and guaranties relating to all or part of the Property;
- (h) copies of fire, hazard, liability, and other insurance policies that currently relate to the Property;
- (i) copies of all leasing or commission agreements that currently relate to all or part of the Property;
- (j) a copy of the "as-built" plans and specifications and plat of the Property;
- (k) copies of all invoices for utilities and repairs incurred by Seller for the Property in the 24 months immediately preceding the effective date;
- (l) a copy of Seller's income and expense statement for the Property from \_\_\_\_\_ to \_\_\_\_\_;
- (m) copies of all previous environmental assessments, studies, or analyses made on or relating to the Property;
- (n) real and personal property tax statements for the Property for the previous 2 calendar years; and
- (o) \_\_\_\_\_.

...

**19. MATERIAL FACTS:** To the best<sup>65</sup> of Seller's knowledge and belief: *(Check only one box.)*<sup>66</sup>

- (A) Seller is not aware of any material defects to the Property except as stated in the attached Property Condition Statement.
  
- (B) Except as otherwise provided in this contract, Seller is not aware of:
  - (1) any subsurface: structures, pits, waste, springs, or improvements;
  - (2) any pending or threatened litigation, condemnation, or assessment affecting the Property;
  - (3) any environmental hazards or conditions that affect the Property;
  - (4) whether the Property is or has been used for the storage or disposal of hazardous materials or toxic waste, a dump site or landfill, or any underground tanks or containers;
  - (5) whether radon, asbestos containing materials, urea-formaldehyde foam insulation, lead-based paint, toxic mold (to the extent that it adversely affects the health of ordinary occupants), or other pollutants or contaminants of any nature now exist or have ever existed on the Property;
  - (6) any wetlands, as defined by federal or state law or regulation, are on the Property;
  - (7) any threatened or endangered species or their habitat are on the Property; and
  - (8) any present or past infestation of wood-destroying insects in the Property's improvements;
  - (9) any contemplated material changes to the Property or surrounding area that would materially and detrimentally affect the ordinary use of the Property;
  - (10) any material physical defects in the improvements on the Property.
  - (11) any condition on the Property that violates any law or ordinance.

*(Describe any exceptions to (1)-(11) in Paragraph 12 or an addendum.)*

....

**22. AGREEMENT OF THE PARTIES:**

- C. This contract contains the entire agreement of the parties and may not be changed except in writing.

## TEXAS ASSOCIATION OF REALTORS

### COMMERCIAL PROPERTY CONDITION STATEMENT

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CONCERNING THE PROPERTY AT \_\_\_\_\_

THIS IS A DISCLOSURE OF THE OWNER'S KNOWLEDGE OF THE CONDITION OF THE PROPERTY AS OF THE DATE SIGNED. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES A BUYER OR TENANT MAY WISH TO OBTAIN. IT IS NOT A WARRANTY OF ANY KIND BY SELLER, SELLER'S AGENTS, OR ANY OTHER AGENT.

**PART I - Complete if Property is Improved or Unimproved**

Are you (Seller) aware of:

- |   | <u>Aware</u>             | <u>Not Aware</u>         |
|---|--------------------------|--------------------------|
| (1) any of the following environmental conditions on or affecting the Property:   |                          |                          |
| (a) radon gas? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (b) asbestos components: .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (1) friable components? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (2) non-friable components? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (c) urea-formaldehyde insulation? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (d) endangered species or their habitat? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (e) wetlands? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (f) underground storage tanks? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (g) leaks in any storage tanks (underground or above-ground)? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (h) lead-based paint? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (i) hazardous materials or toxic waste? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (j) open or closed landfills on or under the surface of the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (k) external conditions materially and adversely affecting the Property such as nearby landfills, smelting plants, burners, storage facilities of toxic or hazardous materials, refining, utility transmission lines, mills, feed lots, and the like? ..... | <input type="checkbox"/> | <input type="checkbox"/> |
| (l) any activity relating to drilling or excavation sites for oil, gas, or other minerals? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (2) previous environmental contamination that was on or that materially and adversely affected the Property, including but not limited to previous environmental conditions listed in Paragraph 1(a)-(l)?...  | <input type="checkbox"/> | <input type="checkbox"/> |
| (3) any part of the Property lying in a special flood hazard area (A or V Zone)? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (4) any improper drainage onto or away from the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (5) any fault line on or near the Property that adversely and materially affects the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (6) outstanding mineral rights, exceptions, or reservations of the Property held by others? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (7) air space restrictions or easements on or affecting the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (8) unrecorded or unplatted agreements for easements, utilities, or access on or to the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (9) special districts in which the Properties lies (for example, historical districts, development districts, extraterritorial jurisdictions, or others)? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (10) pending changes in zoning, restrictions, or in physical use of the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (11) your receipt of any notice concerning any likely condemnation, planned streets, highways, railroads, or developments that would materially and adversely affect the Property (including access or visibility)? .....                                   | <input type="checkbox"/> | <input type="checkbox"/> |
| (12) lawsuits affecting title to or use or enjoyment of the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (13) your receipt of any written notices of violations of zoning, deed restrictions or regulations of the EPA, OSHA, or TCEQ, or other government agencies? .....   | <input type="checkbox"/> | <input type="checkbox"/> |

- |   | <u>Aware</u>             | <u>Not<br/>Aware</u>     |
|---|--------------------------|--------------------------|
| (14) common areas or facilities affiliated with the Property co-owned with others? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (15) an owners' or tenants' association or maintenance fee or assessment affecting the Property? .....                                      | <input type="checkbox"/> | <input type="checkbox"/> |
| If aware, name of association: _____;   |                          |                          |
| Name of manager: _____;   |                          |                          |
| Amount of fee or assessment: \$ _____ per _____;  |                          |                          |
| Are fees current through the date of this notice? <input type="checkbox"/> yes <input type="checkbox"/> no <input type="checkbox"/> unknown |                          |                          |
| (16) subsurface structures, hydraulic lifts, or pits on the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (17) intermittent or weather springs that affect the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (18) any material defect in any irrigation system, fences, or signs on the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (19) conditions on or affecting the Property that materially affect the health or safety of an ordinary individual? .....                   | <input type="checkbox"/> | <input type="checkbox"/> |

If you are aware of any of the conditions listed above, explain. *(Attach additional information if needed.)*

**PART 11 - Complete Only if Property is Improved**

A. Are you (Seller) aware of any material defects in any of the following on the Property?:

- |   | <u>Aware</u>             | <u>Not<br/>Aware</u>     | <u>Not<br/>Appl</u>      |
|---|--------------------------|--------------------------|--------------------------|
| (1) <u>Structural Items:</u>  |                          |                          |                          |
| (a) foundation systems (slabs, columns, trusses, bracing, crawl spaces, piers, beams, footings, retaining walls, basement, grading)? .....                        | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (b) exterior walls? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (c) fireplaces and chimneys? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (d) roof, roof structure, or attic (covering, flashing, skylights, insulation, roof penetrations, ventilation, gutters and downspouts, decking)? .....            | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (e) windows, doors, plate glass, or canopies? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (2) <u>Plumbing Systems:</u>  |                          |                          |                          |
| (a) water heaters or water softeners? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (b) supply or drain lines? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (c) faucets, fixtures, or commodes? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (d) private sewage systems? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (e) pools or spas and equipments? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (f) sprinkler systems? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (g) water coolers? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (h) private water wells? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (i) pumps or sump pumps? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (3) <u>HVAC Systems:</u> any cooling, heating, or ventilation systems? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (4) <u>Electrical Systems:</u> service drop, wiring, connections, conductors, plugs, grounds, power, polarity, switches, light fixtures, or junction boxes? ..... | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (5) <u>Other Systems or Items:</u>  |                          |                          |                          |
| (a) security or fire detection systems? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (b) porches or decks? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
|   | <u>Aware</u>             | <u>Not<br/>Aware</u>     | <u>Not<br/>Appl</u>      |
| (c) gas lines? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (d) garage doors and door operators? .....  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (e) loading doors or docks? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| (f) rails or overhead cranes? .....   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

- (g) elevators or escalators? .....
- (h) parking areas, drives, steps, walkways? .....
- (i) appliances or built-in kitchen equipment?.....

If you are aware of material defects in any of the items listed under Paragraph A, explain. (*Attach additional information if needed.*)

B. Are you (Seller) aware of: .....

- |  |                          |                          |
|--|--------------------------|--------------------------|
| (1) any of the following water or drainage conditions materially and adversely affecting Property:   |                          | Not                      |
|  | <u>Aware</u>             | <u>Aware</u>             |
| (a) ground water? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (b) water penetration? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (c) previous flooding or water drainage? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (d) soil erosion or water ponding? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (2) previous structural repair to the foundation systems on the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (3) settling or soil movement materially and adversely affecting the Property? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (4) pest infestation from rodents, insects, or other organisms on the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (5) termite or wood rot damage on the Property needing repair? .....   | <input type="checkbox"/> | <input type="checkbox"/> |
| (6) mold to the extent that it materially and adversely affects the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (7) mold remediation certificate issued for the Property in the previous 5 years? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| <i>if yes, attach a copy of the mold remediation certificate.</i>  |                          |                          |
| (8) previous termite treatment on the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (9) previous fires that materially affected the Property? .....  | <input type="checkbox"/> | <input type="checkbox"/> |
| (10) modifications made to the Property without necessary permits or not in compliance with building codes in effect at the time? .....                                | <input type="checkbox"/> | <input type="checkbox"/> |
| (11) any part, system, or component in or on the Property not in compliance with the Americans with Disabilities Act or the Texas Architectural Barrier Statute? ..... | <input type="checkbox"/> | <input type="checkbox"/> |

If you are aware of any conditions described under Paragraph B, explain. (*Attach additional information if needed.*)

Seller: \_\_\_\_\_ Date: \_\_\_\_\_

Seller: \_\_\_\_\_ Date: \_\_\_\_\_

**The undersigned acknowledges receipt of the foregoing statement.**

Buyer or Tenant: \_\_\_\_\_ Date: \_\_\_\_\_

Buyer or Tenant: \_\_\_\_\_ Date: \_\_\_\_\_

**NOTICE TO BUYER/TENANT: The Broker representing Seller and the broker representing you advise you that this statement was completed by Seller, as of the date signed. The brokers have relied on this statement as true and correct and have no reason to believe it to be false or inaccurate. YOU ARE ENCOURAGED TO HAVE AN INSPECTOR OF YOUR CHOICE INSPECT THE PROPERTY.**

### 3. Texas Real Estate Forms Manual Sales Contract

TEXAS REAL ESTATE FORMS MANUAL Ch. 8

#### §8.10 Representations

Representations are negotiated by the parties with specific reference to the transaction. Representations may include such matters as ownership of the property; organization of the parties; authority to execute the contract and close the transaction; condition of title; parties in possession; pending litigation and claims that may ripen into litigation; pending or threatened condemnation or other taking; use restrictions, such as zoning and restrictive covenants; condition of the property or disclaimer of representations—for example, "as"; presence of landfills or hazardous and toxic wastes; floodplain location; utility availability and capacity; compliance with all laws; effectiveness of required licenses and permits; status of leases; operation and maintenance of property before closing; accuracy of books and records; agricultural or other special-use tax assessment; payment of ad valorem taxes; and status of debt to be assumed or taken "subject to."

In negotiating representations, the parties often consider issues such as whether the representations will be absolute or based on the seller's knowledge and belief; whether the representations will be based on the knowledge of the entity that is the seller or on the knowledge of specified individuals; whether the seller must perform further investigation to make the representations or may rely on its current knowledge, without further investigation; and whether and to what extent the representations will survive closing.

The approach used in this contract limits the seller's representations, but it is not intended to insulate the seller from liability for fraud or misrepresentation.

- The seller represents only facts, not opinions. For example, the seller does not represent whether, in the seller's opinion, the property is in compliance with applicable laws and regulations. Instead, the seller represents that it has not received notice of violation of any law, ordinance, regulation, or requirement affecting the property or use of the property, except as stated in the contract
- The seller makes no representation that is not stated in the contract, including exhibit D (notices, statements, and certificates required by law and regulation).

The following optional clauses are also provided:

- The buyer agrees to accept the property in its "as is, where is" condition, investigate the property on the buyer's own behalf, and not rely on information or representations attributable to the seller, except to the extent stated in the contract.
- The buyer waives its rights under the Texas Deceptive Trade Practices—Consumer Protection Act.
- The buyer assumes responsibility after closing for all environmental matters relating to the property.

If the parties negotiate different representations, exhibit B must be revised accordingly.

The contract provides that the parties' representations are true and accurate when made and must be true and accurate at closing, or the buyer may terminate the contract.

It is common practice to include representations regarding the organization and authority of the parties in contracts but to defer the obligation to deliver documentary evidence confirming those representations until the closing of the transaction. That evidence customarily consists of certificates of existence and

good standing from public officials, certified copies of organizational documents, certified corporate resolutions or partnership consents, and certificates of incumbency. The attorney may consider requiring such documentary evidence at the execution of the contract to avoid encountering a claim after substantial obligations have been paid or incurred that the other party is not authorized to consummate the transaction. While the seller's organizational documents should be available at the time of execution of the contract, the buyer's organizational documents are often not prepared until before closing.

#### Real Estate Sales Contract (Form 8-1)

...

#### G. Inspection Period

1. *Review of Seller's Records.* Seller will deliver to Buyer copies of Seller's records specified in Exhibit C, or otherwise make those records available for Buyer's review, by the deadline stated in section A.7.
2. *Entry onto the Property.* Buyer may enter the Property before closing to inspect it, subject to the following:
  - a. Buyer must deliver evidence to Seller that Buyer has insurance for its proposed inspection activities, in amounts and with coverages that are substantially the same as those maintained by Seller or in such lesser amounts or with such lesser coverages as are reasonably satisfactory to Seller;
  - b. Buyer may not interfere in any material manner with existing operations or occupants of the Property;
  - c. Buyer must notify Seller in advance of Buyer's plans to conduct tests so that Seller may be present during the tests;
  - d. if the Property is altered because of Buyer's inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs;
  - e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days after their preparation or receipt; and
  - f. Buyer must abide by any other reasonable entry rules imposed by Seller.
3. *Buyer's Right to Terminate.* Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period. If Buyer does not notify Seller of Buyer's termination of the contract before the end of the Inspection Period, Buyer waives the right to terminate this contract pursuant to this provision. **[Include if applicable:** If Buyer does not terminate this contract pursuant to this provision, Buyer must deposit the Additional Earnest Money with the Title Company on or before the Additional Earnest Money Deadline.]
4. *Buyer's Indemnity and Release of Seller*
  - a. *Indemnity.* Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation of the Property, except for repair or remediation of existing conditions discovered by Buyer's inspection. The obligations of Buyer under this provision will survive termination of this contract and closing.
  - b. *Release.* Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Property.

**H. Representations**

The parties' representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date.

...

**M. Miscellaneous Provisions**

...

2. *Entire Contract.* This contract, together with its exhibits, and any Closing Documents delivered at closing constitute the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no oral representations, warranties, agreements, or promises pertaining to the sale of the Property by Seller to Buyer not incorporated in writing in this contract.

...

11. *No Special Relationship.* The parties' relationship is an ordinary commercial relationship, and they do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship.

...

14. *Waiver of Consumer Rights.* BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ. OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

...

**Exhibit B**

**Representations; Environmental Matters**

**A. Seller's Representations to Buyer**

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date.

1. *Authority.* Seller is a [specify type of organization] duly organized, validly existing, and in good standing under the laws of the state of [Texas/[state]] with authority to convey the Property to Buyer. This contract is, and all documents required by this contract to be executed and delivered to Buyer at closing will be, duly authorized, executed, and delivered by Seller.

2. *Litigation.* There is no litigation pending or threatened against Seller that might affect the Property or Seller's ability to perform its obligations under this contract [include if applicable: , except: [specify]].

3. *Violation of Laws.* Seller has not received notice of violation of any law, ordinance, regulation, or requirements affecting the Property or Seller's use of the Property [include if applicable: , except: [specify]].

4. *Licenses, Permits, and Approvals.* Seller has not received notice that any license, permit, or approval necessary to operate the Property in the manner in which it is currently operated will not be renewed on expiration or that any material condition will be imposed in order to obtain their renewal [include if applicable: , except: [specify]].

5. *Condemnation; Zoning; Land Use; Hazardous Materials.* Seller has not received notice of any condemnation, zoning, or land-use proceedings affecting the Property or any inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials on the Property or the migration of hazardous materials from the Property [include if applicable: , except: [specify]].

6. *No Other Obligation to Sell the Property or Restriction against Selling the Property.* Except for granting a security interest in the Property, Seller has not obligated itself to sell the Property to any party other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound.

7. *No Liens.* On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature except the Permitted Exceptions, and no work or materials will have been furnished to the Property that might give rise to mechanic's, materialman's, or other liens against the Property other than work or materials to which Buyer has given its consent.

8. *No Other Representation.* Except as stated above or in the notices, statements, and certificates set forth in **Exhibit D**, Seller makes no representation with respect to the Property.

9. *No Warranty.* Seller has made no warranty in connection with this contract.

**B. "As Is, Where Is"**

THIS CONTRACT IS AN ARM'S-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN "AS IS, WHERE IS" TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE CLOSING DOCUMENTS AND SELLER'S REPRESENTATIONS TO BUYER SET FORTH IN SECTION A OF THIS **EXHIBIT B**.

THE PROPERTY WILL BE CONVEYED TO BUYER IN AN "AS IS, WHERE IS" CONDITION, WITH ALL FAULTS. **[Include if applicable: SELLER MAKES NO WARRANTY OF CONDITION, MERCHANTABILITY, OR SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PERSONAL PROPERTY.]** ALL WARRANTIES, EXCEPT THE WARRANTY OF TITLE IN THE CLOSING DOCUMENTS, ARE DISCLAIMED.

The provisions of this section B regarding the Property will be included in the deed **[include if applicable: and bill of sale]** with appropriate modification of terms as the context requires.

**C. Environmental Matters**

AFTER CLOSING, AS BETWEEN BUYER AND SELLER, THE RISK OF LIABILITY OR EXPENSE FOR ENVIRONMENTAL PROBLEMS, EVEN IF ARISING FROM EVENTS BEFORE CLOSING, WILL BE THE SOLE RESPONSIBILITY OF BUYER, REGARDLESS OF WHETHER THE ENVIRONMENTAL PROBLEMS WERE KNOWN OR UNKNOWN AT CLOSING. ONCE CLOSING HAS OCCURRED, BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM LIABILITY FOR ANY LATENT DEFECTS AND FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE. **BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF SELLER'S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER'S REPRESENTATIVES.** BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY.

The provisions of this section C regarding the Property will be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

### Exhibit C

#### Seller's Records

To the extent that Seller has possession of the following items pertaining to the Property, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in section A.7.:

##### Governmental

governmental licenses, certificates, permits, and approvals  
tax statements for the current year and the last [number] years  
notices of appraised value for the current year and the last [number] years  
records of regulatory proceedings or violations (for example, condemnation, environmental)  
other: [specify]

##### Land

soil reports  
environmental reports  
water rights  
engineering reports  
prior surveys  
site plans  
other: [specify]

##### Facilities

as-built plans, specifications, and mechanical drawings for improvements  
warranty agreements  
management, employment, labor, service, equipment, supply, and maintenance agreements  
insurance policies  
ADA and other building inspection reports  
engineering reports  
environmental reports  
operating and maintenance plans (for example, asbestos maintenance plans)  
life-safety plans

other: **[specify]**

**Financial**

annual operating statements for the most recent **[number]** years of operation

monthly operating statements since the close of the last fiscal year

balance sheet as of **[date]**

books and records for the Property

utility bills for the most recent **[number]** months of operation

other: **[specify]**

**Leases**

Leases

commission and leasing agent agreements

rent roll setting forth for each Lease:

tenant's name

square footage leased

date of expiration of current and renewal terms

renewal options

basic rent and formula for any additional rents

amount of additional rent paid during the last **[number]** [months/years]

prepaid rent

delinquent rent

security deposit

current tenant or landlord defaults

options to purchase any portion of the Property

rights of first refusal to lease other space

rights to rent concessions, tenant improvements, or other allowances

unpaid or contingent brokerage commissions (including commission on renewals)

estoppel letters and/or subordination agreements

other: **[specify]**

**4. Best Practice Forms (Provision Appearing in Thomas Properties sale to Target).****4. Contingencies.**

Buyer contemplates acquiring the Property for the construction and operation of a general merchandise store initially containing approximately \_\_\_\_\_ square feet of ground floor space and related outside sales areas, if any, together with parking and other appurtenant facilities. Seller acknowledges that the Property may be of no use to Buyer unless certain conditions precedent to such use exist, but nothing in this Agreement, by implication or otherwise, shall be interpreted to require Buyer to construct or operate any improvement on the Property, subject to the provisions of Section 4Q below. Buyer's obligation to close the transaction contemplated herein shall therefore be conditioned upon Buyer satisfying itself within 90 days after the Effective Date (the "Contingency Date") that the following contingencies are met:

A. The construction of the improvements contemplated by Buyer will not require extraordinary, excessive, or unusually costly construction techniques, and drainage of both surface and subsurface water can be accomplished by ordinary construction techniques not involving unusual or excessive costs.

B. All utilities, including electricity, telephone, gas, water (fire and domestic), storm and sanitary sewer, are, or will be at the time of Closing, available on site or on the Property's side of abutting streets of size and capacity sufficient to serve the contemplated building and retail use, and at the time of Closing, Buyer will be immediately entitled to connect into such utilities upon payment of only the usual and customary connection fees. Notwithstanding the foregoing, Buyer and Seller contemplate that after the Closing certain utilities will be installed and/or constructed to and within the Property as part of the work to be performed pursuant to the SDA (as defined in Section 4P below.)

C. Buyer shall be satisfied with the results of its investigations, studies and preliminary economic evaluations of the Property, and with matters and conditions which have been disclosed by information delivered to Buyer, either by Seller or at Seller's direction.

D. Buyer's Capital Expenditure Committee shall have approved the transaction contemplated by this Agreement.

E. Buyer shall have obtained a Site Development Permit ("SDP") in a form acceptable to Buyer from the City of Austin or other applicable governing body. Seller shall have the right to monitor all activities related to Buyer's Site Development Permit application. Buyer shall copy Seller on all correspondence with the City of Austin, neighborhood groups and environmental groups related to Buyer's Site Development Permit activities. Seller shall have the opportunity to attend all meetings with the City of Austin, neighborhood groups, and environmental groups related to Buyer's Site Development Permit activities.

F. Buyer shall have reviewed and approved the P.U.D. for \_\_\_\_\_ Centre, the USFWS 10(a) Permit, and the existing Declaration of Covenants, Restrictions and Easements and Design Guidelines for \_\_\_\_\_ Centre (the "CCR's")

G. Buyer may use the Property for retail/commercial purposes without being in violation of any applicable legal requirement, including any zoning classification, land use classification, environmental requirement, building classification, or any other classification or requirement established by any entity or authority having legal jurisdiction or authority there over. The availability or probability of the issuance of a variance or special use permit necessary to satisfy this condition shall not be considered sufficient unless the actual issuance thereof is or will be unconditional and the time period for appeal of such issuance has expired without contest.

H. The following plans, acceptable to Buyer in Buyer's sole and absolute discretion, have received all necessary governmental approvals, and all time periods for appeal of such approvals have expired without contest: (i) a site plan for the use and development of the Property, including all points of access and signage locations (the "Site Plan"), and (ii) a signage plan, including the size, type and design of all exterior building and freestanding signage Buyer and Seller intend to erect with respect to the

Property (the "Signage Plan"). Buyer's site design consultant, civil engineer, architect and all other development and design consultants and staff shall cooperate with Seller and Seller's site design consultants to create the Site Plan. The Site Plan also shall be subject to Seller's reasonable approval, on or before the Contingency Date. The final design of all improvements on the Property shall comply with the \_\_\_\_\_ Centre P.U.D., the USFWS Section 10(a) Permit, and the CCR's. Seller and Buyer shall use reasonable efforts to agree upon the Site Plan on or before the Contingency Date.

I. If the Property must be platted or subdivided pursuant to Section 6 below, a plat or subdivision map (i) has been recorded, or (ii) has received all necessary approvals, is in final recordable form and has been delivered to the Title Company for recording at Closing.

J. The Property has or will have adequate ingress and egress for vehicular traffic to and from adjacent public streets to meet the unique needs of Buyer's business operation. Buyer may determine the adequacy of access based on proposals or plans it assumes or estimates will have been implemented as of the date it projects for the opening of its retail business on the Property.

K. All permits, licenses and other governmental and quasi-governmental authorizations necessary for the development of the Property in accordance with the approved Site Plan and the approved Signage Plan (i) have been or will be issued and outstanding, (ii) shall not be subject to any conditions other than the closing of the transaction contemplated by this Agreement and the obtaining of building permits, and (iii) the time periods for appeal of issuance of such permits, licenses and other authorizations shall have expired without contest.

L. Subject to the closing of the transaction contemplated by this Agreement, if Buyer were to apply for a building permit for a "\_\_\_\_\_" store on the Property as of the Date of Closing and pay all required application fees, and provided that the plans for such store complied with all applicable building codes, Buyer could, as a matter of right, obtain such building permit without further act.

M. All covenants of Seller required in this Agreement to be performed on or before the Contingency Date have been timely and duly performed in all material respects.

N. At the time of Closing, Buyer will be immediately entitled to connect into all utilities, including electricity, telephone, gas, water (fire and domestic), storm and sanitary sewer, upon payment of only the usual and customary connection and capital recovery fees.

O. Buyer shall have received a certification from its consultant indicating that any and all removal, remediation, transportation, disposal and/or control of all Hazardous Materials on or under the Property or migrating to or from the Property (including any soil contaminated by one or more Hazardous Materials) have been completed.

P. Seller and Buyer shall have approved the final forms of an Operation and Easement Agreement ("OEA"), a Site Development Agreement ("SDA"), and a Developer Acquisition Rights Agreement (the "Acquisition Agreement") for the Property on or before the Contingency Date. Seller and Buyer shall use reasonable efforts to agree upon the final forms of the OEA, the SDA, and the Acquisition Agreement on or before the Contingency Date.

If any of the conditions set forth in this Section 4 are not found to exist to the satisfaction of Buyer, in its sole and absolute discretion, then Buyer may, at its sole option, terminate this Agreement by giving written notice to Seller at any time on or before the Contingency Date. If any of the conditions set forth in Section 4H or Section 4P are not found to exist to the satisfaction of Seller, in its sole and absolute discretion, then Seller may, at its sole option, terminate this Agreement by giving written notice to Buyer at any time on or before the Contingency Date. Upon any such termination, both parties shall be released from all duties and obligations under this Agreement, except as otherwise provided in this Agreement. The conditions set forth in this Section 4, other than Section 4H and 4P above, are for Buyer's sole benefit, and Buyer may, in its sole and absolute discretion, waive the fulfillment of any one or more of such conditions, or any part thereof. Seller shall use reasonable efforts to avoid any action that modifies or changes the circumstances upon which the conditions set forth in this Section 4 were deemed satisfied or waived by Buyer.

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**7. Buyer's Investigations and Inspections.**

**A. Access and Resulting Reports.** Seller hereby grants to Buyer, its employees, agents, consultants and contractors, the right to enter onto the Property and, to the extent necessary, onto any other part of the Property for the purpose of performing such surveys, soil tests, hydrology tests, percolation tests, environmental tests, and other engineering tests or environmental investigations which Buyer may reasonably deem appropriate. Within 30 days after written notice to Buyer from Seller, Buyer shall make reasonable efforts to deliver to Seller copies of all reports and other information obtained in connection with such inspections. Upon Seller's written request Buyer shall, at Seller's sole cost and expense, use commercially reasonable efforts to have any of such reports and information as designated by Seller, certified to Seller, Seller's attorneys and consultants, and/or the Title Company. Buyer will give Seller's designated representative (who shall be \_\_\_\_\_, subject to change pursuant to Section 17 below) reasonable prior notice of entry onto the Property, and shall use reasonable care and effort not to disrupt or interfere with any activities within the Property or with the use and enjoyment of the Property by Seller or its tenants. Prior to entering onto the Property, Buyer and Buyer's agents and representatives shall first obtain commercial general liability insurance, naming Seller as an additional insured and with liability limits of at least \$1,000,000 per accident and \$100,000 for property. The provisions of this subparagraph A. shall survive Closing or termination of this Agreement, as the case may be.

**B. Submittals of Information.** Within 10 days after the Effective Date, Seller shall deliver to Buyer any information (for example, any surveys, topographical maps, engineering studies, condemnation notices, proceedings and awards, plans, reports, test results, permits or tank registrations, title information, the P.U.D., and all tax bills, including but not limited to property, personal, rental and special assessments for \_\_\_\_\_ and current tax appraisals) Seller has within its possession regarding the Property including the environmental condition and/or any subterranean structures or utilities which may be present on the Property. Seller agrees that following said initial submission of information to Buyer, throughout the term of this Agreement Seller shall continue to deliver to Buyer all such information obtained by Seller promptly after Seller receives or obtains possession of the same.

**C. Cost of Inspection; Buyer's Indemnity; Seller's Indemnity.** Buyer agrees to pay all of the costs and expenses associated with its investigations and testing and to repair and restore, at Buyer's expense, any damage to the Property caused by Buyer's investigations or testing. Buyer also agrees to hold Seller and the Property harmless from all costs, expenses and liabilities arising out of Buyer's activities, negligence or willful misconduct or that of its employees, agents, consultants or contractors in performing its evaluation of the Property, except that Buyer shall have no responsibility to Seller, and Seller hereby releases Buyer from liability for any damage to persons or property arising out of existing environmental conditions or subterranean structures or utilities that were known to Seller and not disclosed to Buyer as provided in subparagraph B above. The terms of this subparagraph C shall survive Closing or termination of this Agreement, as the case may be.

**D. Samples; Disposal.** Soil, rock, water, asbestos, and other samples taken from the Property shall remain the property of Seller. At Seller's request, Buyer will cooperate with Seller with respect to Seller's decisions regarding the lawful disposal of any contaminated samples, and Buyer further agrees to reimburse Seller for (or pay on Seller's behalf) reasonable costs associated with the lawful disposal of such samples. In any case, Seller shall be required to sign any manifests and any other documents required in connection with the disposal of contaminated samples. If Seller is not willing to sign the required documentation, Buyer's only obligation with respect to contaminated samples shall be to return the same to Seller. The terms of this subparagraph D. shall survive Closing or termination of this Agreement, as the case may be.

**E. As Is.** Other than as specifically set forth or warranted in this Agreement or with respect to the warranty of title Seller agrees to deliver in the Deed required under Section 12A below, it is expressly stipulated and agreed that Buyer accepts the Property "AS IS" and "WITH ALL FAULTS", and that Seller makes and has made NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, with respect to the condition of the Property, the fitness of the Property for any intended use or purpose, the existence of any hazardous or toxic materials in or on the Property or any other environmental condition of the Property,

the availability of utilities or other services to the Property, or the present or future income that may be generated from the Property. Buyer acknowledges that is not relying upon any information supplied by, representation, statement or other assertion with respect to the Property Condition made by Seller, its employees or agents, but is relying solely upon its examination of the Property. Without limiting the foregoing, in the event Buyer consummates the Closing pursuant to this Agreement with knowledge contrary to any representations, warranties, covenants, or other information made or provided by Seller pursuant to this Agreement, Buyer shall be conclusively deemed to have satisfied itself, based on its own inspections and investigations, as to the condition of the Property and all matters pertaining thereto, thereby releasing Seller from any liability as to such matters. **BUYER ACKNOWLEDGES THAT THE INFORMATION PROVIDED AND TO BE PROVIDED WITH RESPECT TO THE PROPERTY WILL BE OBTAINED FROM A VARIETY OF SOURCES, AND SELLER HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION OR ANY EXPRESS, IMPLIED, ORAL OR WRITTEN REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION.**

**10. Representations and Warranties.**

**A. General Representations and Warranties.** Seller represents and warrants to Buyer that the following statements are now true and accurate:

1. To the extent of Seller's current actual knowledge, Seller has good, indefeasible and insurable record title to the Property; Seller has owned and/or been in possession of the Property for approximately one year.

2. To Seller's current actual knowledge, the Property is not subject to any mechanics' liens, nor are there any third parties in or entitled to possession or use of the Property, and there are no management agreements (other than in connection with the CCR's), maintenance or service contracts, non-governmental use restrictions or other agreements relating to the Property which are unrecorded and which would be binding on the Property or Buyer.

3. Seller has not received any notice nor is it aware of any pending action to take all or any portion of the Property, nor has Seller agreed or committed to dedicate any part of the Property.

4. To Seller's current actual knowledge, the Property and the Property have free and full access to and from all adjoining streets, roads and highways, subject to the P.U.D. and the final plat thereof, and there is no pending or threatened action which would limit or impair such access.

5. The Property has not been classified under any designation authorized by law to obtain a special low ad valorem tax rate or receive either an abatement or deferment of ad valorem taxes which, in such case, will result in additional, catch-up ad valorem taxes in the future in order to recover the amounts previously abated or deferred, and there are no minimum value, minimum tax or other agreements with respect to the Property which would restrict Buyer's right to contest the value or taxes attributable to the Property.

6. To Seller's current actual knowledge, neither the Property nor its use is in violation of any local governmental rule, ordinance, regulation or building code, nor is there a pending or threatened investigation regarding a possible violation of any of the foregoing.

7. Seller has not received any notice nor is it aware of any litigation or administrative proceeding pending or threatened (including the expiration of any appeal period with respect thereto) relating to the Property or its use which may adversely affect the validity of any license, permit or other governmental determination or authorization necessary to development and operation of the Property.

8. Seller is not a "foreign person" as contemplated by Section 1445 of the Internal Revenue Code.

9. Seller has the full capacity, right, power and authority to execute, deliver and

perform this Agreement and all documents to be executed by Seller pursuant hereto, and all required actions and approvals therefore have been duly taken and obtained. The individuals signing this Agreement and all other documents executed or to be executed pursuant hereto on behalf of Seller are and shall be duly authorized to sign the same on Seller's behalf and to bind Seller thereto.

10. This Agreement and all documents to be executed pursuant hereto by Seller are and shall be binding upon and enforceable against Seller in accordance with their respective terms, and, to Seller's current actual knowledge, the transaction contemplated hereby will not result in a breach of, or constitute a default or permit acceleration and maturity under, any indenture, mortgage, deed of trust, loan agreement or other agreement to which Seller or the Property or the balance of the Property is subject or by which Seller or the Property or the balance of the Property is bound.

11. Seller has not (i) made a general assignment for the benefit of creditors, (ii) filed any involuntary petition in bankruptcy or suffered the filing of any involuntary petition by Seller's creditors, (iii) suffered the appointment of a receiver to take possession of all or substantially all of Seller's assets, (iv) suffered the attachment or other judicial seizure of all, or substantially all, of Seller's assets, (v) admitted in writing its inability to pay its debts as they come due, or (vi) made an offer of settlement, extension or composition to its creditors generally.

**B. Environmental Representations and Warranties.** Seller represents and warrants to Buyer that the following statements are now true and accurate:

1. To Seller's current actual knowledge, there are no Hazardous Materials, as defined below in this subparagraph B, located on, in, or under the Property, except as disclosed on Exhibit D.

2. To Seller's current actual knowledge, neither as of this date nor at any time prior to the date hereof, has there been a Release, as defined below in this subparagraph B, of any Hazardous Material in, on or under the Property, except as disclosed on Exhibit D.

3. Seller has not used the Property for the use, storage, generation, manufacture, treatment, transportation, handling or disposal of any Hazardous Material, nor, to Seller's current actual knowledge, has the Property ever been used for the use storage, generation, manufacture, treatment, transportation, handling or disposal of any Hazardous Material, except as disclosed on Exhibit D.

4. To Seller's current actual knowledge, Seller's activities on the Property and those of its tenants, subtenants and licensees, if any, comply with all applicable Environmental Laws, as defined below in this subparagraph B.

5. To Seller's current actual knowledge, except as disclosed on Exhibit D, there is no, nor has there ever been any, investigation, administrative proceeding, litigation, regulatory hearing or other action proposed, threatened or pending, relating to the Property and alleging non-compliance with or liability under any Environmental Law; nor to Seller's current actual knowledge is the Property listed on CERCLIS or any comparable state list of hazardous waste sites identified for investigation or remediation.

6. Seller has disclosed to Buyer on Exhibit D any assessments, studies, sampling results, evaluations and other reports commissioned by or for Seller or within Seller's possession relating to the environmental condition of the Property. In addition, to Seller's current actual knowledge, there are no land use controls imposed on the Property in connection with environmental concerns, and no real estate tax benefits and/or rebates accruing in connection with the environmental condition of the Property.

7. To Seller's current actual knowledge, there are not now and were not at any time during which Seller had any interest in the Property, nor have there ever been, any above-ground or underground storage tanks located in, on or under the Property, except as disclosed on Exhibit D.

8. No storage tanks have been removed from the Property at a time during which Seller had any interest in the Property.

