

**DRAFTING ASSIGNMENTS OF RENT UNDER THE TEXAS
ASSIGNMENT OF RENTS ACT**

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CHAPTER 8

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DRAFTING ASSIGNMENTS OF RENTS UNDER THE TEXAS ASSIGNMENT OF RENTS ACT

I. Introduction.¹

a. Why does Texas need an assignment of rents act?

Rents are an important part of mortgage loan collateral when the collateral is income producing. To secure an interest in rents, mortgage lenders have, for many decades, sought an assignment of rents. While such assignments raise a number of issues, two of the most important are obtaining (a) perfection or priority as protection against competing claims or liens of others and (b) possession of the rents.

Because rents can be both severed [paid] or unsevered [unpaid], obtaining and maintaining a perfected security interest or lien is more complicated than it is for the land or improvements. A major reason for this is rents that have been paid can be fungible and difficult to trace. Once severed from the real property, rental proceeds can take many forms. Thus, the character of rents creates multiple issues for the mortgage lender, its counsel, and the courts. Since there has been no statutory guidance regarding perfecting a lien or security interest in or obtaining possession of real property rents, Texas courts have had to fashion rules to address these issues, and these rules have been engendered their own problems.

An assignment of rents takes a number of the forms, including a collateral assignment²

¹ The opinions expressed in this article are those of the author and not that of the State Bar of Texas, the Real Property, Probate and Trust Law Section, the Committee that drafted the proposed version of TARA, nor of the author's firm. The author and his firm reserve the right to take positions contrary to those stated in this article if the facts or circumstances of a specific transaction dictate, the law changes, it is of benefit to any client or potential client, or we just plain feel like it.

² For example, "to further secure payment of the indebtedness, Assignor grants to Assignee all rents, income, insurance awards, and profits due or to become due from the Property."

or absolute assignment.³ As a predicate for understanding the issues, it is important to remember that in Texas the lien theory of mortgages applies to real property, including rents and leases.⁴ In Texas, if a mortgage lender holds a collateral or conditional assignment of rents, it holds only a lien in rents. This means that the mortgage lender has to foreclose its lien or take some other action to obtain the right to possession of the real property collateral, including rents. It is when the lien theory is applied to rents that the problems associated with obtaining a perfected lien or security interest in or right to possession of rents are brought into sharp relief. The seminal case in point is illustrative:

"The Texas cases addressing rentals assigned as security have followed the common law rule that an assignment of rentals does not become operative until the mortgagee obtains possession of the property, or impounds the rents, or secures the appointment of a receiver, or takes some other similar action. *Simon v. State Mutual Life Assur. Co.*, 126 S.W.2d 682 (Tex. Civ. App. --- Dallas 1939, writ ref'd); *McGeorge v. Henrie*, 94 S.W.2d 761 (Tex. Civ. App. --- Texarkana 1936, no writ). Most jurisdictions are in accord. 59 C.J.S. Mortgages § 316 n. 71 at 411."⁵

The *Taylor* Court went on to say:

"On the other hand, an absolute assignment of rentals operates to

³ For example, "Assignor absolutely and unconditionally grants, conveys, assigns, transfers and sets over unto Assignee all rents, income, insurance awards, and profits due or to become due from the Property." This provision is often supplemented with other terms to bolster the "absolute" nature of the assignment.

⁴ *Taylor v. Brennan*, 621 S. W. 592, 594 (Tex. 1981); *In the Matter of Village Properties, Ltd.*, 723 F.2d 441, 445 (5th Cir. 1984); *In re Spears*, 352 B.R. 83, 89 (Bankr. N.D. Tex. 2006).

⁵ *Taylor v. Brennan*, 621 S. W. 2d at 594.

transfer the right to rentals automatically upon the happening of a specified condition, such as default. *Kinnison v. Guaranty Liquidating Corporation*, 18 Cal.2d 256, 115 P.2d 450, 453 (Cal.1941). The absolute assignment does not create a security interest but instead passes title to the rents. *In Re Ventura---* *Louise Properties*, 490 F.2d 1141 (9th Cir. 1974).⁶

The court focused on the language of the assignment to determine the intent of the parties. It concluded that certain phrases or words indicated intent to create a pledge of or lien interest in rent and, in *dicta*, mentioned one of the results of an absolute assignment of rents.

“When an assignment of rentals is given as “further” or “additional” security, there is a strong indication the parties intended a pledge, *Simon v. State Mutual Life Assur. Co.*, *supra*, while an absolute assignment of rentals is not security, but is a *pro tanto* payment of the obligation. *Malsman v. Brandler*, 230 Cal.App.2d 922, 41 Cal. Rptr. 438 (1964).”⁷

This portion of the *Taylor* decision has been the subject of many articles and has created a good deal of consternation among mortgage lenders’ legal counsel, if not the mortgage lenders themselves. Mortgage lenders and their counsel did not want to have to seek impoundment of rents, appointment of a receiver or take similar actions. If they thought much about it, and most did not, they did not want to suffer a *pro tanto* payment of the obligation, i. e. the indebtedness.

On the other hand, mortgage lenders were quick to see the potential advantages of an absolute assignment of rents both in state courts and bankruptcy courts. In the former, the mortgage lender did not have to obtain possession of the real property, impound the rents, secure the appointment of a receiver, or take some other similar action to have the

immediate right to possession of the rents. This, in theory at least, saves time and money. In a Chapter 11 federal bankruptcy court, the mortgage lender might argue that absolutely assigned rents were no longer part of the debtor’s estate and therefore not available for the use of the debtor in its reorganization.

The *Taylor* Court did not provide any details regarding the manner in which an absolute assignment of rents could be created or identified. In a case involving Texas, the U. S. Fifth Circuit did.⁸ In *International Property Management*, the federal court again focused on the intent of the parties as evidenced by their agreement.⁹ An absolute assignment must not, in the opinion of the Fifth Circuit, contain words like “security” or “pledge”, and it must not require the mortgagee to take any action after default to secure the rents.¹⁰ After reviewing the language of the assignment of rents at issue in the case, the Fifth Circuit found it was an absolute assignment, but did not address the issue of a *pro tanto* payment of the obligation.¹¹

The *Taylor* Court did note that if an absolute assignment of rents existed, it would constitute a *pro tanto* payment of the obligation. In Latin “*pro tanto*” means for so much; for as much as one is able; or as far as it can go. In the context of a mortgage loan, it means that the assignment of rents is a *pro tanto* payment of the obligation. The *Taylor* Court did not elaborate how this reduction would function, however, some value would be assigned to the absolute assignment and that amount would reduce the indebtedness owed to the mortgage lender. Neither *Taylor* nor its progeny have provided any guidance on the application of the *pro tanto* payment rule.

Despite numerous warnings regarding the risks of *pro tanto* payment associated with absolute assignments of rent, mortgage lenders and their counsel have not been dissuaded from

⁶ *Id.*

⁷ *Id.*

⁸ *FDIC v. International Property Management*, 929 F.2d 1033 (5th Cir. 1991).

⁹ *International Property Management* at 1036.

¹⁰ *International Property Management* at 1037.

¹¹ *International Property Management* at 1038.

using absolute assignments of rent.¹² On occasion this has had serious, adverse consequences for the mortgage lender.¹³ In the *Nolana* case, the mortgage lender had an absolute assignment of rents. The court held that this constituted a *pro tanto* payment of the obligation, that is, the value of the rents offset the outstanding obligation. The case was remanded to determine if the borrower applied the rents as required by the terms of the loan documents and no further judicial history has been reported. One could be forgiven for suspecting the lender never wanted the final decision to see the light of day. Nevertheless, the *Nolana* case should raise a number of red flags for holders of true absolute assignees of rents, particularly if the real property generates significant income. The greater the income absolutely assigned, the greater the *pro tanto* payment of the obligation. If the absolute assignment reduces the obligation, does it happen at the inception of the loan? If so, the value of the assignment might exceed the principal balance of the loan obligation. If this happens or even if the principal is merely reduced by a significant amount, the interest contracted to be paid or actually received on the stated principal may create a usury claim or

defense.¹⁴ In the almost three decades *Taylor* has been the law, there has been no reported case that fully applies the most draconian results of a *pro tanto* payment. The courts are clearly reluctant to do this,¹⁵ but that does not eliminate the risk. It is still possible, if unlikely, that some Texas court may apply the rule to an unsuspecting mortgage lender to its great surprise and dismay.

Finally, the efficacy of an absolute assignment of rents in the context of a bankruptcy is less clear than it seemed in the past. Federal bankruptcy law now provides some protection to the mortgage lender with regard to collateral taking the form of rent. Since the enactment of Section 552(b) (2) of the Bankruptcy Code in 1994, federal law seems to confer automatic perfected status on rents of a debtor that accrue and are paid after the commencement of bankruptcy proceedings if the debtor entered into a security agreement, *i. e.* assignment covering rents that accrue in the future, and that agreement is recorded. Moreover, bankruptcy courts have not routinely allowed the use of absolute assignments of rent to remove the rents from the estate of the debtor in bankruptcy. As a result of these factors, one of the major bankruptcy rationales for having an absolute assignment of rents has diminished, if not disappeared.¹⁶

All of this left Texas lawyers in a quandary about how best to obtain a perfected lien or security interest in rents from mortgaged real estate and avoid the attendant risks.

b. Potential Solutions.

¹² R. Danley & A. Jillson, *Absolute Assignments of Leases and Rents Has the Unicorn Been Found or Is It Still Myth*, Texas Bar Real Estate, Probate and Trust Law Reporter (Volume 30, No. 3, April 1992); R. Danley, *Absolute Assignments of Leases and Rents: Are They Enforceable, Are They Worth the Effort?*, 26th Annual Mortgage Lending Institute (University of Texas Law School, 1992); R. Danley, *Absolute Assignments Versus Collateral Assignments of Leases and Rents: What Are The Issues, Are Absolute Assignments Worth the Effort* Texas Bar Real Estate, Probate and Trust Law Reporter (Volume 36, No. 3, April 1998); D. Derber, *Assignment of Real Estate Rents, Absolute, Collateral or Conditional: Do We Or Should We Care?* State Bar of Texas, Advanced Real Estate Drafting Course (2000).

¹³ 801 *Nolana, Inc. v. RTC Mortgage Trust*, 944 S.W.2d 751, 754 (Tex. App.—Corpus Christi, 1997, writ denied); *NCNB Texas National Bank v. Sterling Projects, Inc.*, 789 S.W.2d 358, 360 (Tex. App.—Dallas 1990, *dism'd w/oj*); *In re Triplet*, 84 Bankr. 84, 88 (Bankr. W.D. Tex. 1988).

¹⁴ Tex. Finance Code Section 305.001(a-1).

¹⁵ *The Cadle Co. v. Collin Creek Phase II Assoc. Ltd.*, 998 S.W.2d 718, 722 (Tex. App. — Texarkana 1999, no pet.); *Oryx Energy Co. v. Union Nat'l Bank of Texas*, 895 S.W.2d 409, 414--15 (Tex. App.—San Antonio 1995, writ denied); see *Taylor v. Brennan*, 621 S.W.2d at 594.

¹⁶ For a more extensive discussion, see G. Hesse, L. Warman, & E. Walker, *Bankruptcy Issues In Workouts And Foreclosures*, 43rd Annual Mortgage Lending Institute (University of Texas Law School, 2009).

Many mortgage lender attorneys have sought to gain the benefits of an absolute assignment of rents and avoid or at least mitigate the risks of a *pro tanto* payment of the obligations. The absolute assignments drafted by these attorneys may provide various terms and conditions to reduce this risk, including, provisions that (i) that in no event will the indebtedness be reduced, except to the extent the mortgage lender receives actual possession of the rents and applies them to the indebtedness; (ii) the debtor is granted a limited license to collect rents prior to default, but requiring the debtor to agree that the value of the absolute assignment equals the value of the license given back to the debtor, at least until it is revoked, (iii) that the value of the license reduces the value of the absolute assignment, and (iv) the right to rents assigned are limited by the usury savings and spreading provisions of the loan documents. The author of this article is unaware of any Texas court holding those or other techniques effective to limit the risk of a *pro tanto* payment of the obligation if a true absolute assignment of rents is found to exist. Indeed, except for a handful of cases, most Texas courts have found the assignments of rent in connection with mortgage loans to be collateral assignments, even when the express provisions of the assignment provide it is absolute.¹⁷ This is probably for the best. The mortgage lender might find a court's decision holding its assignment of rent absolute, as in *Nolana*, a Pyrrhic victory.

A better solution would be to change current law. The National Conference of Commissioners of Uniform State Laws promulgated a model act, the Uniform Assignment of Rents Act ("UARA"), in 2005. A committee of the Real Estate, Probate & Trust Law Section of the State Bar of Texas, chaired by Richard Spencer of Houston,¹⁸ worked over

the past two years or more on a project to draft an assignment of rents act for enactment by our Legislature. The committee has based its work largely on UARA, but has made very extensive deletions, additions and other changes to better address existing law, custom, and practice in Texas.

The State Bar approved the Committee's proposed Texas Assignment of Rent Act ("Proposed TARA"). Senator John Corona agreed to sponsor a bill in the Texas Senate to enact an assignment of rents act based on Proposed TARA, which became Senate Bill 889. Representative Sarah Davis agreed to sponsor a companion bill, HB 2486, in the Texas House. Senate Bill was passed unanimously by both the Texas House and Senate, and signed on June 17, 2011 by the Governor.¹⁹ Because SB 889 receive at least the vote of two-thirds of all members of each house of the Legislature, it became effective on June 17, 2011. I will refer to SB 889 as enacted as "TARA." A copy of the Act is appended to this Article.

II. Proposed TARA.

solely those of the author, which may or may not be shared by other members of the committee. In particular, comments regarding the *pro tanto* payment of the obligation rule and its affects are solely those of the author and are not shared by all of other committee members.

¹⁹ Act of June 17, 2011, 82nd Leg., R.S., ch. 636, 2011 Tex. Gen. Laws. SB 889 was enacted by the 82nd Texas Legislature as Chapter 636 of the General and Special Laws of Texas and is scheduled to be codified as Chapter 64 of the Texas Property Code. Unfortunately, another law, SB 1368, which addresses authority of a co-owner to encumber residential property, enacted by the 82nd Texas Legislature as Chapter 918 of the General and Special Laws of Texas and is also scheduled to be codified as Chapter 64 of the Texas Property Code. Codification of the two laws has not been completed, but this paper assumes TARA will be Chapter 64 of the Texas Property Code when codification is completed. Thanks to SMU Law School Professor Julie Forrester and Underwood Law Library Collection Development Librarian Laura Justiss for shedding light on this problem, which, along with several other TARA-related issues, will need to be rectified in a future Legislative session.

¹⁷ *The Cadle Co. v. Collin Creek Phase II Assoc. Ltd.*, 998 S.W.2d at 722.

¹⁸ Other members of the TARA Committee include Julie Forrester, Paul Pruitt, Cary Barton, David Derber, Bill Locke, and the author of this article. Although reference is made in this article to the TARA committee or its intent, any comments are

a. Major Changes from UARA Model Act.

UARA was drafted to address a variety of issues not relevant to Texas, and the TARA committee has removed numerous UARA provisions it felt were not useful in Texas in its draft of Proposed TARA. This article will not cover all the changes made to UARA in the drafting of Proposed TARA, but will describe some of the major or more interesting changes. Among the major modifications was deletion of enforcement of the assignment of rents through receiverships. Receiverships are necessary in those jurisdictions that have extended periods to complete foreclosure sales. However, because (a) nonjudicial foreclosure sales in Texas are typically completed in a short period,²⁰ (b) filing of a receivership would place the collateral in *custodia legis*²¹, and (c) Texas has adequate existing receivership laws, all receivership provisions were excluded from Proposed TARA.

One of the goals of the committee was to shorten Proposed TARA from the rather lengthy UARA and to improve or clarify terms and provisions that were unclear, inexact or inapplicable to Texas practice. The proposed TARA has approximately 3,665 words. UARA, including the introductory notes, text and commentary has approximately 64,612 words. Even allowing for text not part of the Model Act proper, Proposed TARA was and TARA is substantially more concise.

b. Structure of Proposed TARA.

i. Short Title.

The official name of Proposed TARA is the "Assignment of Rents Act." Proposed TARA is not a uniform act. Although its source was largely UARA, Proposed TARA is distinguishable in myriad respects. Hence

²⁰ Tex. Prop. Code §51.002.

²¹ *Palmer v. Texas*, 212 U.S. 118, 29 S. Ct. 230, 53 L. Ed. 435 (1909); *First Southern Properties, Inc. v. Vallone*, 533 S.W.2d 339, 343 (Tex. 1976); *Kirby v. Dilworth & Marshall*, 260 S.W. 152, 156 (Tex. Comm'n App.1924, holding approved).

TARA is also very different from UARA and, although based on Proposed TARA, TARA is not identical to Proposed TARA. Proposed TARA underwent material revisions by the Texas Legislative Council before TARA was introduced.

ii. Substantive Provisions.

Proposed TARA has eighteen sections, which have been incorporated into TARA with some material changes, which will be discussed below. Because the provisions of Proposed TARA and TARA are similar, if not identical, in most cases, they will be discussed in detail in the context of TARA.

iii. Official Comments.

UARA contained extensive commentary and examples in each section. The author of this paper believes the official comments to UARA are inapplicable to Texas, and Texas courts and practitioners should not refer to the official comments to UARA when seeking guidance in the interpretation of TARA.²²

iv. Pro tanto payment.

Proposed TARA does contain one comment the committee believes is important.²³ This comment may be found in Proposed TARA Section 4 and is intended to emphasize the elimination of the Texas Supreme Court's *pro tanto* payment of the obligation rule.²⁴ That

²² This opinion is not shared by all the members of the TARA Committee that drafted the Proposed TARA.

²³ "Texas Comment: Subsection (c) of Section 4 [of Proposed TARA] is intended to eliminate confusion created by language in *Taylor v. Brennan*, 621 S.W.2d 529 (Tex. 1981), to the effect that an absolute assignment of rents is a *pro tanto* payment of the obligation. This section makes clear that unless the parties otherwise agree (a very unlikely agreement), the secured obligation is reduced only if and to the extent that the assignee collects rents and applies them. Simply taking an assignment of rents does not reduce the secured obligation."

²⁴ *Taylor v. Brennan*, 621 S.W.2d 592 (Tex. 1981).

comment, to this author's dismay, was not included in TARA.

III. TARA.

The following is a section-by-section analysis of TARA.

a. Short Title.

TARA does not contain a short title, which was eliminated by the Texas Legislative Council, although a short title would have facilitated future references to the Act.

b. Section 64.001²⁵ - Definitions.

Reference to the definitions section is essential to understanding and using TARA. Section 64.001 contains definitions of terms used in TARA. Most of these are taken from Proposed TARA, which derived many definitions from UARA. However, extensive changes were made to the Proposed TARA definitions to avoid conflicts and to better integrate Proposed TARA with existing Texas statutory definitions. TARA picks up most of the definitions used in Proposed TARA, with some significant exceptions.

The definition of "assignment of rents" was modified to contain carve-outs for assignments of rent made under Section 306.101 of the Texas Finance Code, which are sometimes referred to as equity kickers,²⁶ and

²⁵ References to TARA will be either by reference to Section 64.____, §64.____, or to Section 1, 2, or 3 of TARA.

²⁶ Tex. Fin. Code §306.101(b) provides in pertinent part: "The parties to a qualified commercial loan agreement may contract for the following charges: . . . (4) an option or other right created by contract, conveyance, or otherwise, to participate in or own a share of the income, revenues, production, or profits: (A) of an obligor or of an affiliate of an obligor; (B) of any segment of the business or operations of an obligor or of an affiliate of an obligor; or (C) derived or to be derived from ownership rights of an obligor or of an affiliate of an obligor in property, including any proceeds of the sale or other disposition of ownership rights."

true sales²⁷ of rents. The first exception refers to a form of assignment of rent that is intended as non-interest additional consideration that may be charged in connection with qualified commercial loans. The second carve-out recognizes that parties may still intend an actual, *bona fide* transfer of title to rents. These will continue to be absolute assignments of rent. **Practice note:** If an equity kicker is obtained by a mortgage lender, it would be prudent to cite the exception in Section 64.001(2).

Section 64.001 (3) defines "assignor" to mean the owner of real property who makes an assignment of rents. Typically this will mean the borrower.

Section 64.001 (1) defines "assignee" to mean a person entitled to enforce an assignment of rents. Typically this will mean the lender.

"Security instrument", which is defined in Section 64.001 (11), cross-references "instruments" as defined in the Property Code²⁸, but also includes any agreement containing an assignment of rents. Thus, security instrument could be a deed of trust containing an assignment of rents, a security agreement containing a grant of a security interest in rents, or a separate document with an assignment of rents. Whether the mortgagee elects to have a single document or multiple assignments of rent will not change the effect of TARA on the assignment.

The term "tenant" includes a person who has an obligation to pay for the right to possess or occupy, or for possessing or occupying, real property, picking up only tenants, but subtenants and licensees. Section 64.001(14).

²⁷ "True sale" means a transfer of rents that is not a disguised secured transaction. Examples of the concept may arise in connection with bankruptcies where 11 U. S. C. §541 or §363(b)(1) comes into play.

²⁸ Tex. Prop. Code §51.001(6), which provides: "Security instrument" means a deed of trust, mortgage, or other contract lien on an interest in real property."

“Rents” are defined very broadly in Section 64.001(9) to mean consideration payable for the right to possess or occupy real property; rental interruption insurance proceeds; claims arising out of a default in payment for the right to possess or occupy real property; consideration payable to terminate an agreement to possess or occupy real property; consideration payable to an assignor for payment or reimbursement of operating expenses or improvements; and any other consideration that constitutes rents under Texas law other than TARA.

Query: Are royalties, rents, bonuses, or other rights to a portion of oil, gas, or other minerals pursuant to a mineral lease “rents” under TARA? The TARA Committee did not consider this issue during its discussions regarding Proposed TARA. Rights of operating lessees under such leases have been referred to as a *profit a prendre*.²⁹ A *profit a prendre* is a right exercised by one person in the soil of another, accompanied with participation in the profits of that soil or a right to take a part of the soil or produce of land.³⁰ Such an interest is distinct from a right to possess or occupy real estate. In Texas, the mineral estate may be severed from the surface estate by a grant of the minerals in a deed or lease or by reservation in a conveyance.³¹ This is accomplished by a grant or reservation of “oil, gas and other minerals.”³² A conveyance of minerals in the typical form oil and gas lease creates a fee simple determinable.³³ Thus, an oil and gas lease is a

²⁹ *Belgam Oil Co., Inc. v. Wirt Franklin Petroleum Corporation, et al*, 209 S.W.2d 376, 379 (Tex. Civ. App. – Galveston, 1948, no writ).

³⁰ Black’s Law Dictionary (Rev. 4th Ed.).

³¹ *Moser v. U. S. Steel Corp.*, 676 S.W.2d 99, 101 (Tex. 1984).

³² *Id.*

³³ *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290, 295 (1923). A mineral lease typically provides that it is for a term of years and, if oil or gas is found then the term continues “as long thereafter as oil or gas is produced”, “for so long as” production continues, or a similar phrase. This creates a fee simple determinable followed by a possibility of reverter. If the provision following the phrase “for so long as” or similar language ceases to be satisfied, the fee simple estate will automatically revert to the

conveyance not merely a right to possess or occupy real property. Although the terminology in the energy industry is similar to that of the real estate industry, the author of this article believes royalties, rents, bonuses, or other rights to a portion of oil, gas, or other minerals pursuant to a mineral lease are not “rents” under TARA. However, that question will ultimately have to be resolved by legislative action or judicial determination.

Proposed TARA used the term “notification”, which means any signed document containing information that Proposed TARA requires or permits a person to give to another. The Legislative Council changed that term to “notice”, but provided no express definition; time will tell whether that will result in problems.

The definition of “signed” in Proposed TARA was taken from the Property Code,³⁴ Government Code,³⁵ and the Business and Commerce Code.³⁶ In TARA, the Legislative Council substituted a more limited definition, “sign”, which includes signing by electronic means. Section 64.001(13). This seems to this author as a bit narrow. TARA uses the term “signed” repeatedly. See for example Section 64.002, which refers to a “signed document” and “signed by”, and Section 64.054(c), which refers to “the date the security instrument was signed.” To be sure, the Code Construction Act provides the words “[i]ncludes” or “including” are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.³⁷ Accordingly, courts

grantor or person to whom the grantor has designated that interest. For example, if oil or gas production ceases, barring an agreement to pay some form of compensation to maintain the effectiveness of the lease term, the fee simple will revert automatically to the grantor or its successors or assigns.

³⁴ Tex. Prop. Code §43.002(8).

³⁵ Gov. Code §311.005(6), which defines “Signed” to include “. . . any symbol executed or adopted by a person with present intention to authenticate a writing.”

³⁶ Bus. & Comm. §15.002(4).

³⁷ Gov. Code §311.005(13).

will have a basis for finding electronic signatures are merely one example of signatures permitted under TARA.

The Code Construction Act, including definitions of terms like “person”, applies to the construction of TARA, except as otherwise expressly provided in the Texas Property Code.³⁸

Other changes to the definitions section include substituting “consideration” for “sums” and deleting of some terms that were inapplicable or addressed in existing statutes.

Practice note: Use of the terms as defined in TARA may assist in the interpretation of assignments of rents by attorneys, the courts, and the parties. To the extent of any doubt, parties and counsel should include such additional definitions as may be prudent to minimize disputes.

i. Section 64.002 - Manner of Providing Notice.

The giving of notice is critical to the exercise or enforcement of rights and obligations under TARA. Extensive revisions to UARA notification provisions were made to the notification section of Proposed TARA and hence to the notice section of TARA, which is Section 64.002. Under UARA and Proposed TARA, the Section was the source for determining addresses for notification. Under TARA, the Legislative Council expanded the Section’s role to one also mandating notice. Whether notice is required or permitted is addressed in other Sections of TARA and inclusion of phrases like “must be sent” in Sections 64.002 (b), (c) and (d) might conflict with other Sections where notice is permissive. A number of other provisions were eliminated. If notice is given in accordance with the requirements for a nonjudicial foreclosure on title to real property,³⁹ it is adequate for TARA

³⁸ Tex. Prop. Code §1.002; Tex. Gov. Code Chapter 311.

³⁹ Tex. Prop. Code §51.002(e).

purposes.⁴⁰ This allows a combined notice for nonjudicial foreclosure and notice for assignment of rents purposes. Alternatively, such notice may be sent, properly addressed, via a commercially reasonable delivery service, e. g. Federal Express or UPS, by first class mail, or any means agreed upon by the persons sending and receiving the notice, i. e. freedom to contract method. **Practice note:** To avoid duplication, assignees may want to provide that all notices with regard to the assignment of rents will be sent in accordance with the deed of trust securing the obligation.⁴¹

TARA also provides rules for determining the address to be used for notice depending on whether notice is to the assignee (meaning mortgage lender), assignor (meaning debtor or borrower), or tenant.

The Legislative Council also introduced the undefined term “relevant security instrument.”⁴² This is another potential source of dispute. How do the courts, attorneys, or the public determine if the security instrument is “relevant”?

The Legislative Council substituted the word “another” for “other” in the notice Section.⁴³ “Another” means an additional or one more of the same already mentioned. “Other” means different or distinct from the one already mentioned or implied. While this may seem an insignificant matter of grammar, a court might find that the address has to be in one security instrument or another security instrument and not in a document other than a security instrument. Recall that a “security instrument” is limited to a security instrument, as that term is

⁴⁰ Sec. 64.002(a)(1).

⁴¹ TARA does not prohibit modification by agreement of the terms and requirements of TARA and, in some sections, provides that the parties may agree to terms others than those expressly set out in TARA. It is the author’s belief that such modifications are permitted in most cases unless expressly prohibited. Of course, there is no guarantee the courts will have the same interpretation of TARA.

⁴² Sec. 64.002(b) & (c).

⁴³ *Id.* See also, 64.053(a).

defined by Section 51.0001,⁴⁴ or an agreement containing an assignment of rents.⁴⁵ If the address for an assignor or an assignee appears in a loan document that is not a deed of trust, mortgage, or other contract lien on an interest in real property or does not contain an assignment or rents, the word “another” could raise serious questions. Such addresses might be found in a loan agreement, promissory note, or contract that is separate from the security instrument or other document containing the assignment of rents. **Practice note:** Include the addresses for notice to assignor and assignee in the security instrument containing the assignment of rents. Assure the addresses for parties contained in all loan documents are identical.

For the assignee, the notice address is the address provided in the security instrument or other document between the parties for address purposes or a more recent address if notice of the new address is given in a document signed by the assignee.⁴⁶

For the assignor, the rule is the same as for the assignee, except the address mandated by Section 51.002 of the Property Code may also be used.⁴⁷ A problem may exist in Section 64.002(c) where reference is made to “notice of default under Section 51.002”, which was another change by the Legislative Council. Section 51.002 refers primarily to notice of foreclosure not to notice of default.⁴⁸ This misstatement may tempt counsel for debtors facing such a foreclosure to seek the courts’ assistance in explaining where Section 51.002 addresses “notice of default.” At a minimum, this could delay resolution of any dispute.

For a tenant, the address is either that address agreed upon in a signed document between the tenant and person giving the notice,

e. g. subordination, nondisturbance, and attornment agreement, the lease or, if those do not apply, then the tenant’s address at the real property covered by the security instrument, unless a more recent address has been by the tenant pursuant to that document.⁴⁹

Practice note: Mortgage lenders should require debtors to include a specific provision in all leases, licenses and similar documents relating to the real property covered or that will be covered by the assignment of rents specifying the address to which notice to tenant for the purposes of TARA should be sent. In the case of both assignors and tenants, notice provisions should not permit the use of notice to any address outside the United States because certified mail, which is required by Chapter 51 of the Property Code, may not be used outside this country.⁵⁰

Notice is deemed to have been received on the earliest of actual receipt, within five days after it was deposited in the U. S. mail, or the date on which notice is considered provided in accordance with an agreement made by the person whom the notice is provided.⁵¹

ii. Section 64.051 - Security Agreement/Assignment of Rents Creates Security Interest.

Section 64.051(a) provides that an enforceable security instrument automatically creates an assignment of rents arising from the real property described in the instrument, unless the instrument provides otherwise or is govern by certain provisions of the Texas Constitution dealing with home equity loans and similar obligations secured by some, but not all, liens affecting homesteads.⁵² Accordingly, it is not necessary to expressly provide for an assignment

⁴⁴ "Security instrument" means a deed of trust, mortgage, or other contract lien on an interest in real property. Tex. Prop. Code §51.0001(6).

⁴⁵ 64.001(11).

⁴⁶ Tex. Prop. Code §64.002(b).

⁴⁷ Tex. Prop. Code §64.002(c).

⁴⁸ The concept of default notice is addressed in the context of foreclosure of debtor’s residence. Tex. Prop. Code §51.002(d).

⁴⁹ Tex. Prop. Code §64.002(d).

⁵⁰ U. S. Postal Service Domestic Mail Manual §3.3.2 provides: Available Destinations Certified Mail may be addressed for delivery only in the United States and its territories and possessions, through APOs and FPOs, or through the United Nations Post Office, New York.

⁵¹ Tex. Prop. Code §64.002(e).

⁵² Tex. Const. Art. XVI, Sec. 50 (a) (6), (7) or (8).

of rents in a security instrument affecting real property; one automatically arises, unless it is expressly disclaimed. **Practice note:** An assignment of rents should still include an express collateral assignment of rents and provisions addressing the specific details the parties desire to have with regard to the assignment, e. g. description of the real property, manner of application of rents prior to and after default, and the other provisions typically found in assignments or rent currently in use by mortgage lenders.

It should be noted that Proposed TARA referred to the real property described in the documents creating the assignment,⁵³ while TARA refers to “. . . real property securing an obligation under the security instrument.”⁵⁴ Although it is unlikely to happen, what if the rents or a portion of the rents were assigned to an assignee that did not have a lien on the real property from which the rents arise? Does the assignee have to be a lienholder with respect to the underlying real property? If so, why? **Practice note:** Assure that assignee holds a lien on the real property from which the rents assigned are derived.

Section 64.051(b) and Section 64.052(b) form the core of TARA. Section 64.051(b) states that an assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the document creating the assignment of rents, regardless of whether the form of the assignment is absolute, conditional, collateral (additional security), or any other form. The security interest is separate and distinct from any other security interest held by the assignee (mortgage lender) in the real property from which the rent arises. In other words, all assignments of rent are presently effective collateral assignments without regard to the form taken in any document. There is an exception to this rule for equity kicker under Section 306.101 of the Texas Finance Code that

takes the form of an assignment of rent or similar interest.⁵⁵

In an effort to drive a stake through the heart of the *pro tanto* rule, Section 64.051(c) provides that an assignment of rents does not reduce the secured obligation, except to the extent the assignee collects and applies rents to the payment of the secured obligations. The Committee added a Comment to the TARA provision that became Section 64.051, which was intended to emphasize that the *pro tanto* rule is no longer the law of the State of Texas.⁵⁶ The Comment was deleted by the Texas Legislative Council.

iii. Section 64.052 - Recordation; Perfection of Security Interest in Rents; Priority of Conflicting Interests in Rents.

Section 64.052 states that an assignment of rents may be recorded in the county in which any part of the real property is located accordance with applicable law. TARA, unlike Proposed TARA, does not specify the manner in which the assignment of rent is to be recorded, but the Property Code provides for the manner in which documents relating to real property must be recorded.⁵⁷ On recording of the assignment of rents, Section 64.052(b) provides the security interest in rents is perfected. Enactment of Sections 64.052(b) and 64.051(b) would resolve the problem of creation and perfection of a security interest or lien in rents. Perfection occurs even if enforcement is deferred, as for example, by until an event of default occurs.

Section 64.052(c) establishes the priorities of persons obtaining security interests in the same rents. For example, a mortgage lender holding a perfected security interest in rents has priority over persons subsequently acquiring a judicial lien or filing an assignment of rents covering the same rents. The priority of a perfected interest in rents takes the same

⁵³ Proposed TARA §4(b).

⁵⁴ Tex. Prop. Code §64.051(a).

⁵⁵ Tex. Prop. Code §64.001(2).

⁵⁶ See footnote 23 above.

⁵⁷ Tex. Prop. Code §§11.001, 12.001(a) & 13.001(a).

priority with respect to future advances as the assignee has with respect to the real property.⁵⁸

iv. Section 64.053 - Enforcement of Security Interest in Rents.

Assignees are, of course, concerned about their inability to obtain possession of rents, except as permitted under the rules laid out in *Taylor v. Brennan*. Sections 64.053, 64.054 and 64.055 provide for alternative methods of enforcement of the assignee's security interest, including methods that allow possession of the rents to be taken by the assignee prior to foreclosure that do not involve seeking receiverships, the courts' assistance in impounding rents (i. e. injunctive relief), or similar actions. This allows assignees to minimize the risks associated with placing the real property into *custodia legis*, which can prevent or delay exercise of a nonjudicial foreclosure remedy during the pendency of the court proceeding.⁵⁹

Section 64.053(a) provides that an assignment of rents may be enforced by any of the methods described in Sections 64.054 or 64.055 or any other method sufficient to enforce the assignment under the law of the State of Texas, for example, by nonjudicial foreclosure. From the date assignee begins to enforce an assignment of rents, the assignee is entitled to collect all certain rents.⁶⁰ Proposed TARA used the phrase: “. . . all rents that . . . have accrued but remain unpaid on that date [meaning the date of enforcement].⁶¹ The Legislative Council substituted the phrase: “. . . all rents that . . . accrued *before* but remain unpaid on that date.”⁶² The clause (2) of Section 64.053(b) provision is intended to allow assignees to obtain possession of certain unaccrued rent or proceeds that have been paid by the tenant, e. g. prepaid rent and deposits. As a general rule,

acceleration of rent has not been permitted under Texas law.⁶³ The assignee would not be able to obtain possession of unpaid, unaccrued rents. The assignee may only obtain possession of the rents as they become payable by the tenant.

Proposed TARA used a defined term, “date of enforcement”, to establish a specific date for this purpose, however, the Legislative Council deleted this concept from TARA. After the rents have been converted to cash or other proceeds, if the security interest in rents was perfected, the security interest in identifiable cash proceeds is perfected.⁶⁴ **Practice note:** A prudent assignee should avoid or minimize the risk that proceeds cannot be identified by taking possession, e. g. lockbox agreement or deposit account security agreement.⁶⁵

Practice note: Include a provision in the assignment of rents requiring assignor to deliver all prepaid rents and deposits to assignee.

v. Section 64.054 - Enforcement by Notice to Assignor.

After default, or as otherwise agreed by the assignor, an assignee may give the assignor notice demanding proceeds⁶⁶ of rents that the assignee is entitled to be paid under Section 64.053.⁶⁷ Section 64.054(b) provides that the date assignee begins enforcement under Section 64.054 against an assignor is the date on which an assignee provides a notice to assignor in accordance with Section 64.002. Note that the date enforcement begins with respect to an assignor, i. e. the borrower, is the date assignee provides notice and not the date the assignor receives notice.⁶⁸ Section 64.002 provides

⁶³ *Stewart v. Basey*, 245 S.W.2d 484 (Tex. 1942).

⁶⁴ Tex. Prop. Code §64.061(a) & (b).

⁶⁵ Tex. Bus. & Comm. Code §9.313; for an excellent article on this topic, including forms, see D. Derber, *Assignment of Rents, Absolute, Collateral or Conditional Do We or Should We Care?* (State Bar of Texas, Advanced Real Estate Drafting Course, 2000).

⁶⁶ “Proceeds” means personal property that is received, collected or distributed on account of an obligation to pay rents. Tex. Prop. Code §64.001(8).

⁶⁷ Tex. Prop. Code §64.054(a).

⁶⁸ Tex. Prop. Code §64.054(b).

⁵⁸ Tex. Prop. Code §64.052(d); *Wood v. Parker Square State Bank*, 400 S.W.2d 898, 901 (Tex. 1966); *Moss v. Hipp*, 387 S.W.2d 656 (Tex. 1965).

⁵⁹ See footnote 21 above.

⁶⁰ Tex. Prop. Code §64.053(b).

⁶¹ Proposed TARA § 6(b)(1).

⁶² Tex. Prop. Code §64.053(b)(1). Emphasis added.

multiple methods by which assignee can provide notice and establish the date enforcement begins. This may be accomplished either:

1. by depositing notice with the United States Postal Service or with a commercially reasonable delivery service, properly addressed to the intended recipient's address as specified in subsection (b), with first-class postage or cost of delivery provided for;⁶⁹

2. by sending notice in accordance with Chapter 51 of the Property Code.⁷⁰ Service of notice under Section 51.002(b)(3) of the Property Code by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address;⁷¹ or

3. by sending notice to the intended recipient by any means agreed upon by that person.⁷²

Practice note: Security instrument should contain provisions to the effect (a) on demand, assignor must pay all rents and proceeds to assignee or as it directs, whether or not a default exists, and (b) notice and cure periods, if any are granted, do not affect, extend or modified the date enforcement begins. Standard notices of mortgage loan default sent by mortgage lender's counsel should contain a notice that demands the assignor pay over rents and the proceeds of any rents to which the assignee is entitled.⁷³ Evidence of the date the default notice letter or notice provided by one of the methods should be retained to establish date the notice is received by the assignor and fix the date enforcement begins with respect to the assignor.

An assignee may not enforce an assignment of rents under TARA if the real

property constitutes the assignor's homestead on which was located a one-to-four family dwelling on the date of the security instrument was signed and on the date of prospective performance.⁷⁴

Practice note: Assure the real property from which the rents are derived is not the assignor's homestead.

vi. Section 64.055 - Enforcement by Notice to Tenant.

Notice to the assignor alone will probably not stop tenants from paying rents to the assignor, who may fail or refuse to perform its obligations under the assignment of rents and TARA. Section 64.055(a) provides that, after default, or as otherwise agreed by the assignor, the assignee may give notice to a tenant demanding the tenant pay to assignee all unpaid accrued rents and all unaccrued rents as they accrue. Notice to tenant must be in the form that complies with Section 64.055. The form described in Section 64.056 satisfies those requirements and should be used. **Practice note:** It will be essential that the assignor continuously provide the assignee with up-to-date rent rolls that contain the name and address for notice purposes of each tenant. An assignee cannot send effective notice to a tenant unless it has the most current name and address of that tenant.

A copy of notice sent to a tenant must be given to the assignor.⁷⁵ The notice must substantially comply with the form contained in Section 64.056 and be signed by assignee or its agent or representative. Accordingly, this notice may be given by the assignee's legal counsel or other representative.⁷⁶ **Practice note:** Assignments of rent should provide that the assignee, at its option, may give notice, prior to or after default, to the tenant or the assignor to turn rents and proceeds over to assignee.

The assignee begins enforcement against a tenant on the date on which the tenant receives a notice that complies with Section

⁶⁹ Tex. Prop. Code §64.002(a)(2).

⁷⁰ Tex. Prop. Code §64.002(a)(1).

⁷¹ Tex. Prop. Code §51.002(e).

⁷² Tex. Prop. Code §64.002(a)(3).

⁷³ Tex. Prop. Code §64.053(b).

⁷⁴ Tex. Prop. Code §64.054(c).

⁷⁵ Tex. Prop. Code §64.055(a).

⁷⁶ *Id.*

64.055(a).⁷⁷ Thus, the same notice sent to the assignor and tenant could have different dates of enforcement depending on when the tenant receives the notice. **Practice note:** Assignees should obtain an agreement from each tenant to a “receipt” of the NPROL that occurs very quickly.

UARA provisions relating to tenant notification provide for a list of items that must be included in the notification.⁷⁸ The committee opted to delete those from Proposed TARA and require a form that substantially complies with the form of Notice to Pay Rents to Person Other than Landlord (“NPROL”) now found in Section 64.056.

Subject to the right to delay payment under Section 64.055(d) and any defenses or claims a tenant may under Texas law other than TARA, after receipt of notice in the form of a NPROL, a tenant is obligated to pay to the assignee giving the notice all unpaid accrued rents and all unaccrued rents as they accrue, unless the tenant has previously received a notice from another assignee of rents given by that assignee in accordance with this section and the other assignee has not canceled that notice.⁷⁹ This, of course, sets the stage for arguments between competing assignees of rent. **Practice note:** Mortgage lenders will need to improve both the contractual terms limiting or prohibiting competing assignments of rent and their vigilance against violation of those limitations or prohibitions. Exculpatory provision of loan documents, including guaranties, should be modified to carve out an exception for breach of any limitation or prohibition regarding assignment of rents. Mortgage lenders may find it prudent to treat such breaches as they treat monetary defaults or fraud.

Except as provided in a document signed by a tenant, the tenant is not obligated to pay assignee rent that was prepaid to assignor prior to receipt of a NPROL from assignee.⁸⁰ In

other words, if the assignor obtains one month’s rent prior to its accrual, the tenant does not have to pay that rent to assignee even if it accrues. The assignee will have to look to the assignor for those rents. **Practice note:** Assignees should either require all leases to prohibit prepayment of rents or require all prepaid rent to be paid over to assignee directly or upon receipt by assignor. If the assignor has collected prepaid rent or other deposits prior to the origination of the loan, the aggregate amount of such rents and deposits should be deposited by assignor with assignee.⁸¹

Unless the tenant occupies the premises as tenant’s primary residence, the tenant that pays rent to the assignor is not discharged from the obligation to pay rents to the assignee.⁸² Thus, a tenant could have to pay the same rent obligation twice. **Practice note:** If you represent a tenant, other than a tenant who occupies the premises as tenant’s primary residence, which has received a NPROL, counsel the tenant not to pay rents to the landlord. If you represent a tenant who occupies the premises as tenant’s primary residence and who has received a NPROL, counsel the tenant he or she will be protected by paying rents either to the assignee or to the landlord. If the collateral real property is residential, the case for use of a lockbox by assignee is strengthened.

If a tenant that has received a NPROL pays the rents then due to the assignee, the tenant’s obligation to pay rents is satisfied to the extent of the payment made.⁸³ **Practice note:** If you represent a tenant that has received a NPROL, counsel the tenant to pay rents due to the assignee. Of course, keep careful records and receipts with respect to each such payment.

⁷⁷ Tex. Prop. Code §64.055(b).

⁷⁸ UARA §9(a).

⁷⁹ Tex. Prop. Code §64.055(c)(1).

⁸⁰ Tex. Prop. Code §64.055(c)(2).

⁸¹ Prior to 2005, such deposits might have been considered compensating balances and lead to the reduction of the principal of the loan by the amount in the deposit. *First State Bank of Bedford v. Miller*, 563 S.W.2d 572 (Tex. 1978). To alleviate that problem, the Texas legislature enacted Tex. Fin. Code §276.003 (b), which provides such deposits are not considered a reduction of the amount of proceeds of the extension of credit, *i. e.* the principal.

⁸² Tex. Prop. Code §64.055(c)(3).

⁸³ Tex. Prop. Code §64.055(c)(4).

A tenant's obligation to pay rents to the assignee continues until the earliest date tenant receives a court order directing the tenant to pay the rents in a different manner, a signed notice that a prior perfected security instrument has been foreclosed, or a signed document from the assignee canceling its notice, whichever occurs first.⁸⁴ **Practice note:** If a prior security interest assignee has agreed to a junior security interest assignee with respect to the rents, the agreement between assignees should provide:

1. The junior assignee will not send any NPROL to any tenant without the express, prior written consent of the senior assignee.

2. The junior assignee should grant the senior assignee an irrevocable power of attorney coupled with an interest to send notices or cancellations of notices on behalf or in the name of junior assignee to tenants, assignors or others, including notice of any NPROL given by the junior assignee.

3. If a NPROL is sent by the junior assignee, on written notice from the senior assignee, the junior assignee shall immediately give notice to the tenant in the form of a signed document cancelling the junior assignee's notice, i. e. the NPROL or requirement to pay rents to the junior assignee.

4. The agreement between the senior and junior assignee could take the form of a detailed subordination, intercreditor, or similar agreement.

Unless the tenant has otherwise agreed in a document signed by the tenant, a tenant that has received a NPROL is not in default for nonpayment of rents accruing within 30 days after the date the notice is received before the earlier of:

a. 10 days after the date the next regularly scheduled rental payment would be due; or

b. 30 days after the date the tenant receives the notice or NPROL.⁸⁵

Practice note: Assignments of rent should require that all leases and similar documents expressly waive the benefits of Section 64.055(d) and that the tenant shall be liable for all rents not paid to assignee after the tenant receives the NPROL. The assignment of rent and each lease should provide for the exact address for tenant notice and the date the tenant is deemed to have "received" the NPROL or other notice. All addresses for notice must be within the United States if notice is to be given by certified mail. The method for notice should also be specified and is not limited to those expressly mentioned in Section 64.002. Other methods may be required in the assignment of rents or leases.⁸⁶

When a junior security interest assignee receives notice from a senior security interest assignee it is enforcing its interest in the rents by notice to tenant or that the senior security interest assignee has conducted a foreclosure of title to the real property from which the rents arise, the junior security interest assignee must immediately give a notice to the tenant cancelling all earlier NPROLs.⁸⁷ **Practice note:** This provision has the likelihood of engendering litigation and is another reason for the senior security interest assignee to either prohibit any junior security interest assignees or to insist on a very comprehensive subordination, intercreditor, or similar agreement.

vii. Section 64.056 – Form of Notice to Tenant.

Neither UARA nor Proposed TARA requires any particular form of NPROL, but both contain a form that satisfies the requirements the

⁸⁴ Tex. Prop. Code §64.055(c)(5).

⁸⁵ Tex. Prop. Code §64.055(d).

⁸⁶ Tex. Prop. Code §64.055(a)(3).

⁸⁷ Tex. Prop. Code §64.055(e).

requirements of those Acts. The form notice provided in Proposed TARA has been incorporated in Section 64.056 with a few minor changes. TARA mandates that a form that substantially complies with the NPROL form in Section 64.056 must be used.⁸⁸ That form requires the NPROL name the tenant, describe the premises, including the address, name the landlord, name the assignee and provide its address, name and phone number of a contact person.

The statutory NPROL contains eight number paragraphs that:

- describe the assignment of rents;
- advise the tenant it may contact the assignee for more information;
- state a default exists under the assignment of rents;
- explain the tenant's rights and that tenant may contact a lawyer;
- state tenant must pay rents to assignee;
- state that, if rents are paid to assignee, the payment will satisfy tenant's rental obligation;
- provide if tenant pays rents to the assignor, tenant will not discharge its rental obligation, but payment to the assignee will satisfy that obligation; and
- state if tenant has received a prior NPROL, tenant should continue paying rent to that assignee until tenant receives notice of cancellation.

The NPROL must be signed by the assignee or its agent.

Practice note: If the tenant has agreed to waive its grace period rights under §64.055(d) to delay payment of rent until 30 days after tenant receives notice of assignee's exercise of its rights to rents, tenant should also be required to waive inclusion of the second sentence paragraph 3 of the statutory NPROL, which

provides for the right to delay payment of rent past its due date under the lease and to agree that the revised form satisfies the requirements of Sections 64.055 and 64.056 for all purposes.

Practice note: If a senior assignee has agreed to allow a junior assignee to obtain an assignment of rents, the senior assignee should also require written agreements from the junior assignee, assignor and each tenant to waive inclusion of paragraph 8 of the NPROL and agree that the revised form satisfies the requirements of Sections 64.055 and 64.056 for all purposes.

A revised, assignee-favorable NPROL is appended to this paper.

viii. Section 64.057 - Effect of Enforcement.

This section contains assignee protective provisions. The enforcement of an assignment of rents by notice to the assignor or the tenant, the application proceeds by an assignee under Section 64.059 after enforcement, the payment of expenses under Section 64.058, or an action under Section 64.060 do not:

1. Make the assignee a mortgagee in possession;
2. Make the assignee an agent of the assignor;
3. Constitute an election of remedies;
4. Make the secured obligation unenforceable;
5. Limit any right available to the assignee with respect to the secured obligation, e. g. nonjudicial foreclosure; or
6. Bar a deficiency judgment.

ix. Section 64.058 - Application of Proceeds.

⁸⁸ Tex. Prop. Code §64.055(a).

Unless otherwise agreed, an assignee that collects rents under TARA or a judgment under Section 64.060, must apply rents in the order specified under Section 64.058:

1. Assignee's enforcement expenses, including reasonable attorney's fees;
2. Assignee's expenses to protect or maintain the real property subject to the assignment of rents if the assignee elects or is required to apply the proceeds to those expenses under Section 64.059;
3. Payment of the secured obligation;
4. Payment of any obligation secured by a subordinate security interest or other lien on rents, if before distribution of the proceeds, assignee receives a signed notice from the holder of the interest or lien demanding payment of the proceeds, and
5. The assignor.

Practice note: Assignees should include a provision in the assignment of rents specifying the order in which proceeds should be applied. Care should be taken to assure the order chosen is consistent with the deed of trust and other loan documents. If a senior assignee permits a junior assignee, the senior assignee should obtain a written agreement from the junior assignee specifying how the senior assignee wishes proceeds to be distributed.

x. Section 64.059 – Application of Proceeds to Expenses of Protecting Real Property; Claims and Defenses of Tenants.

Unless otherwise agreed by assignee, an assignee that collects rents following enforcement by notice to the assignor or tenant is not obligated to apply the rents to payment of expenses of protecting or maintaining the real property from which the rents arise.⁸⁹

⁸⁹ Tex. Prop. Code §64.059(a).

Unless otherwise agreed by a tenant, the right of the assignee to collect rents from the tenant is subject to the terms of any agreement between the assignor and tenant or any claim or defense arising from the assignor's nonperformance of that agreement.⁹⁰ **Practice note:** The assignment of rents should include provisions normally contained in a lease subordination agreement, including those that provide or require:

- Each lease to contain a provision pursuant to which tenant waives the exercise of any claim or defense arising from the assignor's performance or nonperformance the lease against assignee or any person acquiring title to the real property at foreclosure or pursuant to a deed in lieu of foreclosure;
- The tenant to agree that the lease and rights of tenant are subordinate to the assignee's deed of trust, assignment of rents and other security instruments;
- That neither (a) assignee by reason of collecting rents pursuant to a notice to assignor or tenant nor (b) assignee or any other person by acquiring title to the real property at foreclosure or deed in lieu of foreclosure will have any liability for nor be bound by:
 - any act or omission of any prior landlord (including assignee) which constitutes a default or breach of the lease;
 - any offsets or defenses that the tenant might be entitled to assert against assignor arising prior to the date assignee takes possession of assignor's interest in the lease or forecloses title to the real property described in the lease;

⁹⁰ Tex. Prop. Code §64.059(b).

- any rent, including prepaid rent or additional rent, that tenant might have paid for more than the current month to any prior landlord (including assignor) unless such rent is actually paid over to assignee;
- any amendment or modification of the lease made without assignee's consent, including any that (i) results in a reduction of rent or other sums due and payable pursuant to the lease (ii) modifies any operating covenant of tenant in the lease, (iii) reduces the term of the lease, (iv) terminates the lease, (v) modifies the terms of the lease regarding surrendering possession of the premises, (vi) provides for payment of rent more than one month in advance (any such prepaid rent to be deposited with assignee), (vii) modifies the permitted uses under the lease or (viii) modifies the provisions regarding tenant's obligation to comply with all laws (including environmental laws) or (ix) materially increases assignor's or decreases tenant's obligations under the lease;
- for any security deposit, rental deposit or similar deposit given by tenant to a prior landlord (including assignor) unless such deposit is actually paid over to assignee by the prior landlord (including assignor);
- for any portion of any tenant allowance or similar amount previously disbursed to assignor by assignee pursuant to the documents evidencing or securing the secured obligation

executed by assignor and assignee;

- for the construction of any improvements required of assignor under the lease in the event assignee or any other person acquires title to the real property or premises prior to full completion and acceptance by tenant of improvements required under the lease;
- for the payment of any leasing commissions or other expenses for which any prior landlord (including assignor) incurred the obligation to pay;
- by any provision of the lease restricting use of other properties owned by assignee or any other person that acquires title to the real property pursuant to foreclosure or deed in lieu of foreclosure.

Suggested provisions modifying Assignors' lease forms to better protect Assignee are appended to this paper. Of course, the provisions must be revised to fit the form and circumstances of the subject transaction.

xi. Section 64.060 – Turnover of Rents; Liability of Assignor.

The section of UARA from which Section 64.060 was derived contained a “good faith” provision. The Texas Supreme Court has rejected implied contractual obligations of good faith in connection with lenders.⁹¹ Neither Proposed TARA nor TARA contains a good faith provision or similar requirement and the exclusion was intentional. **Practice note:** Assignees would still be prudent to include a disclaimer of any duty of good faith or other fiduciary duty to the assignor or any tenant.

⁹¹ *Federal Deposit Insurance Corporation v. Coleman*, 795 S.W.2d 706 (Tex. 1990); *English v. Fisher*, 660 S.W.2d 521 (Tex. 1983).

If an assignor collects rents an assignee is entitled to collect under TARA, the assignor must turn the proceeds over to the assignee within 30 days after notice from assignee under Section 64.054 or such period as may be provided in the security instrument or other document signed by assignor and approved by assignee, less any amount less any expenses authorized by a security instrument or other document signed by the assignee.⁹²

Practice note: The assignor should be required to waive any right to delay turnover of or withhold any amount permitted under Section 64.060(b) for expenses. The assignment of rents should provide that upon the giving of a NPROL, tenant shall (a) immediately turn the proceeds over to assignee and (b) not deduct any portion of the rents for any purpose notwithstanding any other provision of the assignment of rents or other loan document, but shall pay all rents to the assignee.

In addition to any other remedy under TARA or other law of the State of Texas, if an assignor fails to turn over proceeds to the assignee as required by Section 64.060(a), the assignee may recover from the assignor in a civil action the proceeds or an amount equal to the proceeds the assignor was obligated to turn over to the assignee, plus reasonable attorney's fees and costs to the extent provided for in an agreement between assignee and assignor and not prohibited under the laws of Texas other than Chapter 64.⁹³

Such a civil action may be maintained either with or without an action to foreclose the security interest the assignee may have in the real property.⁹⁴ This should help ameliorate the risk such an action might be held to place the real property in *custodia legis* and thus prevent a nonjudicial foreclosure without the court's consent.⁹⁵ An action to enforce the right to possession of severed rents should not be

construed as seeking the courts' assistance with respect to the underlying real property.

Unless otherwise agreed, a junior security interest assignee is not obligated to turn over proceeds it collects before it receives notice from a senior security interest assignee.⁹⁶ However, that same junior security interest assignee must turn over any proceeds it collects after it receives the notice from a senior assignee on or before 30 days after it receives such notice. The assignor is also required to turn over proceeds of rents it receives subsequently within ten days of such receipt.⁹⁷ **Practice note:** A senior security interest assignee that consents to the assignment of a junior security interest in rents should require that the junior security interest assignee agree to hold all rents it collects in trust for the benefit of the senior security interest assignee and to turn those rents and other proceeds over to the senior security interest assignee without notice or demand immediately upon receipt by the junior security interest assignee.

The Legislative Council introduced the undefined terms "subordinate creditor" and "priority assignee".⁹⁸ **Practice note:** Although the risk of misinterpretation or dispute may be low with respect to these terms, counsel may wish to provide definitions to eliminate or minimize such risk.

xii. Section 64.061 - Attachment, Perfection and Priority of Assignee's Security Interest in Proceeds.

An assignee's security interest in rents attaches to identifiable proceeds.⁹⁹ If the security interest in rents is perfected, the security interest in cash proceeds is perfected.¹⁰⁰ In other situations, whether a security interest is perfected, the effect of perfection or non-perfection, and priority is governed by Chapter 9 of the Business and Commerce Code or the

⁹² Tex. Prop. Code §64.060(a).

⁹³ Tex. Prop. Code §64.060(b).

⁹⁴ Tex. Prop. Code §64.060(c).

⁹⁵ *First South Properties, Inc. v. Vallone*, 533 S.W.2d 339 (Tex. 1976).

⁹⁶ Tex. Prop. Code §64.060(d).

⁹⁷ *Id.*

⁹⁸ Tex. Prop. Code §64.060(d).

⁹⁹ Tex. Prop. Code §64.061(a).

¹⁰⁰ Tex. Prop. Code §64.061(b).

comparable provisions of the UCC of another applicable jurisdiction.¹⁰¹ **Practice note:** Real estate practitioners are going to have to become much more familiar with the UCC perfection and priority rules. The description of collateral in financing statements filed in connection with assignment of rents or mortgage loans should include Rents and Proceeds, as defined in TARA.

For the purposes of TARA, cash proceeds are identifiable if they are maintained in a segregated deposit account, or, if commingled with other funds, to the extent they can be identified by a method of tracing, legal or equitable, permitted under the law of the State of Texas with respect to commingled funds.¹⁰²

Practice note: Assignees of rent should require deposit of all rents into a lockbox or other deposit account pursuant to a lockbox agreement, deposit account control agreement, or similar agreement to assure that all rents can be traced and that the perfected security interest in those rents remains perfected.¹⁰³

xiii. Section 64.062 - Priority Subject to Subordination.

TARA does not preclude subordination by agreement by a person entitled to priority.¹⁰⁴ Thus, an assignee that holds a priority security interest in rents could agree to subordinate that interest. For example, if a creditor brings new financing to a project, an existing creditor may subordinate its security interest in rents.

xiv. Section 3 - Application to Existing Relationships.

Except as provided in Section 3(c), TARA is applied retroactively to:

- enforcement of an assignment of rents;
- priority and perfection of a security interest in rents; and
- attachment and perfection of a security interest in proceeds,

regardless of whether the assignment of rent was signed and delivered before the effective date of TARA.¹⁰⁵ Section 3(a) of TARA addresses procedural matters within the police powers of the State of Texas and, although applied retroactively, should pass constitutional muster.¹⁰⁶

Section 3(c) of TARA reads:

“Subsection (a), Section 64.051, Property Code, as added by this Act, applies only to a security instrument signed and delivered on or after the effective date of this Act. A security instrument signed and delivered before the effective date of this Act is governed by the law that applied to the instrument immediately before that date, and the former law is continued in effect for that purpose.”

The first sentence of Section 3(c) clearly applies the automatic creation of an assignment of rents arising from real property described in a security instrument prospectively.

The second sentence of Section 3(c) was added by the Legislative Council. Its intended effect is not entirely clear. Read literally every security instrument signed and delivered before the effective date of TARA is governed by prior law. To give effect to all provisions in Section 3 of TARA, Section 3(a) would apply retroactively to such security instruments. However, because both sentences are in the

¹⁰¹ Tex. Prop. Code §64.061(c).

¹⁰² Tex. Prop. Code §64.061 (d).

¹⁰³ For an excellent article on this topic, including forms, see D. Derber, *Assignment of Real Estate Protecting the Lender's Interest*, The University of Texas School of Law, Bernard O. Dow Leasing Institute (2005).

¹⁰⁴ Tex. Prop. Code §64.062.

¹⁰⁵ TARA §3(a).

¹⁰⁶ See Tex. Const., art. I, § 16; *Barshop v. Medina Underwater Conservation District*, 925 S.W.2d 618, 633-635 (Tex. 1996); *but see*; *Robinson v. Crown Cork & Seal Co, Inc.*, 335 S.W.3d 126 (Tex. 2010).

same subsection, perhaps the Legislative Council intended the second sentence to refer only to Section 64.051(a). That is, to apply TARA retroactively, except for the automatic creation of an assignment of rents under Section 64.051(a).

Practice note: Because Section 3(c) of TARA may be read to apply TARA prospectively only, except as expressly provided in Section 3(a) of TARA, some risk of a *pro tanto* payment of the obligation will continue to exist with respect to true absolute assignments of rent signed and delivered prior to the effective date of TARA. As time goes by and the mortgage loans subject to true absolute assignments are paid off or otherwise disappear, the risk should dwindle away. Lenders and their counsel must continue to be alert for the potential adverse results that may flow from an absolute assignment of rents that comes into existence prior to the effective date of TARA.

TARA does not affect:

- Any action commenced before the effective date of TARA.¹⁰⁷
- The enforceability of an assignee's security interest in rents or proceeds if, immediately before the effective date of TARA, that security interest was enforceable;
- The perfection of an assignee's security interest in rents or proceeds if, immediately before the effective date of TARA, that security interest was perfected; or
- The priority of an assignee's security interest in rents or proceeds with respect to the interest of another person if, immediately before the effective date of TARA, the interest of the other person was enforceable and

perfected, and that priority was established.¹⁰⁸

xv. Section 4 – Effective Date.

As noted above, because TARA was enacted by unanimous vote of both houses, it became effective on June 17, 2011 when the Governor signed the law.

xvi. Section 1 - Conforming Amendments.

Section 1 amends the exclusions to the scope of Chapter 9 of the Business and Commerce Code by defining real property leases and rents by cross-reference to TARA. It will remain for the courts to determine how to simultaneously apply Business and Commerce Code §9.109 (d) (11), as amended by TARA,¹⁰⁹ and Section 64.061(c), which, as noted above, provides that Chapter 9 of the Business and Commerce Code governs in certain situations for the purpose of determining whether a security interest is perfected, the effect of perfection or non-perfection, and priority. The only change to Section 9.109(d) (11) would be the cross-reference to the definitions in TARA. However, Section 9.109(d) would continue to exclude creation or transfer of an interest in or lien on real property, including leases and rents.

In other words, Chapter 9 would continue to exclude from its coverage the creation or transfer of an interest in or lien on real property, including a lease or rents. However, except for security interests in identifiable cash proceeds,¹¹⁰ Chapter 9 would govern the perfection, the effect of perfection or non-perfection, and the priority of security interests in proceeds. While creation and transfer of a security interest are distinct from perfection, the effect of perfection or non-perfection, and the priority of a security interest,

¹⁰⁸ TARA §3(d).

¹⁰⁹ Tex. Bus. & Comm. Code §9.109(d) (11) would be amended to read: “(c) This chapter does not apply to: . . . (11) the creation or transfer of an interest in or lien on real property, including a lease or rents, as defined in Section 64.001, Property Code . . .”.

¹¹⁰ Tex. Prop. Code §64.061.

¹⁰⁷ TARA §3(b).

there will be a strong temptation, if not inclination, for the courts and attorneys to conflate the concepts of UCC law with those of Texas real property, mortgage and foreclosure laws, including Chapter 51 of the Property Code.

The exclusion of the concept of good faith from Section 64.061(a) is indicative of the intent to limit the application of UCC concepts to the interpretation and application of TARA. Except as expressly stated in TARA, UCC concepts should not be extended to apply to TARA or other aspects of real property rents or leases, including foreclosures in connection with those interests. Rather, the narrow list of matters described in Section 64.061(a) should be interpreted as an exhaustive statement of the areas that TARA intends for the UCC to govern in connection with real property rents.

IV. Foreclosure.

TARA does not provide for a separate procedure for foreclosing on rents in which an assignee holds a security interest. If the rents have not been paid (unsevered) from the real property, then the rents will follow the real property in either a nonjudicial or judicial foreclosure. If the rents have been paid or converted to proceeds (severed), then foreclosure must be accomplished in accordance with Chapter 9 of the Business and Commerce Code. Note however, that Chapter 9 provides, in pertinent part:

If a security agreement covers both personal and real property, a secured party may proceed:

(1) under this subchapter as to the personal property without prejudicing any rights with respect to the real property; or

(2) as to both the personal property and the real property in accordance with the rights with respect to the real property, in which case the

other provisions of this subchapter does not apply.¹¹¹

The definition of “security agreement” under Chapter 9 is broad and appears to include an assignment of rents:

“Security agreement” means an agreement that creates or provides for a security interest.¹¹²

Practice note: To avoid any question, mortgage lenders, should include a statement in each assignment of rents that it constitutes a security agreement with respect to personal property described in the assignment of rents.

V. Annotated Assignment of Rents Form.

To assist practitioners in the adaptation of assignments of rent to address TARA, an example is attached to this article. The form was taken from a typical absolute assignment of rents modified to include the provisions addressing the TARA issues referred to above in the Practice Notes. The form has been annotated to indicate the provisions of TARA and other laws that relate to the terms or sections annotated. Of course, any other form of assignment of rents may be adapted to incorporate those clauses or provisions from the form the draftsman finds useful.

The attached form is generic in nature. It is intended as a teaching aid with regard to TARA, but is not intended as an exhaustive treatment of all aspects of assignments of rent under Texas law. The form is lender-favorable. Counsel for borrowers will need to make extensive revisions to address concerns of their clients. Lenders, borrowers, and their legal counsel must modify this form to meet the specific facts and circumstances of each transaction. Because TARA has not been scrutinized by Texas courts, there can be no guarantee that the approaches taken in the attached form will be held enforceable. The

¹¹¹ Tex. Bus. & Comm. Code §9.604 (a).

¹¹² Tex. Bus. & Comm. Code §9.102(a) 74).

author disclaims any intent to provide specific legal advice regarding any actual transaction.

It is not necessary to have an assignment of rents. TARA provides that an enforceable security instrument automatically creates an assignment of rents arising from real property securing an obligation under the security instrument, unless the security instrument provides otherwise.¹¹³ If, for example, an enforceable, deed of trust is recorded in the county in which the real property securing an obligation is located, a perfected security interest will be created automatically in the rents arising from that property. However, that security interest will be subject to the provisions of TARA, which will not create the optimum terms and conditions a creditor could achieve by entering into an express assignment of rents modifying the terms of TARA to the extent allowed by that law.

VI. **Conclusion.**

For almost three decades the Texas courts, mortgage lenders and their counsel have been saddled with the legacy of *Taylor v. Brennan*. Courts are poor vehicles for addressing issues like the creation or perfection of interests in real property rents. A legislative solution was long over-due. TARA represents a comprehensive statutory solution not only for the creating and perfecting such interests, but of the pernicious effects of the *pro tanto* payment rule. While TARA is not perfect, it is a great improvement over prior Texas law.

¹¹³ Tex. Prop. Code §64.052(b).

ANNOTATED ASSIGNMENT OF LEASES AND RENTS¹¹⁴

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.¹¹⁵

Assignment: This Assignment of Leases and Rents

Date:

Assignor:¹¹⁶

Assignor's Address for Notice:¹¹⁷

Assignee:¹¹⁸

Assignee's Address for Notice:¹¹⁹

Secured Obligation:¹²⁰

Note

Date:

Original principal amount:

Payor:

Payee:

Deed of Trust

Date:

Grantor:

Grantee:

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¹¹⁴ Record assignments of rent in the county in which a part of the real property is located. Tex. Prop. Code §11.001. Assignments must be recorded in the manner provided in Tex. Prop. Code §§ 12.001(a) & 13.001(a). Upon recordation, the security interest in rents is perfected. Tex. Prop. Code §64.052(b). See also, 11 U.S.C. §552(b)(2).

¹¹⁵ Tex. Prop. Code §11.08.

¹¹⁶ Tex. Prop. Code §64.001(3), defines "assignor" to mean the owner of real property who makes an assignment of rents, which is typically, but not always, the borrower. Be sure to have the owner of the real property sign the assignment.

¹¹⁷ Tex. Prop. Code §64.002(c).

¹¹⁸ Tex. Prop. Code §64.001(1).

¹¹⁹ Tex. Prop. Code §64.002(b).

¹²⁰ Tex. Prop. Code §64.001(10):

Trustee:

Other or Future Debt or Obligations: ¹²¹

Loan Agreement:

Date:

Borrower:

Lender:

Property (including all improvements): The land described in **Exhibit "A"** attached hereto and made a part hereof and the improvements located thereon.

Prior Assignment of Rents:¹²²

Permitted Exceptions:¹²³

Business Day: Monday through Friday, except a legal holiday or a day on which banking institutions in the State of Texas are authorized by law to be closed.

Certified Rent Roll: A true, correct and complete rent roll for the Property in form satisfactory to Assignee, which shall include a description of all Leases, the names and addresses for notice purposes of all tenants of the Property, the amount of Rents prepaid or payable under each Lease, a description of the premises covered by each Lease, the address of each such premises, the amount and nature of all deposits, and such other information as Assignee, in its sole discretion, may require from time-to-time.

Day: Calendar day.

Event of Default: The failure to timely and fully perform its obligations under this Agreement, the Note, the Deed of Trust or the other Loan Documents by Assignor, Payor, Grantor, or Borrower, as the case may be, or the occurrence of an event of default, default or similar event under and as defined in the Loan Agreement, the Note, the Deed of Trust, any guaranty of the Secured Obligation, or any of the other Loan Documents.

Leases: All leases, subleases, licenses, and all other agreements for the right to possess or occupy the Property or any portion thereof, extensions, modifications, amendments, or similar agreements and assignments thereof.

Loan: The loan evidenced by the Note.

Loan Documents: This Agreement, the Loan Agreement, Note, Deed of Trust, and all other documents evidencing or securing the Secured Obligation or any portion thereof.

Lockbox: Lockbox, deposit account control, or similar agreement.

¹²¹ Tex. Prop. Code §64.052(d); *Wood v. Parker Square State Bank*, 400 S.W.2d 898, 901 (Tex. 1966); *Moss v. Hipp*, 387 S.W.2d 656 (Tex. 1965).

¹²² Insert description of prior assignment(s) of rent, if any.

¹²³ Insert description of exceptions to covenants of title and against encumbrances, if any.

Notice: A signed document containing information that this Chapter requires or permits a person to give to another, including a NPROL.¹²⁴

NPROL: Notice to Pay Rents to Person Other than Landlord.¹²⁵

Rents: All of the rents, income, receipts, revenues, issues, profits, security or other deposits, receivables, cash proceeds or other proceeds¹²⁶ received, collected, or distributed on account of any obligation to pay rents, and other sums of money, including “Rents” as defined in TARA.¹²⁷

TARA: Act of June 17, 2011, 82nd Leg., R.S., ch. 636, 2011 Tex. Gen. Laws to be codified as Tex. Prop. Code, Chapter 64.

Each capitalized term not otherwise defined in this Assignment shall have the meaning specified or used in TARA unless otherwise expressly provided herein or the context requires.

Assignment

For the sum of Ten Dollars (\$10.00) cash in hand paid and other good and valuable consideration paid by Assignee, the receipt and sufficiency of which are hereby acknowledged, Assignor grants, conveys, assigns, transfers and sets over to Assignee the following:

A. all rights, title, interests, estates, powers, privileges, options and other benefits of landlord¹²⁸ in, to and under the Leases, which now or in the future, from time to time, cover or affect all or any portion of the Property; and

B. all Rents that are now or at any time hereafter become due and payable to Assignor under the terms of the Leases or arising or issuing from or out of the Leases or from or out of the Property or any part thereof, including but not limited to minimum rents, additional rents, percentage rents, deficiency rents and liquidated damages following default, security and other deposits, advance rents, prepaid rents, daily rents or room charges, all proceeds payable under any policy of insurance covering loss of rents resulting from untenantability caused by destruction or damage to the Property and all of landlord’s rights to recover monetary amounts from any tenant in bankruptcy including, without limitation, rights of recovery for use and occupancy and damage claims arising out of any Lease default including rejections, under the Federal Bankruptcy Code, including specifically the immediate and continuing right to collect and receive each and all of the foregoing; and

C. any and all guaranties of payment of the Rents.

Agreements

¹²⁴ Proposed TARA §2(8) contained the following definition: “*Notification*” means a signed document containing information that this Chapter requires or permits a person to give to another. The Texas Legislative Council removed that definition from TARA and inserted in its place the undefined term “notice.” This Assignment form provides that a “Notice” has the same meaning that a “Notification” has under TARA.

¹²⁵ Tex. Prop. Code §64.056.

¹²⁶ Tex. Prop. Code §64.001(8); Tex. Prop. Code §64.061 (a) & (b).

¹²⁷ Tex. Prop. Code §64.001(9).

¹²⁸ Note assignment is of landlord’s interest in the Rents and Leases not Assignor’s. The phrase “all right, title, and interest” implies a quitclaim and Assignee will want an assignment of the Rents and Leases, not merely the interest, if any of Assignor. *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763, 769 (1994); *Enerlex, Inc. v. Amerada Hess, Inc.*, 302 S.W.3d 351 (Tex. App.-Eastland 2009, no pet.).

This Assignment is made by Assignor to provide additional security¹²⁹ for the currents and future payment and performance of the Secured Obligation; subject, however, to the terms, provisions and conditions set forth in this Assignment.

1. **Assignor's Representations and Warranties.** Assignor represents and warrants unto Assignee:

- a. Assignor is the sole owner of the entire landlord's interest in the Leases and has marketable title and good right to assign the Leases and Rents hereby assigned [subject to the Prior Assignment of Rents, and the Permitted Exceptions],¹³⁰ and no other person or entity has any right, title, security interest, lien or other interest therein.
- b. Assignor has duly and punctually performed all of the terms, covenants, conditions and warranties of the Leases that were to be kept, observed and performed by it. Assignor will perform all the obligations of the landlord under all Leases
- c. [Except for the Prior Assignment of Rents and the Permitted Exceptions],¹³¹ Assignor has not at any time prior to the date hereof exercised any right to subordinate any Lease to any assignment of leases, assignment of rents, deed of trust, mortgage, security agreement, or any other encumbrance of any kind; that Assignor has not executed any prior assignments of the Leases or the Rents thereunder.¹³²
- d. No Rents reserved in any Lease have been prepaid or anticipated and no Rents for any period subsequent to the date of this Assignment have been collected in advance of the time when the same became due under the terms of the applicable Lease or if any Rents have been prepaid or anticipated, the same have been deposited with Assignee not later than the date this Assignment is executed by Assignor.¹³³
- e. Assignor has performed no act or executed any other security instrument, security agreement, document or other instrument which might prevent Assignee from enjoying and exercising any of its rights and privileges evidenced hereby.
- f. Each of the Leases is valid, enforceable, subsisting and in full force and effect and unmodified.
- g. There exists no defense, counterclaim or set-off to the payment of the Rents under the Leases.
- h. There are no defaults now existing under the Leases and no event has occurred which with the passage of time or the giving of notice or both, would constitute such a default.
- i. The Property is not and, so long as the Secured Obligation or any part thereof shall remain

¹²⁹ All assignments signed and delivered after the effective date of TARA create presently effective security interests in rent; in other words, cannot be absolute assignments of rent, but are collateral assignments, except for a "true sale" of rents [a concept related to bankruptcy] or those described in Tex. Fin. Code §306.101[sometimes referred to as "equity kickers"]. Tex. Prop. Code §64.051(b).

¹³⁰ Remove brackets if applicable. Delete to the extent there are no prior assignments of rent or permitted exceptions.

¹³¹ Remove brackets if applicable. Delete to the extent there are no prior assignments of rent or permitted exceptions.

¹³² Tex. Prop. Code §64.055(e) and Tex. Prop. Code §64.060(d).

¹³³ Tex. Prop Code §64.055 (c) (2).

unpaid or unperformed, the homestead of Assignor.¹³⁴

2. **Assignor's Covenants and Agreements:** Assignor covenants and agrees that, so long as the Secured Obligation or any part thereof shall remain unpaid or unperformed:

- a. Assignor will grant no security interest¹³⁵ in and will make no assignment, pledge or disposition of the Leases or the Rents or Proceeds thereunder;¹³⁶ nor will Assignor subordinate any of the Leases to any deed of trust, mortgage, or any other encumbrance of any kind or permit, consent or agree to such subordination; nor will Assignor reduce the Rents payable under any of the Leases, modify, alter or amend the Leases or waive, excuse, condone, discount, set off, compromise or in any manner release or discharge any tenant under any Lease of and from any obligations, covenants, conditions and agreements to be kept, observed and performed by the tenant, including the obligation to pay the Rents thereunder in the manner and at the place and time specified therein; nor will Assignor incur any indebtedness to a tenant under or guarantor of any Lease which may under any circumstance be used as an offset against the Rents or other payments due under said Lease; nor will Assignor exercise any option required or permitted by the terms of any of the Leases without the prior written consent of Assignee; nor will Assignor receive or collect any Rents from any present or future tenant of the Property or any part thereof except in trust for Assignee and then only for such periods not to exceed one month in advance of the date on which such payment is due and shall deposit the same with Assignee to be held by Assignee as additional security for the payment and performance of the Secured Obligation;¹³⁷ nor will Assignor cancel or terminate any of the Leases, accept a surrender thereof, commence an action of ejectment or any summary proceedings for dispossession of a tenant under any of the Leases, or convey or transfer or suffer or permit a conveyance or transfer of the premises demised thereby or of any interest therein so as to effect directly or indirectly, proximately or remotely, a merger of the estates and rights of, or a termination or diminution of the obligations of any tenant thereunder; nor will Assignor consent to an assignment or sublease of the interest and estate of any tenant under any of the Leases, whether or not in accordance with its terms; nor will Assignor modify or change the terms of any guaranty of any of the Leases or cancel or terminate such guaranty; nor will Assignor enter into additional Leases covering any portion of the Property, or renew or extend the term of any Lease unless an option therefor was originally reserved by the tenant in the Lease for a fixed and definite rental, or relocate or expand the floor space of any tenant under a Lease within the Property, without first having obtained the written consent of Assignee; and any such acts, if done or permitted to be done without prior consent of Assignee, shall be null and void.
- b. To observe and perform duly and punctually all of the obligations imposed upon any landlord under the Leases and not to do or permit to be done anything to impair the value thereof; to enforce the performance of each and every term, provision, covenant, agreement and condition in the Leases to be performed by any tenant thereunder.

¹³⁴ Tex. Prop. Code §64.054(c).

¹³⁵ Because all assignments of rent will constitute security interests, it is a security interest that must be prohibited as well as assignments of rent.

¹³⁶ Tex. Prop. Code §64.060(d).

¹³⁷ Tex. Prop. Code §64.052(b). Upon recording of the assignment of rents, the security interest in rents is perfected. Perfection continues in identifiable proceeds. Tex. Prop. Code §64.061 (a) & (b). If proceeds become unidentifiable, perfection could be lost. To forestall this risk, rent should be paid into a lockbox or a deposit account in which Assignee has a perfected security interest and control of the funds deposited. It would be prudent for the Assignment to describe in detail the lockbox or deposit into which rents are to be deposited.

- c. To appear in and defend any action or proceeding arising under, occurring out of or in any manner connected with any of the Leases, or the obligations, liabilities or duties of Assignor or any tenant under the Leases and, upon request by Assignee.
- d. To make appearance in the name and on behalf of Assignee, but at the expense of Assignor; to exercise any option or election contained in or relating to any of the Leases which Assignee shall require; at Assignee's request to assign and transfer to Assignee by specific Assignment of Leases and Rents, in the form of this Assignment, any and all subsequent Leases upon all or any part of the Property (it being understood and agreed that no such specific assignment shall be required for such subsequent Leases to be covered by and included within this Assignment as provided herein).
- e. To promptly deliver to Assignee executed copies of any and all Leases, renewals and extensions of existing Leases and any and all subsequent Leases upon all or any part of the Property.
- f. To execute and deliver at the request of Assignee all such further assurances and assignments in the Property or portion thereof covered by the Leases or Rents as Assignee shall from time to time require and to deliver other records and instruments, including but not limited to rent rolls and books of account certified by Assignor to be true, correct and complete, that Assignee shall from time to time require.
- g. Assignee's collection of Rents does not relieve Assignor of any obligations in the Note and the Deed of Trust.
- h. Neither acceptance of this Assignment nor any other act of Assignee under this Assignment will be construed as a waiver of the priority of the liens or security interests contained in the Deed of Trust or any other Loan Document as to any Lease or other contract affecting the Property.
- i. Assignor will promptly inform Assignee of all material events concerning the Leases or Rents.
- j. Assignor will keep accurate records of all aspects of Leases and on request will make them available for Assignee's examination or that of Assignee's representatives.
- k. Assignee does not have or assume any obligations as landlord to any tenant of the Property.
- l. Assignee may exercise Assignee's rights and remedies in this Assignment without taking possession of the Property.

3. **Notice to Pay Rents to Person Other Than Landlord:** Assignor covenants with Assignee, for so long as the Secured Obligation or any part thereof shall remain unpaid or unperformed, to cause each Lease or a separate document signed by the tenant to contain provisions providing:

- a. the address to which all Notices, as defined below, including any NPROL, required or permitted to be sent to the tenant¹³⁸ are sent; such address may not be change unless 30 days prior written notice is given to Assignee and such address must be within the United States

¹³⁸ Tex. Prop. Code §64.002(d).

of America;¹³⁹

- b. tenant agrees that the Lease and the rights of tenant are subordinate to the Deed of Trust, this Assignment and each other document evidencing or securing the indebtedness evidenced by the Note;¹⁴⁰
- c. tenant waives the exercise of any claim or defense arising from the Assignor's performance or nonperformance the Lease against assignee or any person acquiring title to the real property at foreclosure or pursuant to a deed in lieu of foreclosure;¹⁴¹
- d. upon the receipt of a NPROL, whether prior to or after default in connection with the Secured Obligations, tenant shall:¹⁴²
 - i. notwithstanding Tex. Prop. Code §64.055(d), immediately turn over all Proceeds, as defined in TARA, Assignee is entitled to collect under Tex. Prop Code §64.054;
 - ii. not deduct any portion of the rents for any purpose, notwithstanding any other provision of TARA, this Assignment, the Deed of Trust or other loan document; and
 - iii. shall pay all Rents as they accrue to the Assignee.
- e. tenant unconditionally:
 - i. waives any right to delay payment of rent as contemplated by Tex. Prop. Code §64.056 or paragraph 3 of the statutory form of NPROL and agrees that the second sentence of paragraph 3 may be deleted from any NPROL sent to tenant; and
 - ii. waives any right to continue paying Rents to any person other than Assignee as contemplated by Texas Prop. Code §64.056 or paragraph 8 of the statutory form of NPROL and agrees that paragraph 8 may be deleted from any NPROL sent to tenant;
- f. to the extent the Lease contains any notice or cure periods, the date Assignee begins enforcement,¹⁴³ as contemplated by TARA, shall not be affected, extended, or otherwise modified by reason of such periods each of which are waived with respect to Assignee;
- g. tenant agrees that Assignee owes tenant no fiduciary duty, duty of good faith or similar duty or obligation;
- h. neither (A) Assignee by reason of collecting rents pursuant to a Notice to Assignor or tenant nor (B) Assignee or any other person acquiring title to the Property at foreclosure

¹³⁹ Tex. Prop. Code §51.002(b)(3) requires notice be sent by certified mail. U. S. Postal Service Domestic Mail Manual §3.3.2 provides: Available Destinations Certified Mail may be addressed for delivery only in the United States and its territories and possessions, through APOs and FPOs, or through the United Nations Post Office, New York.

¹⁴⁰ Tex. Prop. Code §64.059(b).

¹⁴¹ *Id.*; Tex. Prop. Code §64.055(c).

¹⁴² Tex. Prop. Code §64.055(d).

¹⁴³ Tex. Prop. Code §64.053 (b), 64.054(b), & 64.055(b).

or deed in lieu of foreclosure shall have any liability for nor be bound by:¹⁴⁴

- i. any act or omission of any prior landlord (including Assignor) which constitutes a default or breach of the Lease;
 - ii. any offsets or defenses that the tenant might be entitled to assert against Assignor¹⁴⁵ arising prior to the date Assignee takes possession of Assignor's interest in the Lease or forecloses title to the Property;
 - iii. any rent or additional rent which tenant might have paid for more than the current month to any prior landlord (including Assignor);
 - iv. any amendment or modification of the Lease made without Assignee's consent that (A) results in a reduction or rent or other sums due and payable pursuant to the Lease (B) modifies any operating covenant of tenant in the Lease, (c) reduces the term of the Lease, (C) terminates the Lease, (D) modifies the terms of the Lease regarding surrendering possession of the premises, (E) provides for payment of rent more than one month in advance, (F) modifies the permitted uses under the Lease or (G) modifies the provisions regarding tenant's obligation to comply with all laws (including environmental laws) or (H) materially increases Assignor's or decreases tenant's obligations under the Lease;
 - v. for any security deposit, rental deposit or similar deposit given by tenant to a prior landlord (including Assignor) unless such deposit is actually paid over to Assignee by the prior landlord (including Assignor);
 - vi. for any portion of any tenant allowance or similar amount previously disbursed to Assignor by Assignee pursuant to the documents evidencing or securing the Secured Obligations;
 - vii. for the construction of any improvements required of Assignor under the Lease if Assignee or any other person acquires title to the Property or premises prior to full completion and acceptance by tenant of improvements required under the Lease;
 - viii. for the payment of any leasing commissions or other expenses for which any prior landlord (including Assignor) incurred the obligation to pay; or
 - ix. by any provision of the Lease restricting use of other properties owned by Assignor or any other person that acquires title to the Property pursuant to foreclosure or deed in lieu of foreclosure, as landlord.
- i. the prepayment of Rents is prohibited, unless such prepaid Rents are immediately paid to or deposited with Assignee;¹⁴⁶
 - j. tenant waives the benefits of tenant under Tex. Prop. Code §64.055(d) and agrees it shall be liable for all Rents not paid to Assignee after the tenant receives a NPROL from Assignee;

¹⁴⁴ Tex. Prop. Code §64.059(b).

¹⁴⁵ Tex. Prop. Code §64.055(c).

¹⁴⁶ Tex. Prop. Code §64.055(c)(2).

and

- k. any Notice, including a NPROL, from the Assignee to the tenant shall be deemed to have been received by the tenant¹⁴⁷ on the earliest of (i) the date of actual receipt by the tenant, (ii) _____ (____) days after the same is sent to the address for Notice specified in the Lease via a commercially reasonable delivery service, e. g. Federal Express or UPS, by first class mail, _____ [specify any other means],¹⁴⁸ or (iii) when deposited in the U. S. Mail in accordance with Tex. Prop. Code §51.002(e).

4. **Receipt, Deposit, and Application of Rents:**¹⁴⁹

- a. Concurrently with the execution of this Assignment, Assignor has entered into a Lockbox for the benefit of Assignee. Assignor covenants and agrees to cause all Rents and Proceeds to be received and deposited into a deposit account or accounts in accordance with the terms of the Lockbox.
- b. Without limiting the obligation of Assignor under Section 4(a) above, Assignor covenants and agrees to receive all Rents and Proceeds that have not been deposited into a deposit account or accounts pursuant to the Lockbox as a fund held in trust for the benefit of Assignee to be applied as directed by Assignee for the payment and performance of the Secured Obligations, including payment of the Note and the payment and performance of the Deed of Trust, the indebtedness evidenced or secured thereby, and the obligations as set forth therein or in this Assignment.
- c. Prior to the occurrence of an Event of Default or an event, which with notice or lapse of time or both may become an Event of Default, Assignee will apply Rents and Proceeds deposited into a deposit account or accounts pursuant to the Lockbox as follows:¹⁵⁰
 - i. First, to the payment of the Secured Obligations.
 - ii. Second, to the payment of taxes and assessments upon the Property before penalty or interest is due thereon, including the escrow of amounts for the payment of the same when due.
 - iii. Third, to the cost of insurance, maintenance and repairs required by the terms of the Deed of Trust, including the escrow of amounts for the payment of the same when due.
 - iv. Fourth, to the payment of expenses of maintenance, management or operation of the Property, which amounts may be released to Assignor or paid directly to third parties to whom such amounts are owed. Such payments may, at the discretion of

¹⁴⁷ Tex. Prop. Code §64.055(b).

¹⁴⁸ Tex. Prop. Code §64.002(a)(3) & (d).

¹⁴⁹ Tex. Prop. Code §64.061 (a) & (b). Assignor should be required to enter into a lockbox, deposit security account or similar agreement to provide for control and identification of Proceeds by Assignee. Rents converted to Proceeds may become unidentifiable. Assignee can limit this risk by requiring Assignor to enter into a lockbox or similar agreement. If no lockbox or similar agreement exists, the risk Proceeds will become unidentifiable will be higher. Although use of a lockbox should be the default requirement, if Rents or Proceeds cannot readily be deposited pursuant to a lockbox, for example from a carwash or coin laundry property, it will be necessary to modify the Assignment to provide for the specific items to which Assignor must apply the Rent and Proceeds.

¹⁵⁰ Cf. order of application of collected Rents under TARA. Tex. Prop. Code §64.058.

Assignee, be made subject to receive of evidence satisfactory to Assignee of the completion of the performance of such of maintenance, management or operation in a first class manner, free of all liens and claims whatsoever. Without limiting the foregoing, Assignee may, at its sole discretion, require recordable releases or waivers of all such liens or claims.

- v. Fifth, to the satisfaction of all obligations specifically set forth in the Leases.
 - vi. Sixth, the balance to Assignor.
- d. Upon the occurrence of an Event of Default or an event, which with notice or lapse of time or both may become an Event of Default, Rent, Proceeds and all amounts in the deposit account or accounts established pursuant to the Lockbox shall be paid to and applied by Assignee as provided in Section 5 of this Assignment.
5. **Notice:** Notwithstanding any other provision of this Assignment, Assignor may only collect such Rents and Proceeds on behalf of Assignee until the giving by Assignee of Notice to Assignor to pay Rents and Proceeds to Assignee or the receipt of a NPROL by any or all tenants of the Property from Assignee. The term “**Notice**” includes a NPROL and any other notice required or permitted to be sent to the tenants of the Property. To the extent the Note, Deed of Trust or any other document evidencing the Secured Obligation contains any notice or cure periods, the date enforcement begins, as contemplated by TARA, shall not be affected, extended, or otherwise modified by reason of such periods.¹⁵¹ Upon the giving of such Notice by Assignee and notwithstanding the terms of the Lockbox:
- i. Assignor shall pay to Assignee all Rents and Proceeds to which Assignee is entitled under this Assignment, the Deed of Trust or any other document securing payment of the Note, without any deduction, set-off, or other reduction of any kind.
 - ii. Each tenant under the Leases is hereby authorized and directed to pay directly to Assignee all Rents thereafter accruing.
 - iii. The unconditional payment to and receipt of Rent by Assignee as provided herein shall be a release of such tenant to the extent of all amounts so paid.¹⁵²
- b. Receipt by a tenant under a Lease of a NPROL from Assignee shall be sufficient authorization for such tenant to make all future payments of Rents directly to Assignee and each such tenant shall be entitled to rely on such Notice and shall have no liability to Assignor for any Rents paid to Assignee after receipt of such Notice. Rents received by Assignee after giving a Notice for any period prior to foreclosure under the Deed of Trust or acceptance of a deed in lieu of such foreclosure shall be applied¹⁵³ by Assignee to the payment (in such order as Assignee shall determine) of:
- i. The Secured Obligation in such order as Assignee in its sole discretion may determine.¹⁵⁴

¹⁵¹ Tex. Prop. Code §§64.053 (b), 64.054(b), & 64.055(b).

¹⁵² Tex. Prop. Code §64.055(c)(4).

¹⁵³ Assure provisions of Deed of Trust and other loan documents for the application of Rent or Proceeds do not conflict with the provisions of this section.

¹⁵⁴ Cf. Tex. Prop. Code §64.058.

- ii. To the extent approved in writing by Assignee but not otherwise, all *bona fide* expenses of managing the Property, including but not limited to the salaries, fees and wages of a managing agent and such other employees as Assignee may deem necessary or desirable; all expenses of operating and maintaining the Property, including but not limited to all *ad valorem* taxes, assessments, charges, claims, utility costs and premiums for insurance, and the cost of all alterations, renovations, repairs or replacements; all expenses incident to taking and retaining possession of the Property or collecting the Rents due and payable under the Leases.¹⁵⁵ Provided, Assignee shall not be obligated to apply Rents or Proceeds received by the Assignee to payment of the expenses of operating or maintaining the Property and shall have no liability for its failure or refusal to do so. If Assignee shall, at its discretion, pay any such expense, such payment shall not be deemed or construed as a waiver of the preceding sentence or Tex. Prop. Code §64.059.
- c. The provisions of this Section for Notice to tenants under the Leases are intended solely for the benefit of Assignee and each such tenant and shall never inure to the benefit of Assignor or any person claiming by, through or under Assignor (other than a tenant under a Lease).
- d. In no event will this Assignment reduce the Secured Obligation, except to the extent, if any, that Rents are actually received by Assignee and applied (after said receipt) to the Secured Obligation. Without impairing its right hereunder, Assignee may, at its option, at any time and from time to time, release to Assignor Rents so received by Assignee or any part thereof. As between Assignor and Assignee, and any person claiming by, through or under Assignor, this Assignment is intended to be the grant of a presently effective first priority lien and security interest in the Rents and Leases.¹⁵⁶

6. **Notices:** Notwithstanding any other provisions of this Assignment or any provision of TARA, all notices or other communications required or permitted to be given pursuant to this Assignment shall be in writing and shall be considered as properly given if mailed by first class United States mail, postage prepaid, or by delivering the same in person to the intended addressee or by recognized courier service, for example Federal Express or UPS.¹⁵⁷ Notice so mailed shall be effective upon deposit in a post office, other official depository, or recognized courier service under the care and custody of such entity. Notice, including with respect to notice in the form of a NPROL, given in any other manner shall be effective to the extent such notice authorized by TARA, the Deed of Trust, or Texas Property Code Section 51.002. For purposes of notice, the addresses of the parties shall be as set forth in the opening recitals of this Assignment; provided, however, that Assignee and Assignor shall have the right to change their address for notice hereunder to any other location within the United States of America by the giving of thirty (30) days' prior written notice to the other party in the manner set forth hereinabove.

7. **Prepaid Rent and Deposits:** If, prior to the date of this Assignment, Assignor has collected any prepaid Rents or deposits of any kind with respect to any Lease, Assignor, concurrently with the execution of this Assignment, shall deposit all such prepaid Rents and deposits into the Lockbox to be

¹⁵⁵ Tex. Prop. Code §64.059. Unless agreed to by the assignee, the assignee is not obligated to apply rents received by the assignee to the payment of expenses for operating or maintaining the Property.

¹⁵⁶ Tex. Prop. Code §64.051(b). Revise to the extent any Prior Assignment of Rents or similar Permitted Exception exists.

¹⁵⁷ Tex. Prop. Code §64.002(a).

held as additional security for the payment and performance of the Secured Obligation.¹⁵⁸

8. **Certified Rent Roll:** Concurrently with the execution of this Assignment Assignor shall deliver to Assignee a Certified Rent Roll. Each Certified Rent Roll shall be certified by the Assignor to be current, true, correct and complete in all respects. Immediately upon any change whatsoever in any of the information required to be included in the Certified Rent Roll, Assignor shall send an updated Certified Rent Roll to Assignee. Without limiting the foregoing, Assignor shall send Assignee an updated Certified Rent Roll to Assignee no less frequently than every calendar month not later than the _____ day of each calendar month. Assignor agrees and acknowledges that, but for the agreements of Assignor contained in this paragraph, Assignee would not have agreed to extend the credit evidenced by the Note. Time is of the essence of this paragraph.

9. **Waiver of Right to Withhold Expenses:** Assignor waives any right to withhold any amount permitted under Tex. Prop. Code §64.060(a) for expenses or any other purpose.

10. **Demand for and Suit to Collect Rents:** Assignor covenants that at any time during which Assignor is receiving Rents directly from tenants under the Leases, Assignor shall, upon receipt of written direction from Assignee, make demand or sue for all Rents due and payable under or in connection with one or more Leases, as directed by Assignee, as it becomes due and payable, including Rents that are past due and unpaid. If Assignor fails to take such action, or at any time during which Assignee is not receiving Rents directly from tenants under the Leases, Assignee shall have the right (but shall be under no duty) to demand, collect and sue for, in its own name or in the name of the Assignor, all Rent due and payable under the Leases, as it becomes due and payable, including Rents which are past due and unpaid.

11. **Disclaimer and Indemnity:** Assignor agrees that Assignee shall not be liable for any loss sustained by Assignor resulting from Assignee's failure to let the Property, or any part thereof, or from any other act or omission of Assignee under or relating to the Leases, INCLUDING ANY LOSS BASED ON THE NEGLIGENCE OF ASSIGNEE, nor shall Assignee be obligated to perform or discharge any obligation, duty or liability under the Leases by reason of this instrument or the exercise of rights or remedies hereunder. Assignee shall not be liable for its failure to collect, or its failure to exercise diligence in the collection of, Rents under the Leases, but shall be accountable only for Rents that Assignee actually receives. Assignor will indemnify and hold harmless Assignee (for purposes of this paragraph, the term "Assignee" shall include the directors, officers, partners, employees and agents of Assignee and any person or entities owned or controlled by, owning or controlling, or under common control or affiliated with Assignee) from and against, and reimburse Assignee for, all claims, demands, liabilities, losses, damages, causes of action, judgments, penalties, costs and expenses (including, without limitation, reasonable attorneys' fees and costs of appeal) incurred under the Leases by reason of this instrument or the exercise of rights or remedies hereunder, or which may be asserted against Assignee by reason of any alleged obligations or undertakings on its part to perform or discharge any of the terms, covenants or agreements contained in the Leases, including specifically any obligation or responsibility for any security deposits or other deposits delivered to Assignor by any tenant under any Lease and not actually delivered to Assignee, INCLUDING ANY OF THE FOREGOING BASED ON THE NEGLIGENCE OF ASSIGNEE. The indemnities contained in this paragraph shall include claims, demands, liabilities, losses, damages, causes of action, judgments, penalties, costs and expenses (including without limitation, reasonable attorney's fees) resulting from THE NEGLIGENCE OF ASSIGNEE. The foregoing indemnities shall not terminate upon release or other termination of this Assignment. Any amount to be paid under this Paragraph by Assignor to Assignee shall be a demand obligation owing by Assignee to Assignee, shall bear interest from the date such amount becomes due until paid at the rate of interest payable on matured but unpaid principal of or interest on the Note and shall be secured by the Deed of Trust and by any other instrument securing the Note. This Assignment shall

¹⁵⁸ Tex. Prop. Code §64.055(c)(2); Tex. Fin. Code §276.003 (b).

not operate to place responsibility upon Assignee for the control, care, management or repair of the Property, nor for the carrying out of any of the terms and conditions of the Leases; nor shall it operate to make Assignee a mortgagee in possession¹⁵⁹ or responsible or liable for any waste committed on the Property by the tenants or by any other parties or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee or stranger.

12. **Security Instrument:** This Assignment shall be construed as, constitute and serve as a security instrument under TARA and a security agreement¹⁶⁰ with regard to Rents, Leases, Proceeds, and other personal property described in this Assignment within the meaning of a first and prior pledge and assignment and a first and prior lien and security interest under the Uniform Commercial Code (being Chapter 9 of the Texas Business and Commerce Code as to the property within the scope thereof and situated in the State of Texas).¹⁶¹

13. **Savings and Spreading.** It is expressly stipulated and agreed to be the intent of Assignor and Assignee at all times to comply with the applicable Texas law governing the maximum rate or amount of interest payable on or in connection with the Loan and this Assignment (or applicable United States federal law to the extent that it permits the Assignee to contract for, charge, take, reserve or receive a greater amount of interest than under Texas law). If the applicable law is ever judicially interpreted so as to render usurious any amount called for under this Assignment or any other Loan Document, or contracted for, charged, taken, reserved or received with respect to the Loan, or if acceleration of the maturity of the Loan or if any prepayment by Assignor results in Assignor having paid any interest in excess of that permitted by law, then it is Assignor's and Assignee's express intent that all excess amounts theretofore collected by Assignee be credited on the principal balance of the Loan (or, if the Loan has been or would thereby be paid in full, refunded to Assignor), and the provisions of this Assignment and the other Loan Documents immediately be deemed reformed and the amounts thereafter collectible hereunder and thereunder reduced, without the necessity of the execution of any new documents, so as to comply with the applicable law, but so as to permit the recovery of the fullest amount otherwise called for hereunder and thereunder. The right to accelerate maturity of the Loan does not include the right to accelerate any interest which has not otherwise accrued on the date of such acceleration, and Assignee does not intend to collect any unearned interest in the event of acceleration. All sums paid or agreed to be paid to Assignee for the use, forbearance or detention of the indebtedness evidenced hereby shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the full term of such indebtedness until payment in full so that the rate or amount of interest on account of such indebtedness does not exceed the applicable usury ceiling.

14. **Remedies:** Assignor agrees that this Assignment is primary in nature to the obligation evidenced and secured by the Note, the Deed of Trust and any other document given to secure and collateralize the indebtedness secured by the Deed of Trust and that any default under this Assignment is and shall be a default under the Deed of Trust. Assignor agrees that Assignee may enforce this Assignment without first resorting to or exhausting any security or collateral securing the payment of the Note; provided however, that nothing herein contained herein shall constitute an election of remedies, prevent Assignee from suing on the Note or any guaranty of the Secured Obligation or any part thereof, foreclosing the Deed of Trust or exercising any other right under any document evidencing or securing the payment or performance of the Secured Obligation, including the Note, or at law or in equity.

15. **Bankruptcy of Tenant:** Assignor covenants and agrees that so long as the Secured

¹⁵⁹ Tex. Prop. Code §64.057.

¹⁶⁰ Tex. Bus. & Comm. Code §9.102(a) 74).

¹⁶¹ Tex. Prop. Code §64.061(c).

Obligation remains unpaid or unperformed, if any tenant under the Leases should be the subject of any proceeding under the Federal Bankruptcy Code or any other federal, state or local statute which provides for the possible termination or rejection of any of the Leases assigned hereby, if any Lease is so rejected, no settlement for damages shall be made without the prior written consent of Assignee, and any check in payment of damages for rejection of any such Lease or with respect to any Rents relating to any such Lease will be made payable to Assignee to the fullest extent permitted by law. Assignor hereby assigns any such payment to Assignee and further covenants and agrees that upon the request of Assignee, it will duly endorse to the order of Assignee any such check, the proceeds of which will be applied to the Secured Obligation in such order as Assignee in its sole discretion may determine.

16. **No Waiver:** Assignor agrees with Assignee that nothing contained herein and no act done or omitted by Assignee pursuant to the powers and rights granted Assignee hereunder shall be deemed to be a waiver by Assignee of its rights and remedies under the Note and the Deed of Trust or a waiver or curing of any default hereunder or under the Note or the Deed of Trust, and this Assignment is made and accepted without prejudice to any of the rights and remedies possessed by Assignee under the terms of the Note, the Deed of Trust or any other document evidencing or securing the Secured Obligation.¹⁶² The right of Assignee to collect said principal sum, interest and other indebtedness and to enforce any security therefor held by it may be exercised by Assignee either prior to, simultaneously with, or subsequent to any action taken by it hereunder.

17. **No Fiduciary Obligation or Duty of Good Faith:** Assignor represents, covenants, and agrees that Assignee owes Assignor no fiduciary duty, duty of good faith or similar duty or obligation and waives all such duties and obligations.

18. **No Exculpation:** Notwithstanding any exculpatory provisions contained in the Note, Deed of Trust or any other Loan Document, or TARA, Assignor and each guarantor of the Secured Obligation shall have full liability, jointly and severally, for all Rents and proceeds thereof Assignee is entitled to collect that are not turned over to Assignee.¹⁶³ If any term of the Note, Deed of Trust, this Assignment, or any other Loan Document, conflicts with the provisions of this Section, the terms of this Section shall control.

19. **Termination:** If the Secured Obligation is paid and performed as the same becomes due and payable or performable and if all of the covenants, warranties, undertakings and agreements made in the Note, Deed of Trust, other documents evidencing or securing payment or performance of the Secured Obligation, and in this Assignment are kept and performed, then this Assignment shall become null and void and of no further force and effect, but no tenant under the Leases shall be required to take notice of such termination until a copy of a release of the Deed of Trust and this Assignment shall have been delivered to such tenant.

20. **Release of Security:** Assignor agrees that Assignee may take or release any security for the payment of the Note and other indebtedness secured by the Deed of Trust, may release any party primarily or secondarily liable therefor and may apply any security held by it to the satisfaction of the Note and such other indebtedness secured by the Deed of Trust without prejudice to any of its rights under this Assignment.

21. **No Impairment:** Assignor agrees that Assignee may at any time and from time to time in writing (a) waive compliance by Assignor with any covenant herein made by Assignor to the extent and in the manner specified in such writing; (b) consent to Assignor doing any act which hereunder Assignor

¹⁶² Tex. Prop. Code §64.057

¹⁶³ Tex. Prop. Code §64.055.

is prohibited from doing, or consent to Assignor failing to do any act which hereunder Assignor is required to do, to the extent and in the manner specified in such writing; or (c) release any part of the Property and/or the Leases, or any interest therein, from this Assignment. No such act shall in any way impair the rights of Assignee hereunder except to the extent specifically agreed to by Assignee in such writing.

22. **Renewals, Extensions, or Other Modifications:** Assignor agrees that the rights and remedies of Assignee hereunder shall not be impaired by any indulgence, including but not limited to (a) any renewal, extension or modification which Assignee may grant with respect to any Secured Obligation, (b) any surrender, compromise, release, renewal, extension, exchange or substitution which assignee may grant in respect of the Property, the Leases, the Rents, Proceeds, or any part thereof or any interest therein, or (c) any release or indulgence granted to any endorser, guarantor or surety of any Secured Obligation.

23. **Severability:** Assignor agrees that a determination that any provision of this Assignment is unenforceable or invalid shall not affect the enforceability or validity of any other provision and any determination that the application of any provision of this Assignment to any person or circumstance is illegal or unenforceable shall not affect the enforceability or validity of such provision as it may apply to any other persons or circumstances.

24. **No Merger:** Assignor agrees that notwithstanding (a) that any Lease or the leasehold estate created thereby may be held, directly or indirectly, by or for the account of any person or entity which shall have an interest in the fee estate of the Property, (b) the operation of law or (c) any other event, tenant's leasehold estate under such Lease shall not merge into the fee estate and the tenant shall remain obligated under such Lease as assigned by this Assignment.

25. **Binding Effect:** Assignor agrees and covenants with Assignee that this Assignment and the terms, provisions, representations and warranties herein contained shall be binding upon Assignor and Assignor's successors and assigns, and all subsequent owners of the Property and shall inure to the benefit of Assignee and Assignee's successors and assigns, including all subsequent holders of the Note and the Deed of Trust. All references in this Assignment to Assignor or Assignee shall be deemed to include all such successors and assigns of such respective party.

26. **Controlling Agreement.** If the provisions of this Assignment conflict with any of the other Loan Documents, it is the intent of the parties hereto that the provisions of this Assignment shall control.¹⁶⁴ The parties hereto acknowledge that they were represented by competent counsel in connection with the negotiation, drafting and execution of this Assignment and the other Loan Documents and that such Loan Documents shall not be subject to the principle of construing their meaning against the party which drafted same.

27. **Headings.** The section or paragraph headings or entitlements hereof are inserted for convenience of reference only and shall in no way alter, modify, or define, or be used in construing the text of such Sections.

28. **Counting of Days.** If any time period ends on a Saturday, Sunday or holiday officially recognized by the state within which the Property is located (whether legal or religious in nature), the period shall be deemed to end on the next succeeding business day.

29. **Assignee's Discretion.** Whenever pursuant to this Assignment, Assignee exercises any right given to it to approve or disapprove, or any arrangement or term is to be at the discretion of or

¹⁶⁴ Assure that "controlling agreement" or similar provisions in the other Loan Documents do not conflict with this Section.

satisfactory to Assignee, the decision of Assignee to approve or disapprove or to decide whether arrangements or terms are acceptable or unacceptable or satisfactory or not satisfactory shall be in the sole discretion of Assignee and shall be final and conclusive.

30. **Certain Terms; Gender and Number:** Assignor agrees that within this Assignment: the term “**tenant**” includes the terms “**lessee**” and “**licensee**”;¹⁶⁵ the term “**landlord**” includes the terms “**lessor**” and “**licensor**”;¹⁶⁶ the term “**subordinate creditor**”¹⁶⁷ shall mean an assignee holding a security interest in rents subordinate to the interest of another assignee of a security interest in the same rents; the term “**priority assignee**”¹⁶⁸ shall mean an assignee holding a security interest in rents prior to the interest of an other assignee of a security interest in the same rents; the words “**include**” and “**including**” mean including, without limitation; words of any gender shall be held and construed to include any other gender; and words in the singular number shall be held and construed to include the plural and words in the plural number shall be held and construed to include the singular; unless the context otherwise requires.

31. **Counterparts:** To facilitate execution, this Assignment may be executed in as many counterparts as may be convenient or required. It shall not be necessary that the signature or acknowledgment of, or on behalf of, each party, or that the signature of all persons required to bind any party, or the acknowledgment of such party, appear on each counterpart. All counterparts shall collectively constitute a single instrument. It shall not be necessary in making proof of this Assignment to produce or account for more than a single counterpart containing the respective signatures of, or on behalf of, and the respective acknowledgments of, each of the parties hereto. Any signature or acknowledgment page to any counterpart may be detached from such counterpart without impairing the legal effect of the signatures or acknowledgments thereon and thereafter attached to another counterpart identical thereto except having attached to it additional signature or acknowledgment pages.

32. **Construction:** Assignor agrees and covenants with Assignee that this Assignment shall not be construed or deemed made for the benefit of any third party or parties.

33. **Electronic Agreements:** The parties hereby disclaim any intent to conduct a transaction or make any agreement or contract by electronic means. Unless expressly stated otherwise in a written communication in other than electronic form, nothing contained herein or in any communication in connection with this Assignment shall satisfy the requirements for a writing, nor constitute a contract or electronic signature, as those terms are defined in or contemplated by the Electronic Signatures In Global And National Commerce, 15 U. S. C. §§ 7001 *et seq.* or the Uniform Electronic Transactions Act, Tex. Bus. & Comm. Code Chapter 322.

34. **Jury Trial:** **THE PARTIES TO THIS ASSIGNMENT HEREBY KNOWINGLY, VOLUNTARILY INTELLIGENTLY, AND WITH SUFFICIENT AWARENESS OF THE RELEVANT CIRCUMSTANCES AND LIKELY CONSEQUENCES WAIVE THEIR RIGHT TO HAVE ANY SUIT, CLAIM OR DISPUTE, ARISING DIRECTLY OR INDIRECTLY UNDER THIS ASSIGNMENT DECIDED BY A JURY AND CONSENT TO HAVE ANY SUCH MATTER DECIDED SOLELY AND EXCLUSIVELY BY THE COURT.**

35. **Governing Law; Venue:** THIS ASSIGNMENT SHALL BE GOVERNED BY

¹⁶⁵ Tex. Prop. Code §64.001(14) contains the definition of the term “tenant”. Because the defined term is quite broad, use “tenant” rather than “lessee.”

¹⁶⁶ TARA uses the term “landlord” rather than “lessor.” See, for example, Tex. Prop. Code §64.056. The word “landlord” is not defined in TARA. However, use the term “landlord” to reduce the admittedly low risk of any ambiguity.

¹⁶⁷ Tex. Prop. Code §64.060(d).

¹⁶⁸ *Id.*

AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS. THE OBLIGATIONS UNDER THE TERMS OF THE ASSIGNMENT ARE PERFORMABLE IN _____ COUNTY, TEXAS. ANY SUIT, CLAIM OR OTHER ACTION WHICH IS BROUGHT TO CONSTRUE THIS ASSIGNMENT, OR WHICH ARISES DIRECTLY OR INDIRECTLY UNDER THIS N, SHALL BE BROUGHT ONLY IN A STATE COURT OF APPROPRIATE JURISDICTION IN _____, _____ COUNTY, TEXAS, AND SUCH COURT SHALL BE THE EXCLUSIVE TRIBUNAL FOR HEARING THE SUIT, CLAIM OR OTHER ACTION. THE PARTIES TO THIS ASSIGNMENT HEREBY WAIVE ANY RIGHT THEY WOULD HAVE TO REMOVE ANY SUCH SUIT, CLAIM OR OTHER ACTION TO ANY FEDERAL COURT.

36. **Integration; Modification:** This Assignment contains the entire agreement concerning the assignment by Assignor of the Leases and the Rents thereunder between the parties hereto. No variations, modifications or changes herein or hereof shall be binding upon any party hereof unless set forth in a document duly executed by or on behalf of such party.

IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment of Leases and Rents as of the date first above written.

ASSIGNOR:

By: _____
Print Name: _____
Title: _____

ASSIGNEE:¹⁶⁹

By: _____
Print Name: _____
Title: _____

¹⁶⁹ Assignee should execute the Assignment of Rents to trigger provisions of TARA that require assignee to have entered into an assignment of rents, security instrument or other document, for example Tex. Prop. Code §64.002(b).

STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of the said _____, a _____, and that he executed the same as the act of such _____ for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 20__.

Notary Public
Print Name: _____

My Commission Expires:

STATE OF TEXAS §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that the same was the act of the said _____, a _____, and that he executed the same as the act of such _____ for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 20__.

Notary Public
Print Name: _____

My Commission Expires:

EXHIBIT A

[PROPERTY DESCRIPTION]

ASSIGNEE’S TARA INSERTS TO TENANT FORM LEASE

Add to or modify Lease Definitions:

Assignee:¹⁷⁰ means _____, the assignee of Rents pursuant to an Assignment.

Assignor:¹⁷¹ means Landlord.

Assignment: means that certain Assignment of Leases and Rents dated _____, 20__, between Assignee and Assignor and any other assignment of rents by Landlord in favor of Assignee that now or later may affect title to the Premises or any part of the Property.¹⁷²

Notice: A signed document containing information that TARA requires or permits a person to give to another, including a NPROL.¹⁷³

NPROL: Notice to Pay Rents to Person other than Landlord.¹⁷⁴

Rents: All of the rents, income, receipts, revenues, issues, profits, security or other deposits, receivables, cash proceeds or other proceeds¹⁷⁵ received, collected, or distributed on account of any obligation to pay rents, and other sums of money pursuant to this Lease, including “Rents” as defined in TARA.¹⁷⁶

Secured Obligation: means the indebtedness and other obligations defined in or referred to in the Assignment.

TARA: Act of June 17, 2011, 82nd Leg., R.S., ch. 636 to be codified as Tex. Prop. Code, Chapter 64.¹⁷⁷

Each capitalized term not otherwise defined in this Assignment shall have the meaning specified or used in TARA unless otherwise expressly provided herein or the context requires.

Add to or modify main text of Lease:

Tenant agrees and covenants:

- a. The address to which all Notices, including any NPROL, required or permitted to be sent to the Tenant¹⁷⁸ is:

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¹⁷⁰ Tex. Prop. Code §64.001(1).

¹⁷¹ Tex. Prop. Code §64.001(3).

¹⁷² For new leases, describe the Assignment and other loan documents with specificity. For existing leases, Assignee should obtain an SNDA or lease amendment.

¹⁷³ TARA §2(8) contained the following definition: “*Notification*” means a signed document containing information that this Chapter requires or permits a person to give to another. The Texas Legislative Council removed that definition from TARA and inserted in its place the undefined term “notice.” This set of inserts provides that a “Notice” has the same meaning that a “Notification” has under TARA.

¹⁷⁴ Tex. Prop. Code §64.056.

¹⁷⁵ Tex. Prop. Code §64.001(8); Tex. Prop. Code §64.061 (a) & (b).

¹⁷⁶ Tex. Prop. Code §64.001(9).

¹⁷⁷ *Supra* footnote 19. Both SB 889 and SB 1368 are scheduled to be codified as Chapter 64

¹⁷⁸ Tex. Prop. Code §64.002(d).

Attention: _____
Phone: _____
Fax: _____
Email _____

The address which all Notices required or permitted to be sent and all payments to be made to the Assignee is:

Attention: _____
Phone: _____
Fax: _____
Email _____

Such addresses may not be change unless 30 days prior written notice is given to the Assignee or Tenant, as the case may be, and such address must be within the United States of America;¹⁷⁹

- b. Tenant accepts this Lease subject to any voluntary lien or security interest in Rents or Leases, Assignment, mortgage, ¹⁸⁰ deed of trust, or security interest (collectively, “**encumbrance**”) that now or later may affect title to the Premises or any part of the Property (including, without limitation, any renewal, modification, refinancing, or extension of any encumbrance).
- c. Tenant waives the exercise of any claim or defense arising from the Landlord’s performance or nonperformance the Lease against Assignee or any other person acquiring title to the Property at foreclosure or pursuant to a deed in lieu of foreclosure;¹⁸¹
- d. Tenant unconditionally agrees, upon the receipt of a NPROL, whether prior to or after default in connection with the Secured Obligations, Tenant shall:¹⁸²
 - i. notwithstanding Tex. Prop. Code §64.055(d), immediately turn over all Rents and Proceeds, as defined in TARA, Assignee is entitled to collect under Tex. Prop Code §64.054;
 - ii. not deduct any portion of the rents for any purpose, notwithstanding any other provision of TARA, this Assignment, or any other encumbrance; and
 - iii. pay all Rents as they accrue to the Assignee, without any deduction, set-off, or other reduction of any kind.

¹⁷⁹ Tex. Prop. Code §51.002(b) (3) requires notice be sent by certified mail. U. S. Postal Service Domestic Mail Manual §3.3.2 provides: Available Destinations Certified Mail may be addressed for delivery only in the United States and its territories and possessions, through APOs and FPOs, or through the United Nations Post Office, New York.

¹⁸⁰ Modify references to loan documents to match terms used in those documents.

¹⁸¹ *Id.*; Tex. Prop. Code §64.055(c).

¹⁸² Tex. Prop. Code §64.055(d).

- e. Tenant unconditionally:
- i. waives any right to delay payment of Rent as contemplated by Tex. Prop. Code §64.056 or paragraph 3 of the statutory form of NPROL and agrees that the second sentence of paragraph 3 may be deleted from any NPROL sent to Tenant;
 - ii. waives any right to continue paying Rents to any person other than Assignee as contemplated by Texas Prop. Code §64.056 or paragraph 8 of the statutory form of NPROL and agrees that paragraph 8 may be deleted from any NPROL sent to Tenant; and
 - iii. agrees any NPROL so modified shall be conclusively deemed to satisfy all requirements of TARA that apply to NPROLs, including Texas Prop. Code §§64.055 and 64.056.
- f. To the extent the Lease contains any notice or cure periods, the date Assignee begins enforcement,¹⁸³ as contemplated by TARA, shall not be affected, extended, or otherwise modified by reason of such periods each of which are waived by Tenant with respect to Assignee;
- g. agrees that Assignee owes Tenant no fiduciary duty, duty of good faith or similar duty or obligation;
- h. agrees neither (a) Assignee by reason of collecting Rents or Proceeds pursuant to a Notice to Landlord or Tenant nor (b) Assignee or any other person acquiring title to the Property at foreclosure or deed in lieu of foreclosure shall have any liability for nor be bound by:¹⁸⁴
- i. any act or omission of any prior landlord (including Landlord) which constitutes a default or breach of the Lease;
 - ii. any offsets or defenses that the Tenant might be entitled to assert against Landlord¹⁸⁵ arising prior to the date Assignee or other person takes possession of Assignor's interest in the Lease or forecloses title to the Property;
 - iii. any Rent which Tenant might have paid to any prior landlord (including Landlord) unless such Rent is actually paid over to Assignee;
 - iv. any amendment or modification of this Lease made without Assignee's written consent that (A) results in a reduction or rent or other sums due and payable pursuant to the Lease (B) modifies any operating covenant of Tenant in the Lease, (C) reduces the term of the Lease, (D) terminates the Lease, (E) modifies the terms of the Lease regarding surrendering possession of the Leased Premises, (F) provides for payment of rent more than one month in advance, (G) modifies the permitted uses under the Lease or (H) modifies the provisions regarding Tenant's obligation to comply with all laws (including environmental laws), (H) materially increases Assignor's or decreases Tenant's obligations under the

¹⁸³ Tex. Prop. Code §64.053 (b), 64.054(b), & 64.055(b).

¹⁸⁴ Tex. Prop. Code §64.059(b).

¹⁸⁵ Tex. Prop. Code §64.055(c).

Lease, or modifies any provision of this Lease intended for the benefit of Assignee;

- v. for any security deposit, rental deposit or similar deposit given by Tenant to a prior landlord (including Landlord) unless such deposit is actually paid over to Assignee;
 - vi. for any portion of any Tenant allowance or similar amount previously disbursed to Landlord by Assignee pursuant to the documents evidencing or securing the Secured Obligations;
 - vii. for the construction of any improvements required of Landlord under this Lease if Assignee or any other person acquires title to the Property or premises prior to full completion and acceptance by Tenant of improvements required under the Lease;
 - viii. for the payment of any leasing commissions or other expenses for which any prior landlord (including Landlord) incurred the obligation to pay; or
 - ix. by any provision of the Lease restricting use of other properties owned by Assignee or any other person that acquires title to the Property pursuant to foreclosure or deed in lieu of foreclosure, as landlord.
- i. agrees that the prepayment of Rents is prohibited, unless such prepaid Rents are immediately paid to or deposited with Assignee;¹⁸⁶
 - j. waives the benefits of Tenant under Tex. Prop. Code §64.055(d) and agrees that Tenant shall be liable for all Rents not paid to Assignee after the Tenant receives a NPROL from Assignee;
 - k. agrees any Notice, including a NPROL, from the Assignee to the Tenant shall be deemed to have been received by the Tenant¹⁸⁷ on the earliest of (i) the date of actual receipt by the Tenant, (ii) _____ (___)¹⁸⁸ days after the same is sent to the address for Notice specified in the Lease via a commercially reasonable delivery service, e. g. Federal Express or UPS, by first class mail, _____ [specify any other means],¹⁸⁹ or (iii) when deposited in the U. S. Mail in accordance with Tex. Prop. Code §51.002(e); and
 - l. Assignee shall not be obligated to apply Rents or Proceeds received by the Assignee to payment of the expenses of operating or maintaining the Property and shall have no liability for its failure or refusal to do so; if Assignee shall, at its discretion, pay any such expense, such payment shall not be deemed or construed as a waiver of the preceding sentence or Tex. Prop. Code §64.059.

¹⁸⁶ Tex. Prop. Code §64.055(c) (2).

¹⁸⁷ Tex. Prop. Code §64.055(b).

¹⁸⁸ Use as short a period as Assignee can obtain.

¹⁸⁹ Tex. Prop. Code §64.002(a) (3) & (d).

S.B. No. 889

AN ACT

relating to assignment of rents to holders of certain security interests in real property.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (d), Section 9.109, Business & Commerce Code, is amended to read as follows:

(d) This chapter does not apply to:

- (1) a landlord's lien, other than an agricultural lien;
- (2) a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section 9.333 applies with respect to priority of the lien;
- (3) an assignment of a claim for wages, salary, or other compensation of an employee;
- (4) a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;
- (5) an assignment of accounts, chattel paper, payment intangibles, or promissory notes that is for the purpose of collection only;
- (6) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;
- (7) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;
- (8) a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9.315 and 9.322 apply with respect to proceeds and priorities in proceeds;
- (9) an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;
- (10) a right of recoupment or set-off, but:
 - (A) Section 9.340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and
 - (B) Section 9.404 applies with respect to defenses or claims of an account debtor;
- (11) the creation or transfer of an interest in or lien on real property, including a lease or rents, as defined by Section 64.001, Property Code ~~[thereunder]~~, the interest of a vendor or vendee in a contract for deed to purchase an interest in real property, or the interest of an optionor or optionee

in an option to purchase an interest in real property, except to the extent that provision is made for:

- (A) liens on real property in Sections 9.203 and 9.308;
- (B) fixtures in Section 9.334;
- (C) fixture filings in Sections 9.501, 9.502, 9.512, 9.516, and 9.519; and
- (D) security agreements covering personal and real property in Section 9.604;

(12) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9.315 and 9.322 apply with respect to proceeds and priorities in proceeds; or

(13) an assignment of a deposit account, other than a nonnegotiable certificate of deposit, in a consumer transaction, but Sections 9.315 and 9.322 apply with respect to proceeds and priorities in proceeds.

SECTION 2. Subtitle B, Title 5, Property Code, is amended by adding Chapter 64 to read as follows:

CHAPTER 64. ASSIGNMENT OF RENTS TO LIENHOLDER

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 64.001. DEFINITIONS. In this chapter:

- (1) "Assignee" means a person entitled to enforce an assignment of rents.
- (2) "Assignment of rents" means a transfer of an interest in rents in connection with an obligation secured by real property from which the rents arise. The term does not include a contract for a charge authorized by Section 306.101, Finance Code, or a true sale of rents.
- (3) "Assignor" means an owner of real property who makes an assignment of rents arising from the property or that owner's successor in interest.
- (4) "Cash proceeds" means proceeds that are money, checks, deposit accounts, or similar legal tender.
- (5) "Day" means a calendar day.
- (6) "Deposit account" means a demand, time, savings, passbook, escrow, or similar account maintained with a bank, savings bank, savings and loan association, credit union, trust company, or other person.
- (7) "Document" means information that is inscribed on a tangible medium or that is stored on an electronic or other medium and is retrievable in perceivable form.
- (8) "Proceeds" means personal property that is received, collected, or distributed on account of an obligation to pay rents.
- (9) "Rents" means:

(A) consideration payable for the right to possess or occupy, or for possessing or occupying, real property;

(B) consideration payable to an assignor under a policy of rental interruption insurance covering real property;

(C) claims arising out of a default in the payment of consideration payable for the right to possess or occupy real property;

(D) consideration payable to terminate an agreement to possess or occupy real property;

(E) consideration payable to an assignor for payment or reimbursement of expenses incurred in owning, operating, and maintaining, or constructing or installing improvements on, real property; or

(F) any other consideration payable under an agreement relating to the real property that constitutes rents under a law of this state other than this chapter.

(10) "Secured obligation" means an obligation secured by an assignment of rents.

(11) "Security instrument" means:

(A) a security instrument, as that term is defined by Section 51.0001; or

(B) an agreement containing an assignment of rents.

(12) "Security interest" means an interest in property that arises by agreement and secures an obligation.

(13) "Sign" includes to sign by an electronic signature, as defined by Section 15.002.

(14) "Tenant" means a person who has an obligation to pay for the right to possess or occupy, or for possessing or occupying, real property.

Sec. 64.002. MANNER OF PROVIDING NOTICE. (a) A person may provide a notice under this chapter:

(1) by transmitting the notice in the manner described by Section 51.002(e);

(2) by depositing the notice with the United States Postal Service or a commercially reasonable delivery service, properly addressed to the intended recipient's address in accordance with this section, with first class postage or other cost of delivery paid; or

(3) by transmitting the notice to the intended recipient by any means agreed to by the intended recipient.

(b) Except as agreed under Subsection (a)(3), notice to an assignee must be sent to the assignee's address as provided in the relevant security instrument or another document entered into for the purposes of this section by the assignee and the person sending the notice, unless a more recent address for notice has been given in a manner provided by Subsection (a) by the assignee to the person sending the notice or in a security instrument or other document signed by the assignee.

(c) Except as agreed under Subsection (a)(3), notice to an assignor must be sent to the assignor's address as provided in the relevant security instrument or another document entered into for the purposes of this section by the assignor and the person sending the notice or an address for the assignor to which a notice of default under Section 51.002 is properly sent, unless a more recent address for notice has been given in a manner provided by Subsection (a) by the assignor to the person sending the notice or in a security instrument or other document signed by the assignor.

(d) Except as agreed under Subsection (a)(3), notice to a tenant must be sent to:

(1) an address for notice to the tenant provided in a signed document entered into by the tenant and the person providing the notice, unless a more recent address for notice has been given by the tenant in accordance with that document;

(2) if an address for notice described by Subdivision (1) does not exist, the address provided in a written agreement between the tenant and the assignor for notices to the tenant if the person sending the notice has received a copy of that agreement or has actual knowledge of the address for notice specified in that agreement; or

(3) if an address for notice described by Subdivision (1) or (2) does not exist, the tenant's address at the real property covered by the security instrument.

(e) Notice provided in accordance with this section is considered received on the earliest of:

(1) the date the notice is received by the person to whom the notice is provided;

(2) the fifth day after the date the notice is provided in accordance with Subsection (a)(2); or

(3) the date on which notice is considered provided in accordance with an agreement made by the person to whom the notice is provided for the purposes of this section.

[Sections 64.003-64.050 reserved for expansion]

SUBCHAPTER B. ASSIGNMENT OF RENTS

Sec. 64.051. SECURITY INSTRUMENT CREATES ASSIGNMENT OF RENTS; ASSIGNMENT OF RENTS CREATES SECURITY INTEREST.

(a) An enforceable security instrument creates an assignment of rents arising from real property securing an obligation under the security instrument, unless the security instrument provides otherwise or the security instrument is governed by Section 50(a)(6), (7), or (8), Article XVI, Texas Constitution.

(b) An assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the document creating the assignment, regardless of whether the document is in the form of an absolute assignment, an absolute assignment conditioned on default or another event, an assignment as additional security, or any other form. The security interest in rents is separate and distinct from any security interest held by the assignee in the real property from which the rents arise.

(c) An assignment of rents does not reduce the secured obligation except to the extent the assignee collects rents and applies, or is obligated to apply, the collected rents to payment of the secured obligation.

Sec. 64.052. RECORDATION AND PERFECTION OF SECURITY INTEREST IN RENTS; PRIORITY OF INTERESTS IN RENTS.

(a) A document creating an assignment of rents may be recorded in the county in which any part of the real property is located.

(b) On recordation of a document creating an assignment of rents, the security interest in the rents is perfected. This subsection prevails over a conflicting provision in the document creating the assignment of rents or a law of this state other than this chapter that prohibits or defers enforcement of the security interest until the occurrence of a subsequent event, such as a subsequent default of the assignor, the assignee's obtaining possession of the real property, or the appointment of a receiver.

(c) Except as provided by Subsection (d), a perfected security interest in rents has priority over the rights of a person who, after the security interest is perfected, acquires:

(1) a lien on or other security interest in the rents or the real property from which the rents arise; or

(2) an interest in the rents or the real property from which the rents arise.

(d) An assignee of a perfected security interest in rents has the same priority over the rights of a person described by Subsection (c) with respect to future advances as the assignee has with respect to the assignee's security interest in the real property from which the rents arise.

Sec. 64.053. ENFORCEMENT OF SECURITY INTEREST IN RENTS GENERALLY.

(a) An assignee may enforce an assignment of rents using one or more of the methods provided by Section 64.054 or 64.055 or another method sufficient to enforce the assignment under a law of this state other than this chapter.

(b) On and after the date on which an assignee begins to enforce an assignment of rents, the assignee is entitled to collect all rents that:

(1) accrued before but remain unpaid on that date; and

(2) accrue on or after that date.

Sec. 64.054. ENFORCEMENT BY NOTICE TO ASSIGNOR.

(a) After default, or as otherwise agreed by the assignor, the assignee may provide the assignor a notice demanding that the assignor pay the assignee the proceeds of any rents that the assignee is entitled to collect under Section 64.053.

(b) For the purposes of Section 64.053, the assignee begins enforcement under this section on the date on which the assignee provides notice to the assignor in accordance with Section 64.002.

(c) An assignee may not enforce an assignment of rents under this section if, on the date the security instrument was signed and the date of prospective enforcement, the real property constitutes the assignor's homestead on which is located a one-family to four-family dwelling.

Sec. 64.055. ENFORCEMENT BY NOTICE TO TENANT.

(a) After default, or as otherwise agreed by the assignor, the assignee may provide to a tenant of real property that is subject to an assignment of rents a notice demanding that the tenant pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue. The assignee shall provide a copy of the notice to the assignor in the manner provided by Section 64.002. The notice must substantially comply with the form prescribed by Section 64.056 and be signed by the assignee or the assignee's authorized agent or representative.

(b) For the purposes of Section 64.053(b), the assignee begins enforcement under this section on the date on which the tenant receives a notice complying with Subsection (a).

(c) Subject to Subsection (d) and any other claim or defense that a tenant has under a law of this state other than this chapter, after a tenant receives a notice under Subsection (a):

(1) the tenant is obligated to pay to the assignee all unpaid accrued rents and all unaccrued rents as they accrue, unless the tenant has previously received a notice under this section from another assignee of rents provided by that assignee in accordance with this section and the other assignee has not canceled that notice;

(2) except as otherwise provided by a document signed by the tenant, the tenant is not obligated to pay to an assignee rent that was prepaid to the assignor before the tenant received the notice under Subsection (a);

(3) unless the tenant occupies the premises as the tenant's primary residence, the tenant is not discharged from the obligation to pay rents to the assignee if the tenant pays rents to the assignor;

(4) the tenant's payment to the assignee of rents then due satisfies the tenant's obligation under the tenant's agreement with the assignor to the extent of the payment made; and

(5) the tenant's obligation to pay rents to the assignee continues until the earliest date on which the tenant receives:

(A) a court order directing the tenant to pay the rents in a different manner;

(B) a signed notice that a perfected security instrument that has priority over the assignee's security interest has been foreclosed; or

(C) a signed document from the assignee canceling the assignee's notice.

(d) Except as otherwise provided by a document signed by the tenant, a tenant who has received a notice under Subsection (a) is not in default for nonpayment of rents that accrue during the 30 days after the date the tenant receives the notice until the earlier of:

(1) the 10th day after the date the next regularly scheduled rental payment would be due;
or

(2) the 30th day after the date the tenant receives the notice.

(e) On receiving a notice from another creditor who has priority under Section 64.052(c) that the creditor with priority has conducted a foreclosure sale of the real property from which the rents arise or is enforcing the creditor's interest in rents by notice to the tenant, an assignee that has provided a notice to a tenant under Subsection (a) shall immediately provide another notice to the tenant canceling the earlier notice.

Sec. 64.056. FORM OF NOTICE TO TENANT. The following form of notice, when properly completed, satisfies the requirements of Section 64.055(a):

NOTICE TO PAY RENTS TO PERSON OTHER THAN LANDLORD

Tenant: [Name of tenant]

Property Occupied by Tenant (the "Premises"): [Address]

Landlord: [Name of landlord]

Assignee: [Name of assignee]

Address of Assignee and Telephone Number of Contact Person: [Address of assignee] [Telephone number of person to contact]

1. Assignee is entitled to collect rents on the Premises under [Name of Document] (the "Assignment of Rents") dated [Date of Assignment of Rents], and recorded at [Recording Data] of [Name of County] County, Texas. You may obtain additional information about the Assignment of Rents and the Assignee's right to enforce it at the address of the Assignee.

2. A default exists under the Assignment of Rents or related documents between the Landlord and the Assignee. The Assignee is entitled to collect rents from the Premises.

3. This notice affects your rights and obligations under the agreement under which you occupy the Premises (your "Lease Agreement"). Unless you have otherwise agreed in a document signed by you, if your next scheduled rental payment is due within 30 days after you receive this notice, you will not be in default under your Lease Agreement for nonpayment of that rental payment until the 10th day after the due date of that payment or the 30th day following the date you receive this notice, whichever occurs first.

4. You may consult a lawyer at your expense concerning your rights and obligations under your Lease Agreement and the effect of this notice.

5. You must pay to the Assignee at the Address of the Assignee all rents under your Lease Agreement that are due and payable on the date you receive this notice and all rents accruing under your Lease Agreement after you receive this notice.

6. If you pay rents to the Assignee after receiving this notice, the payment will satisfy your rental obligation to the extent of that payment.

7. If you pay any rents to the Landlord after receiving this notice, your payment to the Landlord will not discharge your rental obligation, and the Assignee may hold you liable for that rental obligation notwithstanding your payment to the Landlord unless you occupy the Premises as your primary residence.

8. If you have previously received a notice from another person who also holds an assignment of the rents due under your Lease Agreement, you should continue paying your rents to the person that sent that notice until that person cancels that notice. Once that notice is canceled, you must begin paying rents to the Assignee in accordance with this notice.

Name of assignee: _____

By: [Officer/authorized agent of assignee]

Sec. 64.057. EFFECT OF ENFORCEMENT. The enforcement of an assignment of rents by a method provided by Section 64.054 or 64.055, the application of proceeds by the assignee under Section 64.059 after enforcement, the payment of expenses under Section 64.058, or an action under Section 64.060 does not:

- (1) make the assignee a mortgagee in possession of the real property from which the rents arise;
- (2) make the assignee an agent of the assignor;
- (3) constitute an election of remedies that precludes a later action to enforce the secured obligation;
- (4) make the secured obligation unenforceable;
- (5) limit any right available to the assignee with respect to the secured obligation; or
- (6) bar a deficiency judgment under any law of this state governing or relating to deficiency judgments following the enforcement of any encumbrance, lien, or security interest.

Sec. 64.058. APPLICATION OF PROCEEDS GENERALLY. Unless otherwise agreed by the assignor, an assignee who collects rents under this chapter or collects on a judgment in an action under Section 64.060 shall apply the sums collected in the following order to:

- (1) reimbursement of the assignee's expenses of enforcing the assignee's assignment of rents, including, to the extent provided for by agreement by the assignor and not prohibited by a law of this state other than this chapter, reasonable attorney's fees and costs incurred by the assignee;
- (2) reimbursement of any expenses incurred by the assignee to protect or maintain the real property that is subject to the assignment of rents if the assignee elects or is required to apply the proceeds to those expenses under Section 64.059;
- (3) payment of the secured obligation;

(4) payment of any obligation secured by a subordinate security interest or other lien on the rents if, before distribution of the proceeds, the assignee receives a signed notice from the holder of the interest or lien demanding payment of the proceeds; and

(5) payment of any excess proceeds to the assignor.

Sec. 64.059. APPLICATION OF PROCEEDS TO EXPENSES OF PROTECTING REAL PROPERTY; CLAIMS AND DEFENSES OF TENANT.

(a) Unless otherwise agreed by the assignee, an assignee that collects rents following enforcement under Section 64.054 or 64.055 is not obligated to apply the collected rents to the payment of expenses of protecting or maintaining the real property subject to an assignment of rents.

(b) Unless otherwise agreed by a tenant, the right of the assignee to collect rents from the tenant is subject to the terms of any agreement between the assignor and tenant and any claim or defense of the tenant arising from the assignor's nonperformance of that agreement.

Sec. 64.060. TURNOVER OF RENTS; LIABILITY OF ASSIGNOR.

(a) If an assignor collects rents that the assignee is entitled to collect under this chapter, the assignor shall turn over the proceeds to the assignee not later than the 30th day after the date the assignor receives notice from the assignee under Section 64.054 or within another period prescribed by a security instrument or other document signed by the assignor and approved by the assignee, less any amount representing payment of expenses authorized by a security instrument or other document signed by the assignee.

(b) In addition to any other remedy available to the assignee under a law of this state other than this chapter, if an assignor does not turn over proceeds to the assignee as required by Subsection (a), the assignee may recover from the assignor in a civil action:

(1) the proceeds, or an amount equal to the proceeds, that the assignor was obligated to turn over under Subsection (a); and

(2) reasonable attorney's fees and costs incurred by the assignee to the extent provided for by an agreement between the assignor and assignee and not prohibited by a law of this state other than this chapter.

(c) The assignee may maintain an action under Subsection (b) with or without taking action to foreclose any security interest that the assignee has in the real property.

(d) Unless otherwise agreed by an assignee that has priority under Section 64.052, a subordinate creditor that has enforced the subordinate creditor's interest under Section 64.054 or 64.055 before the priority assignee enforces the priority assignee's interests in rents is not obligated to turn over any proceeds that the subordinate creditor collects before the subordinate creditor receives a signed notice from the priority assignee informing the subordinate creditor that the priority assignee is enforcing the priority assignee's interest in rents. The subordinate creditor shall turn over to a priority assignee any proceeds that the subordinate creditor collects after the subordinate creditor receives the notice from the priority assignee that the priority assignee is enforcing the priority assignee's interest in rents not later than the 30th day after the date the

subordinate creditor receives the notice or as otherwise agreed between the priority assignee and the subordinate creditor. Any proceeds subsequently collected by the subordinate creditor shall be turned over to the priority assignee not later than the 10th day after the date the proceeds are collected or as otherwise agreed between the priority assignee and the subordinate creditor.

Sec. 64.061. ATTACHMENT, PERFECTION, AND PRIORITY OF ASSIGNEE'S SECURITY INTEREST IN PROCEEDS.

- (a) An assignee's security interest in rents attaches to identifiable proceeds.
- (b) If an assignee's security interest in rents is perfected, the assignee's security interest in identifiable cash proceeds is perfected.
- (c) Except as provided by Subsection (b), the provisions of Chapter 9, Business & Commerce Code, or the comparable Uniform Commercial Code provisions of another applicable jurisdiction, determine:
 - (1) whether an assignee's security interest in proceeds is perfected;
 - (2) the effect of perfection or nonperfection;
 - (3) the priority of an interest in proceeds; and
 - (4) the law governing perfection, the effect of perfection or nonperfection, and the priority of an interest in proceeds.
- (d) For purposes of this chapter, cash proceeds are identifiable if they are maintained in a segregated deposit account or, if commingled with other funds, to the extent they can be identified by a method of tracing, including application of equitable principles, that is permitted under a law of this state other than this chapter with respect to commingled funds.

Sec. 64.062. PRIORITY SUBJECT TO SUBORDINATION. This chapter does not preclude subordination by agreement by a person entitled to priority.

SECTION 3.

- (a) Except as otherwise provided by this section, Chapter 64, Property Code, as added by this Act, governs the enforcement of an assignment of rents, the perfection and priority of a security interest in rents, and the attachment and perfection of a security interest in proceeds regardless of whether the document creating the assignment of rents was signed and delivered before the effective date of this Act.
- (b) Chapter 64, Property Code, as added by this Act, does not affect an action or other proceeding commenced before the effective date of this Act.
- (c) Subsection (a), Section 64.051, Property Code, as added by this Act, applies only to a security instrument signed and delivered on or after the effective date of this Act. A security instrument signed and delivered before the effective date of this Act is governed by the law that applied to the instrument immediately before that date, and the former law is continued in effect for that purpose.

(d) Chapter 64, Property Code, as added by this Act, does not affect:

- (1) the enforceability of an assignee's security interest in rents or proceeds if, immediately before the effective date of this Act, that security interest was enforceable;
- (2) the perfection of an assignee's security interest in rents or proceeds if, immediately before the effective date of this Act, that security interest was perfected; or
- (3) the priority of an assignee's security interest in rents or proceeds with respect to the interest of another person if, immediately before the effective date of this Act, the interest of the other person was enforceable and perfected and that priority was established.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 889 passed the Senate on March 24, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 889 passed the House on May 23, 2011, by the following vote: Yeas 146, Nays 0, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

NOTICE TO PAY RENTS TO PERSON OTHER THAN LANDLORD

Tenant: ~~{Name of tenant}~~ _____

Property Occupied by Tenant (the "Premises"): ~~{Address}~~

Landlord: ~~{Name of landlord}~~ _____

Assignee: ~~{Name of assignee}~~ _____

Address of Assignee and Telephone Number of Contact Person: ~~{Address of assignee}~~ ~~{Telephone number of person to contact}~~

1. Assignee is entitled to collect rents on the Premises under _____ ~~{Name of Document}~~ (the "**Assignment of Rents**") dated _____ ~~{Date of Assignment of Rents}~~, and recorded at _____ ~~{Recording Data}~~ of _____ ~~{Name of County}~~ County, Texas.¹⁹⁰ You may obtain additional information about the Assignment of Rents and the Assignee's right to enforce it at the address of the Assignee.

2. A default exists under the Assignment of Rents or related documents between the Landlord and the Assignee. The Assignee is entitled to collect rents from the Premises.

3. This notice affects your rights and obligations under the agreement under which you occupy the Premises (your "**Lease Agreement**"). ~~Unless you have otherwise agreed in a document signed by you, if your next scheduled rental payment is due within 30 days after you receive this notice, you will not be in default under your Lease Agreement for nonpayment of that rental payment until the 10th day after the due date of that payment or the 30th day following the date you receive this notice, whichever occurs first.~~¹⁹¹

4. You may consult a lawyer at your expense concerning your rights and obligations under your Lease Agreement and the effect of this notice.

5. You must pay to the Assignee at the Address of the Assignee all rents under your Lease Agreement that are due and payable on the date you receive this notice and all rents accruing under your Lease Agreement after you receive this notice.

6. If you pay rents to the Assignee after receiving this notice, the payment will satisfy your rental obligation to the extent of that payment.

¹⁹⁰ Note NPROL requires recorded assignment of rents.

¹⁹¹ Must have separate agreement executed by tenant pursuant to which it waives any right to delay payment of rent as contemplated by Tex. Prop. Code §64.056 or paragraph 3 of the statutory form of NPROL and agrees that the second sentence of paragraph 3 of the statutory form may be deleted from any NPROL sent to tenant.

7. If you pay any rents to the Landlord after receiving this notice, your payment to the Landlord will not discharge your rental obligation, and the Assignee may hold you liable for that rental obligation notwithstanding your payment to the Landlord unless you occupy the Premises as your primary residence.

~~8. If you have previously received a notice from another person who also holds an assignment of the rents due under your Lease Agreement, you should continue paying your rents to the person that sent that notice until that person cancels that notice. Once that notice is canceled, you must begin paying rents to the Assignee in accordance with this notice.~~¹⁹²

Name of assignee: _____

By: [Officer/authorized agent of assignee]

¹⁹² Must have separate agreement executed by tenant pursuant to which it waives any right to continue paying Rents to any person other than Assignee as contemplated by Tex. Prop. Code §64.056 or Paragraph 8 of the statutory form of NPROL and agrees that Paragraph 8 may be deleted from any NPROL sent to tenant.