

RESOLUTION NO. 2013-02-___ (R)

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, APPROVING A CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MCKINNEY AND WINCO FOODS, LLC., A DELAWARE LIMITED LIABILITY COMPANY; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, the City Council of the City of McKinney, Texas, has determined the need to approve a Chapter 380 Economic Development Agreement to provide incentives to WinCo Foods, LLC., a Delaware limited liability company; and

WHEREAS, a Chapter 380 Economic Development Agreement is the binding, legal document governing the incentives and development of the site.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, THAT:

Section 1. The City Council of the City of McKinney, Texas hereby approves the Chapter 380 Economic Development Agreement between the City of McKinney and WinCo Foods, LLC., a Delaware limited liability company; and

Section 2. The City Manager is authorized to execute the Chapter 380 Economic Development Agreement between the City of McKinney and WinCo Foods, LLC., a Delaware limited liability company; and

Section 3: This Resolution shall take effect immediately from and after the date of passage and is so resolved.

DULY PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS ON THE 19th DAY OF FEBRUARY, 2013.

CITY OF MCKINNEY, TEXAS

BRIAN LOUGHMILLER
Mayor

ATTEST:

SANDY HART, TRMC, MMC
City Secretary
BLANCA I. GARCIA
Assistant City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney

**THE CITY OF MCKINNEY, TEXAS
AND
WINCO FOODS, LLC.
CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENT**

WHEREAS, *WINCO FOODS, LLC*, a Delaware limited liability company (hereinafter “WINCO”), is entering into this Chapter 380 Economic Development Agreement (this “Agreement”) pursuant to a program initiated by the **CITY OF MCKINNEY, TEXAS** (hereinafter “CITY”) pursuant to Chapter 380 of the Texas Local Government Code, for the primary purpose of constructing, staffing, and operating a retail grocery facility (the “Project”) located wholly within the City of McKinney, Texas; and

WHEREAS, the CITY has agreed to a conditional economic development grant to WINCO based on the timely completion of the Project, including but not limited to the construction of certain building and site improvements and other economic development criteria; to be funded by the CITY upon the timely performance of WINCO under this Agreement; and

WHEREAS, the CITY has the authority under Chapter 380 of the Texas Local Government Code to make loans or grants of CITY funds for the purposes of promoting local economic development and stimulating business and commercial activity within the CITY; and

WHEREAS, the CITY has determined the Project to be an eligible project for a conditional grant to WINCO of its funds which grant will serve the public purpose of promoting local economic development and enhancing business and commercial activity in the City of McKinney, Texas; and

WHEREAS, the CITY has concluded and hereby finds that this Agreement clearly promotes economic development in the City of McKinney and, as such, meets the requisites under Chapter 380 of the Texas Local Government Code and further, is in the best interests of the CITY and WINCO; and

WHEREAS, the City Council has considered and approved this Agreement authorizing the CITY pursuant to applicable law; and

NOW, THEREFORE, for and in consideration of the agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, CITY and WINCO agree as follows:

SECTION 1. TERM

This Agreement shall be effective from the Effective Date until January 31, 2019, unless terminated sooner under the provisions herein.

SECTION 2. DEFINITIONS

The following words shall have the following meanings when used in this Agreement.

- a. Agreement. The word “Agreement” means this Chapter 380 Economic Development Agreement, together with all exhibits and schedules attached to this Agreement and specifically incorporated herein.
- b. CITY. The word “CITY” means the City of McKinney, Texas. For purposes of this Agreement, CITY’s address is 222 N. Tennessee, McKinney, Texas 75069.

- c. Comptroller. The word “Comptroller” means the Office of the Texas Comptroller of Public Accounts, or any successor agency.
- d. WINCO. The words “WINCO” mean WinCo Foods, LLC, a Delaware limited liability company, having its corporate headquarters at 650 N. Armstrong Place, Boise, ID 83704.
- e. Grant. The word “Grant” means a payment or payments to WINCO under the terms of this Agreement, including the Initial Grant and subsequent payments computed with reference to Sales and Use Taxes generated by WINCO.
- f. Grant Submittal Package. The words “Grant Submittal Package” mean the documentation required to be supplied to CITY as a condition of receipt of any Grant. The words “Grant Submittal Package” mean the documentation required to be supplied to City on a quarterly basis as a condition of receipt of any Grant.
- g. Initial Grant. The words “Initial Grant” mean an incentive payment of Three Hundred Forty and No/100 Dollars (\$340,000.00) payable upon the receipt of a Certificate of Occupancy.
- h. Project. The word “Project” means the grocery facility known as “WinCo Foods--McKinney”, owned and operated by WINCO, including but not limited to, the real property, 94,403 square feet of building improvements, equipment, fixtures, business personal property, employee staffing and horizontal site improvements, located on an approximately 11.82 acre parcel at 1800 N. Graves, McKinney, TX, 75069. Notwithstanding the foregoing, the “Project” and the “Property” shall not include Parcels B and C as generally depicted on **Exhibit B** attached hereto and by this reference incorporated herein.
- i. Sales and Use Tax Grant. The words “Sales and Use Tax Grant” mean an amount of the City’s general funds equal to the Sales and Use Taxes charged on taxable sales at the Project during the Term of the Agreement; however not exceeding in aggregate One Hundred Ninety Thousand and No/100 Dollars (\$190,000.00).
- j. Sales and Use Taxes. The words “Sales and Use Taxes” mean the state and local sales and use taxes charged on the taxable sales made by WINCO on or after the date WINCO first opens to business to the general public at the Project, as reported to City by the Comptroller.

SECTION 3. GRANT FUNDING OBLIGATION OF CITY

- a. During the term of this Agreement, CITY shall fund the Initial Grant in the amount of Three Hundred Forty Thousand and No/100 Dollars (\$340,000.00) payable to WINCO upon WINCO’s receipt of a certificate of occupancy for the Project and provided the express terms and conditions described in Section 4 below are satisfied. Subject to WINCO’s continuous satisfaction of Section 4 below, the CITY agrees to process the Initial Grant within thirty (30) days after receipt of WINCO’s Initial Grant Submittal Package.
- b. Subject to WINCO’s satisfaction of the requirements of Section 4 below, the City agrees to process any Sales and Use Tax Grant payments to WINCO within thirty (30) days after receipt of the later of:
 - (1) Sales and Use Tax funds from the State Comptroller’s office; and
 - (2) WINCO’s Grant Submittal Package for the applicable quarter.

For each calendar quarter during the term of this Agreement and beginning in the second full or partial calendar quarter after the date WINCO first opens to business to the general public at the Project, the City's one (1%) percent Sales and Use Tax revenue, generated by and attributed solely to WINCO's sales from the Project in the immediately prior calendar quarter and received from the Comptroller by City, shall be tendered as Sales and Use Tax Grant by the City to WINCO on a quarterly basis upon WINCO's satisfaction of the requirements of Section 4 below. For clarity, the City's one (1%) percent Sales and Use Tax revenue is separate and distinct from the one (1%) percent Sales and Use Tax revenue currently split between the McKinney Community Development Corporation (a Type B economic development corporation under Texas law) and the McKinney Economic Development Corporation (a Type A economic development corporation under Texas law). No Type B or Type A sales tax shall be included in any grant hereunder.

SECTION 4. OBLIGATIONS OF WINCO

While this Agreement is in effect, WINCO shall comply with the following terms and conditions to be eligible for any Grant(s); as such conditions are described or may apply:

- a. WINCO shall complete construction of the Project, consisting of approximately 94,403 square feet of improved, retail grocery space and receive a Certificate of Occupancy therefor on or before September 1, 2014.
- b. The Project, including the real property, real property improvements and business personal property shall have an appraised value on January 1, 2015, as determined by the Collin County Appraisal District ("CCAD"), of not less than \$11,200,000.00. WINCO may render the value of the property described in this subsection b. to achieve compliance herewith.
- c. On or before the 28th day of the first calendar month after the month in which WINCO makes its final payment of Sales and Use Tax to Comptroller for its first full or partial calendar quarter of sales at the WINCO and continuing on or before the 28th day of the second calendar month after each successive calendar quarter thereafter, WINCO agrees to submit to the City a Sales and Use Tax Grant Submittal Package containing the following:
 - i. WINCO's grant request letter (or email) stating the gross amount of the City's one (1%) percent Sales and Use Tax paid by WINCO for the applicable quarter;
 - ii. WINCO's certification of the documentation required by Section 4(c)(iii) below, evidencing the amount of Sales and Use Tax paid by WINCO to the Comptroller for the applicable quarter; and
 - iii. WINCO's documentation identifying the taxable "sales and use tax-eligible" sales from the Project for the preceding quarter.
- d. Unless otherwise agreed by the City and WINCO, each Sales and Use Tax Grant Submittal Package shall be in the form attached hereto as **Exhibit A**. Unless determined otherwise by the Texas Attorney General in writing, the submitted documentation shall be considered confidential financial information contained in a public document (or other reproduction media) not subject to release to the public. City shall seek a written opinion from the Texas Attorney

General, raising any applicable exception to release, prior to any release to a third-party under the Texas Public Information Act. The parties agree that this Agreement, once consummated, shall not be considered confidential.

- e. If WINCO shall fail to timely submit a Sales and Use Tax Grant Submittal Package for a particular quarter, then the City may give WINCO written notice of WINCO's failure to timely submit such Grant Submittal Package, and WINCO shall have thirty (30) calendar days calculated from the date on which such written notice is given in which to submit such Grant Submittal Package. The City's determination of the amount of the Grant payment due to WINCO is final; provided, however WINCO may appeal to the City Manager within thirty (30) days of payment, the City Manager shall hear the appeal within thirty (30) days and the City Manager's determination of the amount of the Grant payment shall be final; provided, however, nothing herein shall limit (or be construed to limit) WINCO's rights and remedies as described in Section 6 below.
- f. WINCO shall pay prior to delinquency (currently, by January 31st of each year) all the real and personal ad valorem taxes due for the previous tax year on the property subject of the Project. WINCO shall have the right to contest the appraised value of the property subject of the Project as provided by law.
- g. WINCO shall submit an Initial Grant Submittal Package consisting of (i) a "Bills Paid Affidavit", as shown on **Exhibit C**, satisfactory to the CITY, covering all vendor/contractor payments and draws for the Project; and (ii) any other cost and payment documentation reasonably requested by CITY for the Project. The CITY, or its designee, may verify that the expenditures were made in such amounts prior to the Initial Grant disbursement.
- h. WINCO shall be in compliance with all applicable City of McKinney codes, state and federal laws, and local ordinances applicable to the Project.

SECTION 5. EVENTS OF DEFAULT.

Each of the following shall constitute an event of default under this Agreement:

- a. CITY's failure to process a Grant payment to WINCO in accordance with Section 3 of this Agreement.
- b. WINCO's violation or failure to perform any of the covenants contained in Section 4 hereinabove.
- c. WINCO's sale or lease of the Property or Project to any third-party within three (3) years after its receipt of a Certificate of Occupancy, except to an approved affiliate.
- d. WINCO's cessation of the Project as an ongoing use within three (3) years after its receipt of a Certificate of Occupancy.

SECTION 6. EFFECT OF AN EVENT OF DEFAULT

In the event of default under Section 5, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement.

As long as it shall not be in default, WINCO shall further have the power to enforce specific performance to collect amounts owing upon CITY's default without terminating this Agreement. No action shall lie for punitive damages, and no special or consequential damages shall be recovered by either party. If WINCO defaults after its receipt of the Initial Grant and such default is not otherwise cured, CITY may seek repayment of the Initial Grant through all legal means, including suit for breach of this Agreement. No Grant payment shall be due or owing by CITY to WINCO after termination.

SECTION 7 MISCELLANEOUS PROVISIONS

The following miscellaneous provisions are a part of this Agreement:

- a. **Amendments.** This Agreement constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by all of the parties hereto.
- b. **Use of Third Party Grant Funds.** CITY and WINCO acknowledge and agree that the Initial Grant may be funded, in part, through the use of grant funds for which the City is eligible from HUD (Department of Housing and Urban Development). Notwithstanding the foregoing, City's obligations under this Agreement are not conditioned upon its eligibility therefor or the receipt of grant funds. Upon its receipt under Section 3(a), WINCO agrees to apply the Initial Grant to its original acquisition costs for the Property.
- c. **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Collin County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Collin County, Texas.
- d. **Binding Obligation Only on Effective Date.** This Agreement shall become a binding obligation on the parties on the Effective Date. CITY warrants and represents that the individual executing this Agreement on behalf of CITY has full authority to execute this Agreement and bind CITY to the same. WINCO warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- e. **No Waiver of Sovereign Immunity.** The CITY shall not have waived any statutory or common law right to sovereign immunity by virtue of its execution hereof.
- f. **Execution of Agreement.** The CITY has authorized its City Manager to execute this Agreement on behalf of the CITY.
- g. **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.
- h. **Notices.** Whenever a Part to this Agreement is required or permitted under this Agreement to provide the other Party with any notice, submittal, request, demand, consent, or approval ("Notice"), the Notice will be given in writing and will be delivered to the other Party at the address or facsimile number set forth below: (a) personally; (b) by a reputable overnight courier service; (c) by certified mail, postage prepaid, return receipt requested; or (d) by e-mail or facsimile transmission. Either Party may change its address for Notice by written notice to the other

Party delivered in the manner set forth above. Notice will be deemed to have been duly given: (i) on the date personally delivered; (ii) one (1) business day after delivery to an overnight courier service with next-day service requested; (iii) on the third (3rd) business day after mailing, if mailed using certified mail; or (iv) on the date sent when delivered by facsimile or e-mail (so long as delivered on a business day and the sender receives electronic confirmation of delivery and a copy of the Notice is sent by one of the other means permitted hereunder on or before the next business day).

IF TO WINCO: WinCo Foods, LLC
Attn: Mark Lavin
650 N. Armstrong Place
Boise, ID 83704
Telephone: (208) 672-2086
Fax: (208) 672-2146
E-mail: Mark.Lavin@wincofoods.com

With a copy at the same address to:

WinCo Foods, LLC
Attn: Tammy Zokan
Telephone: (208) 672-2064
Fax: (208) 672-2146
E-mail: Tammy.Zokan@wincofoods.com

REMAINDER OF PAGE LEFT BLANK

IF TO CITY: City of McKinney, Texas
Attn: Jason Gray, City Manager
222 N. Tennessee Street
McKinney, TX 75069
Phone: (972) 547-7520
Fax: (972) 547-2607
E-mail: jgray@mckinneytexas.org

- i. **Effective Date.** The effective date (the "Effective Date") of this Agreement shall be the latter of the dates on which the WINCO and CITY have each executed this Agreement.
- j. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.

WINCO FOODS, LLC,
a Delaware limited liability company

By: _____
Its _____

Date
Signed: _____

CITY OF MCKINNEY, TEXAS

By: _____
Name: JASON GRAY
Title: CITY MANAGER
Date
Signed: _____

ATTEST:

SANDY HART, TRMC, MMC
City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
Attorney for City of McKinney

PREPARED IN THE OFFICES OF:
Brown & Hofmeister, l.l.p.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/747-6100
214/747-6111 Fax

EXHIBIT A

Form of Sales and Use Tax Grant Submittal Package

[See Attached]

Exhibit A - Grant Submittal

FROM:
WINCO FOODS, LLC
650 N. Armstrong Place
Boise, Idaho 83704
Telephone: _____
Fax: _____

TO:
CITY OF MCKINNEY
Attn: Rodney Rhoads, Finance Director
222 N. Tennessee Street
McKinney, Texas 75069
Telephone: (972)547-7500
Fax: (972)547-2612

Re: Grant as provided in the Chapter 380 Economic Development Agreement effective the ____ day of _____, 2013 for the WinCo Foods - McKinney grocery facility, located at 1800 N. Graves, McKinney, Texas 75069

Date: _____

Quarter ended: _____

Eligible Taxable sales: \$ _____

State sales and use tax paid (6.25%): \$ _____

Combined local sales and use tax paid [**includes** City of McKinney 1.00% below] (2.00%):

\$ _____

City of McKinney sales and use tax paid (1.00%):

\$ _____

Amount due WinCo (1.00%): \$ _____

Date paid to Comptroller: _____

Copy of check attached: Yes No

Copy of Sales and Use Tax Return attached: Yes No

Confirmation from Comptroller for amount of Sales and Use Tax paid attached: Yes No

I hereby certify that the information contained herein is accurate and complete and is within my knowledge in my capacity stated below.

WINCO FOODS, LLC

EXHIBIT B

Depiction of Parcels B and C (NOT included in "Project" or "Property")

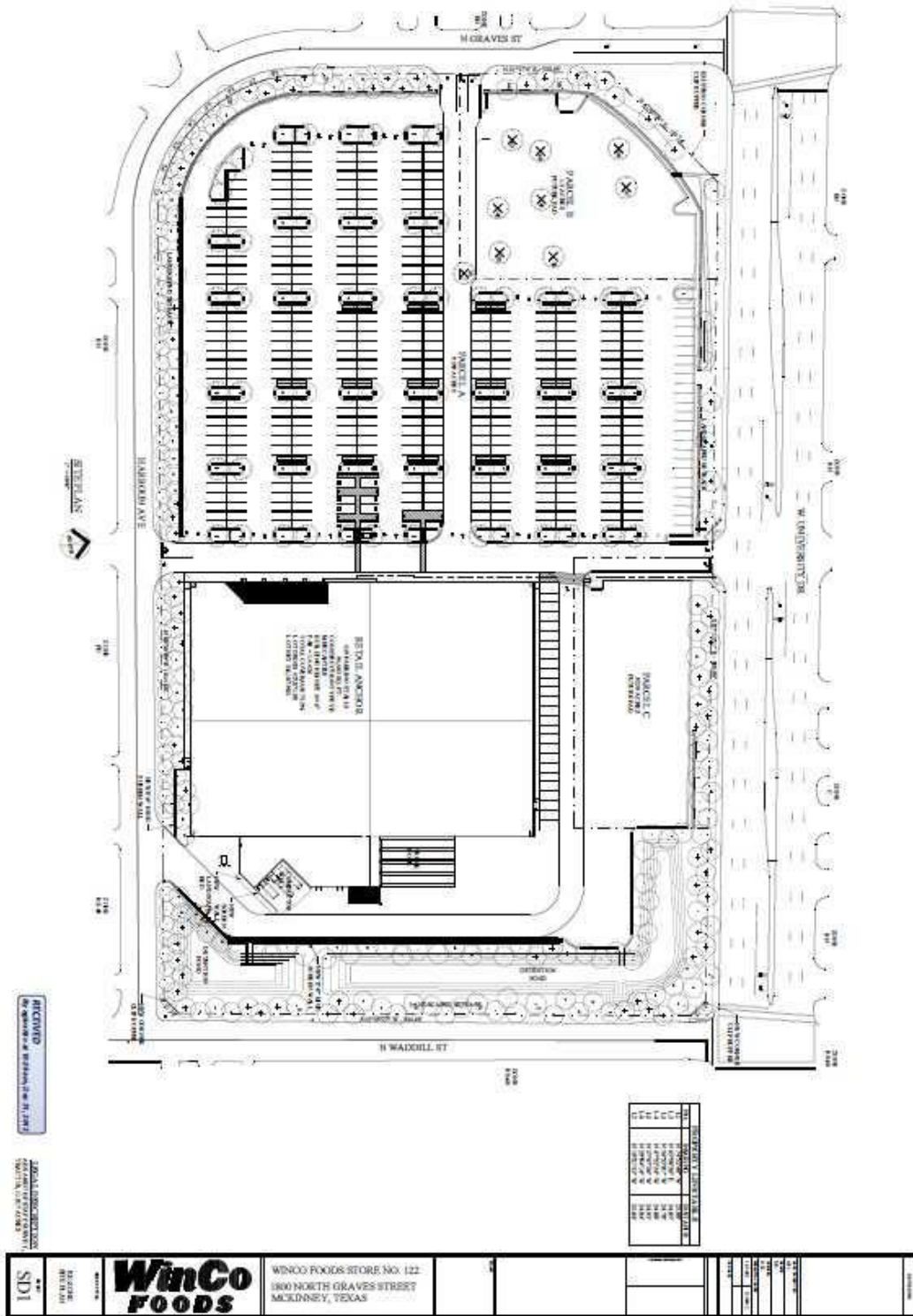


Exhibit C

Bills-Paid Affidavit

Date: _____

Project Name: _____

Owner Name: _____

Owner's Mailing Address:

Contractor Name(s): _____

Contractor's Mailing Address(es):

Affiant's Name: _____

Affiant's Mailing Address:

Phase/Lots and Blocks:

Improvements: _____

THE STATE OF TEXAS §

COUNTY OF COLLIN §

Before me, the undersigned, on this day personally appeared _____, known to me to be a credible person and officer of _____, a _____ (hereinafter called "Affiant"),

and who, being duly sworn, upon his oath declares and acknowledged that the following statements are true and within the personal knowledge of Affiant:

1. Affiant has personal knowledge of the facts stated in this affidavit. Affiant has full authority to make the agreements in this affidavit on behalf of Owner(s)

_____ (hereinafter referred to as "Owner" whether one or more).

2. Affiant understands that the City of McKinney, Texas ("City") has required this affidavit as a condition of its grant of incentives under an economic development agreement involving the Property identified above in the City of McKinney, Collin County, Texas (the "Project").

3. Owner has constructed and installed, or caused to be constructed and installed, certain private building improvements, public improvements and infrastructure required by the City and necessary to serve the Project.

4. Affiant has actual knowledge that all bills owed by Owner to others for materials supplied or labor performed in connection with the Project have been fully paid and satisfied.

5. **Owner agrees to indemnify and hold City harmless from and against any loss or expense resulting from false or incorrect information in this affidavit.**

OWNER:

_____ [INSERT OWNER'S NAME]
a _____ [Insert type of business entity]

By: _____
Name:

Title:

SUBSCRIBED AND SWORN TO before me on this ____ day of _____, 2013, by _____, in his/her capacity as _____, of _____ a _____ (hereinafter called "Affiant").

Notary Public, State of Texas