

# SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT

**[insert name of company]**

THIS SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT [Agreement] is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation [Grantee], and **[insert name of company]**, a California public benefit corporation [Operator], as of **December 14, 2022 , 2020** [Effective Date]. Grantee and Operator are sometimes referred to in this Agreement, individually, as a “Party” or collectively, as the “Parties.”

## **RECITALS**

- A. Grantee was approved by the United States Foreign-Trade Zones Board [Board] as grantee of Foreign-Trade Zone No. 153 pursuant to Board Order No. 394, dated October 14, 1988, and published at 53 Federal Register 41616, on October 24, 1988, and received a grant of authority (defined in Title 15 Code of Federal Regulations section 400.2(i)) from the Board to establish, operate, and maintain Foreign-Trade Zone No. 153 [FTZ 153]; and
- B. Grantee submitted an Alternative Site Framework [defined in Title 15 Code of Federal Regulations section 400.2] [ASF] application for FTZ No. 153 and reorganized FTZ 153 into the ASF following official approval by the Board, on June 3, 2011; and
- C. Grantee is authorized within the FTZ 153 service area to request designation of Foreign-Trade Zone sites from the Board and activation of Foreign Trade Zone areas within those sites from U.S. Customs and Border Protection Service [CBP], all in accordance with all federal, State of California and local law; and
- D. CBP handles the day-to-day monitoring of FTZ 153 activity and Grantee is not responsible for providing operational oversight or direction to Operator; and
- E. Operator’s business, staffing, and operation activities are described in Exhibit “A” attached to this Agreement [Business]; and
- F. Operator currently conducts its Business on the real property specifically described in Exhibit “B” attached to this Agreement [Property]; and
- G. The Board designated the Property as Foreign-Trade Zone **(Subzone 153J, Sites 1-5)**; and
- H. Operator applied to CBP for activation of subzones within the FTZ No. 153 Service Area (defined in Section 1.21) and, as of **December 14, 2022**, received a letter of activation from CBP giving Operator the exclusive authority to use, maintain, operate and manage the FTZ Area;
- I. **Operator submitted a notification requesting production authority in subzone locations, Sites**

1-5, within the FTZ No. 153 Service Area (defined in Section 1.21) and, as of January 5, 2023 received a letter of authorization from the Board for production activity; and

- J. CBP, as part of Operator's application for activation of the FTZ Area within FTZ 153, conducts background investigations of Operator, including Operator's management involved in the operation of the Foreign-Trade Zone area and key employees of Operator that have access to or could cause changes to Operator's inventory or recordkeeping system; and

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

## 1. DEFINITIONS.

1.1 Act. The Foreign-Trade Zones Act of June 18, 1934, as amended (Pub. L. 397, 73<sup>rd</sup> Congress, 48 Stat. 998 - 1003 (Title 19 United States Code sections 81a - 81u)).

1.2 Affiliate. Any other Person, directly or indirectly, Controlling or Controlled by or under common Control with the specified Person.

1.3 Agreement. This San Diego Foreign-Trade Zone Operating Agreement by and between Grantee and Operator, including all of the attached exhibits, which are incorporated into this Agreement by reference.

1.4 ASE. Defined in Recital B.

1.5 Bankruptcy Proceeding. Any proceeding, whether voluntary or involuntary, under Title 11 of the United States Code or any other or successor State or Federal statute relating to assignment for the benefit of creditors, appointment of a receiver or trustee, bankruptcy, composition, insolvency, moratorium, reorganization, or similar matters.

1.6 Board. Defined in Recital A.

1.7 Board Regulations. Title 15 Code of Federal Regulations sections 400.1 - 400.53.

1.8 Business Day. Any weekday on which Grantee is open to conduct regular Grantee functions with Grantee personnel.

1.9 CBP. Defined in Recital C.

1.10 CBP Regulations. Title 19 Code of Federal Regulations Part 146.

1.11 Claim. Any claim, loss, cost, damage, expense, liability, lien, action, cause of action (whether in tort, contract, under statute, at law, in equity or otherwise), charge, award, assessment, fine or penalty of any kind (including consultant and expert fees and expenses and investigation costs of whatever kind or nature, and if an Indemnitor improperly fails to provide a defense for an Indemnitee or provides a defense under a reservation of rights, then Legal Costs of the Indemnitee) and any judgment.

1.12 Control. Possession, directly or indirectly, of the power to direct or cause the direction

of the management and policies of a Person, whether by ownership of equity interests, by contract or otherwise. “Controlling” and “Controlled” shall have correlating meanings.

1.13 County. The County of San Diego, California.

1.14 Default. A Monetary Default or a Non-Monetary Default.

1.15 Effective Date. Defined in the initial paragraph of this Agreement to correspond with the date of the CBP letter of activation giving Operator the exclusive authority to use, maintain, operate, and manage the FTZ Area.

1.16 Event of Default. The occurrence of any one or more of the following:

1.16.1 *Monetary Default*. A Monetary Default that continues for ten (10) calendar days after Notice to the Party in Default specifying in reasonable detail the amount of money not paid and the nature and calculation of each such amount, bond, surety or insurance not provided;

1.16.2 *Bankruptcy or Insolvency*. Operator admits in writing that Operator is unable to pay Operator’s debts as they become due or Operator becomes subject to any Bankruptcy Proceeding (except an involuntary Bankruptcy Proceeding dismissed within ninety (90) days after commencement), or a custodian or trustee is appointed to take possession of, or an attachment, execution or other judicial seizure is made with respect to, substantially all of Operator’s assets or Operator’s interest in this Agreement or the FTZ Area (unless such appointment, attachment, execution, or other seizure was involuntary, and is contested with diligence and continuity and vacated and discharged within ninety (90) days);

1.16.3 *Assignment*. The occurrence of an assignment, whether voluntarily or involuntarily or by operation of Law, in violation of the terms of this Agreement; or

1.16.4 *Non-Monetary Default*. Any Non-Monetary Default, other than those specifically addressed in Section 1.16.2 or Section 1.16.3, that is not cured within thirty (30) days after Notice to the Party in Default describing the Non-Monetary Default in reasonable detail. In the case of such a Non-Monetary Default that cannot with reasonable diligence be cured within thirty (30) days after the date the Notice of the Non-Monetary Default is received by the Party asserted to be in Default, the Party asserted to be in Default shall only be in Default if such Party does not do all of the following: (a) within thirty (30) days after Notice of such Non-Monetary Default, advise the other Party of the intention of the Party in Default to take all reasonable steps to cure such Non-Monetary Default; (b) duly commence such cure within such thirty (30) day period; and (c) diligently prosecute such cure to completion within a reasonable time under the circumstances.

1.17 Federal. Relating or pursuant to the authority of the federal government of the United States of America.

1.18 Foreign-Trade Zone. Defined in Title 15 Code of Federal Regulations section 400.2(h).

1.19 FTZ 153. Defined in Recital A.

1.20 FTZ Activity. All Foreign-Trade Zone activity permitted under Law.

1.21 FTZ Area. The area of the Site specifically activated by CBP for FTZ Activity.

1.22 Government. Any and all courts, boards, agencies, commissions, offices or authorities of any nature whatsoever of any governmental unit (Federal, State, County, district, municipal, or otherwise) whether now or later in existence.

1.23 Grantee. The City of San Diego, a California municipal corporation.

1.24 Grantee Parties. Collectively, Grantee, the City Council, and all Grantee elected or appointed officials, employees, agents and attorneys.

1.25 Indemnify. Where this Agreement states that any Indemnitor shall “Indemnify” any Indemnitee from, against, or for a particular Claim, that the Indemnitor shall indemnify the Indemnitee and defend and hold the Indemnitee harmless from and against such Claim (alleged or otherwise). “Indemnified” shall have the correlative meaning.

1.26 Indemnitee. Any Person entitled to be indemnified under the terms of this Agreement.

1.27 Indemnitor. A Party that agrees to Indemnify any other Person under the terms of this Agreement.

1.28 Insurance Documents. Copies or originals of insurance policies or endorsements evidencing all insurance coverage required to be obtained or maintained by Operator pursuant to Section 8.2.

1.29 Law. Every law, ordinance, requirement, order, proclamation, directive, rule or regulation of any Government applicable to this Agreement, the Site, the FTZ Area, or FTZ 153, in any way, whether in force on the Effective Date or passed, enacted, modified, amended or imposed at some later time, including any retroactively-applicable law, subject in all cases, however, to any applicable waiver, variance or exemption, including: (a) the Act; (b) the CBP Regulations; (c) the Board Regulations; (d) all Board policies and procedures; (e) all conditions imposed upon Grantee under the grant of authority for FTZ 153; (f) relating to any development, construction, use, maintenance, taxation, operation, occupancy of or environmental conditions affecting real property or other elements of the environment; (g) otherwise relating to this Agreement or any Party’s rights, obligations or remedies under this Agreement; or (h) any transfer or assignment of any Party’s rights, obligations, or remedies under this agreement or the title to or right to use or occupy the Site or the FTZ Area.

1.30 Legal Costs. In reference to any Person, all reasonable costs and expenses such Person incurs in any legal proceeding (or other matter for which such Person is entitled to be reimbursed for its Legal Costs), including reasonable attorneys’ fees, court costs and expenses and consultant and expert witness fees and expenses.

1.31 Monetary Default. Any failure by either Party to pay, deposit or deliver, when and as this Agreement requires, any amount of money, any bond or surety or evidence of any insurance coverage required to be provided under this Agreement, whether to or with a Party or a Third Person.

1.32 Non-Monetary Default. The occurrence of any of the following, except to the extent constituting a Monetary Default: (a) any failure of a Party to perform any of such Party's obligations under this Agreement; (b) any failure of a Party to comply with any material restriction or prohibition in this Agreement; or (c) any other event or circumstance that, with passage of time or giving of Notice, or both, would constitute a breach of this Agreement by a Party.

1.33 Notice. Any consent, demand, designation, election, notice or request relating to this Agreement, including any Notice of Default. All Notices must be in writing.

1.34 Notify. To give a Notice.

1.35 Operator Parties. Collectively, Operator and the directors, officers, employees, agents, shareholders, members, managers and partners of Operator.

1.36 Parties. Collectively, Grantee and Operator.

1.37 Party. Individually, either Grantee or Operator, as applicable.

1.38 Person. Any association, corporation, Government, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization or other entity of any kind.

1.39 Property. Defined in Recital G.

1.40 SDMC. San Diego Municipal Code.

1.41 Site. Defined in Recital H.

1.42 State. The State of California.

1.43 Term. Defined in Section 4.

1.44 Third Person. Any Person that is not a Party, an Affiliate of a Party, or an elected official, officer, director, manager, shareholder, member, principal, partner, employee or agent of a Party.

1.45 Zone Schedule. The then current zone schedule approved by the Board for FTZ 153 in accordance with Title 15 Code of Federal Regulations section 400.44.

2. **OPERATOR RESPONSIBLE FOR FTZ AREA**. Operator agrees to be solely and fully responsible for the use, maintenance, operation, and management of the FTZ Area in accordance with the terms of this Agreement and applicable Law.

3. **DISCLAIMER OF PRIVILEGES**. Grantee makes no representation or warranty to Operator about any particular privileges or benefits that may accrue to Operator from Operator's operation of the FTZ Area, as those privileges or benefits may vary as a result of interpretation, enforcement, or changes in Law or business decisions of Operator. Grantee shall in no way be liable for any costs or losses sustained by Operator as a result of Operator's operation of the FTZ Area.

4. **DURATION OF AGREEMENT.** This Agreement shall be in effect beginning on the Effective Date and continuing until this Agreement is terminated in accordance with Section 12 [Term].

5. **STANDARDS OF OPERATION.**

5.1 Compliance with Law. Operator shall use, maintain, operate, and manage the FTZ Area in accordance with the terms of this Agreement and all applicable Law. Except for the submission of Grantee's annual reports to the Board, all duties and obligations under applicable Law relating to the FTZ Area are solely and exclusively the duties and obligations of Operator, at Operator's sole cost and expense.

5.2 Site Procedures Manual. Prior to conducting any FTZ Activity, Operator shall establish written standards for operation and management of The FTZ Area, in accordance with Title 19 Code of Federal Regulations section 146.21, in a document entitled "FTZ Procedures Manual" [Procedures Manual]. The Procedures Manual shall comply with all requirements imposed by CBP for any FTZ Activity. Operator shall conform to the standards set forth in the Procedures Manual and applicable Law in its operation and management of the FTZ Area. Operator shall require all Persons admitted to the FTZ Area to conform to the standards set forth in the Procedures Manual and applicable Law. Operator shall provide a copy of the Procedures Manual to Grantee and CBP prior to conducting any FTZ Activity. Operator shall keep its Procedures Manual current and shall submit to Grantee and CBP each change in Operator's Procedures Manual at the time the change is made.

5.3 Merchandise Handling. Operator represents and warrants to Grantee that Operator has trained and experienced personnel familiar with CBP approved software to meet mandatory electronic filing requirements, and is capable and qualified to provide the facilities and services related to the proper maintenance and lawful operation of the FTZ Area. Operator is responsible for the receipt, verification, and physical count of all merchandise admitted to the FTZ Area, the timely filing of information with the Federal Government in the proper format and on the proper report, the appropriate handling of all merchandise, the preparation and shipment of all merchandise, and the physical count of all merchandise for import, export, transfer, or destruction, all with prior authorizations from CBP and such other Government agencies as may be required by Law.

5.4 Right of Entry. Representatives of the Board, CBP, and other Federal Government agencies shall have the right to enter the Property and the FTZ Area consistent with applicable Law. Representatives of Grantee shall have the right to enter the Property and the FTZ Area upon forty-eight (48) hours prior Notice to Operator to determine whether the FTZ Area is being operated and maintained, or FTZ Activity is being conducted, all in accordance with this Agreement. If Grantee has a reasonable belief that activity or conditions detrimental to public health or safety is taking place or exist within the Property and the FTZ Area, Grantee may enter the Property and the FTZ Area any time during regular business hours, without Notice to Operator.

5.5 Foreign-Trade Zone Operator's Bond. Operator shall secure and maintain, in its name and at its sole cost and expense, any bond required by the Board or CBP for the establishment or

operation of the FTZ Area [FTZ Bond]. Each FTZ Bond shall be issued by a surety company authorized to do business in the State by the State Department of Insurance and approved by CBP.

5.6 CBP Personnel Charges. If it becomes necessary for CBP personnel to be located at the FTZ Area, Operator shall pay all expenses for such personnel billed by CBP. Operator shall be responsible for any late fees or interest associated with failure to pay any such bill as and when due.

## 6. **RECORDS, AUDITS AND INSPECTIONS.**

6.1 Annual Report. By February 15 of each calendar year, Operator shall submit to Grantee a preliminary annual report containing all the data and information required to be submitted by Grantee to the Board relating to the FTZ Area for the prior calendar year covering January 1 through December 31. The preliminary annual report shall be prepared using the Online FTZ Information System [OFIS] available on the Board website. The contact name on the preliminary annual report shall be Operator's authorized and responsible Person that can attest to the accuracy of the data and information contained in the preliminary annual report (a declaration under the penalty of perjury). Each Operator preliminary annual report will be finalized by Grantee into a final annual report and submitted by Grantee through OFIS to the Board. Operator shall pay Grantee \$100 per day for each day after February 15 that the preliminary annual report data or information is not submitted through OFIS, unless Grantee has given Operator a written extension of time beyond February 15 to submit such data or information.

6.2 Audits and Inspections. Operator shall Notify Grantee of any request by the Board, CBP, or other Government for an inspection of the FTZ Area or an audit of financial, accounting, or other records relating to the FTZ Area, within seven (7) days after Operator receives such request. Operator shall, if requested by Grantee, provide Grantee copies of all correspondence, notices, reports and other written communications received by Operator from or given by Operator to the Board, CBP or other Government relating to the FTZ Area.

6.3 Record Retention. All records concerning the FTZ Area and FTZ Activity, including financial, accounting, and operations records, shall be retained by Operator as required by Law.

6.4 Confidentiality of Operator's Business Information. All financial and operations information concerning the FTZ Area shall be confidential, except information required to be disclosed or made public pursuant to Law. All procedures manuals, computer programs, computer reports, and systems designs developed by Operator for the FTZ Area operations shall remain the property of Operator. Grantee shall not intentionally disclose confidential information provided to it by Operator unless prior written approval is obtained from Operator or disclosure is required pursuant to Law. If Operator sends a Notice to Grantee requesting the return of any material belonging to Operator, Grantee shall return such material to Operator within a reasonable time, unless Grantee is required by Law to keep or maintain any information provided in such material.

## 7. **ADMINISTRATIVE EXPENSES.**

7.1 Application Fee. Operator shall pay Grantee an application fee in the amount set forth in the Zone Schedule that will be invoiced on the initial Annual Fee (defined in Section 7.3) invoice from Grantee to Operator. The Parties agree that the amount of the application fee is a fair and

reasonable amount to compensate Grantee for the expenses of processing Operator's application for the FTZ Area.

7.2 Operator Agreement Fee. Operator shall pay Grantee an operating agreement fee in the amount set forth in the Zone Schedule that will be invoiced on the initial Annual Fee invoice from Grantee to Operator. The Parties agree that the amount of the operator agreement fee is a fair and reasonable amount to compensate Grantee for the expenses of preparing and processing this Agreement.

7.3 Annual Fee. Operator shall also pay Grantee an annual fee in the amount set forth in the Zone Schedule [Annual Fee] for each fiscal year (July 1 – June 30) during the Term. The first Annual Fee is due on the Effective Date and shall be prorated from the Effective Date to June 30, 2020. The Parties agree that the Annual Fee is a fair and reasonable amount to recover costs incurred by or on behalf of Grantee for the performance of the Grantee function in administration of FTZ 153. The Annual Fee may be increased by Grantee to recover any additional expenses associated with administration of FTZ 153 and any related services provided by Grantee. If Grantee intends to increase the Annual Fee, Grantee shall Notify Operator of the proposed increase by the May 1 immediately preceding the fiscal year in which the increase will take effect, with the increased Annual Fee to be effective as of the immediately following July 1. If Operator disagrees with the amount of the increase in the Annual Fee, Operator may terminate this Agreement within thirty (30) days after delivery of Notice of the increased Annual Fee, with ninety (90) days' Notice to Grantee. Upon termination of this Agreement, pursuant to this Section 7.1, Grantee shall refund to Operator that amount of the Annual Fee for the fiscal year in which such termination occurs attributable to the number of days remaining in the fiscal year after the last day of the required ninety (90) days' Notice of termination period.

7.4 Fee Payments. All fee payments under this Agreement shall be made payable to "City Treasurer," and remitted to Grantee by United States Postal Service first-class mail at City's Notice address pursuant to Section 15.1 or, if one or more other methods of payment are made available by Grantee for fee payments under this Agreement at any time after the Effective Date, then by one of such other payment methods.

7.5 LATE PAYMENT DAMAGES. IN ADDITION TO THE FEES DESCRIBED IN THIS SECTION 7, IF OPERATOR DOES NOT PAY ALL OR ANY PART OF SUCH A FEE ON OR BEFORE THE DATE THE FEE IS DUE, OPERATOR SHALL ALSO PAY TO GRANTEE THE AMOUNT OF ONE HUNDRED DOLLARS (\$100) FOR EACH DAY THAT ALL OR ANY PART OF THE FEE IS NOT PAID AFTER THE DATE THE FEE IS DUE AS LIQUIDATED DAMAGES, NOT AS A PENALTY. OPERATOR ACKNOWLEDGES AND AGREES THAT GRANTEE WILL INCUR COSTS AND DAMAGES, IF OPERATOR PAYS ALL OR ANY PART OF ANY FEE DESCRIBED IN THIS SECTION 7 AFTER THE DATE THE FEE IS DUE, AND THE AMOUNT OF LIQUIDATED DAMAGES PROVIDED IN THIS SECTION 7.5 IS FAIR AND REASONABLE UNDER THE CIRCUMSTANCES.

7.6 Payment of Obligations. Operator shall be solely responsible for the payment and satisfaction of any and all assessments, charges, fees, costs, damages, penalties or fines imposed by the Board, CBP, or any Government resulting from any FTZ Activity, any act or omission to act by Operator, or the use, maintenance, development, operation, or management of the FTZ Area,



including the import or export of merchandise to or from the FTZ Area. Operator shall promptly Notify Grantee of any and all such assessments or obligations, even if Operator disputes their validity.

7.7 Zone Schedule. Operator acknowledges that the Zone Schedule is published on the Board website. Operator represents to Grantee that Operator has reviewed the Zone Schedule as of the Effective Date. Operator shall abide by the Zone Schedule and any updates to the Zone Schedule that may be implemented from time to time. General information concerning the FTZ Area approval and location may be included in the Zone Schedule describing FTZ 153.

## 8. INDEMNITY AND INSURANCE.

8.1 Indemnification Agreement. Operator shall Indemnify Grantee Parties against any Claim arising from: (a) this Agreement; (b) any FTZ Activity; (c) operation, maintenance or development of the FTZ Area; (d) any wrongful intentional act or negligence of one or more of Operator Parties; (e) any agreement that Operator (or anyone claiming by or through Operator) makes with a Third Person regarding this Agreement, any FTZ Activity or the FTZ Area; (f) any worker's compensation claim or determination relating to any employee of one or more of Operator Parties or their contractors; or (g) any violation of Law by one or more of Operator Parties.

8.1.1 *Independent of Insurance Obligations*. Operator's indemnification obligations under this Agreement shall not be construed or interpreted as in any way restricting, limiting, or modifying Operator's insurance or other obligations under this Agreement. Operator's obligation to Indemnify Grantee Parties under this Agreement is independent of Operator's insurance and other obligations under this Agreement. Operator's compliance with Operator's insurance obligations and other obligations under this Agreement shall not in any way restrict, limit or modify Operator's obligations to Indemnify Grantee Parties under this Agreement and are independent of Operator's obligations to Indemnify Grantee Parties and other obligations under this Agreement.

8.1.2 *Survival of Indemnification and Defense Obligations*. The obligation of Operator under this Agreement to Indemnify Grantee Parties shall survive the expiration or earlier termination of this Agreement, until any and all actual or prospective Claims regarding any matter subject to any such obligation under this Agreement to Indemnify Grantee Parties are fully, finally, absolutely and completely barred by applicable statutes of limitations.

8.2 Insurance. Operator shall provide Grantee with Insurance Documents evidencing all insurance coverage required pursuant to this Section 8.2 within seven (7) days after the Effective Date and at any other time during the Term, upon Grantee's request. Operator shall obtain and keep in effect at all times during the Term commercial general liability insurance, including an obligation of the insurer to defend Grantee in any action covered by such insurance, providing coverage for bodily injury, including death, personal injury, property damage, and the contractual indemnity obligations of Operator under this Agreement, with a minimum liability limit of One Million Dollars (\$1,000,000) per occurrence and a minimum annual aggregate liability limit of Two Million Dollars (\$2,000,000).

8.2.1 *Additional Insured Status.* The Grantee, its officers, officials, employees, and volunteers are to be covered as additional insureds on the commercial general liability policy.

8.2.2 *Qualified Insurer(s).* All insurance required by this Agreement must be provided by insurers licensed to do business in the State that are rated at least “A-, VI” by the current applicable A.M. Best Ratings Guide and are acceptable to Grantee. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of State eligible surplus lines insurers and otherwise meet Grantee’s requirements.

8.2.3 *Continuity of Coverage.* All insurance policies shall be in force as of the Effective Date and shall be kept in force for the duration of this Agreement. Upon expiration of each required insurance policy, Operator shall furnish a certificate(s) showing that a new or extended policy has been obtained that meets the requirements of this Agreement. Operator shall provide proof of continuing insurance at least annually while this Agreement is in effect. If any insurance coverage lapses or is discontinued for any reason, Operator shall immediately notify Grantee and obtain replacement insurance coverage as soon as possible.

8.2.4 *Modification.* To assure protection from and against the kind and extent of risk related to this Agreement, Grantee, at its discretion, may require Operator to obtain increased liability limits or additional insurance coverage at any time while this Agreement is in effect by giving Operator sixty (60) days prior written notice. Operator shall obtain all increased liability limits or additional insurance coverage required by Grantee for changed circumstances or Grantee’s reasonable re-evaluation of risk levels related to this Agreement.

9. **ASSIGNMENT PROHIBITED.** Operator shall not assign any of its rights or obligations under this Agreement without Grantee’s prior written approval, which approval may be given or withheld in Grantee’s sole and absolute discretion. In no event shall any assignment of this Agreement by Operator create a contractual relationship between Grantee and any asserted assignee, without Grantee’s prior written consent, which consent may be given or withheld in Grantee’s sole and absolute discretion.

10. **MOVING OR ALTERATION OF FTZ AREA.** Operator acknowledges and agrees that Operator may not move the FTZ Area to a different physical location or physically alter its facilities on the FTZ Area, without approval from CBP and the prior written concurrence of Grantee.

11. **NO PARTNERSHIP OR JOINT VENTURE.** The Parties each intend and agree that Grantee and Operator are independent contracting entities and do not intend by this Agreement to create any partnership, joint venture or similar business arrangement, relationship or association between or among them. Operator acknowledges and agrees that Operator is not an agent or employee of Grantee. Operator shall have no authority to bind Grantee in any manner, or to incur any obligation, debt or liability of any kind, on behalf of or against Grantee, whether by contract or otherwise.

## 12. TERMINATION.

12.1 Termination without Cause by Operator. Notwithstanding any other provision of this Agreement to the contrary, Operator may, at any time and without cause, terminate this Agreement upon ninety (90) days prior Notice to Grantee. If Operator desires to terminate this Agreement, pursuant to this Section 12.1 or any other provision of this Agreement, Operator must first deactivate the FTZ Area through CBP, including all conditions to such de-activation imposed or required by applicable Law.

12.2 Termination by Grantee for Violation of Law. If Grantee determines Operator has violated any Law, Grantee may immediately terminate this Agreement by Notice to Operator.

12.3 Termination Resulting from Withdrawal of Grant. If the grant of authority to Grantee for FTZ 153 is revoked or canceled by the Board, this Agreement shall terminate concurrently with any such revocation or cancellation, and Operator shall have no claim against Grantee by reason of such revocation or cancellation.

12.4 Termination on Event of Default. Notwithstanding any other provision of this Agreement to the contrary, either Party may terminate this Agreement on the occurrence of an Event of Default attributable to the other Party.

13. **LEGAL ACTIONS.** Either Party may institute legal action, at law or in equity, to enforce or interpret the rights or obligations of the Parties under this Agreement or recover damages.

14. **RIGHTS AND REMEDIES ARE CUMULATIVE.** Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties set forth in this Agreement are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by such Party, at the same or different times, of any other right or remedy for the same Default or Event of Default or the same right or remedy for any other Default or Event of Default by the other Party.

## 15. GENERAL PROVISIONS.

15.1 Notices, Demands and Communications between the Parties. Any and all Notices submitted by any Party to another Party pursuant to or as required by this Agreement shall be proper, if in writing and dispatched by messenger for immediate personal delivery, nationally recognized overnight (one Business Day) delivery service (i.e., United Parcel Service, Federal Express, etc.) or by registered or certified mail through the United States Postal Service, postage prepaid, return receipt requested, to the address of the recipient Party, as set forth in Exhibit C attached to this Agreement. Notices may be sent in the same manner to such other addresses as either Party may from time to time designate by Notice in accordance with this Section 15.1. Notice shall be deemed received by the addressee, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, on the day that the Notice is dispatched by messenger for immediate personal delivery, one (1) Business Day after delivery to a nationally recognized overnight delivery service or two (2) calendar days after the Notice is deposited with the United States Postal Service in accordance with this Section 15.1. Any attorney representing a Party may give any Notice on behalf of such Party. The Notice addresses for the Parties, as of the Effective Date, are set forth in Exhibit C attached to this Agreement.

15.2 Relationship of Parties. The Parties each intend and agree that Grantee and Operator are independent contracting entities and do not intend by this Agreement to create any partnership, joint venture or similar business arrangement, relationship or association between them.

15.3 Incorporation of Recitals. The recitals of fact at the beginning of this Agreement are true and correct and are incorporated into this Agreement by this reference, as though fully set forth in this Agreement.

15.4 Warranty against Payment of Consideration for Agreement. Operator represents and warrants to Grantee that: (a) Operator has not employed or retained any Person to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees of Operator and Third Persons to whom fees are paid for professional services related to documentation of this Agreement; and (b) no gratuities, in the form of entertainment, gifts or otherwise have been or will be given by Operator or any of Operator's agents, employees or representatives to any official or employee of Grantee in an attempt to secure this Agreement or favorable terms or conditions for this Agreement. Breach of the representations or warranties of this Section 15.4 shall entitle Grantee to terminate this Agreement immediately, without liability, upon seven (7) days' Notice to Operator.

15.5 No Discrimination or Segregation. Operator covenants by and for itself and all Persons claiming under or through Operator that there shall be no discrimination against or segregation of any Person or group of Persons on account of any basis listed in subdivision (a) or (d) of section 12955 of the Government Code, as those bases are defined in sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of section 12955, and section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the FTZ Area, nor shall Operator or any Person claiming under or through Operator establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sub lessees, subtenants, or vendees in the FTZ Area.

15.6 Non-liability of Grantee Officials and Employees. No official or employee of Grantee shall be personally liable to Operator, or any successor in interest to Operator, in the event of any Default or Event of Default by Grantee or for any amount that may become due to Operator or to Operator's successor on any obligations under the terms of this Agreement, except to the extent resulting from the negligence or willful misconduct of such official or employee.

15.7 Calculation of Time Periods. Unless otherwise specified, all references to time periods in this Agreement measured in days shall be to consecutive calendar days, all references to time periods in this Agreement measured in months shall be to consecutive calendar months and all references to time periods in this Agreement measured in years shall be to consecutive calendar years. Any reference to Business Days in this Agreement shall mean consecutive Business Days.

15.8 Principles of Interpretation. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Agreement. The Parties have both participated substantially in the negotiation, drafting and revision of this Agreement, with advice from legal and other counsel and advisers of their own selection. A word, term or phrase defined in the singular in this Agreement may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which shall govern all language in this Agreement. The

words “include” and “including” in this Agreement shall be construed to be followed by the words: “without limitation.” Each collective noun in this Agreement shall be interpreted as if followed by the words “(or any part of it),” except where the context clearly requires otherwise. Every reference to any document, including this Agreement, refers to such document, as modified from time to time (excepting any modification that violates this Agreement), and includes all exhibits, schedules, addenda and riders to such document. The word “or” in this Agreement includes the word “and,” except where the context clearly requires otherwise. Every reference to a law, statute, regulation, order, form or similar Government requirement refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time.

15.9 Governing Law. This Agreement shall be governed by and construed in accordance with: (a) the Act; (b) the CBP Regulations; (c) all other Laws applicable to Foreign-Trade Zones, the FTZ Area or the import or export of goods to or from the United States; (d) all Board Regulations, policies or procedures; (e) all conditions imposed upon Grantee under the grant of authority from the Board for FTZ 153; and (f) the procedural and substantive laws of the State, without application of conflicts of laws principles or statutes. The Parties submit to the personal jurisdiction of, and all legal actions arising from this Agreement shall be filed in, the Superior Court of the State in and for the County or the United States District Court with jurisdiction in the County.

15.10 Municipal Powers. Nothing contained in this Agreement shall be construed as a limitation upon the powers of Grantee as a chartered city of the State.

15.11 Tax Consequences. Operator acknowledges and agrees that Operator shall bear any and all responsibility, liability, costs or expenses connected in any way with any tax consequences experienced by Operator related to this Agreement, any FTZ Activity or operation, maintenance or development of the FTZ Area.

15.12 No Third-Party Beneficiaries. Nothing in this Agreement, express or implied, is intended to confer any right or remedy under or by reason of this Agreement on any Person other than the Parties and their respective permitted successors and assigns, nor is anything in this Agreement intended to relieve or discharge any obligation of any Third Person to any Party or give any Third Person any right of subrogation or action over or against any Party.

15.13 Effect. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, executors, administrators, legal representatives, successors and assigns, subject to the limitations of Section 9.

15.14 Time Declared to be of the Essence. As to the performance of any obligation under this Agreement of which time is a component, the performance of such obligation within the time specified is of the essence.

15.15 Entire Agreement. This Agreement (including the exhibits attached to this Agreement) integrates all of the terms and conditions mentioned in this Agreement or incidental to this Agreement, and supersedes all negotiations or previous agreements between the Parties with respect the subject matter of this Agreement.

15.16 Severability. If any term or provision of this Agreement or its application to any Person or circumstance shall to any extent be invalid or unenforceable, then the remainder of this Agreement, or the application of such term or provision to Persons or circumstances, other than those as to which it is invalid or unenforceable, shall not be affected by such invalidity. All remaining provisions of this Agreement shall be valid and be enforced to the fullest extent Law allows.

15.17 Signing Authority. Operator shall provide Grantee with evidence satisfactory to Grantee that Operator's signatory to this Agreement is authorized to enter into this Agreement on behalf of Operator and that Operator is in good standing in its home state and, if necessary, qualified to do business in the State.

15.18 Waivers and Amendments. All waivers of the provisions of this Agreement must be in writing and signed by the authorized representative(s) of the Party making the waiver. All amendments to this Agreement must be in writing and signed by the authorized representative(s) of both Grantee and Operator, respectively.

15.19 No Implied Waiver. Failure to insist on any one occasion upon strict compliance with any term, covenant, condition, restriction or agreement contained in this Agreement shall not be deemed a waiver of such term, covenant, condition, restriction or agreement, nor shall any waiver or relinquishment of any right or power under this Agreement, at any one time or more times, be deemed a waiver or relinquishment of such right or power at any other time or times.

15.20 Survival of Agreement. All of the provisions of this Agreement shall be applicable to any dispute between the Parties arising from this Agreement, whether prior to or following expiration or termination of this Agreement, until any such dispute is finally and completely resolved between the Parties, either by written settlement, entry of a non-appealable judgment or expiration of all applicable statutory limitations periods and all terms and conditions of this Agreement relating to dispute resolution, indemnity or limitations on damages or remedies shall survive any expiration or termination of this Agreement.

15.21 Counterparts. This Agreement shall be signed in three (3) originals, each of which is deemed to be an original. This Agreement includes fifteen (15) pages and three (3) exhibits that constitute the entire understanding and Agreement of the Parties regarding the subject matter of this Agreement. This Agreement may be signed by the authorized representatives of the Parties in multiple counterpart originals (including facsimile or electronic counterpart originals), each of which shall be deemed an original, and all such counterpart originals, when taken together, shall constitute one agreement.

15.22 Facsimile or Electronic Signatures. Signatures delivered by facsimile or electronic means shall be binding as originals upon the Party so signing and delivering.

15.23 Further Documents and Actions. Each Party shall sign and deliver such further documents and take such further action as may be reasonably necessary to carry out the purposes of this Agreement.

15.24 Exhibits Incorporated. All exhibits, documents, or materials referenced in this Agreement are incorporated into this Agreement by such reference.

15.25 Headings. Headings and captions in this Agreement are solely for convenience of reference and shall not affect the interpretation of this Agreement.

15.26 Legal Costs. If either Party brings an action or proceeding against the other Party relating to this Agreement, the prevailing Party shall be entitled to recover from the other Party all Legal Costs relating to of such action or proceeding. The “prevailing Party” shall be the Party who obtains substantially the result sought, whether by settlement, dismissal, or judgment.

**[Remainder of page intentionally blank. Signatures appear on following page.]**

SAMPLE

**SIGNATURE PAGE  
TO  
SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT  
([insert name of company])**

IN WITNESS WHEREOF, this Agreement is signed and entered into by Operator and Grantee, as of the Effective Date, by and through the signatures of their respective authorized representative(s) as follows:

THE CITY OF SAN DIEGO,  
a California municipal corporation

[insert company name]

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

CHRISTIE MARCELLA  
Deputy Director  
City of San Diego Economic Development  
Department

[insert name]  
[insert title]  
[insert company name]

Approved as to Form:

HEATHER FERBERT, City Attorney

By: \_\_\_\_\_

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

MARGUERITE MIDDAUGH

Deputy City Attorney



**EXHIBIT A**

**TO SAN DIEGO FOREIGN-TRADE ZONE OPERATING  
AGREEMENT**

**([insert name of company])**

**Operator's Business**

[insert text]

SAMPLE

**EXHIBIT B**

**TO SAN DIEGO FOREIGN-TRADE ZONE OPERATING  
AGREEMENT**

**([insert name of company])**

**Property Description**

**[insert site/subzone information]**

SAMPLE

**EXHIBIT C**

**To SAN DIEGO FOREIGN-TRADE SUBZONE OPERATING  
AGREEMENT**

**([insert name of company])**

**Notice Addresses**

To Operator:

[insert name]

[insert address]

To Grantee:

The City of San Diego  
Economic Development Department  
ATTN: Karina Danek  
Business Development Coordinator  
1200 Third Avenue, Suite 1400  
San Diego, CA 92101  
Phone: (619) 533-5954  
Email: [kdanek@sandiego.gov](mailto:kdanek@sandiego.gov)