

SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT

THIS SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT [Agreement] is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation [City], and **[TO BE DETERMINED]** [Operator], as of **[INSERT DATE CERTAIN]** [Agreement Date]. City and Operator are sometimes referred to in this Agreement, individually, as a “Party” or collectively, as the “Parties.”

RECITALS

- A. City 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. City 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. City is authorized to request designation of usage-driven sites from the Board and activation of those sites from U.S. Customs and Border Protection Service [CBP] within the FTZ 153 service area 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 City is not responsible for providing operational oversight or direction to Operator; and
- E. CBP, as part of Operator’s application for activation of a usage-driven site (defined in Title 15 Code of Federal Regulations section 400.2(t)) within FTZ 153, conducts background investigations of Operator, including Operator’s management involved in the operation of the usage-driven site and key employees of Operator that have access to or could cause changes to Operator’s inventory or recordkeeping system; and
- F. Operator’s business is described in Exhibit “A” attached to this Agreement [Business]; and
- G. Operator currently conducts its Business on the real property specifically described in Exhibit “B” attached to this Agreement [Usage-Driven Site 17]; and
- H. Upon activation of Usage-Driven Site 17, Operator will continue to conduct its Business from Usage-Driven Site 17 consistent with the terms of this Agreement; and

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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, 73rd 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 City and Operator, including all of the attached exhibits, which are incorporated into this Agreement by reference.

1.4 Agreement Date. Defined in the initial paragraph of this Agreement.

1.5 Annual Fee. Seven Thousand Five Hundred Dollars (\$7,500) or as increased in accordance with Section 13.

1.6 ASF. Defined in Recital B.

1.7 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.

1.8 Board. Defined in Recital A.

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

1.10 Business Day. Any weekday on which City is open to conduct regular City functions with City personnel.

1.11 CBP. Defined in Recital C.

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

1.13 City. The City of San Diego, a California municipal corporation, and any assignee of or successor to the rights, powers or responsibilities of the City of San Diego, a California municipal corporation.

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

1.15 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

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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.

1.16 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.

1.17 County. The County of San Diego, California.

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

1.19 Default Interest. Interest at an annual rate equal to the lesser of: (a) eight percent (8%) per annum; or (b) the highest rate of interest, if any, that Law allows under the circumstances.

1.20 Effective Date. The date of the CBP letter of activation giving Operator the exclusive authority to use, maintain, operate, and manage Usage-Driven Site 17, subject to the terms of this Agreement.

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

1.21.1 *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;

1.21.2 *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 Usage-Driven Site 17 (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);

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

1.21.4 *Non-Monetary Default*. Any Non-Monetary Default, other than those specifically addressed in Section 1.21.2 or Section 1.21.3, 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.

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

1.23 FTZ 153. Defined in Recital A.

1.24 FTZ Bond. Defined in Section 15.

1.25 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.

1.26 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.

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

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

1.29 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 20.

1.30 Law. Every law, ordinance, requirement, order, proclamation, directive, rule or regulation of any Government applicable to this Agreement, Usage-Driven Site 17 or FTZ 153, in any way, whether in force on the Agreement 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 City 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 Usage-Driven Site 17.

1.31 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.

1.32 Mayor. The Mayor of City or his or her designee or successor in function.

1.33 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

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coverage required to be provided under this Agreement, whether to or with a Party or a Third Person.

1.34 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.

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

1.36 Notify. To give a Notice.

1.37 OFIS. Defined in Section 9.

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

1.39 Parties. Collectively, City and Operator.

1.40 Party. Individually, either City or Operator, as applicable.

1.41 Permitted Activity. Any and all activity relating to Usage-Driven Site 17 that is permitted under all applicable Law.

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

1.43 SDMC. San Diego Municipal Code.

1.44 State. The State of California.

1.45 Term. Defined in Section 4.

1.46 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.

1.47 Usage-Driven Site 17. Defined in Recital G.

1.48 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. **ACTIVATION ACCEPTED**. Operator agrees to be solely and fully responsible for the use, maintenance, operation, and management of Usage-Driven Site 17 in accordance with the terms of this Agreement and applicable Law.

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3. **DISCLAIMER.** City makes no representation or warranty to Operator about any particular privileges or benefits that may accrue to Operator from Operator's operation of Usage-Driven Site 17, as those privileges or benefits may vary as a result of interpretation, enforcement, or changes in Law or business decisions of Operator. City shall in no way be liable for any costs or losses sustained by Operator as a result of Operator's operation of Usage-Driven Site 17.

4. **DURATION OF AGREEMENT.** This Agreement shall remain in full force and effect from the Effective Date until the earlier of [Term]: (a) the fifth (5th) anniversary of the Effective Date; or (b) this Agreement is terminated in accordance with Section 27.

5. **COMPLIANCE WITH LAW.** Operator shall use, maintain, operate, and manage Usage-Driven Site 17 in accordance with the terms of this Agreement and all applicable Law. Except for the submission of City's annual reports to the Board, all duties and obligations under applicable Law relating to Usage-Driven Site 17 are solely and exclusively the duties and obligations of Operator, at Operator's sole cost and expense.

6. **PROCEDURES MANUAL.** Prior to conducting any Permitted Activity, Operator shall establish written standards for operation and management of Usage-Driven Site 17, in accordance with Title 19 Code of Federal Regulations section 146.21, in a document entitled "Foreign-Trade Zone 153 - Usage-Driven Site 17 Procedures Manual" [Procedures Manual]. The Procedures Manual shall comply with all requirements imposed by the Board and CBP for any Permitted Activity. Operator shall conform to the standards set forth in the Procedures Manual and applicable Law in its operation and management of Usage-Driven Site 17. Operator shall require all Persons admitted to Usage-Driven Site 17 to conform to the standards set forth in the Procedures Manual and applicable Law. Operator shall provide a copy of the Procedures Manual to City and CBP prior to conducting any Permitted Activity. Operator shall keep its Procedures Manual current and shall submit to City and CBP each change in Operator's Procedures Manual at the time the change is made.

7. **MERCHANDISE HANDLING.** Operator represents and warrants to City 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 Usage-Driven Site 17. Operator is responsible for the receipt, verification, and physical count of all merchandise admitted to Usage-Driven Site 17, 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.

8. **RIGHT OF ENTRY.** Representatives of the Board, CBP, and other Federal Government agencies shall have the right to enter Usage-Driven Site 17 consistent with applicable Law. Representatives of City shall have the right to enter Usage-Driven Site 17 upon forty-eight (48) hours prior Notice to Operator to determine whether Usage-Driven Site 17 is being operated and maintained, or Permitted Activity is being conducted, all in accordance with this Agreement. If City has a reasonable belief that activity or conditions detrimental to public health or safety is

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taking place or exist within Usage-Driven Site 17, City may enter Usage-Driven Site 17 any time during regular business hours, without Notice to Operator.

9. **ANNUAL REPORT.** By February 15 of each calendar year, Operator shall submit to City a preliminary annual report containing all the data and information required to be submitted by City to the Board relating to Usage-Driven Site 17 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 City into a final annual report and submitted by City through OFIS to the Board. Operator shall pay City \$100 per day for each day after February 15 that the preliminary annual report data or information is not submitted through OFIS, unless City has given Operator a written extension of time beyond February 15 to submit such data or information.

10. **CONFIDENTIALITY OF OPERATOR'S BUSINESS INFORMATION.** All financial and operations information concerning Usage-Driven Site 17 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 Usage-Driven Site 17 operations shall remain the property of Operator. City 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 City requesting the return of any material belonging to Operator, City shall return such material to Operator within a reasonable time, unless City is required by Law to keep or maintain any information provided in such material.

11. **AUDITS AND INSPECTIONS.** Operator shall Notify City of any request by the Board, CBP, or other Government for an inspection of Usage-Driven Site 17 or an audit of financial, accounting, or other records relating to Usage-Driven Site 17, within seven (7) days after Operator receives such request. Operator shall, if requested by City, provide City 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 Usage-Driven Site 17.

12. **RECORD RETENTION.** All records concerning Usage-Driven Site 17 and Permitted Activity, including financial, accounting, and operations records, shall be retained by Operator for at least five (5) years after the act or occurrence recorded in such records, or after the merchandise disclosed or covered by such records has been removed from Usage-Driven Site 17, whichever is later.

13. **APPLICATION FEE; OPERATOR AGREEMENT FEE; ANNUAL FEE.** Operator shall pay City a \$1,600 application fee and \$1,200 operator agreement fee, each within seven (7) days after the Effective Date. The Parties agree that these amounts are fair and reasonable amounts to compensate City for the expenses of processing Operator's application for Usage-Driven Site 17 and preparing and processing this Agreement. Operator shall also pay City the 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, [INSERT YEAR]. The Parties agree

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that the Annual Fee is a fair and reasonable amount to compensate City for the expense of the services to be provided by City in its oversight and administration of FTZ 153 relating to Usage-Driven Site 17. The Annual Fee may be increased by City to account for any additional expenses associated with administration of FTZ 153 and any related services provided by City. If City intends to increase the Annual Fee, City 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 sixty (60) days' Notice to City. Upon termination of this Agreement, pursuant to this Section 13, Operator shall pay City a prorated Annual Fee for the fiscal year in which such termination occurs based on the Annual Fee in effect prior to the proposed increase in the Annual Fee and the number of days elapsed in the fiscal year through the termination date. Any and all amounts becoming due from Operator to City under this Agreement and not paid when due shall accrue Default Interest until paid in full, including all accrued interest. Payments shall be made payable to "City Treasurer," and mailed to City at the address set forth in Section 31.1.

14. **ZONE SCHEDULE.** Operator acknowledges receipt of a copy of the Zone Schedule in effect as of the Agreement Date. City agrees to provide Operator a copy of any updates to the Zone Schedule during the Term. Operator shall abide by the Zone Schedule and any updates that may be implemented and delivered to Operator from time to time. General information concerning Usage-Driven Site 17 approval and location may be included in the Zone Schedule describing FTZ 153.

15. **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 Usage-Driven Site 17 [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.

16. **CBP PERSONNEL CHARGES.** If it becomes necessary for CBP personnel to be located at Usage-Driven Site 17, Operator shall pay all expenses for such personnel billed by CBP. City shall request that CBP bill Operator directly for any CBP personnel expense attributable to Usage-Driven Site 17 operations, and Operator shall pay any such expenses to CBP, as and when due. If such direct billing to Operator is not acceptable to CBP, following City's receipt of any bill for personnel expenses from CBP related to Usage-Driven Site 17, City will send the bill to Operator for payment to CBP, as and when due. Operator shall be responsible for any late fees or interest associated with failure to pay any such bill as and when due.

17. **INDEMNIFICATION AGREEMENT.** Operator shall Indemnify the City Parties against any Claim arising from: (a) this Agreement; (b) any Permitted Activity; (c) operation, maintenance or development of Usage-Driven Site 17; (d) any wrongful intentional act or negligence of one or more of the Operator Parties; (e) any agreement that Operator (or anyone claiming by or through Operator) makes with a Third Person regarding this Agreement, any Permitted Activity or Usage-Driven Site 17; (f) any worker's compensation claim or determination relating to any employee of

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one or more of the Operator Parties or their contractors; or (g) any violation of Law by one or more of the Operator Parties.

17.1 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 the City 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 the City Parties under this Agreement and are independent of Operator's obligations to Indemnify the City Parties and other obligations under this Agreement.

17.2 Survival of Indemnification and Defense Obligations. The obligation of the Operator under this Agreement to Indemnify the City 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 the City Parties are fully, finally, absolutely and completely barred by applicable statutes of limitations.

18. **INSURANCE.** Operator shall obtain and maintain, to protect the City Parties against all insurable Claims relating to this Agreement, Usage-Driven Site 17 or the Permitted Activity, at the sole cost and expense of Operator, all of the insurance coverage described in Exhibit "C" attached to this Agreement (or its then reasonably available equivalent). Operator shall not begin any Permitted Activity until Operator has obtained and provided City with Insurance Documents evidencing all insurance coverage required to be obtained pursuant to this Section 20.

19. **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 Permitted Activity, any act or omission to act by Operator, or the use, maintenance, development, operation, or management of Usage-Driven Site 17, including the import or export of merchandise to or from Usage-Driven Site 17. Operator shall promptly Notify City of any and all such assessments or obligations, even if Operator disputes their validity.

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

21. **INDEPENDENT CONTRACTOR.** Operator acknowledges that Operator is an independent contractor and not an agent or employee of City. Any provision of this Agreement that may appear to give City a right to direct Operator concerning the details of performing its obligations under this Agreement, or to exercise any control over such performance, shall mean only that Operator shall follow the direction of City concerning the end results of the performance. Operator shall have no authority to bind City in any manner, or to incur any obligation, debt or

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liability of any kind, on behalf of or against City, whether by contract or otherwise, unless such authority is expressly conferred under this Agreement or is otherwise expressly conferred in writing by City.

22. **EQUAL EMPLOYMENT OPPORTUNITY.** Operator shall comply with Title VII of the Civil Rights Acts of 1964, as amended, Executive Orders 11246, 11375, and 12086, the State Fair Employment Practices Act, and any other similar Law. Operator shall not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability, medical condition or place of birth.

23. **TOTAL OR PARTIAL DESTRUCTION OF ZONE SITE.** If Usage-Driven Site 17 or the ability to conduct Permitted Activity at Usage-Driven Site 17 is totally or partially (35 percent or more of the previously conducted Permitted Activity at Usage-Driven Site 17 is prevented, based on a comparison of income derived, exclusive of insurance recovery) destroyed, Operator shall either: (a) provide City with general building and financial plans for the restoration of Usage-Driven Site 17 or the ability to conduct Permitted Activity at Usage-Driven Site 17 within ninety (90) days after such destruction; or (b) Notice of termination of this Agreement. If Operator does not timely provide City with any plans for restoration of Usage-Driven Site 17 or the ability to conduct Permitted Activity at Usage-Driven Site 17, City shall have the right to immediately terminate this Agreement by Notice to Operator.

24. **MEDIATION.**

24.1 Mandatory Mediation. If a dispute between the Parties arises out of, or relates to this Agreement, or a Default or Event of Default, and the dispute cannot be settled through negotiations between the Parties, the Parties shall submit the dispute to a neutral and mutually agreed upon mediator before having recourse in a court of law. Any and all such mediation shall be non-binding on the Parties. To initiate mediation, the initiating Party shall send a Notice entitled "Request for Mediation" to the other Party stating the grounds for requesting mediation.

24.2 Mediation Costs. The expenses of each witness attending mediation shall be paid by the Party producing such witness. All other expenses of the mediation, including fees charged by the mediator and the costs of any evidence or expert advice requested by the mediator, shall be borne equally by the Parties, unless they agree otherwise in writing.

24.3 Conduct of Mediation Sessions. Mediation sessions will be conducted in an informal manner and discovery will not be allowed. All mediation sessions pursuant or relating to this Agreement shall be held in the City of San Diego, California. All discussions, statements, or admissions during mediation shall be confidential to the Party's legal position. The Parties may agree to exchange any information they deem necessary. Any agreement or settlement resulting from mediation shall not be binding on the Parties, unless and until set forth in a written document signed by both of the Parties.

25. **TERMINATION.**

25.1 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

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upon ninety (90) days prior Notice to City. If Operator desires to terminate this Agreement, pursuant to this Section 27.1 or any other provision of this Agreement, Operator must first de-activate Usage-Driven Site 17 through the Board and CBP, including all conditions to such de-activation imposed or required by applicable Law.

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

25.3 Termination Resulting from Withdrawal of Grant. If the grant of authority to City 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 City by reason of such revocation or cancellation.

25.4 Termination for Non-Activation. If Operator fails to activate Usage-Driven Site 17 within three (3) years after Operator is notified of the Board's approval of Usage-Driven Site 17, this Agreement shall automatically terminate. Upon termination of this Agreement under this Section 27.4, Operator shall sign and deliver to City any and all documents necessary to terminate Usage-Driven Site 17.

25.5 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.

26. **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, subject to Section 26.

27. **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.

28. **DEACTIVATION OF USAGE-DRIVEN SITE.** Upon the expiration or termination of this Agreement, if no new agreement is entered into between City and Operator regarding Usage-Driven Site 17, Operator shall deactivate Usage-Driven Site 17 as of the date of expiration or termination of this Agreement. Prior to deactivating Usage-Driven Site 17, Operator shall ensure that all foreign status merchandise has either been subject to the payment of customs duties and fees or been transferred, in bond, to another foreign trade zone facility.

29. **GENERAL PROVISIONS.**

29.1 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

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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 designated below in this Section 31.1. 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 31.1. 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 31.1. Any attorney representing a Party may give any Notice on behalf of such Party. The Notice addresses for the Parties, as of the Agreement Date, are as follows:

To Operator: **[TO BE DETERMINED]**
 ATTN: [TO BE DETERMINED]
 [INSERT STREET ADDRESS]

To City: The City of San Diego
 Economic Development Department
 ATTN: Foreign-Trade Zones Program
 Administrator
 1200 Third Avenue, Suite 1400
 San Diego, California 92101

29.2 Relationship of Parties. The Parties each intend and agree that City 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.

29.3 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.

29.4 Warranty against Payment of Consideration for Agreement. Operator represents and warrants to City 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 City in an attempt to secure this Agreement or favorable terms or conditions for this Agreement. Breach of the representations or warranties of this Section 31.4 shall entitle City to terminate this Agreement immediately, without liability, upon seven (7) days' Notice to Operator.

29.4.1 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

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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 Usage-Driven Site 17, 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 Usage-Driven Site 17.

29.5 Non-liability of City Officials and Employees. No official or employee of City shall be personally liable to Operator, or any successor in interest to Operator, in the event of any Default or Event of Default by City 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.

29.6 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.

29.7 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.

29.8 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, Usage-Driven Site 17 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 City 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.

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

29.10 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 Permitted Activity or operation, maintenance or development of Usage-Driven Site 17.

29.11 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.

29.12 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 22.

29.13 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.

29.14 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 to the subject matter of this Agreement.

29.15 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.

29.16 Signing Authority. Sub-Recipient shall provide City with evidence satisfactory to City that Operator's signatory to this Agreement is authorized to enter into this Agreement on behalf of Operator and that Operator is a valid, qualified corporation or limited liability company in good standing in its home state and, if necessary, qualified to do business in the State.

29.17 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 City and Operator, respectively.

29.18 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

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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.

29.19 Mayor Implementation. City shall implement this Agreement through its Mayor. The Mayor is authorized to enter into agreements and sign documents referenced in this Agreement or reasonably required to implement this Agreement, issue approvals, interpretations or waivers and enter into amendments to this Agreement, all on behalf of City. Nothing in this Section 31.19 shall restrict the submission to the City Council of any matter within the Mayor's authority under this Section 31.19, in the Mayor's sole and absolute discretion, to obtain the City Council's express and specific authorization on such matter. The specific intent of this Section 31.19 is to authorize certain actions on behalf of City by the Mayor, but not to require that such actions be taken by the Mayor without consideration by the City Council.

29.20 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.

29.21 Counterparts. This Agreement shall be signed in three (3) originals, each of which is deemed to be an original. This Agreement includes eighteen (18) 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.

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

29.23 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.

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

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

29.26 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.

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

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

THE CITY OF SAN DIEGO,
a municipal corporation

[TO BE DETERMINED]

By: _____
Lydia Moreno
Deputy Director
Economic Development Department

By: _____
[TO BE DETERMINED]

Approved as to Form:

MARA W. ELLIOTT, City Attorney

By: _____
Delmar G. Williams
Deputy City Attorney

[Type here]

**EXHIBIT A
TO
SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT
([INSERT NAME OF OPERATOR])**

Operator's Business Activities

[TO BE INSERTED]

[Type here]

**EXHIBIT B
TO
SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT
([INSERT NAME OF OPERATOR])**

Description of Usage-Driven Site 17 Property

[TO BE INSERTED]

[Type here]

**EXHIBIT C
TO
SAN DIEGO FOREIGN-TRADE ZONE OPERATING AGREEMENT
([INSERT NAME OF OPERATOR])**

Insurance Requirements

1. **General Requirements.** Operator shall not begin any performance under this Agreement until it has: (1) provided City insurance certificates and endorsements evidencing all insurance policies and endorsements described in this Exhibit C; (2) obtained City approval of each insurance company or companies issuing all insurance policies or endorsement described in this Exhibit C; and (3) confirmed that all insurance policies or endorsements contain the special provisions described in this Exhibit C. Maintenance of the insurance coverage described in this Exhibit C is a material term of this Agreement and Operator's failure to maintain or renew any such insurance coverage or to provide evidence of renewal or replacement of any such insurance coverage during the Term shall be an Event of Default by Operator.

2. **Specific Insurance.** Operator shall procure and maintain for the duration of the Term insurance against claims for injuries to Persons or damages to property that may arise from or in connection with Operator's performance under this Agreement and performance by any agents, representatives, employees or subcontractors of Operator. Operator shall provide, at a minimum, the following insurance coverage:

2.1. **Commercial General Liability.** Insurance Services Office Form CG 00 01 covering commercial general liability on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury, with liability limits no less than \$1,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this Agreement (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the amount of the required occurrence limit.

2.2. **Commercial Automobile Liability.** Insurance Services Office Form Number CA 0001 covering Code 1 (any auto) or, if Operator has no owned autos, Code 8 (hired) and Code 9 (non-owned), with a liability limit no less than \$1,000,000 per accident for bodily injury and property damage.

2.3. **Workers' Compensation.** Workers' Compensation Insurance as required by the State, with statutory liability limits, and Employer's Liability Insurance with a liability limit of no less than \$1,000,000 per accident for bodily injury or disease.

2.4. **Other Insurance Provisions.** The insurance policies required by this Agreement are to contain, or be endorsed to contain, the following provisions:

2.4.1. ***Additional Insured Status.*** The City Parties are to be covered as additional insured on the required Commercial General Liability insurance policy with respect to liability arising out of work or operations performed by or on behalf of Operator, including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can

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be provided in the form of an endorsement to Operator's Commercial General Liability insurance policy (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37, if a later edition is used).

2.4.2. *Primary Coverage.* For any claims related to this Agreement, Operator's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 as respects City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City Parties shall be excess of Operator's insurance and shall not contribute with it.

2.4.3. *Notice of Cancellation.* Each insurance policy shall provide that coverage shall not be canceled, except after thirty (30) calendar days' Notice of cancellation to City.

2.4.4. *Waiver of Subrogation.* Operator grants to City a waiver of any right to subrogation that any insurer of Operator may acquire against City by virtue of the payment of any loss under any insurance policy. Operator agrees to obtain any endorsement that may be necessary to effect this waiver of subrogation, but this waiver of subrogation applies regardless of whether or not Operator obtains such a waiver of subrogation endorsement from the insurer.

2.5. Deductibles/Self Insured Retentions. All deductibles under any insurance policy shall be the sole responsibility of Operator and shall be disclosed to City at the time the evidence of the insurance coverage is provided to City. Self-insured retentions under any insurance policy shall be the sole responsibility of Operator and must be declared to and approved by City at the time the evidence of the insurance coverage is provided to City. City may require Operator to purchase coverage with a lower deductible or self-insured retention or provide proof of ability to pay losses and related investigation, claim administration, and defense expenses within the deductible or self-insured retention. Each insurance policy with a self-insured retention shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the named insured or City.

2.6. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VI, unless otherwise approved in writing by City. City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State by the State Department of Insurance and is included on such department's List of Approved Surplus Lines Insurers (LASLI list). All policies of insurance issued by non-admitted carriers are subject to all of the requirements of this Agreement applicable to insurance policies issued by admitted carriers.

2.7. Verification of Coverage. Operator shall furnish City with original certificates and amendatory endorsements or copies of all applicable insurance policy language effecting insurance coverage described in this Exhibit C. All insurance certificates and endorsements are to be received and approved by City before any performance commences under this Agreement. Failure to obtain the required Insurance Documents prior to Operator beginning performance shall not waive Operator's obligation to provide the required insurance coverage or evidence of such insurance coverage. City reserves the right to require complete, certified copies of all insurance policies, including endorsements, described in this Exhibit C, at any time.

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2.8. Special Risks or Circumstances. City reserves the right to modify the insurance requirements of this Agreement, including liability limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

2.9. Additional Insurance. Operator may obtain additional insurance not required by this Agreement, as long as the City Parties are named additional insured under such insurance policies.

2.10. Excess Insurance. All policies providing excess coverage to City shall follow the form of the primary policy or policies, including all endorsements.

2.11. Subcontractors. Operator shall require and verify that all subcontractors maintain insurance meeting all the insurance requirements of this Agreement. Operator shall also ensure that the City Parties are named additional insured on insurance required from subcontractors. For commercial general liability insurance coverage, subcontractors shall provide coverage with a form at least as broad as the CG 20 38 04 13 endorsement.