



**THE CITY OF SAN DIEGO**  
**AND**  
**BRAMMER FARMS, LLC.**

**CITY OF SAN DIEGO**  
**FLAT RATE LEASE**

THIS CITY OF SAN DIEGO FLAT RATE LEASE ("Lease") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), as Lessor, and Brammer Farms, LLC, a California limited liability company ("LESSEE"), as Lessee, to be effective as of the date signed and approved by CITY, LESSEE, and by the San Diego City Attorney ("Effective Date"). CITY and LESSEE may be referred to individually herein as a "Party" and together as the "Parties."

**RECITALS**

- A. CITY owns that certain real property consisting of approximately 226.1 total acres of land, as depicted in **Exhibit A**, attached hereto and incorporated herein by reference (the "Premises").
- B. CITY has installed, operates and maintains various public utilities under the Premises, including but not limited to two water storage tanks and Wells SP033, SP034, SP031, and SP032 with City installed flow meters on SP033 and SP034 .
- C. Effective as of November 1, 2006, CITY entered into that certain Flat Rate Lease, filed in the Office of the San Diego City Clerk as Document No. RR-301867 on September 12, 2006, with William Brammer dba Brammer Farms ("Brammer"), which allowed Brammer to use approximately 136.4 acres of the Premises (the "Previous Lease Premises") for the sole and exclusive purpose of growing of organic vegetables and other related activities ("Previous Lease").
- D. As of the date of this Lease, Brammer continues to occupy and use the Previous Lease Premises for the purposes established in the Previous Lease.
- E. The Previous Lease expired by its own terms on November 1, 2016, and therefore, Brammer occupies and uses the Previous Lease Premises on a month-to-month basis under the holdover provision in the Previous Lease.
- F. Effective as of November 1, 2012, CITY and Brammer entered into a Right of Entry Permit for approximately 32.7 acres of the Premises (separate from and in addition to the Previous Lease Premises) ("32.7 ROE Permit" and those premises, the "32.7 Premises"), which allowed Brammer to use the 32.7 Premises for the same purpose as set forth in the Previous Lease.
- G. The 32.7 ROE Permit expired by its own terms on October 31, 2015.
- H. Effective as of July 1, 2014, CITY and Brammer entered into a Right of Entry Permit for approximately 57 acres of the Premises (separate from and in addition to the Previous Lease Premises and the 32.7 Premises) ("57 ROE Permit" and those premises, the "57 Premises"; the 57 ROE Permit and the 32.7 ROE Permit may be referred to together as

the “**Right of Entry Permits,**” and together with the Previous Lease, the “**Prior Agreements**”; the Previous Lease Premises, the 32.7 Premises, and the 57 Premises together shall be referred to herein as the “**Premises**”), which allowed Brammer to use the 57 Premises for the same purpose as set forth in the Previous Lease.

- I. The 57 ROE Permit expired by its own terms on June 30, 2017.
- J. Notwithstanding the expiration of the Prior Agreements, Brammer, with the consent of CITY, remains in possession of the entirety of the Premises and continues to use the Premises for the sole and exclusive agricultural purpose originally agreed to by CITY under the Prior Agreements.
- K. Brammer is the sole member of LESSEE, which is a California limited liability company in good standing.
- L. CITY and LESSEE desire to authorize the continued use of the Premises for agricultural uses as more fully set out below by: (i) terminating the Prior Agreements, and (ii) entering into this Lease.
- M. This Lease is not subject to the Surplus Land Act (Gov’t C. § 54220 *et seq.*) (the “Act”), because (1) the Premises are being used by CITY for public utilities purposes as described in Recital B and are therefore not “surplus land” as defined in Sections 54221(b)(1) and (c)(1) of the Act; and (2) even if the Premises were surplus (which they are not), the Lease does not constitute a “disposition of surplus property” or a “lease” for purposes of the Act, because the Lease is “a lease of land on which no development or demolition will occur.” See Act Guidelines (Apr. 2021), § 102(h).

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, and based upon the foregoing Recitals which are incorporated into this Lease by this reference, the parties agree as follows:

#### **SECTION 1: PREMISES; ALLOWED USES**

- 1.1 Leasing; Termination of Prior Agreements. Effective as of the Commencement Date (as defined below in Section 2.1), CITY hereby leases the Premises to LESSEE, and LESSEE hereby leases the Premises from CITY under the terms and conditions of this Lease. On the Commencement Date, the Prior Agreements shall, to the extent not already terminated, terminate except for provisions therein which are intended to survive termination.
- 1.2 Allowed Uses. LESSEE shall use the Premises, solely and exclusively for the purposes of growing and selling organic vegetables, and related agricultural crops that rotate with the seasons, including washing and packing vegetables for sale, operating and maintaining a business office related to the growing and selling of organic vegetables, and for such other related or incidental purposes as may be first approved in writing by the Mayor of San Diego or the Mayor’s designee (“Mayor”), and for no other purpose whatsoever (the “Allowed Uses”).

1.3 **Superior Interests.** This Lease is subject to all liens, encumbrances, covenants, conditions, restrictions, reservations, contracts, permits and licenses, easements, and rights-of-way pertaining to the Premises, whether or not of record. LESSEE shall obtain all licenses, permits and agreements from such third parties as may be or become necessary or reasonably advisable to allow its use of the Premises, relative to any such superior interest. If LESSEE's use or occupation of the Premises are or become inconsistent or incompatible with a preexisting, superior interest, LESSEE shall take such actions and pay all costs and expenses necessary to remove that inconsistency or incompatibility to the satisfaction of the holder of the superior interest.

1.4 **Governmental Approvals.**

1.4.1 By entering into this Lease, neither CITY nor the CITY's City Council (the "City Council") is obligating itself to LESSEE or to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to LESSEE's occupancy, use, development, rehabilitation, maintenance or restoration of the Premises or any other improvements thereon. Discretionary action includes without limitation re-zonings, variances, environmental clearances and all other governmental approvals required for the Allowed Uses. LESSEE shall be solely responsible for processing all applicable land use, development, stormwater requirements, and construction approvals required for the occupancy, use, development, rehabilitation, maintenance or restoration of the Premises. When a CITY body, officer, or employee is considering whether to issue a CITY permit or approval (in CITY's governmental regulatory capacity), nothing in this Lease overrides or limits the decision-maker's authority to make wholly-independent judgments related to the requested permit or approval, and this Lease in no way shall dictate the outcome of any findings required for any permit or approval.

1.4.2 LESSEE acknowledges and agrees that CITY has not made, nor now makes, any determinations regarding any aspect, sufficiency or legality of any development, rehabilitation, maintenance or restoration of the Premises, or any other improvements thereon, any aspect thereof, or issues or matters related thereto. Furthermore, CITY does not represent, warrant or guarantee any future approval of any development, rehabilitation, maintenance or restoration of the Premises or any other improvements thereon, or any aspect thereof by the CITY, in its governmental capacity, or the City Council, nor shall anything in this Lease be interpreted as representing, warranting or guaranteeing any such future approval. CITY shall not be liable or obligated for any burden or loss, financial or otherwise, incurred by LESSEE as a result of CITY's or the City Council's failure to approve any construction, alteration, rehabilitation, or improvement of the Premises or LESSEE's facilities, or any other improvements thereon.

1.4.3 **LESSEE's Waiver.** LESSEE expressly waives any claim against CITY and its elected officials, officers, employees, representatives and agents for any burden, expense or loss which LESSEE incurs as a result of CITY's failure to approve any development, rehabilitation, maintenance or restoration of the Premises or any

other improvements thereon.

- 1.5 **CITY's Consent, Approval.** CITY's consent or approval under this Lease shall mean the written consent or approval of the Mayor unless otherwise expressly provided in this Lease or required by law. CITY's discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise expressly provided in this Lease or required by law.
- 1.6 **Quiet Possession.** LESSEE, performing the covenants and agreements in this Lease, shall at all times during the term of this Lease peaceably and quietly have, hold, and enjoy the Premises. If LESSEE is temporarily dispossessed through action or claim of a title superior to CITY's, this Lease shall not be voidable, nor shall CITY be liable to LESSEE for any loss or resulting damages; but there shall be determined and stated by CITY, in writing, a proportionate reduction of the rent under Section 3 for the period or periods during which LESSEE is prevented from having the quiet possession of all or a portion of the Premises. Reduction or abatement of rent shall be the LESSEE's sole remedy for any interruption of the quiet enjoyment and/or dispossession of the Premises, and LESSEE shall not be entitled to any other direct, consequential, or punitive damages, and hereby specifically waives any rights to such damages. No implied or inferred rights are intended under this covenant. This covenant is also not intended to limit CITY's governmental police or regulatory powers.
- 1.7 **Reservation of Rights.**
- 1.7.1 **Natural Resources.** CITY reserves all rights, title and interest in and to any and all natural resources related to the Premises, including subsurface natural gas, oil, minerals, and water as outlined under Section 10.7, on within or beneath the Premises.
- 1.7.2 **Access Rights.** CITY reserves the right to grant, establish and use easements and rights-of-way over, under, along, across and through the Premises for utilities, thoroughfares or access as it deems advisable for the public good, without provision of consideration to LESSEE or any reduction in rent due under this Lease.
- 1.7.3 **Repairs.** CITY may at all reasonable times upon not less than 72 hours written notice to the LESSEE (except in the event of an emergency, in which case no prior notice shall be required) enter upon the Premises for the purpose of making repairs to or developing municipal resources and services. In addition, LESSEE shall provide access to well(s) on or off the Premises for the CITY, its contractors, licensees, employees, and agents to conduct tests, such as, but not limited to, aquifer tests, groundwater-level measurements, and water quality sampling.
- 1.7.4 **Noninterference.** In the exercise of the rights reserved under this section, CITY shall not substantially and unreasonably interfere with LESSEE's or LESSEE's subtenants' use of the Premises.
- 1.7.5 **Costs.** CITY shall pay the costs of maintenance and repair of all CITY installations made pursuant to these reserved rights.

- 1.8 Competent Management. LESSEE shall provide competent management of the Allowed Uses to CITY's reasonable satisfaction. "**Competent management**" shall mean management practices generally considered acceptable within LESSEE's industry for the management and operation of activities substantially similar to the Allowed Uses and in compliance with all applicable laws, ordinances, requirements, orders, proclamations, directives, rules, or regulations of any governmental authority (together, "**Applicable Law**"), and in a fiscally responsible manner. "**Fiscally responsible manner**" shall mean in accordance with generally accepted accounting principles consistently applied and absent financial malfeasance.

## **SECTION 2: TERM AND COMMENCEMENT**

- 2.1 Commencement. The term of this Lease ("**Term**") shall commence on the first day of the calendar month following the Effective Date ("**Commencement Date**") and continue until the earlier of: (a) the date that is three (3) Lease Years from the Commencement Date; and (b) the date that this Lease is earlier terminated by a Party or both Parties according to the terms of the Lease. "**Lease Year**" as used in this Lease shall mean the 12-month period commencing on the Commencement Date. With respect to the Commencement Date, for the avoidance of doubt, if the Effective Date is, for example, October 20, the Commencement Date would be November 1.
- 2.2 Holdover. Any holding over by LESSEE after expiration must be expressly consented to in writing by CITY (which consent may be withheld in the sole discretion of CITY) and shall not be considered as a renewal or extension of this Lease. The occupancy of the Premises after the expiration of this Lease constitutes a month-to-month tenancy, and all other terms and conditions of this Lease shall continue in full force and effect and CITY may terminate the holdover tenancy at will. The Parties specifically intend that the presumptions contained in Civil Code section 1945 shall not apply to this Lease and any holding over by LESSEE under this Lease shall be governed by this Section 2.2.
- 2.3 Surrender of the Premises. Upon the expiration or earlier termination of this Lease, LESSEE shall vacate the Premises and surrender the Premises to CITY free and clear of all liens and encumbrances directly or indirectly related to LESSEE's activities on the Premises or arising in whole or in part from this Lease, and in a condition reasonably satisfactory to CITY.
- 2.3.1 If the LESSEE fails to so surrender the Premises to CITY free and clear of all liens and encumbrances, and in a condition reasonably satisfactory to CITY, LESSEE shall be solely responsible for and shall pay for (and shall reimburse CITY for any and all costs incurred by CITY for) the removal of such liens and encumbrances and putting the Premises back to a condition reasonably satisfactory to CITY; this provision shall survive the expiration or earlier termination of this Lease.
- 2.3.2 On execution of this Lease, LESSEE shall deliver to CITY a quitclaim deed in recordable form quitclaiming all its rights in and to the Premises. CITY may record

such deed only upon expiration of the Term or earlier termination of this Lease. In the event that CITY requires any subsequent quitclaim deed, LESSEE or its successor in interest shall deliver the same within five (5) business days after receipt of written demand therefor.

### **SECTION 3: RENT**

- 3.1 Place of Payment. All rent payments shall be made payable to "City Treasurer" and mailed to:

The Office of the City Treasurer  
City of San Diego  
P.O. Box 129030  
San Diego, California 92112-9030

or hand-delivered to

The Office of the City Treasurer  
Civic Center Plaza  
1200 Third Avenue, First Floor  
San Diego, California 92101

CITY may change the place of payment at any time upon thirty (30) days written notice to LESSEE. Mailed payments shall be deemed paid upon the date the payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed received only upon actual receipt.

- 3.2 Time and Amount of Rent Payment

3.2.1 Rent Amount; No Offsets. The annual rent shall be \$96,000 (approximately \$425 per acre per year), to be paid in quarterly installments of \$24,000. The first quarterly payment of rent shall be made on or before the Commencement Date, with each subsequent payment of quarterly rent occurring on or before the first calendar day of the following quarter during the Term. LESSEE shall pay all rent without offset, defense, claim, counterclaim, reduction, or deduction of any kind whatsoever. The initial annual rent is subject to adjustment based on increases, if any, in the Consumer Price Index (CPI).

3.2.2 (1) CPI Adjustments. The rent is subject to adjustment beginning on the second anniversary of the Commencement Date and shall continue to be adjusted on the anniversary date of the Commencement Date every two years thereafter for the duration of the Term (as it may be extended or renewed, and excluding a holdover event as specified in Section 2.2). The rent adjustment shall be based on percentage increases in the Consumer Price Index (CPI), pursuant to the formula stated below. The "current index" shall be the three (3) month average of the published CPI index, as more particularly described below. The three months to be used to establish the

average shall be the fourth, fifth, and sixth full month preceding the adjustment date.

The index used will be the CPI for "All Urban Consumers" for Los Angeles/Riverside/Orange County, California. If this index is no longer published, the index for adjustment will be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the aforesaid index. If a rent adjustment is calculated using an index from a different base year than 1982-84, which equaled a base figure of 100 for the CPI, the base figure used will first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.

If the Department of Labor indices are no longer published, another index generally recognized as authoritative will be substituted by agreement of CITY and LESSEE. If the parties cannot agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the Regional Office of the Bureau of Labor Statistics or its successor, notwithstanding continued reference herein to CPI in any event.

Regardless of the index publication dates, the effective date of the rent adjustment is as specified in this Section 3.2.2(1), CPI Adjustments. Until the rent adjustment can be reasonably determined by the index method, LESSEE shall continue to make payments at the existing rental rate. When the adjustment is determined, the balance of rents due at the adjusted rate will be paid to the CITY within thirty (30) days of CITY's written notice to LESSEE thereof. In no event shall the adjusted rent as established by the CPI be less than the rent in existence immediately prior to the adjustment date. The failure of CITY to deliver timely notice of any rent adjustment shall not constitute a waiver by CITY of its rights hereunder.

(2) Index Adjustment Computation. The rent for each rental period following the adjustment until the next adjustment or other rental determination, as provided herein, shall be determined prior to the date of adjustment by multiplying the rent which is effective immediately prior to said adjustment by the "adjustment figure" established as follows:

The "adjustment figure" shall be established by dividing the "current index" by the "base figure" both as defined herein:

The "base figure" for the first such adjustment shall be the three (3) month average of index figures published by said CPI using the fourth, fifth, and sixth full months preceding the effective date of this agreement.

To illustrate, if the lease began in May, the CPI figures for November (sixth month), December (fifth month), and January (fourth month) preceding May would be averaged to establish the base figure (Example 1).

The "current index" shall be a three (3) month average of index figures published by said CPI. The three months to establish said average shall be the fourth, fifth, and sixth full months preceding the adjustment period (Example 2).

Example 1

Current Index 121

Base Figure 110 = 1.10 (Adjustment Figure)

Effective Rent x 1.10 = Adjusted Rent

Example 2

Current Index 138

Base Figure 121 = 1.14 (Adjustment Figure)

Effective Rent x 1.14 = Adjusted Rent

The adjustment figure is then multiplied by the monthly rent from the preceding adjustment period to determine the new rent. Using the foregoing examples, if the rent is now \$1,000 per month, after the first adjustment it will be \$1,100 per month ( $\$1,000 \times 1.10$ ). In the second adjustment it will be \$1,254 per month ( $\$1,100 \times 1.14$ ).

- 3.3 Payment for Ground Water. CITY reserves the right to charge LESSEE for the use of ground water ("Water Charge"). If the CITY exercises its right to implement a Water Charge, CITY shall notify LESSEE in writing one year prior to imposing the Water Charge. The LESSEE may terminate this Lease with twelve (12) months prior written notice delivered to the CITY if the Water Charge implemented under this Section 3.3 becomes cost prohibitive. Early termination of the Lease shall be LESSEE's sole remedy related to an imposition of a Water Charge in accordance with this Section 3.3, and LESSEE specifically waives any right to damages, losses, lost profits, relocation expenses, or any other types of damages, including consequential damages, and punitive damages related to CITY's exercise of its rights under this Section 3.3.
- 3.4 Unauthorized-Use Charge. LESSEE shall pay CITY one hundred percent (100%) of the gross receipts from any use of the Premises that is not an Allowed Use as set forth in Section 1.2 of this Lease (each, an "Unauthorized Use"), regardless of any related penalties charged LESSEE by competent governmental authorities. Such Unauthorized Use charge shall be payable to CITY within thirty (30) days after LESSEE receives such gross receipts. No Unauthorized Use charges shall satisfy or be credited against any other rent obligations of LESSEE under this Lease. The Unauthorized Use charge shall otherwise be considered additional rent under this Lease and shall be subject to all costs and penalties for delinquent payments hereunder. The existence of such Unauthorized Use charge and CITY's acceptance thereof shall not constitute authorization for the use in question and shall not waive any of CITY's rights under this Lease.
- 3.5 Invoicing Courtesy. CITY may invoice LESSEE for monetary amounts payable under this Lease. However, any such invoicing is a courtesy only. LESSEE shall make all payments becoming due under this Lease on or before each applicable due date, regardless of whether or not CITY invoiced the required payment.

- 3.6 **Delinquent Payments.** If LESSEE fails to make any payment under this Lease when due, LESSEE shall pay to CITY, in addition to the unpaid amount, five percent (5%) of the unpaid amount, which shall be additional rent. If any amount of such payment remains unpaid after fifteen (15) days past due, LESSEE shall pay to CITY an additional five percent (5%) of the unpaid amount being a total of ten percent (10%), which shall be additional rent. Notwithstanding the foregoing, in no event shall the charge for late payment of rent be less than Twenty-Five Dollars (\$25). After thirty (30) days past due, unpaid amounts due to CITY under this Lease may be referred to the San Diego City Treasurer for collection and shall be subject to San Diego Municipal Code section 22.1707, as may be amended from time to time. LESSEE shall pay to CITY any collection-referral fee and all other fees and charges plus interest as may then be charged by the San Diego City Treasurer under authority of the San Diego Municipal Code. Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of LESSEE's breach or default with respect to the late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity. In addition, any additional rent charged pursuant to this Section 3.6 shall constitute an administrative charge, intended to compensate CITY for the inconvenience and staff time incurred by CITY to handle the late or missed payment and shall not be deemed a penalty or compensation for use of funds and shall not be credited against any other obligations of LESSEE under this Lease. As required by Applicable Law, LESSEE is hereby notified that a negative credit report may be submitted to a credit reporting agency if amounts due CITY are not paid when due.

- 3.7 **[Reserved].**

#### **SECTION 4: ASSIGNMENT, SUBLETTING & REFINANCING**

- 4.1 **Right to Assign and Sublet.** The LESSEE shall not assign this Lease or any interest herein and shall not sublet the Premises or any part of the Premises, or grant any license or other right or appurtenant privilege to the Premises, or permit any other person, except LESSEE's employees, agents, and guests, to use or occupy the Premises or any part of the Premises without prior written consent from CITY. Any such approval shall not be deemed approval to any subsequent assignment, subletting, occupation, or use by another person. This Lease and any interest therein shall not be assignable by operation of law without the written consent of CITY which shall not be unreasonably withheld.

**"Assignment"** for the purposes of this Lease shall include, without limitation, any transfer of any interest in this Lease by LESSEE or by any partners, principals, or stockholders, as the case may be, from the original LESSEE, its general partners or principals.

Approval of any assignment shall be conditioned upon the assignee agreeing in writing that it will assume the rights and obligations thereby assigned and that it will keep and perform all covenants, conditions and provisions of this Lease which are applicable to the rights acquired. CITY may require, as a condition to consenting of any assignment, that the proposed assignee pay additional rent to CITY to equal the full fair market rent justifiable at the date of such proposed assignment. CITY may require, as a condition to consenting

to any assignment, sublease or other grant of rights related to the use and occupancy of the Premises, that this Lease be revised to comply with then-current CITY lease provisions, and that the assignment, sublease or other grant of rights be subject and subordinate to each and every provision of this Lease. The City will not approve any assignee that is not at least comparable to the original LESSEE in financial and professional capabilities to operate the Premises for the Allowed Uses, as determined by the CITY, in the CITY's sole discretion.

Pursuant to San Diego City Charter section 225, LESSEE and each of its subtenants and assignees shall make a full and complete disclosure of the name and identity of all-natural persons who own more than 10% of the entity contracting with the City. Pursuant to City Charter Section 225, every person or entity which will have an interest in this Lease must be reviewed and approved by CITY, in its sole discretion.

- 4.2 Encumbrance of Lease. Subject to CITY's prior written consent, LESSEE may encumber this Lease, its interest in the Lease and its improvements on the Premises by deed of trust, mortgage, chattel mortgage, or other security instrument to assure the payment of a promissory note or notes of LESSEE, upon the express condition that the proceeds of such loan or loans be devoted exclusively to the purpose of improving the Premises ("Encumbrance"). In the event of an encumbrance or refinancing against the leasehold:

- a. CITY shall not be required to subject its fee estate and interest in the Premises to the lien of any leasehold financing or mortgage sought or obtained by LESSEE.
- b. The term of the encumbrance shall not exceed the Term.

In the event any such approved deed of trust or mortgage or other security-type instrument should at any time be in default and be foreclosed or transferred in lieu of foreclosure, CITY will accept the approved mortgagee or beneficiary thereof as its new tenant under this Lease with all the rights, privileges, and duties granted and imposed in this Lease.

Upon prior written approval by CITY, said mortgagee or beneficiary may assign this Lease or its rights hereunder to its designee, if, in the opinion of CITY, the designee is a reputable, qualified, and financially responsible person. Any deed of trust, mortgage, or other security instrument shall be subject to all of the terms, covenants, and conditions of this Lease and shall not be deemed to amend or alter any of the terms, covenants, or conditions hereof. Pursuant to San Diego City Charter section 225, all mortgagees, beneficiaries, designees and nominees shall make a full and complete disclosure of the name and identity of all-natural persons who will receive more than 10% of the contracted amount or who own more than 10% of the entity that may be receiving or assuming any rights or obligations under the Lease.

- 4.3 Additional Consideration to CITY. In the event of an Assignment (as defined in Section 4.1 above), or a subletting of any portion of the leasehold, or a sublicense, or an Encumbrance (as defined in Section 4.2 above), LESSEE shall pay to CITY two percent (2%) of the gross amount of any proceeds paid to LESSEE for consideration of the leasehold in connection with an approved Assignment of the Lease or sublease or

sublicense or Encumbrance. The amount upon which the two percent (2%) shall be based shall be the total consideration resulting from the transaction including total cash payments and the market value of noncash consideration, including but not limited to stocks, bonds, deferred payments, secured and unsecured notes, and forbearances regarding claims and judgments, less the amount listed in LESSEE's most recent federal tax return as the current depreciated value of the improvements upon the Premises. Prior to CITY's consent to any Assignment, subletting, sublicense, or Encumbrance, LESSEE shall deliver to CITY a written statement of all sums due and owing to CITY from LESSEE pursuant to the provisions of this paragraph, together with an acknowledgment from the proposed assignee, sublessee, sublicensee, or financial lender as to the amount due CITY. The sum due CITY shall be payable in full to CITY concurrent with the completion of the transaction, be it an assignment, a sublease, a sublicense, or Encumbrance. For subleases or sublicenses, such additional consideration shall be payable to CITY when accrued regardless of actual receipt by LESSEE. Any Assignment, subletting, sublicense, or Encumbrance in violation of the terms and conditions of this Section 4.3 shall be void. The provisions of this Section 4.3 shall not apply to:

- i. An assignment or transfer of a beneficial interest in the leasehold resulting from devise, bequest, intestate succession, or by operation of law for the benefit of the spouse or descendants of (i) LESSEE (if an individual) or (ii) of LESSEE's principal owner or chief executive officer (if LESSEE is other than an individual);
- ii. Such other assignment deemed by CITY, in its sole discretion, not to materially affect the legal and equitable ownership interests in the leasehold or license, such as a change in the legal or fictitious name of the LESSEE without any other change in the equity in, beneficial use of, or legal title to, the leasehold or license as an asset or the income produced thereby.

## **SECTION 5: DEFAULT AND REMEDIES**

5.1 Default. LESSEE shall be in default of this Lease if any of the following occurs:

- 5.1.1 LESSEE fails to make any payment required under this Lease when due;
- 5.1.2 LESSEE breaches any of its obligations under this Lease, other than those requiring payment to CITY, and fails to cure the breach within thirty (30) days following written notice thereof from CITY, or if not curable within thirty (30) days, fails to commence to cure the breach within thirty (30) days and diligently pursues the cure to completion;
- 5.1.3 LESSEE voluntarily files or involuntarily has filed against it any petition under any bankruptcy or insolvency act or law;
- 5.1.4 LESSEE is adjudicated bankrupt; or
- 5.1.5 LESSEE makes a general assignment for the benefit of creditors.

5.2 Remedies. Upon LESSEE's default, CITY may, at its option, give LESSEE, or any person claiming rights through LESSEE, (1) a written "Three Day Notice to Pay or Quit," for failure to make required payments, or (2) a "Notice of Termination" for defaults not requiring payment to CITY, in order that CITY may seek to terminate the Lease and all rights of LESSEE, and all persons claiming rights through LESSEE, to the Premises or to possession of the Premises. Upon termination, CITY may enter and take possession of the Premises, and may recover from LESSEE the sum of:

5.2.1 the worth at the time of any unpaid rent that was due at the time of termination;

5.2.2 the worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss, if any, that LESSEE affirmatively proves could have been reasonably avoided;

5.2.3 the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of rental loss, if any, that LESSEE affirmatively proves could be reasonably avoided;

5.2.4 any other amount necessary to compensate CITY for all the detriment proximately caused by LESSEE's breach and default, or that in the ordinary course of things, would be likely to result; and

5.2.5 all other amounts in addition to or in lieu of those previously stated as may be permitted from time to time by California law.

As used in clauses 5.2.1 and 5.2.2, above, the "worth at the time of award" is computed by allowing interest at the rate of ten percent (10%) per annum. As used in clause 5.2.3, above, the "worth at the time of award" is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in this section, the term "rent" shall include rent and any other amounts payable by LESSEE under this Lease.

5.3 Default if Leasehold is Encumbered. If there is a CITY-approved Encumbrance on LESSEE's leasehold interest, CITY shall give the mortgagee or beneficiary written notice of LESSEE's default under this Lease, and the same mortgagee or beneficiary shall have thirty (30) days from the notice to cure the default, or, if the default is not curable within thirty (30) days, to commence to cure the default and diligently pursue the cure to completion. CITY may extend the cure period if the mortgagee or beneficiary uses reasonable diligence to pursue a cure. If the mortgagee or beneficiary chooses to cure the default through litigation or foreclosure, then CITY may exercise any of the following options:

5.3.1 CITY may correct the default and charge the costs to the account of LESSEE, which charge shall be due and payable on the date that the rent is next due after CITY's notice of such costs to LESSEE, and mortgagee or beneficiary;

- 5.3.2 CITY may correct the default and pay the costs from the proceeds of any insurance fund held by CITY, CITY and LESSEE, or by CITY and mortgagee or beneficiary, or CITY may use the funds of any faithful performance or cash bond on deposit with CITY, or CITY may call on the bonding agent to correct the default or to pay the costs of correction performed by or at the direction of CITY; and,
- 5.3.3 CITY may terminate this Lease as to the rights of LESSEE by assuming or causing the assumption of liability for any trust deed or mortgage. LESSEE shall assume and pay any and all penalties or bonuses required by the beneficiaries, trustees or mortgagees as a condition of early payoff of the related obligations by CITY. CITY may, as an alternative, substitute the terminated LESSEE with a new lessee reasonably satisfactory to the mortgagee or beneficiary. LESSEE shall pay to CITY all reasonable costs incurred by CITY in re-leasing to a new lessee.
- 5.3.4 If the default is non-curable by LESSEE, then any lender holding a beneficial interest in the Premises, whose qualifications as an assignee have been approved by CITY, shall have the absolute right to substitute itself to the estate of LESSEE hereunder and to commence performance of this Lease. If the mortgagee or beneficiary gives notice in writing of its election to substitute itself within the thirty (30) day period after receiving CITY's written notice of a default, and the default, if curable, is cured by the mortgagee or beneficiary, then this Lease will not terminate pursuant to the default. In that event, CITY consents to the substitution and authorizes the mortgagee or beneficiary to perform under this Lease with all the rights, privileges, and obligations of LESSEE, subject to the curing of the default, if possible, by mortgagee or beneficiary. In that event, LESSEE shall assign to mortgagee or beneficiary all of its interest in and to the leasehold estate under this Lease.
- 5.4 Abandonment by LESSEE. If LESSEE abandons the Premises, this Lease shall continue in effect as long as CITY does not terminate this Lease, and CITY may enforce all of its rights and remedies under this Lease and Civil Code Section 1951.4, including without limitation the right to recover rent as it becomes due, plus damages.
- 5.5 Waiver. Any waiver by CITY of a breach or default by LESSEE shall not be a waiver of any other breach or default. No waiver shall be valid and binding unless in writing and executed by CITY. CITY's delay or failure to enforce a right or remedy shall not be a waiver of that or any other right or remedy under this Lease. The enforcement of a particular right or remedy for a breach or default shall not waive any other right or remedy for the same breach or default, or for any other or later breach or default. CITY's acceptance of any rents shall not be a waiver of any default preceding such payment. LESSEE acknowledges that the Premises are a part of publicly-owned property held in trust for the benefit of the citizens of the City of San Diego, and that any failure by CITY to discover a breach or default, or take prompt action to require the cure of any breach or default, shall not result in an equitable estoppel, but CITY shall at all times, have the legal right to require the cure of any breach or default. CITY's acceptance of a partial payment of rent shall not constitute a waiver of the balance of the rent payment due.

## **SECTION 6: EMINENT DOMAIN**

- 6.1 Eminent Domain. If all or part of the Premises are taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of CITY and LESSEE (or beneficiary or mortgagee) shall be as follows:
- 6.1.1 Full Taking. If the entire Premises are taken, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- 6.1.2 Partial Taking - Remainder Unusable. If a partial taking of the Premises occurs, and in the opinion of CITY, the remaining part of the Premises are unsuitable for continued lease operation, this Lease shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.
- 6.1.3 Partial Taking - Remainder Usable. If a partial taking of the Premises occurs, and in the reasonable opinion of CITY, the remaining part of the Premises are suitable for continued Lease operation, this Lease shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, but shall continue for the portion not taken. The rent shall be equitably reduced to reflect the portion of the Premises taken, only to the extent that LESSEE's operations are reduced or impaired.
- 6.1.4 LESSEE's Award. Subject to the rights of mortgagees and reimbursement of CITY's actual costs and expenses, including reasonable attorneys' fees, incurred in connection with the taking (except when CITY is the condemning authority), LESSEE shall receive the fair market value of its leasehold interest under this Lease for the remaining Term and the value of its loss of goodwill, if any, awarded by the taking authority. CITY shall have no liability to LESSEE for any award not provided by the condemning authority.
- 6.1.5 Transfer. CITY has the right to transfer CITY's interests in the Premises in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, LESSEE shall retain whatever interest it may have in the fair market value of any LESSEE-owned improvements on the Premises in accordance with this Lease.
- 6.1.6 No Inverse Condemnation. The exercise of any CITY right under this Lease shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon CITY for inverse condemnation.

## **SECTION 7: INDEMNITY; HOLD HARMLESS; INSURANCE**

- 7.1 Indemnification & Hold Harmless. LESSEE shall indemnify, defend, and hold harmless CITY, CITY's City Council, and each CITY elected official, employee, agent, or attorney

(collectively, "**CITY Parties**") against all claims, losses, costs, damages, expenses, liabilities, liens, actions, causes of action (whether in tort, contract, under statute, at law, in equity, or otherwise, or foreseeable or unforeseeable), charges, awards, assessments, fines or penalties of any kind (including reasonable consultant and expert fees, expenses and investigation costs of whatever kind or nature, and attorney fees and costs), all judgments, and other costs incurred in enforcing LESSEE's indemnity, defense, or hold harmless obligation(s) under this Lease (collectively, "**Claims**") arising from: (a) use of the Premises by LESSEE or LESSEE's employees, guests, invitees, contractors, or agents (collectively, "**LESSEE Parties**"), including personal injury (including death) or property damage resulting from such use; (b) personal injury (including death) or property damage (to property of LESSEE or any other person) occurring on the Premises; (c) all wrongful intentional acts or negligence of one or more of the LESSEE Parties; (d) strict liability relating to use of the Premises by one or more of the LESSEE Parties; (e) all applications for government approvals made by or on behalf of one or more LESSEE Parties; (f) all agreements that one or more LESSEE Parties makes with a third person regarding this Lease or the Premises; (g) all services, labor, material, or equipment supplied to, for, on behalf of, or at the request of one or more LESSEE Parties, including associated liens asserted against the Premises; (h) all workers' compensation claims by one or more employees or contractors of one or more LESSEE Parties; (i) all Environmental Conditions; or (j) acts of God, including flooding, fire, earthquake, and drought. Notwithstanding anything to the contrary in this Lease, LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties excludes Claims arising solely from the established active negligence or willful misconduct of a CITY Party.

7.1.1 Survival of Indemnification Obligations. LESSEE's obligations to indemnify the CITY Parties under this Lease shall survive the expiration or termination of this Lease, until all actual or prospective Claims subject to LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties under this Lease are fully, finally, absolutely, and completely resolved or barred by applicable statutes of limitations.

7.1.2 Indemnification Procedures. Wherever this Lease requires LESSEE to indemnify, defend, and hold harmless the CITY Parties:

7.1.2.1 *Notice.* The affected CITY Parties shall notify LESSEE of the Claim within a reasonable time. Notwithstanding the foregoing, in the case of a lien or notice of lien filed against the Premises, LESSEE shall notify CITY of the lien within five (5) days after LESSEE first becomes aware of the existence of the lien.

7.1.2.2 *Selection of Counsel.* LESSEE shall select counsel reasonably acceptable to CITY's City Council. Even though LESSEE shall defend the Claim, the affected CITY Parties may, at their respective options, engage separate legal counsel, at LESSEE's expense, to advise them regarding the Claim and their defense. The affected CITY Parties' separate legal counsel(s) may attend all proceedings and meetings. LESSEE's legal

counsel shall actively consult with the CITY Parties' separate legal counsel, subject to applicable conflict of interest and privileged communication limitations.

7.1.2.3 *Cooperation.* The affected CITY Parties shall reasonably cooperate with LESSEE's defense of the CITY Parties.

7.1.2.4 *Settlement.* LESSEE may only settle a Claim with the prior written consent of the affected CITY Parties, in their respective sole and absolute discretion. In the case of a lien or notice of lien filed against the Premises, within thirty (30) days after the filing, LESSEE shall either: (a) take all actions necessary to record a valid release of the lien; or (b) file with CITY a bond, cash or other security acceptable to CITY and in compliance with the provisions of Civil Code Section 8424 sufficient to pay in full all claims of all persons seeking relief under the lien.

7.1.3 Immediate Duty to Defend. The duty to defend that is within LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties under this Lease includes Claims for which the CITY Parties may be liable without fault or strictly liable and applies regardless of whether the issues of negligence, liability, fault, default, or other obligation on the part of LESSEE or the CITY Parties have been determined. The duty to defend applies immediately, regardless of whether the CITY Parties have paid any amount or incurred any detriment arising out of or relating (directly or indirectly) to any Claims. It is the express intention of CITY and LESSEE that the CITY Parties be entitled to obtain summary adjudication or summary judgment regarding LESSEE's duty to defend the CITY Parties at any stage of a Claim within the scope of LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties under this Lease.

7.1.4 Savings Provision. Notwithstanding anything in this Lease to the contrary, if the extent of LESSEE's obligation to indemnify, defend, and hold harmless the CITY Parties under this Lease exceeds the indemnity obligation allowed by applicable law, LESSEE's obligation to indemnify, defend, and hold harmless the CITY Parties shall be reduced to the extent required to comply with applicable law.

7.2 Insurance. LESSEE shall not begin operating under this Lease until it has: (a) obtained, and upon CITY's request provided to CITY, insurance certificates reflecting evidence of all insurance required below; however, CITY reserves the right to request, and LESSEE shall submit, copies of any policy upon reasonable request by CITY; (b) obtained CITY approval of each company or companies; and (c) confirmed that all policies contain the specific provisions required below. LESSEE's liabilities, including but not limited to LESSEE's indemnity obligations, under this Lease, shall not be deemed limited in any way to the insurance coverage required herein. Except as provided for under California law, all policies of insurance required hereunder must provide that CITY is entitled to thirty (30) days prior written notice (10 days for cancellation due to non-payment of premium) of cancellation or non-renewal of the policy or policies. Maintenance of specified insurance

coverage is a material element of this Lease and LESSEE's failure to maintain or renew coverage or to provide evidence of renewal during the term of this Lease may be treated as a material breach of contract by CITY.

Further, LESSEE shall not modify any policy or endorsement thereto which increases CITY's exposure to loss for the duration of this Lease.

7.2.1 Types of Insurance. At all times during the term of this Lease, the LESSEE shall maintain insurance coverage as follows:

7.2.1.1 Commercial General Liability. Commercial General Liability (CGL) Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all personal injury or property damage in the amount of \$2 million per occurrence and subject to an annual aggregate of \$4 million. There shall be no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured claims or contractual liability. All defense costs shall be outside the limits of the policy.

7.2.1.2 Commercial Automobile Liability. For all of LESSEE's automobiles including owned, hired and non-owned automobiles, LESSEE shall keep in full force and effect, automobile insurance written on an ISO form CA 00 01 12 90 or a later version of this form or an equivalent form providing coverage at least as broad for bodily injury and property damage for a combined single limit of \$1 million per occurrence. Insurance certificate shall reflect coverage for any automobile (any auto).

7.2.1.3 Workers' Compensation. For all of LESSEE's employees who are subject to the Lease and to the extent required by the applicable state or federal law, LESSEE shall keep in full force and effect, a Workers' Compensation policy. That policy shall provide a minimum of \$1 million of employers' liability coverage, and LESSEE shall provide an endorsement that the insurer waives the right of subrogation against CITY and its respective elected officials, officers, employees, agents and representatives.

7.2.1.4 Causes of Loss - Special Form Property Insurance. LESSEE shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of LESSEE's insurable property related to the Allowed Uses under this Lease or the Premises in an amount to cover one hundred percent (100%) of the replacement cost.

7.2.2 Deductibles. All deductibles on any policy shall be the responsibility of LESSEE and shall be disclosed to CITY at the time the evidence of insurance is provided.

7.2.3 Acceptability of Insurers. Except for the State Compensation Insurance Fund, all

insurance required by the Lease shall only be carried by insurance companies with a rating of at least "A-, VI" by A.M. Best Company, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved 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 of California and is included on the List of Eligible Surplus Lines Insurers (LESLI list). All policies of insurance carried by non-admitted carriers are subject to all of the requirements for policies of insurance provided by admitted carriers described herein.

**7.2.4 Required Endorsements.** The following endorsements to the policies of insurance are required to be provided to CITY prior to the Commencement Date.

**7.2.4.1 Commercial General Liability Insurance Endorsements.**

**ADDITIONAL INSURED.** To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include, as an Additional Insured, CITY and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of (a) ongoing operations performed by you or on your behalf, (b) your products, (c) your work, including but not limited to your completed operations performed by you or on your behalf, or (d) premises owned, leased, controlled or used by you.

**PRIMARY AND NON-CONTRIBUTORY COVERAGE.** The policy or policies must be endorsed to provide that the insurance afforded by the Commercial General Liability policy or policies is primary to any insurance or self-insurance of CITY and its elected officials, officers, employees, agents and representatives as respects operations of the Named Insured. Any insurance maintained by CITY and its elected officials, officers, employees, agents and representatives shall be in excess of LESSEE's insurance and shall not contribute to it.

**SEVERABILITY OF INTEREST.** The policy or policies must be endorsed to provide that the LESSEE's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.

**7.2.4.2 Automobile Liability Insurance Endorsements.**

**ADDITIONAL INSURED.** To the fullest extent allowed by law including but not limited to California Insurance Code Section 11580.04, the policy or policies must be endorsed to include, as an Additional Insured, CITY and its respective elected officials, officers, employees, agents and representatives with respect to liability arising out of automobile owned, leased, hired or borrowed by or on behalf of LESSEE.

7.2.4.3 Worker's Compensation Insurance Endorsements.

WAIVER OF SUBROGATION. The Worker's Compensation policy or policies must be endorsed to provide that the insurer will waive all rights of subrogation against CITY and its respective elected officials, officers, employees, agents and representatives for losses paid under the terms of this policy or these policies which arise from work performed by the Named Insured for CITY.

- 7.3 Reservation of Rights and Modification. CITY reserves the right, from time to time, to review LESSEE's insurance coverage, limits, deductibles and self-insured retentions to determine if they are acceptable to CITY. To assure protection from and against the kind and extent of risk existing with the Allowed Uses, CITY, at its reasonable discretion, may require the revision of amounts and/or coverage of any insurance required under this Lease at any time, by giving LESSEE thirty (30) days prior written notice. LESSEE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances, or CITY's reasonable re-evaluation of risk levels related to the Allowed Uses.
- 7.4 Additional Insurance. LESSEE may obtain additional insurance not required by the Lease.
- 7.5 Excess Insurance. All policies providing excess coverage to CITY shall follow the form of the primary policy or policies including but not limited to all endorsements.
- 7.6 Accident Reports. LESSEE shall immediately report to CITY any accident causing property damage or injury to persons on the Premises or otherwise related to the Allowed Uses. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
- 7.7 Independence of Insurance and Indemnity Obligations. LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties under this LEASE shall not be construed or interpreted as in any way restricting, limiting, or modifying LESSEE's insurance or other obligations under this Lease. LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties under this Lease are independent of LESSEE's insurance and other obligations under this Lease. LESSEE's compliance with its insurance obligations and other obligations under this Lease shall not in any way restrict, limit, or modify LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties under this Lease and are independent of LESSEE's obligations to indemnify, defend, and hold harmless the CITY Parties and other obligations under this Lease.

**SECTION 8: IMPROVEMENTS; ALTERATIONS; MAINTENANCE**

- 8.1 Acceptance of Premises. By signing this Lease, LESSEE represents and warrants that it or its affiliates or related parties have continuously occupied the Premises for at least the past five (5) years immediately preceding the Commencement Date, and that LESSEE has

independently inspected the Premises and made all tests, investigations, and observations necessary to satisfy itself as to the conditions of the Premises and its suitability for the Allowed Uses. LESSEE further represents and warrants that LESSEE is not relying on any representation by CITY as to the condition of the Premises or its suitability for the Allowed Uses, and that LESSEE is relying solely on its own independent inspections, tests, investigations, and observations of the current conditions, and acknowledges and agrees that CITY has fulfilled all obligations CITY may have had to improve modify, repair, replace, alter, or otherwise develop the Premises prior to the Effective Date. LESSEE shall not hold CITY responsible for any defects, whether apparent or latent, within the Premises. LESSEE accepts and assumes all risk of harm to all persons and property, including, without limitation, LESSEE's employees, from any defects within the Premises, and shall be solely responsible therefor. LESSEE has been given the opportunity to investigate the Premises for the presence of any Hazardous Substances, including without limitation, the opportunity to perform soil borings and tests. LESSEE shall notify CITY if LESSEE'S investigations indicate the presence of any Hazardous Substances in any of the Premises. LESSEE waives any claims against CITY which may result from the presence of Hazardous Substances on or within any of the Premises. For purposes of this Lease, "**Hazardous Substance**" means any flammable substance, explosive, radioactive material, asbestos, asbestos-containing material, polychlorinated biphenyl, chemical known to cause cancer or reproductive toxicity, pollutant, contaminant, hazardous waste, medical waste, toxic substance or related material, petroleum, petroleum product or any "hazardous" or "toxic" material, substance or waste that is defined by those or similar terms or is regulated as such under any Applicable Law, any matter, waste or substance that is subject to any Applicable Law regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source or in the regulations adopted under any Applicable Law.

- 8.2 Improvements/Alterations. No improvements shall be constructed on the Premises, and the Premises may not be altered, by LESSEE without CITY's prior written approval, which shall be at the CITY's sole discretion. LESSEE shall not make any structural or architectural design alterations to approved improvements, structures or installations, or create any roads on the Premises without CITY's prior written approval. LESSEE is also responsible for obtaining all applicable local, state, and federal approvals and permits related to any improvement or alteration. This provision shall not relieve LESSEE of any maintenance obligation under this Lease. CITY shall not be obligated by this Lease to make or assume any expense for any improvements or alterations to the Premises.
- 8.3 Construction Bond. If LESSEE constructs improvements on the Premises, LESSEE shall deposit with CITY, prior to commencement of the construction, a faithful performance bond in the amount of one hundred percent (100%) of the estimated construction cost of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to CITY. The bond shall insure that the construction commenced by LESSEE shall be completed in accordance with the plans approved by CITY or, at the option of CITY that the uncompleted construction shall be removed, and the Premises restored to a condition satisfactory to CITY. The bond or cash shall be held in trust by

CITY for the purpose specified above, or at CITY's option may be placed in an escrow approved by CITY.

Prior to the commencement of any work on the Premises, LESSEE shall deliver to City a payment bond (materials and labor bond) in an amount not less than one hundred percent (100%) of the total amount payable under the contract(s) for construction on the Premises to satisfy claims of material suppliers and of mechanics and laborers employed on the contract(s) for construction on the Premises. The bond shall be provided in compliance with California Civil Code sections 9550-9566. The bond shall be executed by an admitted surety, consistent with California Code of Civil Procedure section 995.670, that is authorized by the State of California Department of Insurance to transact surety insurance in the State. Lessee shall maintain the bond in full force and effect until all improvements for the construction on the Premises are accepted by City and until all claims for materials and labor are paid, and must otherwise comply with the Government Code. Should the bond become insufficient, Lessee shall renew, or cause the renewal of, the bond within ten (10) calendar days after receiving notice from City.

8.4 [Reserved].

8.5 Ownership of Improvements and Personal Property.

8.5.1 Any and all permanent improvements, in-ground plant or tree material, in-ground irrigation and water wells, structures, and installations or additions to the Premises now existing or constructed on the Premises by LESSEE shall at expiration or termination of this Lease be deemed to be part of the Premises and shall become, at CITY's option, CITY's property free of all liens and claims, except as otherwise provided in this Lease.

8.5.2 If CITY elects not to assume ownership of all or any improvements, plant or tree material, in-ground irrigation and water wells, structures, or installations, CITY shall so notify LESSEE one hundred eighty (180) days prior to expiration of the Lease or thirty (30) days prior to early termination of the Lease if possible, however, if the Lease is terminated early with less than thirty (30) days notice, CITY shall have up to thirty (30) days after the early termination of the Lease to provide notice that CITY elects not to assume ownership of said items. If CITY elects to not assume ownership, LESSEE shall remove all such improvements, structures and installations that had been installed by LESSEE or at the request of LESSEE including any installations by LESSEE's immediate predecessor, as directed by CITY at LESSEE's sole cost on or before Lease expiration or early termination, or if CITY provided notice after the early termination of the Lease, within thirty (30) days of being provided written notice that CITY elected not to assume ownership. If LESSEE fails to remove any improvements, structures, and installations installed by LESSEE as directed by CITY, LESSEE shall pay CITY the full cost of any removal.

- 8.5.3 LESSEE-owned machines, appliances, equipment, trade fixtures, and other items of personal property shall be removed by LESSEE by the date of the expiration or early termination of this Lease. Any said items which LESSEE fails to remove will be considered abandoned and become CITY's property free of all claims and liens, or CITY may, at its option, remove said items at LESSEE's expense. To the extent CITY elects to retain such property, LESSEE shall assign to CITY, without recourse, and give CITY copies or originals of, all assignable warranties then in effect for any personal property remaining on the Premises.
- 8.5.4 If any removal of such personal property by LESSEE results in damage to the Premises or any improvements thereon, LESSEE shall repair all such damage.
- 8.5.5 Any necessary removal by either CITY or LESSEE which takes place beyond the expiration or termination hereof shall require LESSEE to pay rent to CITY on a per diem basis at the rate in effect immediately prior to said expiration or termination.
- 8.5.6 Notwithstanding any of the foregoing, in the event LESSEE desires to dispose of any of its personal property used in the operation of the Premises upon expiration or termination of this Lease, then CITY shall have the first right to acquire or purchase said personal property.
- 8.6 Unavoidable Delay. If the performance of any act required of CITY or LESSEE is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, pandemics, epidemics, freight embargoes, or other causes beyond the reasonable control of the party required to perform an act, said party shall be excused from performing that act for the period equal to the period of the prevention or delay. Provided, however, this provision shall not apply to obligations to pay rent as required pursuant to this Lease. In the event LESSEE or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in writing of such fact, described in reasonable detail, within ten (10) days after the beginning of any such claimed delay. The party claiming extension of time to perform due to an unavoidable delay shall make reasonable efforts to cure the condition causing the unavoidable delay or perform in spite of the delay in a manner that is mutually satisfactory to the parties.
- 8.7 Waste, Damage, or Destruction. LESSEE shall not commit or allow to be committed any waste or any public or private nuisance on the Premises. LESSEE shall keep the Premises clean and clear of refuse and obstructions, and shall dispose of all garbage, trash, rubbish and oil/chemical contaminated soil in a manner satisfactory to CITY and in compliance with all applicable laws. If the Premises are put into a condition which is not decent, safe, healthy and sanitary, LESSEE shall commence to restore the Premises to a decent, safe, healthy and sanitary condition within a reasonable time (but no later than thirty (30) days after the date of waste) and shall restore the Premises to CITY's reasonable satisfaction within ninety (90) days of commencement. LESSEE must obtain all approvals required for restoration of all waste or damages to the Premises.

- 8.8 **Entry and Inspection.** CITY reserves and shall always have the right, but not the obligation, to enter said Premises for the purpose of viewing and ascertaining the condition of the same, to protect its interests in the Premises, to exercise any rights reserved to or provided to CITY under this Lease, or to inspect the operations conducted thereon. Such entry shall not constitute an actual or constructive eviction of LESSEE from the Premises and shall not entitle LESSEE to any offset, deduction, or abatement of rent. In the event that such entry or inspection by CITY discloses that said Premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, after ten (10) days written notice to LESSEE, to have any necessary maintenance work done at the expense of LESSEE, and LESSEE hereby agrees to pay promptly any and all costs incurred by CITY in having such necessary maintenance work done, in order to keep said Premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that said Premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require LESSEE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. Said bond shall be in an amount adequate in the opinion of CITY to correct the said unsatisfactory condition. LESSEE shall pay the cost of said bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Lease imposed on CITY.
- 8.9 **Maintenance.** LESSEE agrees to assume full responsibility and cost for the operation and maintenance of all portions of the Premises and all wells and improvements located on the Premises throughout the Term. LESSEE will make all repairs and replacements necessary to maintain and preserve the Premises in a decent, safe, healthy, and sanitary condition satisfactory to CITY and in compliance with all Applicable Laws. LESSEE agrees to assume full responsibility to fence and maintain such fencing around non useable acres to prevent unauthorized access or use of the Premises and to curtail illegal or unwanted activity on the Premises. To the maximum extent allowed by law, LESSEE expressly waives all of CITY's obligations to maintain or repair the Premises, all right to terminate this Lease pursuant to Civil Code Sections 1932 or 1933 or any similar law, and all right to make repairs at CITY's expense pursuant to Civil Code Sections 1941 through 1942 or any similar law.
- 8.10 **Utilities.** LESSEE may order and install utilities to facilitate the Allowed Uses on the Premises, subject to obtaining all necessary approvals and permits. LESSEE shall order, obtain and pay for all utilities and service and installation charges in connection with the Premises. CITY shall not be liable for any interference with or disruption of any utilities or services for the Premises.
- 8.10.1 LESSEE agrees and acknowledges that there are currently six (6) wells on the Premises. The wells are identified as Well Nos. SP009, SP031, SP032, SP033, SP034, and SP054. Wells SP033 and SP034 currently have meters installed and owned by CITY. LESSEE may install additional wells at its sole cost and expense, subject to CITY consent in accordance with Section 8.2 and subject to LESSEE securing all applicable local, state and federal approvals and permits.

8.10.2 LESSEE agrees and acknowledges that these wells may be, or in the future potentially may be, used for domestic drinking water and as such are subject to complying with San Diego County Department of Environmental Health ("DEH") regulations. The DEH has an agreement with the State Water Resources Control Board, Division of Drinking Water for administration and enforcement of the Federal and State statutes and regulations for any water systems under 200 service connections, including State Small Water Systems. A State Small Water System is a public water system that has 5 to 14 residential service connections and does not regularly serve potable water to more than 25 individuals for more than 60 days out of the year. LESSEE agrees to maintain and operate wells in accordance with all local, state, and federal regulations for wells and water systems.

8.11 Taxes. LESSEE shall pay, before delinquency, all taxes, assessments and fees assessed or levied upon the Premises or upon LESSEE's use and occupancy of the Premises, including without limitation licenses and permits, and including the land and any improvements or fixtures installed or maintained by LESSEE thereon. LESSEE acknowledges that this Lease may create a possessory interest subject to property taxation and that LESSEE may be subject to the payment of taxes levied on that possessory interest. LESSEE shall pay all such possessory interest taxes. LESSEE's payment of taxes, fees and assessments shall not reduce any rent due to the CITY. CITY shall not assume any responsibility for any taxes whatsoever resulting from LESSEE's possession, use or occupancy of the Premises.

8.12 Signs. LESSEE shall not erect or display any banners, pennants, flags, posters, signs, decorations, marquees, awnings or similar devices or advertising without CITY's prior written consent or approval. If any such unauthorized item is found on the Premises, LESSEE shall remove the item at its expense within twenty-four (24) hours after notice by CITY, or CITY may thereafter summarily remove the item without further notice, at LESSEE's cost.

## **SECTION 9: GENERAL PROVISIONS**

9.1 Time is of Essence; Provisions Binding on Successors. Time is of the essence of all of the terms, covenants, and conditions of this Lease, and, except as otherwise provided herein, all of the terms, covenants, and conditions of this Lease shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.

9.2 Accessibility Assessment. In accordance with California Civil Code Section 1938, CITY hereby states that the Premises have not been inspected by a Certified Access Specialist ("CASp").

Further, pursuant to California Civil Code section 1938(e), CITY is required to state: "A Certified Access Specialist (CASp) can inspect the subject premises and determine whether the subject premises comply with all of the applicable construction-related accessibility standards under state law. Although state law does not require a CASp inspection of the subject premises, the commercial property owner or lessor may not prohibit the lessee or tenant from obtaining a CASp inspection of the subject premises for the occupancy or

potential occupancy of the lessee or tenant, if requested by the lessee or tenant. The parties shall mutually agree on the arrangements for the time and manner of the CASp inspection, the payment of the fee for the CASp inspection, and the cost of making any repairs necessary to correct violations of construction-related accessibility standards within the premises."

- 9.3 Notices. Any notice required or permitted to be given under this Lease shall be in writing and may be served by (i) messenger for immediate personal delivery; (ii) nationally recognized overnight (one business day) delivery service (e.g., United Parcel Service, Federal Express, etc.); or (iii) United States Postal Service, postage prepaid and addressed as follows:

If to LESSEE:

Bill Brammer  
Brammer Farms, LLC  
20505 San Pasqual Road  
Escondido, California 92025

If to CITY:

THE CITY OF SAN DIEGO  
Attention: Director, Department of Real Estate & Airport Management  
1200 Third Avenue, Suite 1700 (MS 51A)  
San Diego, California 92101

Notice shall be considered 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 the notice is sent by messenger for immediate personal delivery, one (1) business day after delivery by a nationally recognized overnight delivery service, or three (3) business days after the notice is deposited with the United States Postal Service in accordance with this Section 9.3. Any attorney representing a party may give any notice on behalf of such party.

- 9.4 Compliance with Law. LESSEE shall at all times in the construction, maintenance, occupancy, restoration and operation of the Premises comply with all Applicable Laws, at LESSEE's sole cost and expense. LESSEE shall promptly deliver to CITY copies of all documentary evidence of such compliance received by or otherwise available to LESSEE (e.g., validation of periodic inspection of LESSEE fire-suppression equipment).
- 9.5 [Reserved].
- 9.6 Equal Opportunity. LESSEE shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086; the California Fair Employment Practices Act; and all other laws, rules and regulations of competent governmental authority. LESSEE shall not discriminate against any employee or applicant for

employment on any basis prohibited by law. LESSEE shall provide equal opportunity in all employment practices. LESSEE shall cause the foregoing provisions to be inserted in all commercial subleases and all contracts for any work covered by this Lease so that such provisions will be binding upon each commercial sublessee and contractor. LESSEE shall fully cooperate with any investigation conducted by the City of San Diego, in its governmental capacity, pursuant to its Nondiscrimination in Contracting Ordinance [San Diego Municipal Code sections 22.3501-22.3517, as amended from time to time], and upon CITY's request, LESSEE shall submit a current Workforce Report. LESSEE acknowledges that failure to comply with the requirements of this section and/or submitting false information in response to these requirements may result in termination of this Lease and debarment from participating in CITY contracts for a period of not less than one (1) year. Nothing in this Section 9.6 shall be interpreted to hold LESSEE liable for any discriminatory practice of its subcontractors.

9.7 Equal Benefits. LESSEE shall comply with San Diego Municipal Code sections 22.4301-22.4308, as amended from time to time, which require lessees of CITY-owned property to offer the same employment benefits to employees with spouses and employees with domestic partners. LESSEE certifies that it will maintain such equal benefits throughout the Term of this Lease.

9.8 Disabled Access Compliance. LESSEE shall, as applicable to the Premises and LESSEE's possession, use and occupancy of the premises, comply with all accessibility requirements under California Government Code sections 11135-11139.5; Title 24 of the California Code of Regulations (i.e., the California Building Code); the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 ("ADA"); and all other applicable laws, rules and regulations of competent governmental authority enacted protecting the rights of people with disabilities. When a conflict exists between any federal or state accessibility requirements, LESSEE will follow the most restrictive accessibility requirement (i.e. that which provides the most access). LESSEE's compliance shall include without limitation the following:

9.8.1 Neither LESSEE nor any contractor or subcontractor shall discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs and termination of employment.

9.8.2 No qualified individual with a disability may be excluded, on the basis of disability, from participation in, or be denied the benefits of, services, programs or activities of LESSEE or LESSEE's contractors or subcontractors.

9.8.3 LESSEE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.

9.8.4 Where required by law, all improvements, fixtures, structures or installations on the Premises shall comply with municipal, state, and federal accessibility requirements by bringing up to code and making accessible any areas of the Premises which deny

access to individuals with disabilities. All improvements and alterations required by Lessee will be at Lessee's sole expense. For any such improvements and alterations required by Lessee, Lessee shall, at Lessee's sole cost and in conformance with all applicable building codes and accessibility regulations, comply with applicable disabled-access requirements by making accessible any areas of the Premises which deny access to disabled persons; and

- 9.8.5 LESSEE shall include language in each sublease or sublicense agreement, if any, indicating the sublessee's or sublicensee's agreement to abide by the provisions of this section.
- 9.8.6 LESSEE's failure to comply with the accessibility requirements of this section or submitting false information in response to these accessibility requirements, or both, will be a default of this Lease.
- 9.8.7 LESSEE and each of its sublessees or sublicensees, if any, shall be individually responsible for their own ADA compliance program.
- 9.9 Product Endorsements. LESSEE shall comply with City Council Policy 000-41 (as may be amended from time to time), which relates to whether and how LESSEE may refer to the CITY as a user of a product, service, or company in advertising, promotion, or other marketing purposes in any platform, including social media.
- 9.10 CITY Employee Participation Policy. CITY may unilaterally and immediately terminate this Lease if LESSEE employs an individual who, within the twelve (12) months immediately preceding such employment did, in their capacity as a CITY officer or employee, participate in negotiations with or otherwise have an influence on a recommendation made to the City Council related to the selection of LESSEE for this Lease. It is not the intent of this policy that these provisions apply to members of the City Council.
- 9.11 Local Business and Employment. LESSEE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. To the extent legally required under applicable law with respect to any work on the Premises, LESSEE shall use its best efforts to solicit applications for employment and bids and proposals for contracts from local residents and firms as opportunities occur. LESSEE shall use its best efforts to hire qualified local residents and firms whenever practicable.
- 9.12 Nondiscrimination. This Lease is made and accepted upon and subject to the covenant and condition, which shall run with the land, that LESSEE or any person claiming under or through LESSEE shall not establish or allow any discrimination against or segregation of any person or group of persons on account of race, color, religion, gender, gender expression, gender identity, disability, sexual orientation, marital status, national origin, ancestry, familial status or source of income in the possession, use and occupancy of the Premises or in the selection, location, number, use or occupancy of tenants, subtenants or vendees on the Premises.

- 9.13. Cumulative Remedies. CITY's rights and remedies under this Lease are cumulative and shall not limit or otherwise waive or deny any of CITY's rights or remedies at law or in equity.
- 9.14. Survival. Any obligation which accrues under this Lease prior to its expiration or termination shall survive such expiration or termination.
- 9.15. Joint and Several Liability. If LESSEE is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of LESSEE under this Lease.
- 9.16. No Affiliation. Nothing contained in this Lease shall be deemed or construed to create a partnership, joint venture or other affiliation between CITY and LESSEE or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of LESSEE or any other party or entity.
- 9.17. Relocation and Related Waivers. LESSEE and CITY agree that no actions that CITY is permitted to take under this Lease, including termination, curtailment, or limitation or the Lease or rights under the Lease, will cause LESSEE to: (1) qualify as a displaced person under California Government Code sections 7260 et seq, and regulations adopted thereunder; or (2) qualify LESSEE for any rights under the doctrine of emblements. Further, LESSEE hereby waives any right or entitlement to receive relocation payments, damages, compensation, or reimbursement under Government Code sections 7260 et seq. or the doctrine of emblements, to the extent that such rights or entitlements might otherwise arise.
- 9.18. Entire Agreement. This Lease constitutes the entire agreement between the parties and supersedes any and all prior oral or written understandings, representations, warranties and agreements between them pertaining to this Lease, including, but not limited to, LESSEE's occupancy, use, development, maintenance and restoration of the Premises. Any modification, alteration or amendment of this Lease shall be in writing and signed by all the parties hereto. Each party represents and warrants that this Lease is binding upon such party in accordance with its terms.
- 9.19. Partial Invalidity. If any term, covenant, condition or provision of this Lease is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
- 9.20. Authority to Contract. Each individual executing this Lease on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Lease on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws or other written rules of conduct or governing agreement, and that this Lease is binding upon such person or entity in accordance with its terms. Each person executing this Lease on behalf of another person or legal entity represents and warrants

such entity is a valid, qualified corporation, limited liability company, partnership or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

- 9.21 Equal Pay Ordinance. Unless an exception applies, LESSEE shall comply with the Equal Pay Ordinance codified in San Diego Municipal Code sections 22.4801 through 22.4809. LESSEE shall certify in writing that it will comply with the requirements of the Equal Pay Ordinance throughout the Term.

9.20.1 LESSEE and Sublessee Requirement. The Equal Pay Ordinance applies to any commercial sublessee of the Premises to the same extent as it would apply to LESSEE. LESSEE shall require commercial sublessees to certify compliance with the Equal Pay Ordinance in their subleases.

9.20.2 Notice Requirement. LESSEE must post a notice informing its employees of their rights under the Equal Pay Ordinance in their workplace or job site.

## **SECTION 10: AGRICULTURAL PROVISIONS**

- 10.1 Water Quality Protection Plan and Monitoring Program Plan. CITY and LESSEE are committed to the implementation of programs to manage activities on the Premises in a manner which aids in the protection of the City of San Diego's valuable water resources. LESSEE shall comply with San Diego Regional Water Quality Control Board ("RWQCB") regulations and either Order No. R9-2016-0004, General Waste Discharge Requirements for Discharges from Commercial Agricultural Operations for Dischargers that are Members of a Third-Party Group in the San Diego Region (Third-Party General Order), or Order No. R9-2016-0005, General Waste Discharge Requirements for Discharges from Commercial Agricultural Operations for Dischargers Not Participating in a Third-Party Group in the San Diego Region (Individual General Order). Collectively, both Orders are referred to as the General Agricultural Orders. To demonstrate compliance, the LESSEE shall send the CITY proof of enrolling in the San Diego Irrigated Lands Program within 3 months of execution of this Lease. In accordance with the General Agricultural Orders, the LESSEE shall develop a Water Quality Protection Plan ("WQPP") and Monitoring Program Plan ("MPP") that will establish best management practices ("BMPs") for, among other things, nutrient (e.g. fertilizer and manure) application, subsurface tile drainage, and ground cover planting to control erosion and reduce the amount of pollutants and other sediments discharged from the Premises. Any records prepared for the RWQCB to comply with the General Agricultural Orders including, but not limited to the Annual Self-Assessment Report, shall be made available to the CITY upon request.

When the WQPP and MPP have been developed and implemented, specific to the Premises and Allowed Uses, it is crucial that the practices be enforced and maintained. It is LESSEE'S responsibility to inform and ensure activities by employees, contractors, subcontractors, agents and vendors are conducted in accordance with the WQPP and MPP. The LESSEE will control erosion on the Premises in compliance with all federal, state, and local laws and regulations, using such typical devices and BMPs as detention

basins, bioswales and vegetative screening, as well as planting field buffers, implementing conservation tillage, and to the extent applicable, managing livestock access to streams, to reduce sediment flow into the creeks.

- 10.2 Reporting Requirements and Inspection of Records. LESSEE agrees to provide to CITY's Public Utilities Department reports about all activities conducted on the Premises. These reports will detail the usage of pesticides, herbicides, fertilizers, and soil amendments. The required reports are specified in the WQPP and MPP, which shall be amended, as needed, on an annual basis. In addition to the monitoring data required under the General Agricultural Orders, LESSEE must provide to CITY, upon request by CITY, the following information: map showing location of well(s), well installation permit(s), well condition (operating, non-operating, abandoned), annual pumping volumes, drilling/geologic or hydrologic data, well construction details, well modifications or rehabilitation, all pump test data and analysis, electrical efficiency tests of well pump, all groundwater-level analyses, annual pumping volumes (acre feet), and annual cropping patterns (acres).

Additionally, at CITY'S request, LESSEE shall promptly provide, at LESSEE'S expense, any necessary data or records to enable CITY to fully comply with all requirements of local, state, or federal governments concerning the Premises and or activities thereon. LESSEE shall keep and make available to CITY upon demand, any and all records or documents pertaining to the costs and usage of water on the Premises which shall include records of costs of construction, maintenance, operation and pumping, and meter readings for all wells located on the Premises. LESSEE shall maintain all such records, documents, and accounts for a minimum period of five (5) years from termination of the Lease.

- 10.3 Septic System Maintenance. LESSEE shall properly maintain any existing or future septic systems and drain fields located on the Premises. Maintenance shall include but is not limited to: having a qualified septic service professional conduct an inspection at least every three (3) years and pumping of any septic tank at least every five (5) years. LESSEE further agrees not to drive or park over any drain field and to keep trees, crops, roof drains, sump pumps, and other rainwater drainage systems an appropriate distance from any drain field.

- 10.4 Noxious Weeds, Pests, Erosion, and Cutting of Trees. LESSEE must take commercially reasonable corrective action, to the satisfaction of CITY, to prevent the infestation of noxious weeds, pests, and erosion throughout the entire Premises, in compliance with all applicable laws and with the WQPP and MPP. Notwithstanding the foregoing, no growing or mature trees are to be destroyed or removed without prior written consent of the CITY; trees growing along roadways may be trimmed back as required by LESSEE. Trees growing in artificially constructed ditches may be removed by LESSEE. Trees growing in natural drainage channels may not be removed without written consent of the CITY.

- 10.5 No Warranty. CITY does not warrant that the Premises are suitable for the purposes for which they are leased as stated herein.

10.6 Assumption of Risk: Flood Damage and Other Acts of God. LESSEE understands and agrees that the Premises are subject to flood damage and that other damage may result to the Premises from other circumstances, including weather conditions and such causes as fire and earthquakes. LESSEE shall notify CITY within ten (10) days of any such damage. LESSEE further specifically agrees that CITY shall have no obligation whatsoever to construct or maintain channels or to construct, maintain, or operate reservoirs or release water from reservoirs, including from Lake Hodges, in such a way as to control, alleviate, or minimize potential damages to the Premises. LESSEE specifically assumes the risk of all damages resulting from flooding or weather conditions or other similar causes. LESSEE is authorized to minimize potential flood damage through improved drainage and other flood control improvements as approved by CITY. LESSEE acknowledges that but for LESSEE's agreement to assume all risks regarding flooding, fire, earthquake, and other such causes, and LESSEE's further agreement that CITY has absolutely no obligation with regard to controlling, mitigating or reducing damages arising from or relating to flooding, fire, earthquakes, and other such causes, CITY would not enter into this Lease.

10.7 Water Use and Access Rights.

CITY reserves all right, title and interest in and to the water on the Premises. There is hereby reserved to CITY, and LESSEE herein expressly agrees that in addition to the reservations made in Section 1.7, CITY shall have the right throughout the Term to divert, impound, store, and transport by means of dams, reservoirs, or by pumping any and all water, both surface and underground, which flows over, under or across the Premises, together with the right to divert, inject, spread, or percolate water in or through the soils beneath the surface of the Premises. Notwithstanding any provision to the contrary in this Lease, CITY has no obligation to provide water to LESSEE, and CITY does not warrant or warrant that ground water will be available for LESSEE's use. Nothing in this Lease shall result in the transfer of CITY's rights, title or interest in the water on, in, or under the Premises to any other person or entity including LESSEE.

10.7.1 LESSEE has been expressly advised and acknowledges that:

10.7.1.1 The Premises are located within the San Pasqual groundwater basin.

10.7.1.2 The CITY is the lawful owner and has at all times asserted its pueblo, overlying and appropriative water rights in the San Pasqual groundwater basin;

10.7.1.3 The CITY intends to take any and all steps necessary to fully protect its water rights in the San Pasqual groundwater basin, including but not limited to, implementing and complying with any Sustainable Groundwater Management Act ("SGMA") and any Groundwater Sustainability Plan ("GSP");

- 10.7.1.4 Protection of the CITY's water rights in the San Pasqual groundwater basin is an essential element of the CITY's long-term plan to ensure a reliable and cost-effective water supply for city residents;
  - 10.7.1.5 Another essential element of the CITY's long-term plan to ensure a reliable and cost-effective water supply for city residents is the increased production and distribution of recycled water for non-potable uses such as those which are the subject of this Lease;
  - 10.7.1.6 In order for the CITY to accomplish its long-term objectives, it is planned that the San Pasqual groundwater basin will be utilized, in part, for the storage of imported or non-potable water, and, that such storage will necessitate certain activities by CITY employees and consultants on the Premises; and
  - 10.7.1.7 Any injury that results from the percolation, storage and recapture of water from the soil beneath the surface of the Premises shall not be considered unreasonable or substantial interference with the LESSEE's use of the Premises, nor otherwise entitle LESSEE to damages or other legal recourse against CITY.
- 10.7.2 LESSEE shall have the limited right, at LESSEE's sole cost, to develop and use on the Premises only the amount of water available and necessary to carry out the Allowed Uses, as follows:
- 10.7.2.1 LESSEE shall have the right to operate the existing wells and use the water on the Premises, subject to the process, timeframes, and rates as otherwise provided herein. CITY may install, at CITY's sole cost, a metering device on all well(s) (including open wells) satisfactory to measure the quantity of water pumped from well(s). CITY shall have the right to reasonable access to such metering devices(s) as required for periodic meter reading and for necessary repair and maintenance of meter.
  - 10.7.2.2 LESSEE may only make material modifications to existing wells or construct new wells with the express written approval of CITY and in conformity with all applicable federal, state, and local standards and regulations and subject to the provisions of Section 8.2. Said approval shall not be unreasonably withheld. Any abandoned well shall also be closed per federal, state, and local standards and regulations.
  - 10.7.2.3 CITY has made no representations or guarantees to LESSEE as to the quantity or quality of water which may be available to LESSEE.
  - 10.7.2.4 LESSEE expressly agrees that said water shall be used only on the Premises and only for the purpose of Allowed Uses.

- 10.7.3 LESSEE agrees that upon termination of this Lease, it will leave any wells developed or used on the Premises in good order and condition and that the casing shall be left in place, unless CITY directs LESSEE to remove otherwise.
- 10.7.4 CITY shall at all times have the right to access to the Premises to protect its water rights and water quality; for ensuring LESSEE's compliance with LESSEE's WQPP and MPP; for monitoring the level and quality of natural surface and groundwater over and under the Premises; and, for purposes necessary to the implementation of any stormwater or groundwater management plan that may be adopted by CITY. Should the monitoring indicate surface and/or groundwater quality degradation, the CITY shall in its sole discretion have the right to require alteration (at LESSEE's sole cost and expense) of any irrigation or other practices by LESSEE which may be a cause of such water quality degradation as determined by CITY.
- 10.7.5 CITY shall have the right in its sole discretion to construct over and under the Premises its own wells, pipelines, and other facilities necessary to develop the maximum water yield potential of the Premises, consistent with Section 1.7.
- 10.7.6 In the event that the CITY, or an entity with explicit authorization to act on the CITY's behalf, diverts, impounds, stores, or transports water by means of dams, reservoirs, or by pumping water on the Premises for a period of six (6) continuous months, and the CITY's action materially interferes with LESSEE's ability to grow and harvest crops on the Premises, LESSEE may terminate this Lease upon six (6) months prior written notice to the CITY.
- 10.8 SGMA and GSP Compliance. LESSEE must comply with any SGMA and any corresponding GSP in the management of the groundwater basin for groundwater extraction levels, pumping rates and groundwater quality. LESSEE must comply with direction from the CITY regarding groundwater pumping rates and frequency. For example, in times of drought, compliance with the GSP may involve decreasing pumping levels. Failure to comply with the provisions of this section shall constitute a default under this Lease.
- 10.9 Creeks and Streams. Creek crossings are only allowed at specific, limited locations. Notwithstanding any contrary provision in this Lease, under no circumstances, whether wet or dry, will LESSEE use or allow the use of creek beds as vehicle access trails, roads, or paths, for convenience, as shortcuts, or for any other reason. Agricultural activities and habitat disturbance will not encroach within 20 feet of any creek bank. LESSEE may only conduct equipment maintenance at least four hundred (400) feet away from stream channels, and at locations with impervious surfaces, a roof or canopy, containment, and sumps. LESSEE shall implement a program to remove any material collected in the sump(s) in compliance with all applicable federal, state, and local regulations, and subject to CITY approval. From the Effective Date and during the Term of this Lease, LESSEE

shall, at its own cost and expense, immediately clean up all oil or chemical spills and store and properly dispose of contaminated soil.

## **SECTION 11: SPECIAL PROVISIONS**

### **11.1 LESSEE Responsibility for Preserving Environmental, Historical and Cultural Resource Sites.**

LESSEE acknowledges and is aware that sensitive resource sites as well as environmental, historical, and cultural resources may be identified on the Premises. LESSEE agrees that it shall be responsible, at its sole cost and expense, for protecting such sites and resources to the extent reasonably feasible, including boundary fencing if required by CITY. However, if additional measures for protecting a sensitive site or resource are required by CITY but cost-prohibitive for LESSEE to bear the cost alone, the installation and maintenance costs of such additional measures shall be the sole responsibility of CITY or another public agency or body charged with operating and/or maintaining the San Dieguito River Valley Park.

### **11.2 Potential Construction of Public Hiking, Biking and Riding Trails, and Access to Sensitive Sites and Resources.**

LESSEE has been advised and acknowledges that the Premises are within the focused planning area of the proposed San Dieguito River Valley Park. LESSEE has further been advised and acknowledges that a system of public hiking, biking and riding trails has been proposed for inclusion through the San Dieguito River Valley Park. In addition, LESSEE understands and agrees that CITY may require LESSEE to accommodate public access to sensitive environmental, historical, and cultural sites and resources that traverses over the Premises. LESSEE agrees that, in the event such trails or means of access are to be constructed through the Premises as determined by CITY in its sole discretion, then the property needed for such trails shall be removed from the Premises, subject to ninety (90) days prior written notice from CITY. The notice of intent to remove the trail area shall include a plat clearly designating the area to be removed. In the event of such modification of Premises, CITY agrees that the rent shall be reduced proportionally. In addition, should any leasehold improvements in the area removed for trails be damaged or destroyed, CITY agrees to reimburse LESSEE for the value of any such improvements in a total amount as reasonably determined by the LESSEE and CITY. CITY further agrees that, in the event a portion of the Premises are removed for such trails as described above, the trails shall be fenced as necessary for the reasonable security and/or protection of the remainder of the Premises. All costs related to the construction and maintenance of trails and security fencing relating to the public trails or access to sensitive sites and resources shall be the sole responsibility of CITY or another public agency or body charged with operating and/or maintaining the San Dieguito River Valley Park.

11.3 Boundary Adjustments. LESSEE has been advised and acknowledges that the boundaries of the Premises are located in the CITY, Multiple Habitat Species Conservation Program ("MSCP") Lake Hodges/San Pasqual Valley Cornerstone Lands and subject to adjustment related to the MSCP. The Premises were used for active organic agriculture prior to the adoption of the MSCP Subarea Plan and will continue to be so used until either the formal Lake Hodges/San Pasqual Bank is established or the Premises are no longer leased for organic farming. Subject to Section 11.1, LESSEE will provide fencing that allows movement of the arroyo toads and keep agricultural operations out of the Multiple Habitat Planning Area ("MHPA"). LESSEE shall further (1) not use chemical fertilizers, pesticides or herbicides, (2) to the extent possible, only till during the breeding season of the arroyo toad (March 15 to July 1). LESSEE agrees that, in the event that boundary adjustments are made due to the MSCP, the property needed to accommodate the MSCP may be removed from the Premises, upon 180 days prior written notice from CITY. The notice of intent to remove said property shall include a plat clearly designating the area to be removed. In the event of such modification of leasehold area, CITY agrees that the rent shall be reduced proportionally, and LESSEE shall be compensated for the loss of improvements.

11.4 Leasehold Boundaries.

The CITY may, at CITY's option, survey the Premises and identify, on ground, demarcation boundaries. All such boundary demarcation markers installed on the Premises shall be maintained by LESSEE.

11.5 Environmental Conditions.

LESSEE shall not cause or permit any violation of Environmental Law or any deposit, discharge, generation, release, or spill of a Hazardous Substance occurring at, on, under, into, or from the Premises, or during transportation of any Hazardous Substance to or from the Premises, or arising at any time from activities conducted at, on, under, or from the Premises (each, an "Environmental Condition"). If LESSEE discovers or becomes aware of an Environmental Condition, LESSEE shall notify CITY of such Environmental Condition as soon as possible, but in all cases within twenty-four (24) hours following LESSEE becoming aware of such Environmental Condition.

11.5.1 Remediation. If an Environmental Condition occurs, LESSEE shall remediate the Environmental Condition in accordance with law to allow all uses of the Property permitted by law immediately before the Environmental Condition is discovered, at LESSEE's sole cost and expense. If LESSEE knows or has reasonable cause to believe that an Environmental Condition is an imminent danger to public health and safety, LESSEE shall take all actions necessary to alleviate the imminent danger, at LESSEE's sole cost and expense.

11.5.2 Removal. If LESSEE stores, utilizes, generates, or otherwise brings Hazardous Substances onto the Premises in accordance with law, LESSEE shall remove all such Hazardous Substances from the Premises prior to the expiration or

termination of this Lease and provide CITY with documentation demonstrating the legal removal and disposal of the Hazardous Substances.

- 11.5.3 Reports. LESSEE shall deliver a written report describing the circumstances of each Environmental Condition in reasonable detail to CITY within three (3) days after notifying CITY of the Environmental Condition. LESSEE shall also submit all required reports relating to the Environmental Condition to other governments as required by law.
- 11.5.4 Environmental Assessment. Upon reasonable cause to believe that an Environmental Condition has occurred, CITY may cause an environmental assessment of the Property to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be performed at LESSEE's sole cost and expense. LESSEE shall reimburse CITY for all costs and expenses reasonably incurred by CITY in performing the environmental assessment within fifteen (15) days after notice to LESSEE of the amount of such costs and expenses. Any amount reimbursable to CITY by LESSEE under this Section 11.5.4 that is not paid within fifteen (15) days after notice to LESSEE of such amount, shall accrue interest at the rate of 7% annually until paid.
- 11.5.5 Hazardous Substance. "Hazardous Substance" means and refers to any flammable substance, explosive, radioactive material, asbestos, asbestos-containing material, polychlorinated biphenyl, chemical known to the State of California to cause cancer or reproductive toxicity, pollutant, contaminant, hazardous waste, medical waste, toxic substance or related material, petroleum, petroleum product or any "hazardous" or "toxic" material, substance, or waste defined by those or similar terms or regulated as such under any law, any matter, waste, or substance subject to any law regulating, relating to, or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property, or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor, or any form of energy, from whatever source.
- 11.5.6 Environmental Law. "Environmental Law" means and refers to all laws, rules, orders, regulations, decrees or requirements of any government, now in effect or later enacted, regulating, relating to, or imposing liability or standards of conduct concerning: (a) any Hazardous Substance; (b) occupational health or industrial hygiene (only to the extent that the occupational health or industrial hygiene laws, ordinances, or regulations relate to Hazardous Substances on, under or about the Premises or relating to the allowed use of the Premises); (c) occupational or environmental conditions on, under or about the Premises or relating to the allowed use of the Premises; (d) or the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water, or land use.

***[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.]***

**SIGNATURE PAGE TO FLAT RATE LEASE BY AND BETWEEN  
THE CITY OF SAN DIEGO  
AND  
BRAMMER FARMS, LLC**

IN WITNESS WHEREOF, this Lease is executed to be effective as of the Effective Date.

Date: 2-16-2023

Brammer Farms, LLC, a California corporation

BY: William Brammer  
Brammer, William  
President

Date: 2-22-2023

THE CITY OF SAN DIEGO, a California municipal corporation

BY: Penny Maus  
Penny Maus  
Director, Department of Real Estate and Airport

Management

*Approved as to Form*  
this \_\_\_\_\_ day of \_\_\_\_\_, 2022

MARA W. ELLIOT, San Diego City Attorney

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## Exhibit A: Premises

