

CITY OF SAN DIEGO

ATM AGREEMENT

THIS ATM AGREEMENT ("Agreement") is executed by and between the CITY OF SAN DIEGO, a municipal corporation ("City"), and San Diego Metropolitan Credit Union ("Credit Union").

1. Right to Enter. City hereby grants permission to Credit Union to enter upon City-owned property located at the San Diego Community Concourse, 202 C Street, San Diego, California 92101 ("Concourse") and as specifically set forth on the attached Exhibit "A" ("ATM Location"), incorporated by this reference. Permission to enter the ATM Location is conditioned upon the terms set forth below.
2. Use of ATM Location. Credit Union shall have exclusive use of the ATM Location for the installation and operation of one (1) automated teller machine ("ATM") and incidental equipment and for no other purpose whatsoever.
3. Commencement. The term of this Agreement shall be three (3) years commencing on the first day of the calendar month following the date of execution by City and approval by the City Attorney. "Agreement Year" as used in this Agreement shall mean the 12-month period commencing on the first day of the calendar month following the execution of this Agreement by City and approval by the City Attorney.
4. Fees.

4.1 Time and Place of Payment. All fees required in this Agreement must be made payable to the City Treasurer and mailed to the Office of the City Treasurer, City of San Diego, P.O. Box 122289, San Diego, California, 92112-4165, or hand delivered to the Office of the City Treasurer, Civic Center Plaza Building, 1200 Third Avenue, First Floor, San Diego, California 92101.

The place of payment may be changed at any time by City upon thirty (30) days written notice to Credit Union. Mailed rental 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 paid upon actual receipt by the City Treasurer. Credit Union assumes all risk of loss and responsibility for late payment charges if payments are made by mail.

4.2 Processing Fee. Consideration to City for processing this Agreement shall be a Six Hundred Dollar (\$600) non-refundable processing fee.

4.3 Annual Minimum Fee. The annual minimum fee established for the term of this Agreement is Three Thousand Nine Hundred Dollars (\$3,900) per year, payable at Three Hundred Twenty-Five Dollars (\$325) per month.

4.4 Percentage Fee. The percentage fee will be calculated on a calendar month basis and will consist of ten percent (10%) of the gross income resulting from all operations conducted at the ATM Location.

4.5 Payment Procedure. On or before the last day of the calendar month following the calendar month in which the gross income subject to a fee was earned, Credit Union shall provide City with a correct statement together with a payment of fee on all applicable gross receipts in a form selected by City. The statement will be signed by Credit Union or its authorized agent attesting to the accuracy thereof, which shall be legally binding upon Credit Union. Each statement will indicate or include:

- a. One-twelfth (1/12) of the annual minimum fee until the full annual minimum fee is achieved in any Agreement Year.
- b. Total gross receipts for the subject month.
- c. The percentage fee due CITY, computed and totaled.
- d. The accumulated total of all fees previously paid for the current Agreement Year.
- e. Payment in the greater of the two following amounts:
- f. One-twelfth (1/12) of the annual minimum fee or the total percentage fee due CITY computed as described in this section.

4.6 Gross Income. "Gross income" or "gross receipts", as used in this Agreement, shall include all income resulting from occupancy of the ATM Location from whatever source derived whether received or to become due. Provided, however, gross income shall not include any federal, state, or municipal taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid over periodically by Credit Union to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by Credit Union in computing gross income. Gross income shall not include refunds of deposits. The amount of taxes and refunds shall be clearly shown on the books and records of Credit Union. The percentage fee shall be calculated and paid by Credit Union on the basis of the gross income whether the

income is received by Credit Union or by any sublessee, Credit Union or licensee, or their agents, and all gross income received by any sublessee, Credit Union, licensee, or other party as a result of occupancy of the ATM Location or the operation thereof shall be regarded as gross income of Credit Union for the purpose of calculating the percentage fee required by this Agreement to be paid by Credit Union to City, except as may be otherwise specified by or pursuant to this Agreement.

4.7 Late Payments. To compensate City for loss of interest and staff time associated with monitoring and follow-up on late payments, payments received by the City Treasurer after the last day of the month will be subject to a late fee of Thirty-Five Dollars (\$35).

5. Right to Terminate. Both parties may terminate this Agreement upon not less than ninety (90) day's written notice to the other party. It is mutually agreed that City shall not be obligated for any loss, financial or otherwise, which may be incurred by Credit Union's termination of this Agreement.
6. Revocable Agreement. This Agreement is not a lease. It is authorization to use City property, revocable at any time by City upon not less than ninety (90) days written notice to Credit Union. It is mutually agreed that City shall not be obligated for any loss, financial or otherwise, which may be incurred by Credit Union as a result of termination of this Agreement, and, further, that Credit Union expressly waives any claim for expense or loss which Credit Union might incur as a result of termination of this Agreement. The parties understand and agree that City shall not have keys permitting access to the ATM; however, City shall have and maintain the right at all times to enter upon the ATM Location in City's sole discretion.
7. Insurance. Prior to approval of this Agreement by City, Credit Union shall deliver to City a certificate of insurance for Commercial General Liability and property damage in which "The City of San Diego, its elected officials, officers, representatives, agents and employees" are named as additional insureds by separate endorsement, in an amount of not less than One Million Dollars (\$1,000,000) per occurrence. The policy shall be kept in force for the duration of this Agreement. The certificate of insurance shall be filed with City's Real Estate Assets Department upon execution of this Agreement.
8. Hold Harmless. Credit Union agrees to defend, indemnify, protect, and hold City, its elected officials, officers, representatives, agents and employees, harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to Credit Union's employees, invitees, guests, agents, or officers, which arise out of or are in any manner directly or indirectly connected with this Agreement, the development or operation of the ATM Location or the work and operations to be performed under this Agreement, and all expenses of investigating and defending against same; provided, however, that Credit Union's duty to indemnify and

hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of City, its elected officials, officers, representatives, agents and employees.

9. No Discrimination. Credit Union shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in Credit Union's use of the ATM Location, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment.

10. Compliance with City's Equal Opportunity Contracting Program.

10.1 Equal Opportunity Contracting. Credit Union acknowledges and agrees that it is aware of, and will comply with, City Council Ordinance No. 18173 (San Diego Municipal Code Sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated herein. Credit Union and all of its subcontractors are individually responsible to abide by its contents.

Credit Union will 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 any other applicable federal and state laws and regulations hereafter enacted. Credit Union will not discriminate against any employee or applicant for employment on any basis prohibited by law.

Credit Union submitted and CITY acknowledges receipt of a current Work Force Report or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions that Credit Union will take to achieve the CITY'S commitment to equal employment opportunities.

Credit Union agrees to insert the foregoing provisions in all subcontracts for any work covered by this lease agreement so that such provisions will be binding upon each subcontractor. Credit Union agrees that compliance with EEO provisions flowing from the authority of both parties will be implemented, monitored, and reviewed by the CITY'S Equal Opportunity Contracting Program staff.

10.2 Local Business and Employment. Credit Union acknowledges that the City of San Diego seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. Credit Union will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this lease agreement from local residents

and firms as opportunities occur. Credit Union agrees to hire qualified local residents and firms whenever feasible.

Credit Union understands that failure to comply with the above requirements and/or submitting false information in response to these requirements may result in termination of this ATM Agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.

11. Credit Union's Risk. All risks in connection with Credit Union's use of the ATM Location and any damages to the improvements thereon, thereunder, or in the vicinity thereof shall be borne in full by Credit Union.
12. Nuisance. Credit Union shall not use the ATM Location in any manner which, in the opinion of the City Manager, creates a nuisance or disturbs the quiet enjoyment of persons in the surrounding area.
13. Possessory Interest Tax. Credit Union recognizes and understands that this Agreement may create a possessory interest subject to property taxation and that Credit Union may be subject to the payment of property taxes levied on such interest. Such tax payment shall not reduce any fee paid City under this Agreement. Credit Union shall pay any tax or assessment before it becomes delinquent.
14. Compliance with Laws. Credit Union shall at its sole cost and expense comply with all the requirements of all municipal, state, and federal authorities now in effect or which may hereafter be in effect, which pertain to the ATM Location.
15. Maintenance of ATM. Credit Union shall use its best effort to operate the ATM during any and all Concourse operating hours. Credit Union shall have the right; however, to suspend operation for periodic maintenance inspections, balancing adjustments, servicing operation or other maintenance purposes. City and Credit Union acknowledge that despite Credit Union's best efforts, the ATM may be rendered inoperative for various periods of time due to breakdowns, operation failures or other reasons. Credit Union shall have the right to service the ATM at all times. Credit Union may engage an independent contractor to perform Credit Union's maintenance or service obligations. City shall grant access to the ATM Location either by Credit Union or Credit Union's representative at all reasonable times, so that Credit Union may maintain the ATM.
16. Removal of ATM. Upon expiration or earlier termination of this Agreement, Credit Union shall, at its sole cost, remove the ATM and all incidental equipment and related signage and repair and/or restore the ATM Location to its original condition, to the satisfaction of the City Manager. The removal of the ATM and restoration of the ATM Location shall occur not more than ninety (90) days after the expiration or earlier termination of this Agreement. In no event shall City be responsible for Credit Union's property during this ninety (90) day period.

17. Service and Utilities. City shall furnish to the ATM Location electricity required by Credit Union for the use and operation of the ATM. City shall keep the area in the vicinity of the ATM Location well lit at all times. City shall maintain all areas adjacent to or in the vicinity of the ATM Location. Credit Union shall be responsible for the installation and all costs and fees of phone / data lines required to operate the ATM.
18. No Assignment. Credit Union shall not assign any rights granted by this Agreement nor any interest therein without the prior written approval of the City Manager. Approval of any such proposed assignment may be withheld in the sole and absolute discretion of the City Manager. Any assignment by operation of law shall automatically terminate this Agreement.
19. Signs. Credit Union may, at its sole expense, erect at the ATM Location Credit Union's normal and customary signs identifying and advertising the ATM. Credit Union may also, at its sole expense, place appropriate signage at the ATM Location with Credit Union's name and ATM networks. Appropriate directional or informational signage (i.e. window stickers and decals) may also be placed on the windows at the entrance to the Concourse building. Such directional or informational signage requires approval by the City Manager, and may be rejected by him, in his sole discretion. No other signs shall be displayed on the ATM Location without the prior written consent of the City Manager. Except as set forth in this paragraph, the ATM Location shall not be used for advertising.
20. Encumbrances. Credit Union shall keep the ATM Location free from all encumbrances and liens of any nature during the term of this Agreement. Credit Union shall defend, hold harmless and indemnify City from and against any and all such encumbrances and/or liens and from and against any claim, liability, cost or expense (including all costs and attorneys' fees), which may be filed or instituted against the ATM Location (including without limitation Credit Union's failure or the failure of any contractor or subcontractor hired by Credit Union) to pay any person or persons referred to in Section 3181 of the California Civil Code or other applicable sections.
21. Maintenance of the ATM Location. Credit Union shall be solely responsible for maintaining the ATM Location in a decent, safe, healthy and sanitary condition at all times during the entire term of this Agreement to the satisfaction of the City Manager or designee.
22. Disabled Access Compliance. Credit Union agrees to comply with the California Government Code, Sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations hereafter enacted protecting the rights of people with disabilities. Credit Union's compliance shall include but not necessarily be limited to the following:

22.1 Credit Union shall not 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.

22.2 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 Credit Union.

22.3 Credit Union shall post a statement addressing the requirements of the ADA in a prominent place at the work site.

22.4 Where required by law, Credit Union shall comply with CITY'S disabled access requirements by bringing up to code and making accessible any areas of the ATM Location which deny access to disabled persons. All such improvements and alterations shall be at the sole cost of Credit Union.

22.5 Credit Union shall include language in each sublease agreement which indicates the sublessee's agreement to abide by the foregoing provisions. Credit Union and sublessees shall be individually responsible for their own ADA employment programs.

Credit Union understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a breach of this agreement.

23. No Publication. City shall not publish any advertising or other promotional materials referring to the ATM without Credit Union's prior consent.
24. Product Endorsement. Credit Union shall not publish any advertising or other promotional materials referring to the City of San Diego as a user of a product or service without the prior written consent of the City Manager who will insure compliance with Council Policy 000-41(2).
25. Waiver. The failure of City to insist upon strict performance by Credit Union of any condition of this Agreement, in one or more instances, shall not be construed as a waiver of any such condition, and the same shall remain in full force and effect.
26. Oral Representations. This Agreement contains the complete expression of the agreement between the parties, and there are no promises, representations, agreements, warranties or inducements, either expressed orally or implied, except as set forth herein. The conditions hereof cannot be changed in any respect except by written agreement between the parties.

27. Maintenance of Records. Credit Union shall maintain complete and accurate records in a manner satisfactory to the City Manager from which City can determine the amounts of all income subject to percentage fee payment.
28. Legal Proceedings. Parties agree that San Diego, California, will be the venue for any and all legal proceedings related to the execution and performance of this agreement. Parties agree that California law will govern such proceedings. Should it become necessary for City to commence legal proceedings to collect any payments due hereunder or to enforce any other condition of this Agreement, Credit Union agrees to pay all legal costs in connection therewith, including reasonable attorneys' fees.
29. Notices. Notices to City shall be mailed to:
- City of San Diego
Real Estate Assets Department
Attention: Deputy Director, Asset Management and Marketing Division
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, CA 92101
- Notices to Credit Union shall be mailed to:
- San Diego Metropolitan Credit Union
Attention: Tina Medrud
P.O. Box 719099
San Diego, CA 92171-9099
30. Governmental Approvals. By the granting of this Agreement, neither City nor the Council of City is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the ATM. Discretionary action includes but is not limited to rezonings, variances, environmental clearances, or any other governmental agency approvals which may be required for the development and operation of the ATM.

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IN WITNESS WHEREOF, this ATM Agreement is executed by City, acting by and through its City Manager, and by Credit Union, acting by and through its lawfully authorized officers.

THE CITY OF SAN DIEGO, a California municipal corporation

Date: 4-07-05

By: [Signature], Deputy Director

SAN DIEGO METROPOLITAN CREDIT UNION

Date: 3-18-05

By: [Signature]
Name: STUART CAMBLIN
Title: PRESIDENT/CEO

This activity is categorically exempt from CEQA pursuant to State CEQA Guidelines, Section 15060 (c)(3).

ENVIRONMENTAL ANALYSIS SECTION
ENVIRONMENTAL CLEARANCE:

Date: April 13, 2005

By: [Signature]

APPROVED AS TO FORM AND LEGALITY:

MICHAEL J. AGUIRRE, City Attorney

Date: April 22, 2005

By: [Signature]
Deputy City Attorney

Site No. _____

EXHIBIT "A" - ATM LOCATION

PLAZA HALL

1st AVE. ROLL-UP DOORS

STAIRS
TO
PARKING

COUNTER
SOUTHWEST
B.O.

EXHIBIT "A"

WOMEN

MEN



DATE

