AMENDED AND RESTATED EXCLUSIVE NEGOTIATING AGREEMENT

THIS AMENDED AND RESTATED EXCLUSIVE NEGOTIATING AGREEMENT ("**Agreement**") is dated as of _____, 20___ ("**Effective Date**") by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("**District**"), and 1HWY1, LLC, a Delaware limited liability company ("**Developer**"). District and Developer may be individually referred to herein as a "**Party**" and collectively as the "**Parties**."

RECITALS:

WHEREAS, on February 22, 2016, District staff issued a Request for Proposals 16-04ME ("**RFP**") for 70 acres of land and water located within the District's Central Embarcadero, in the City of San Diego, California; and

WHEREAS, on May 2, 2016 and in response to the RFP, District received eleven proposals and six were deemed complete; and

WHEREAS, the proposals from Gafcon, Inc. (on behalf of a to be formed entity that is now the Developer), Great Western Pacific, HKS, McWhinney, OliverMcMillan, Inc., and Ripley Entertainment, Inc. were deemed complete; and

WHEREAS, on July 13, 2016, the Board of Port Commissioners ("**Board**") directed staff to enter into exclusive discussions with the Developer team to further evaluate the "Seaport San Diego World Class Waterfront Development" dated May 2, 2016, while not making a final selection or eliminating the other five proposals/proposers; and

WHEREAS, following the Board's direction, staff conducted a preliminary due diligence phase and issued a supplemental information request to Developer and responses were provided between August 5 and September 19, 2016; and

WHEREAS, at its November 8, 2016 Board meeting, the Board selected Developer as the successful proposer, concluded the RFP process, eliminated the other five proposers, directed staff to continue due diligence excluding any hotel due diligence, and return to the Board at a future date to enter into a preliminary agreement with Developer; and

WHEREAS, following the Board's selection of Developer as the successful proposer, District and Developer (as successor-in-interest to Protea Waterfront Development, LLC), with Board approval pursuant to Resolution No. 2016-177, entered into that certain Exclusive Negotiating Agreement dated October 2, 2017 and recorded in the Office of the District Clerk as Document No. 67343 (the "**2017 ENA**"); and

WHEREAS, the negotiation period under the 2017 ENA was from October 2, 2017 to October 1, 2019, provided that District's Executive Director had the sole and absolute discretion to extend such negotiation period in writing by 90-day increments so long as the negotiating period did not exceed a total of five years; and

WHEREAS, on September 19, 2019, in response to a request from Developer, District sent a letter to Developer extending the Negotiating Period to December 31, 2019; and

WHEREAS, on December 18, 2019, in response to a request from Developer, District sent a letter to Developer extending the Negotiating Period to March 30, 2020; and

WHEREAS, on March 27, 2020, in response to a request from Developer, District sent a letter to Developer extending the Negotiating Period to September 26, 2020; and

WHEREAS, on September 14, 2020, in response to a request from Developer, District sent a letter to Developer extending the Negotiating Period to March 27, 2021; and

WHEREAS, in order to further extend the negotiating period under the 2017 ENA and make additional revisions thereto, District and Developer, with Board approval, later entered into that certain Agreement for Amendment of Exclusive Negotiating Agreement Amendment No. 1 dated January 5, 2021 and recorded in the Office of the District Clerk as Document No. 72137 ("**Amendment No. 1**", and, together with the 2017 ENA, the "**Original ENA**"); and

WHEREAS, the Negotiating Period (as defined in the Original ENA) is currently scheduled to expire on October 1, 2024; provided that the Executive Director has the ability to extend such Negotiating Period by up to an additional year through October 1, 2025 without Board approval; and

WHEREAS, pursuant to the Original ENA, Developer has delivered to District certain submittals required in connection with the Seaport Proposal (as defined in the Original ENA), including, but not limited to, feasibility studies, project descriptions and revisions thereto, pro-formas, a development phasing plan, and a financing strategy; and

WHEREAS, at the March 8, 2022 Board meeting, District staff and Developer presented updates to the draft Seaport Proposal's project description and received stakeholder and Board feedback on the same; and

WHEREAS, at the November 8, 2022 Board meeting, the Board received a preliminary project review presentation by Developer of the October 2022 Project Description, which iteration resulted from Developer refining the initial Seaport Proposal in response to extensive stakeholder and Board feedback, including feedback received at the March 8, 2022 Board meeting; and

WHEREAS, also at the November 8, 2022 Board meeting, the Board adopted Resolution No. 2022-134 authorizing District staff to commence environmental review in accordance with the California Environmental Quality Act (codified as California Public Resource Code §§ 21000 et seq.), the California Environmental Quality Guidelines (codified as 14 California Code of Regulations §§ 15000 et seq.) and District's Guidelines for Compliance with the California Environmental Quality Act (collectively, "**CEQA**") and the National Environmental Policy Act ("**NEPA**"), as applicable, for the Proposed Development (as defined in Section 4 below); and

WHEREAS, following the November 8, 2022 Board meeting, District, Developer, and HDR Engineering, Inc., a Nebraska corporation ("**HDR**"), entered into that certain Agreement No. 59-2023JLR for Environmental Consulting Services for Seaport San Diego Project (the "**HDR Three-Party Agreement**"), a copy of which is filed in the Office of the District Clerk on May 24, 2023 as Document No. 75567; and

WHEREAS, pursuant to the HDR Three-Party Agreement, HDR has been engaged by District to prepare an Environmental Impact Report ("**EIR**") and/or appropriate environmental document pursuant to CEQA and NEPA for the Proposed Development; and

WHEREAS, Developer is solely responsible for compensating HDR for all services rendered in accordance with the HDR Three-Party Agreement, which costs, as of the Effective Date, are estimated at $2,902,898; and

WHEREAS, in connection with the commencement of environmental review and the execution of the HDR Three-Party Agreement, District issued a Notice of Preparation of a Draft Environmental Impact Report for the Seaport San Diego Redevelopment Project (UPD #EIR-2022-117) on September 14, 2023 (the "**NOP**") notifying the public and responsible and interested agencies that District would be conducting an environmental assessment and preparing an EIR for the Proposed Development; and

WHEREAS, since November 2023, Developer has made various submittals requested by District for the purposes of environmental review and, subsequent to the NOP, and based upon comments received by District, feedback from other stakeholders and governmental entities, and Developer's internal analysis, Developer has made modifications to the Proposed Development including, but not limited to removal of waterside development beyond the pierhead line; and

WHEREAS, the timeframe necessary to conduct environmental review and certify an EIR is anticipated to take a minimum of approximately thirty-six (36) months given the scope of, and parties interested in, the Proposed Development; and

WHEREAS, given the extensive review and anticipated time required in order to complete the environmental review process and the costs Developer expects to incur during this timeframe (including, but not limited to, internal costs, those to be paid to HDR, and Developer's own consultants for design, engineering, legal, and financing, among others), Developer requested to extend the Negotiating Period (as defined in the Original ENA) through October 1, 2027; and

WHEREAS, the Parties also desire to clarify the description of the Property that was subject to the terms of the Original ENA; and

WHEREAS, in light of the Board authorizing the commencement of environmental review, the time required to complete the environmental review process, including an evaluation of the significant environmental impacts of the Proposed Development, and to allow for additional time for the Parties to negotiate in good faith in an effort to come to terms on a Definitive Agreement (as defined in Section 2(b) below) to be presented to the Board for approval, with any such approval to be granted, denied, or conditioned in the Board's sole and absolute discretion, the Parties are mutually desirous of amending and restating the Original ENA,

NOW THEREFORE, for good and valuable consideration, District and Developer agree as follows:

AGREEMENT

1. PROPERTY. The term "**Property**" as set forth in this ENA shall be the real property as depicted on Exhibit A attached hereto and incorporated herein by reference.

2. AGREEMENT TO NEGOTIATE.

(a) **Period of Negotiations.** The Parties shall continue to negotiate, subject to the terms and conditions of this Agreement, for the period commencing on the Effective Date and ending on October 1, 2027 (the "**Negotiating Period**"). District undertakes no commitment

or obligation to further extend the Negotiating Period in the event that this Agreement terminates in accordance with its terms.

(b) **Agreement to Negotiate.** During the Negotiating Period, the Parties agree to negotiate the terms of a disposition and development agreement, option to lease, lease, and/or other form of binding agreement that specifies the rights and obligations of the Parties with respect to the development, leasing, and operation of the Proposed Development on the Property (collectively, a "**Definitive Agreement**"), and which Definitive Agreement may include, as exhibits, such other documents and/or security agreements as District or Developer may require in such Party's sole and absolute discretion in connection with the development, leasing, and operation of the Proposed Development. During the Negotiating Period, District and Developer shall make qualified and authorized personnel reasonably available to actively participate in negotiations as well as review and comment on materials submitted by the other Party. Developer acknowledges and agrees that any Definitive Agreement must be ultimately approved by the Board as a condition to such Definitive Agreement's execution and effectiveness, and the Board may grant, deny, or condition its approval in the Board's sole and absolute discretion.

(c) **Exclusivity.** Except as permitted under Section 13, District agrees during the Negotiating Period, to negotiate exclusively with Developer regarding Developer's Proposed Development to be located on the Property. Developer agrees that District is not precluded from negotiating with other parties for other development on any other District property(ies), including, but not limited to, those directly adjacent to the Property. Nothing in this Agreement shall preclude District from using the Property in accordance with the terms of Section 13 below. Nothing in this Agreement shall prohibit District from updating the public regarding the Proposed Development.

(d) **End of Negotiating Period.** Unless, prior to the expiration of the Negotiating Period, this Agreement is superseded by a Definitive Agreement executed by the Parties following approval by the Board (in the Board's sole and absolute discretion) or terminated in accordance with this Agreement's terms, then upon the expiration of the Negotiating Period, this Agreement shall automatically and immediately terminate without the need for further notice and/or action by either Party. Upon such automatic termination, neither Party shall have any further rights, remedies, responsibilities, obligations, and/or liability under this Agreement, including, without limitation, the obligation to continue to negotiate with respect to the Proposed Development, except as set forth in those provisions of this Agreement that expressly survive the expiration of the Negotiating Period or earlier termination of this Agreement.

3. TERMINATION RIGHTS.

(a) **Feasibility.** Each Party shall have a separate and independent right to terminate this Agreement if at any time the terminating Party determines, in its sole and absolute discretion, that the Proposed Development (including any alternatives to be studied through the environmental review process) is not feasible, including, but not limited to, for the reasons set forth below in this Section 3(a). Without limitation of a Party's right to making a determination, in such Party's sole and absolute discretion, that the Proposed Development is not feasible, such a determination may mean that one or more of the following factors are present:

i. The Proposed Development does not comply with the Public Trust Doctrine, the California Coastal Act (the "**Coastal Act**"), or any other Law (as defined in Section 25(l) below);

ii. The Proposed Development cannot be financed without a financial subsidy from District (with the clarification that public infrastructure financing to be approved by the applicable governmental authorities, including without limitation, the City and/or County of San Diego, which does not require any financial contribution or payment responsibility on the part of District, is not considered a financial subsidy);

iii. The minimum annual rent produced by the Proposed Development is expected to be less than $22,500,000 in year eight of stabilization;

iv. Developer is unable to secure equity and debt financing sufficient to complete construction of the Proposed Development;

v. Adverse changes to the financial capacity of Developer; and/or

vi. Any other reason the result of which is that the Party will be adversely affected economically.

(b) **Termination Process.** In the event that either Party makes a determination that the Proposed Development is not feasible and as a result, desires to terminate this Agreement, the terminating Party shall provide written notice to the non-terminating Party (a "**Termination Notice**"). In the case of District, the Board shall have voted to terminate this Agreement prior to District's delivery of a Termination Notice to Developer. Within 45 days after the non-terminating Party's receipt of a Termination Notice, the Parties shall hold an in-person meeting with personnel each Party deems material to the Proposed Development and the proposed termination of this Agreement. Within 10 Business Days of the meeting held pursuant to the previous sentence, the terminating Party shall provide a second notice to the non-terminating Party either: (i) confirming the terminating Party's election to terminate this Agreement, in which case this Agreement shall terminate upon the non-terminating Party's receipt of such confirmation, which, in the case of District, may be provided by the Executive Director in his or her sole discretion without additional Board approval; or (ii) withdrawing the Termination Notice; provided, that the failure to deliver either such second notice shall be deemed to be an election to withdraw the Termination Notice, in which case this Agreement shall remain in full force and effect. In the event of a termination in accordance with the procedures set forth in this Section 3, neither Party shall have any further rights, remedies, responsibilities, obligations, and/or liability under this Agreement except for those obligations that expressly survive termination.

(c) **No Limitation on Termination for an Uncured Default.** The termination rights set forth in this Section 3 are in addition to, and not in lieu of, each Party's termination rights set forth in Section 15 below with respect to an Uncured Default (as defined in Section 14 below).

4. PROPOSED DEVELOPMENT. For purposes of this Agreement, the "**Proposed Development**" shall mean Developer's proposal as set forth in the Project Description Summary in the NOP, as the same has been modified in response to comments received through the NOP process and may continue to be modified, with the consent of District, in the project description in the draft EIR/EIS. Each Party acknowledges and agrees that the Proposed Development is subject to change during the Negotiating Period and over the course of the CEQA and project approval processes; provided that Developer acknowledges and agrees that District shall have sole and absolute discretion with respect to any Discretionary Action (as defined in Section 10 below), which shall include, but is not limited to, the sole and absolute discretion to certify, not

certify, or condition certification of an EIR and/or to approve, deny, and/or condition a Coastal Development Permit ("**CDP**"), and/or any Definitive Agreement.

5. DEVELOPER SUBMITTALS. District acknowledges that Developer has made significant submittals in furtherance of and as necessary for the CEQA review and EIR process and Developer acknowledges and agrees that additional extensive submittals will be required in order to further refine the components of the Proposed Development throughout the CEQA review and EIR process and to evaluate the financial and market feasibility of the Proposed Development for purposes of attempting to come to terms on a Definitive Agreement. In connection with the requisite submittals, Developer agrees as follows:

(a) **District Requested Submittals.** In order to properly evaluate the Proposed Project for District related purposes, including, but not limited to, feasibility analysis, all proposed financing mechanisms, CEQA analysis or other environmental review, land use entitlements and/or permits, updated Proposed Development descriptions, engineering and site development information, construction and phasing plans, transportation and circulation designs, infrastructure and utility requirements, easement and dedication requirements, Coastal Act and/or Public Trust Doctrine compliance, consistency with all Laws, benefits to California residents, District's financial interests, and/or provisions to be included in any Definitive Agreement, District may request, in its reasonable discretion, Proposed Development related submittals. Following any District submittal request ("**Submittal Request**"), Developer shall utilize best efforts to produce the requested submittals and provide the same to District within 30 days of the Submittal Request; provided, however, if the Submittal Request is of an extensive nature and despite Developer's best efforts, Developer is unable to produce the requested submittals within such 30 day period, Developer shall have a reasonable amount of additional time to comply with the Submittal Request (but in no event, unless otherwise indicated by District in writing, to exceed 90 days from the date of the Submittal Request). Any Submittal Request sent by District pursuant a method set forth in Section 21(a)(i), Section 21(a)(ii), or Section 21(a)(iii) shall contain the words "ATTENTION: SUBMITTAL REQUEST" prominently in such Submittal Request, and any Submittal Request sent via email pursuant to Section 21(a)(iv) shall contain "LEGAL NOTICE: SUBMITTAL REQUEST" in all capital letters in the subject line of the email transmission.

(b) **Requisite Expertise.** All Developer submittals required pursuant to the terms of this Agreement shall be prepared in a professional manner by personnel with the requisite amount of expertise and experience.

6. DEVELOPER'S FINDINGS, STUDIES, AND REPORTS.

(a) **Products.** The Parties acknowledge and agree that Developer, and/or third parties on behalf of Developer, have commissioned, prepared, shall be preparing, or are in the process of preparing various items and work product in connection with and related to the Proposed Development, that include, but are not limited to, the following (collectively, as the same may be in draft form, initially prepared and/or revised, "**Products**"): design, architectural, and engineering products, plans, reports, tests, studies, cost estimates, and investigations; development and construction related plans, phasing, schedules, and costs; marketing analysis and studies; geotechnical analysis and surveys; soils and materials investigations, tests, reports, and results; hazardous materials investigations, tests, reports, and results; financial and/or feasibility analysis and proformas; due diligence related items; and work product documents. Developer agrees to provide to District (i) promptly following completion, copies of all final Products prepared in connection with the Original ENA or this Agreement regardless of whether

Developer's rights to proceed with the Proposed Development have been terminated, and (ii) upon District's request, drafts and progressions of all such Products.

(b) **Transferable Products.** Products related to the physical condition of the Property, including any structures located thereon, subsurface conditions, and conditions of water and sediment, shall be referred to herein as "**Transferable Products**." Developer shall use commercially reasonable efforts to cause all contracts with third parties preparing Transferable Products to provide that Transferable Products be prepared for the benefit of both Developer and District and/or in any event be transferable in whole part by and to District without restriction, cost, or fee. Upon the expiration of the Negotiating Period or earlier termination of this Agreement and regardless of whether a Definitive Agreement is executed, Developer shall be deemed to have to have transferred its interest in all Transferable Products already provided to District, and Developer shall immediately deliver to District the most up to date versions/copies of all Transferable Products not already delivered to District, in both cases without representation or warranty except as to the delivery of the most current complete form of the Transferable Products generated by Developer or generated on Developer's behalf. Following such transfer, the Transferable Products shall be the property of District and District shall have the right, at no cost to District and in its sole and absolute discretion, to use, grant, license, reproduce, or otherwise dispose of such Transferable Products to any person or entity, in connection with the any future development of the Property, or for any other reason. Developer represents and warrants that all Transferable Products provided to District are transferable to District without cost or expense to District, and that District may transfer such Transferable Products may use, grant, license, reproduce, or otherwise dispose of such Transferable products to any person or entity; provided that Developer makes no representation or warranty and shall have no liability to District or other transferee regarding the accuracy or breadth of information contained in the Transferable Products or the use thereof.

(c) **Other Products.** As between the Parties, all Products other than Transferable Products ("**Other Products**") shall be and remain the sole property of Developer and shall not be deemed transferred to District; provided, however, that District shall not be prohibited or limited from disclosing and providing copies of any Other Products to a third party as District determines such disclosure and/or production is required pursuant to the California Public Records Act, the Brown Act, or other requirement under applicable Laws, subject to the provisions of Section 21(b) below.

(d) **Survival.** The terms of this Section 6 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

7. DEVELOPER ORGANIZATIONAL STRUCTURE/AGREEMENT TRANSFER.

(a) **Developer Structure**. Developer represents and warrants the following as of the Effective Date: (i) Protea Waterfront Development, LLC, a California limited liability company ("**PWD**"), Odysea San Diego LLC, an Arizona limited liability company ("**Odysea**"), Bean Realty Partners, L.P., a Tennessee limited partnership (as successor-in-interest to ThrillCorp, Inc., "**Bean Realty**"), and RCI SD, LLC, a Florida limited liability company ("**RCI**", and together with PWD, Odysea and Bean Realty, the "**Existing Class A Members**"), collectively constitute all of the Class A members and hold 68.5% of the ownership of the membership or other voting interest of Developer; (ii) PWD is the managing member of Developer with the power to direct the management of Developer with respect to any major as well as the day to day decisions of Developer, whether through voting interests or by way of agreement. In addition, Developer acknowledges and agrees that the expertise, experience, and financial capability of PWD as

Developer's managing member were of significant importance to District's selection of Developer as the successful proposer pursuant to the RFP to undertake the potential development of the Property as contemplated by this Agreement as well as District's execution of the Original ENA and this Agreement.

(b) **Transfer**. Except for a Permitted Transfer completed in accordance with Section 7(c) below, any Transfer without the express written consent of District (which consent may be granted, withheld, or conditioned in District's sole and absolute discretion) shall be null and void and constitute an automatic default under this Agreement. For purposes hereof, a "**Transfer**" shall mean any one or more of the following: (i) any transfer or assignment by Developer of this Agreement or of any rights, duties, or obligations under this Agreement, whether by operation of law, through a pledge, through hypothecation, or otherwise; (ii) any assignment or transfer of any direct or indirect ownership interest in Developer; (iii) Developer changing its form of entity or place of incorporation; (iv) PWD no longer serving as managing member of Developer with the powers as set forth in Section 7(a)(ii) above; or (iv) PWD changing its form of entity from a California limited liability company.

(c) **Permitted Transfers**. For purposes of this Section 7, a "**Permitted Transfer**" shall mean either of (i) a transfer among or to any of the Approved Owners (as defined in Section 7(d) below) so long as PWD is the managing member of Developer with the powers as set forth in Section 7(a)(ii) above, or (ii) except with respect to any Approved Owners, the direct or indirect transfer of any membership interest in Developer or admission of new direct or indirect member(s) in Developer so long as: (A) PWD shall remain the managing member of Developer with the powers as set forth in Section 7(a)(ii) above; (B) other than any Existing Class A Member, and their respective affiliates, no individual member of Developer or such individual member's affiliates collectively hold 51% or more of the ownership of the membership or other voting interest of Developer or the ownership of beneficial interests in Developer; (C) the proposed transferee or new member (and any principals) are reputable (meaning the absence of a reputation for dishonesty, criminal conduct, or association with criminal elements), provided that "reputable" does not mean "prestigious", nor does the determination of whether one is reputable involve consideration of personal taste or preference; (D) if the proposed transferee or new member (and any principals) is a counterparty to an agreement or agreements with District, such person or entity (and any principals) is then in good standing with District under such agreement(s); (E) there is no change in entity form of Developer; (F) no less than 10 Business Days prior to consummating the Transfer, Developer delivers to District prior written notice of such proposed action listing the new transferee or new member(s) (and any principals), along with an updated organizational chart showing the new member(s) following the consummation of the Transfer, member(s) operating, partnership, or other formation agreement, and a certified copy of the formation documents for the new member(s); and (G) any additional information on the new member(s) as is reasonably requested by District; provided that, in the event that a Transfer or series of Transfers that otherwise constitutes a Permitted Transfer(s) will result in the Approved Owners not holding the ownership of more than 50% of the stock or other voting interest of Developer or the ownership of beneficial interests in Developer, such Transfer(s) will require the consent of the Executive Director in his or her reasonable discretion; further provided that in the event the Executive Director does not provide consent or denial within 10 Business Days of receiving the information required under Section 7(c)(ii)(F) above, the proposed Transfer(s) shall be deemed approved. In addition, within thirty days (30) of receiving a request from District, Developer shall provide to District a detailed organizational chart and other information to determine the person(s) and/or entities holding a direct or indirect interest in Developer and who has control over Developer, including information on beneficial ownership and voting rights needed to make such determination.

(d) **Approved Owners**. For purposes of this Section 7, the term "**Approved Owners**" shall mean whether direct or indirect, the partners, members, or shareholders, or their respective affiliates, as the case may be, of Developer, as of the Effective Date.

(e) **OFAC Compliance**. The terms of this Agreement, including this Section 7, shall at all times be subject to compliance with Section 24.

8. PROPERTY DUE DILIGENCE.

(a) **Right of Entry License Agreement.** Upon written request from Developer, and subject to the preconditions for conducting Ground Work (as defined below) and any necessary CEQA review, District shall consider approval of one or more temporary Right of Entry License Agreement (each an "**ROE License**") on District's standard terms and conditions for those portions of the Property not subject to an agreement with a third party and under the immediate control of District, permitting Developer and its employees, contractors, subcontractors, and agents to enter designated portions of the Property for the purposes of conducting soils tests and other due-diligence tests, investigations, and examinations in, on, under or about the Property (collectively, "**Work**"), all at Developer's sole cost and expenses. As a condition to entering any designated portions of the Property under the ROE License to conduct Work requiring ground disturbances or consisting of any subsurface or invasive testing or investigation, including any sediment testing in the San Diego Bay (collectively, "**Ground Work**"), (i) Developer shall obtain District's consent to an associated Work plan, provided that District may grant, withhold, or condition such consent in its sole and absolute discretion, and (ii) a District-appointed monitor with experience in the type of Ground Work proposed to be conducted shall be present to observe the Ground Work and to advise District whether Ground Work was carried out in accordance with the Work plan in accordance with accepted industry standards.

(b) **Indemnity.** Developer agrees, to the fullest extent provided by Law, to defend, indemnify, and hold harmless District, its commissioners, employees, contractors, subcontractors, and agents (each a "**District Party**" and collectively, "**District Parties**") as well as the Property from any and all claims, demands, liability, losses, costs, damages, expenses (including, without limitation, all reasonable attorneys' fees and consultant/expert fees), liens, awards, fines, penalties, charges, actions, causes of actions, suits of any kind, administrative or judicial proceedings, orders, and/or judgments, whether based on contract or in tort, at law or in equity, or as a violation of any Laws (collectively, "**Claims**") as a result of any Work or accessing the Property, except to the extent arising from either: (i) Developer's discovery of any pre-existing condition unless Developer (A) negligently exacerbates such condition, (B) performs the Work in a manner that is inconsistent with commonly accepted industry standards or in violation of Laws, or (C) performs the Ground Work in a manner inconsistent with the Work plan; or (ii) District's sole negligence or willful misconduct. The indemnity set forth in this Section 8(b) shall survive the expiration of the Negotiation Period or earlier termination of this agreement and also be in addition to, and not in lieu of, the indemnity set forth in Section 17 below and any indemnity provisions set forth in a District issued ROE License or other agreement.

(c) **ROE License Term.** Any ROE License issued by District shall in no event have a term that extends beyond the Negotiating Period or the earlier termination of this Agreement. Notwithstanding anything to the contrary in any ROE License, any ROE License issued by District to Developer shall automatically, without the need for further action by any Party, terminate and be of no further force and of effect upon the expiration of the Negotiating Period or

earlier termination of this Agreement; provided that any obligations accruing under the ROE License prior to termination shall survive.

9. NEED FOR DEFINITIVE AGREEMENT.

(a) **Purpose.** The Parties acknowledge and agree that this Agreement is for the sole purpose of stating the intention of the Parties to negotiate in good faith the terms of a Definitive Agreement, and nothing in this Agreement shall or is intended to bind the Parties to entering into a Definitive Agreement and/or carrying out the Proposed Development or any component thereof. Unless and until a Definitive Agreement is approved as set forth in Section 9(c) below and executed by both Parties, the Parties do not intend to be bound by any agreement other than this Agreement and the HDR Three-Party Agreement.

(b) **Negotiating Framework.** District and Developer acknowledge that this Agreement is a framework for negotiation of essential terms in a Definitive Agreement, but that they have not agreed upon the essential terms or the material elements of a transaction, including, without limitation, the rent, the final legal description of the Property subject to a Definitive Agreement, the time or manner of and significant terms related to a Definitive Agreement, the conditions precedent to lease, if any (including without limitation; related to the design and entitlement of the Proposed Development) and the requirements related to development of the Proposed Development, each of which are an essential component of the transaction which shall be the subject matter of their further negotiations and shall be set forth, if at all, in a Definitive Agreement approved by the Board (or in the case of Developer, its principal(s)), in their respective sole an absolute discretion, and executed by authorized representatives of each of District and Developer subject to said approval. Further, Developer acknowledges that the design of the Proposed Development, the identity, stability and financial capacity of Developer, and the terms and conditions of the lease of the Proposed Development, if any, will be of material concern to District and comprise part of the essential terms that are not yet agreed upon by the Parties.

(c) **Formal Approval Requirement.** Any Definitive Agreement shall not be approved or binding on either Party unless and until it has been fully executed by District and Developer, approved by counsel of each Party as to form and legality, and approved by the Board with respect to District and by the authorized representatives of Developer following compliance with all Laws. The Definitive Agreement shall be subject to all applicable Laws.

(d) **Survival.** The terms of this Section 9 shall survive the expiration of the Negotiating Period or earlier termination of this Agreement.

10. RESERVATION OF DISCRETION.

(a) **Discretionary Actions.** Notwithstanding anything to the contrary set forth in this Agreement or in the Original ENA, Developer acknowledges and agrees as follows:

i. District reserves its sole and absolute discretion to approve, disapprove, or condition all actions, which require by Law the exercise of discretion, including without limitation all legislative and quasi-judicial actions and which District cannot lawfully be committed to by contract (collectively, "**Discretionary Action**"), and that nothing in this Agreement or the Original ENA will be construed as circumventing or limiting District's discretion with respect to environmental review required by CEQA (including, without limitation, an EIR, a Mitigated Negative Declaration, or mitigation measures in connection with the CEQA review, or adoption of a "no project" alternative pursuant to CEQA), approval of a Port Master Plan

Amendment ("**PMPA**"), CDP, CDP exclusion, or other permits and entitlements, approval of a Definitive Agreement, the exercise of eminent domain, code enforcement, and the making of findings and determinations required by Law;

ii. compliance with CEQA is a legal precondition to District's or Board's commitment or approval of any Discretionary Action, and no Discretionary Action shall be approved or deemed to be approved by District or the Board until the requisite CEQA analysis has been completed and any Proposed Development has been considered and approved by District or the Board in accordance with CEQA's requirements;

iii. any and all Discretionary Actions may be approved, denied, and/or conditioned by District, in its sole and absolute determination, and subject to such discretionary standard, no Discretionary Actions will be presented to or considered by District (whether or not acting through the Board) for consideration unless and until all necessary environmental review under CEQA has been completed and certified; and

iv. District is in the process of updating the Port Master Plan ("**PMPU**"), and that the project description for the Proposed Development, including land and water uses, is not sufficiently defined to include the Proposed Development in the PMPU, and any Discretionary Actions for the Proposed Development shall be subject to the Port Master Plan then in effect and controlling as of the time any Discretionary Action is considered by District.

(b) **No Commitment.** The Parties agree and acknowledge that an approval of a project under CEQA and CEQA Guideline Sections 15352 and 15378 has not occurred by District's approval of this Agreement. The CEQA analysis, any Discretionary Actions, the Proposed Development, and any Definitive Agreement may be reviewed and considered by District, in its sole and absolute discretion, and the Parties acknowledge and agree that this Agreement is not and in no way guarantees approval of a Definitive Agreement, CEQA analysis, required findings, including without limitation a Statement of Overriding Considerations, a Mitigation Monitoring Reporting Program, or any permits, entitlements (including, without limitation, any Discretionary Actions), improvements or other project approvals, or the availability or approval of public financing (collectively, "**Required Approvals**") of or for the Proposed Development, as the Proposed Development is contemplated by this Agreement or otherwise. Developer acknowledges that this Agreement shall in no event be construed as a direct or indirect commitment by District, the Board, or any other entity to take or to not take any action, whether under CEQA, the Coastal Act, or under any other Law.

(c) **Requisite Approvals.** Developer acknowledges and agrees that other than the Board acting as District's governing body pursuant to all Laws, District's Executive Director or any other District Parties expressing concurrence, acceptance, or approval of any terms of any Definitive Agreement, whether verbally or in writing, shall not in any way be construed or interpreted by Developer as District concurring, accepting, or approving of such Definitive Agreement.

11. THREE-PARTY AGREEMENT(S). Developer acknowledges that in addition to CEQA analysis, and if deemed necessary by District, in its sole and absolute discretion, a PMPA and CDP under the Coastal Act may be required in connection with any Proposed Development. District, in its sole and absolute discretion, may elect to have the CEQA analysis, PMPA, CDP, and/or other entitlement work (including, but not limited to, obtaining any approvals from the California Coastal Commission ("**Coastal**")) prepared by one or more private firms (each a "**Consultant**" and collectively, "**Consultants**") under a three-party agreement (such as the HDR

Three-Party Agreement) by and among District, Developer, and the applicable Consultant. Developer agrees to enter into a three-party agreement for a Consultant as required by District that include the following terms: (a) District's ability to control and direct the Consultant without any influence from Developer; (b) subject to a right to review and protest unreasonable costs and fees, Developer's obligation to pay for all Consultant fees and costs within 30 days after receiving an invoice for the same (whether from District or Consultant); (c) Developer's obligation to cooperate and furnish information as requested by Consultant for the related entitlement work; and (d) Developer's obligation to attending and presenting at community workshops and/or other public forums (including, without limitation, Board meetings) in connection with CEQA analysis, a PMPA, a CDP, or other requisite entitlements. Prior to entering into a three-party agreement, Consultant agrees to provide Developer with a fee estimated. Except as otherwise may be provided in any Definitive Agreement, Developer shall have no liability for Consultant costs and expenses incurred following the expiration or termination of this Agreement.

12. COSTS AND EXPENSES/ATTORNEYS' FEES. Except as otherwise set forth in Sections 5, 6, 8, 11, 17, 20, 21, 22, and in this Section 12, each Party shall be responsible for its own costs and expenses in connection with any activities and negotiations undertaken in connection with the performance of its obligations under this Agreement; provided that Developer, not District, shall be responsible for all fees and costs associated with the Proposed Development as set forth in Board Policy No. 106 for Cost Recovery User Fees. Prior to assessing any fees under Board Policy No. 106, District shall provide Developer with an estimate of fees. The terms of this Section 12 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

13. CURRENT USE OF THE PROPERTY.

(a) **Current Uses.** Developer acknowledges and agrees that the Property is currently operated by District (including, without limitation, for uses such as a public promenade, public parks, commercial fishing operations, and the specialty retail center known as Seaport Village), leased to third parties, or for other such uses as District deems appropriate in its sole and absolute discretion (collectively, the "**Current Uses**"), and District intends that such Current Uses will continue until such time as may be agreed by the Parties in an approved Definitive Agreement executed by the Parties. For avoidance of doubt and unless and until otherwise stated in an approved Definitive Agreement executed by the Parties, and subject to the procedures set forth in Section 13(b) below, District shall have the right, in its sole and absolute discretion and without Developer's consent, to do any of the following, none of which shall be a breach by District of its obligations under this Agreement: (i) use, operate, manage, or issue rights (whether through a lease, easement, permit, license, or other agreement) to any party for all or any portion of the Property for any and all legal uses, including, without limitation, any of the Current Uses; (ii) to construct or to permit construction of infrastructure on the Property, including, without limitation, realignment of streets and repaving and restriping of parking; (iii) to demolish, or permit the demolition, of any improvements located on the Property; (iv) to construct, or to permit construction on the Property, including, without limitation, tenant improvements; and/or (v) to amend, modify, or terminate any agreement(s) related to the Property.

(b) **Occupancy Agreements with Expiration Dates Beyond October 1, 2029.** District shall provide Developer with written notice at least 10 days prior to entering into any lease, tidelands use and occupancy permit, or easement granting rights to use or occupy some or all of the Property (each an "**Occupancy Agreement**") that extends beyond October 1, 2029 (as determined inclusive of any rights or options to extend the term beyond such date). Developer may object to any such Occupancy Agreement within five days of receiving written

notice of the same. In the event Developer issues a timely objection, District shall reasonably consider such objection prior to entering into the applicable Occupancy Agreement.

14. DEFAULT. Failure by either Party to do any of the following shall constitute a default under this Agreement: (a) subject to each Party's discretion with respect to various determinations set forth in this Agreement (including with respect to any Definitive Agreement or, in the case of District, with respect to any Discretionary Actions), to negotiate in good faith; (b) to negotiate exclusively as provided in Section 2(c) above; (c) to timely perform any of its obligations the HDR Three-Party Agreement or a separate three-party agreement entered into pursuant to Section 11 above; or (d) to timely perform any other of its duties as provided in this Agreement. The non-defaulting Party shall give written notice of a default to the defaulting Party, specifying the nature of the default and the action required to cure the default. If an actual default remains uncured for 20 days after the date of such notice, it shall be deemed an "**Uncured Default**," and the non-defaulting Party may terminate this Agreement in accordance with Section 15 of this Agreement. In the case of District, the Board shall have voted to approve providing Developer with a notice of termination for the Uncured Default prior to delivery thereof to Developer.

15. REMEDIES FOR BREACH OF AGREEMENT/WAIVER.

(a) **Sole Remedy.** In the event of an Uncured Default, the sole remedy of the non-defaulting Party, whether the non-defaulting Party be District or Developer, shall be to terminate this Agreement. Termination for an Uncured Default shall be effective upon the defaulting Party receiving a written termination notice from the non-defaulting Party. Except for those obligations that expressly state that they survive the termination of this Agreement, following any termination by either Party for an Uncured Default, neither Party shall have any further rights, remedies, or obligations to the other Party under this Agreement and the Parties shall each be relieved and discharged from all further responsibility or liability under this Agreement.

(b) **Limitations on Remedies.** Developer acknowledges that District would not have entered into this Agreement if District could become liable for damages or specific performance whether under this Agreement or in anticipation of an prior to the mutual execution of a Definitive Agreement or in connection with the Proposed Development. Consequently, and regardless of any actual or alleged default by District or Developer, the Parties agree as follows:

i. Except with respect to any attorneys' fees awarded by a court pursuant to Section 20, in no event shall District have any liability for monetary damages of any type whatsoever (whether based on contract or tort);

ii. In no event shall District be liable for specific performance or any other equitable remedy;

iii. Except with respect to liabilities, obligations, costs, and expenses in connection with obligations that expressly survive the expiration of the Negotiation Period or termination of this Agreement, in no event shall Developer have any liability for monetary damages of any type whatsoever (whether based in contract or tort); and

iv. In no event shall Developer be liable for specific performance or any other equitable remedy, except for Developer's obligations with respect to the Transferable Products.

(c) **Survival.** The terms of this Section 15 shall survive the expiration of the Negotiating Period or earlier termination of this Agreement.

16. ASSUMPTION OF THE RISK. District and Developer each assumes the risk that, notwithstanding the terms of this Agreement, good faith negotiations, expenditure of significant funds, and expenditure of significant personnel time, that (a) the Parties may not come to terms on a Definitive Agreement, (b) any and all Discretionary Actions, including, but not limited to, those requiring Board approval, may be denied in District's and/or the Board's sole and absolute discretion. Accordingly, except as otherwise expressly set forth in this Agreement, neither Party shall have any liability to the other in the event that the Parties are unable to come to terms and/or fail to enter into a Definitive Agreement. The terms of this Section 16 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

17. INDEMNITY.

(a) **Developer Indemnity Obligations.** Without limitation of Developer's other obligations under this Agreement, Developer agrees, at its sole cost and expense, to indemnify, defend, and hold harmless all District Parties from any and all Claims arising out of: (i) the performance or non-performance by Developer of any of its obligations under the Original ENA or this Agreement; (ii) any actions taken by Developer or its affiliates, representatives, directors, officers, employees, shareholders, managers, members, partners, agents, contractors, attorneys, successors and assigns (each a "**Developer Party**" and collectively, "**Developer Parties**") in connection with the Original ENA or this Agreement; (iii) the consideration or approval of this Agreement; (iv) the consideration, approval, and/or denial of any permits and/or approvals sought by or granted to any Developer Party; (v) the approval, denial, or conditioning of any amendments to this Agreement, any Discretionary Actions, or any other action or decision taken by District or the Board in connection with this Agreement, the Property, the Proposed Development, and/or any Discretionary Action; and/or (vi) alleged non-compliance with CEQA or NEPA related to this Agreement, any amendments to this Agreement, the Proposed Development, the Property, any Discretionary Actions, or any decisions taken by District and/or the Board.

(b) **District Defense.** District shall be entitled to select its own counsel, in its sole and absolute discretion, that is independent and separate to any counsel selected by Developer to represent Developer to conduct defense of District Parties from any Claims. Costs and expenses incurred by District in defense of any Claims shall be covered by Developer's indemnification obligations under this Section 17 and subject to immediate payment by Developer. District's participation in its defense of any District Parties from any Claims shall not relieve Developer of any indemnity obligations under this Section 17. The indemnity obligations set forth in this Section 17 are in addition to, and not in lieu of, any other Developer indemnity obligations in this Agreement, the HDR Three-Party Agreement, or otherwise.

(c) **Survival.** The terms of this Section 17 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

18. WAIVER AND RELEASE.

a. **Released Claims.** In connection with the execution of this Agreement, Developer, on behalf of itself and the Developer Parties, does hereby fully and without limitation release, acquit and forever discharge District and the District Parties of and from any and all manner of Claims, rights, debts, contracts, agreements, promises, and commitments, of whatever

nature, known or unknown, suspected or unsuspected, disclosed or undisclosed, fixed or contingent, in law or in equity, whether class, derivative or individual in nature, for indemnity or otherwise, which any Developer Party now has or may have against any District Party based on, related to, and/or arising from any of the following (collectively, "**Released Claims**"): (i) the Original ENA; (ii) any act or omission of any of the District Parties prior to the Effective Date; (iii) the limitation on remedies set forth in Section 15 above; or (iv) District, the Board, Coastal, and/or any other governmental entity with jurisdiction over the Property not approving any of the Required Approvals.

b. **1542 Waiver**. With respect to the Released Claims, Developer, on behalf of itself and all Developer Parties, expressly waives all rights under Section 1542 of the California Civil Code, which reads as follows:

> "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH A CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

Developer: _____

c. **Survival.** The terms of this Section 18 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

19. NO WAIVER. No waiver of any provision of this Agreement shall be implied by any failure of a Party to provide a notice of default or to enforce any remedy on account of the violation of such provision, even if such violation shall continue or be repeated subsequently. Any waiver by a Party of any provision of this Agreement may only be in writing, and no express waiver shall affect any provision other than the one specified in such waiver and that one only for the time and in the manner specifically stated.

20. ATTORNEYS' FEES. In the event of any dispute between the Parties involving the covenants or conditions contained in this Agreement or arising out of the subject matter of this Agreement, the prevailing Party shall be entitled to have and recover from the other Party reasonable attorneys' fees and costs of suit, including, without limitation, any and all costs incurred in enforcing, perfecting, and executing any judgment. The terms of this Section 20 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

21. NOTICES/DISCLOSURES.

a. **Notice Procedures**. Any notices, consents, and/or approvals may be addressed as set forth below (as such address may have been changed by subsequent notice given to the other Party) and shall be in writing and: (i) personally served upon the applicable Party; (ii) delivered via reputable over-night courier service; (iii) delivered by U.S. postal service certified letter; or (iv) sent via email, in which case the actual notice shall be executed and sent as an attachment to the electronic mail transmission, and the subject line of the electronic mail transmission shall include the words "LEGAL NOTICE" in all capital letters. Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the applicable Party when received (including when received via email); provided, however, if served by certified mail, service will be considered completed and binding on the Party served forty-eight (48) hours after deposit in the U.S. Mail.

Developer Notice Address:

Yehudi Gaffen
3262 Holiday Court, Suite 101
La Jolla, CA 92037
Email: gaf@gp-fh.com

with a copy to:

Kathy Breedlove
Protea Properties
3262 Holiday Court, Suite 100
La Jolla, CA 92037
Email: kbreedlove@proteaproperties.com

with a copy to:

Sheppard Mullin
Attn: Michael Leake
501 West Broadway, 18th Floor
San Diego, CA 92101-3598
Email: mleake@sheppardmullin.com

District Notice Address:

Director, Real Estate
Anthony Gordon, Assistant Vice President, Real Estate
San Diego Unified Port District
3165 Pacific Highway
Post Office Box 120488
San Diego, CA 92112-0488
Email: agordon@portofsandiego.org

with a copy to:

Office of the General Counsel
Attn: Thomas Russell, General Counsel
San Diego Unified Port District
3165 Pacific Highway
San Diego, CA 92101
Email: trussell@portofsandiego.org
dajones@portofsandiego.org

with a copy to:

K&L Gates LLP
Attn: Kenneth Kecskes
4 Embarcadero Center, Suite 1200
San Francisco, CA 94111
Email: ken.kecskes@klgates.com

b. **Requests for Developer Information.** In the event that District receives a request under the California Public Records Act or other applicable Law to disclose information related to the Proposed Development that has been provided to District by Developer (each a "**Request for Information**"), the following procedures shall apply:

i. Within two Business Days of receiving a Request for Information, District agrees to notify Developer of the same;

ii. District and Developer agree to reasonably collaborate and discuss, in good faith, any information District has received from Developer that District deems responsive to a Request for Information;

iii. Prior to disclosing, in response to a Request for Information, any information that District has received from Developer, District agrees to notify Developer of such information that District deems responsive to the Request for Information, and Developer shall have 10 Business Days from receipt of the notice to issue any objection(s) (and the legal basis therefor) to disclosing any specific Developer provided information that District deems responsive to the Request for Information. In the event Developer issues a timely objection, District shall consider such objection when determining in District's sole and absolute discretion whether to withhold or disclose the applicable information;

iv. In the event District withholds any information requested in a Request for Information to which Developer has issued an objection under Section 21(b)(iii), and the withholding is challenged by the requester or other party(ies), Developer agrees that Developer's indemnification obligations under Section 17 shall apply to any and all Claims arising out of District's decision to withhold. If Developer at any time fails to indemnify District as provided in the previous sentence, District may disclose the applicable information; provided that Developer shall remain obligated to indemnify District notwithstanding the disclosure;

v. No less than 24 hours prior to disclosing any Developer provided information in response to a Request for Information, District shall notify Developer of the planned disclosure;

vi. Developer acknowledges and agrees that all provisions of this Section 21(b) shall be subject to the following: (A) District's decision to disclose or withhold any information in response to a Request for Information shall be within District's sole and absolute discretion; (B) District shall have no liability to Developer whatsoever in connection with any District decision to disclose or to not disclose information; and (C) Developer waives any and all Claims involving District or any District Party in connection with the disclosure; and

vii. This Section 21(b) shall not apply to any request for information made by Developer or any Developer Party.

22. NO BROKER. Developer hereby represents and warrants to District that Developer has not retained or employed any real estate broker, agent, or finder in connection with this Agreement. Developer shall be solely responsible for the payment of any fee or commission due to any broker and agrees to indemnify and defend and hold District harmless from any and all Claims with respect to any commission or equivalent compensation alleged to be owing by District. The terms of this Section 22 shall survive the expiration of the Negotiating Period or the earlier termination of this Agreement.

23. NO RELATIONSHIP. Developer and all Developer Parties shall act in an independent capacity and in no event as agents, officers, employees, representatives, or contractors of District. District assumes no liability for Developer or any Developer Party's actions and/or performance, and District assumes no responsibility whatsoever for any taxes, bonds, payments or commitments of any kind, explicit or implicit, made by Developer or a Developer Party. Nothing in this Agreement creates or shall be deemed to create any form of joint venture or partnership between the Parties.

24. OFAC COMPLIANCE. Developer represents and warrants to District as follows: (a) Developer and any person or entity owning an interest in Developer is not now, and shall not while this Agreement is in effect, a person or entity with whom Developer or any citizen of the United States is restricted from doing business with under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, H.R. 3162, Public Law 107-56 (commonly known as the "**USA Patriot Act**") and regulations promulgated pursuant thereto, or under any successor statutes or regulations, including, without limitation, persons and entities ("**Prohibited Persons**") named on the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control, Department of the Treasury and/or on any other similar list pursuant to any authorizing statute, executive order or regulation, nor a person or entity (also, a "**Prohibited Person**") with whom a citizen of the United States is prohibited to engage in transactions by any trade embargo, economic sanction, or other prohibition of United States law, regulation, or Executive Order of the President of the United States; (b) none of the funds or other assets of Developer constitute property of, or are beneficially owned, directly or indirectly, by any Prohibited Person; (c) no Prohibited Person has any interest of any nature whatsoever in Developer (whether directly or indirectly); (d) none of the funds of Developer have been derived from any unlawful activity with the result that the investment in Developer is prohibited by law or that this Agreement is in violation of law; and (e) Developer has implemented procedures, and will consistently apply those procedures, to ensure the foregoing representations and warranties remain true and correct at all times.

25. MISCELLANEOUS.

(a) **Entire Agreement; Amendments.** This Agreement constitutes the entire understanding and agreement of the Parties, integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements or understandings between, and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements or statements of, the Parties, their commissioners, employees, contractors, subcontractors, their agents, or their predecessors in interest with respect to all or any part of the subject matter hereof. The terms of this Agreement may not be amended or modified except by a written instrument duly executed by both Parties.

(b) **Supersedure of Original ENA.** As of the Effective Date, this Agreement amends, restates, and wholly supersedes the Original ENA in its entirety.

(c) **Incorporation of Recitals and Exhibits.** The Recitals set forth above are hereby incorporated by reference and deemed a part of this Agreement. All Exhibits attached to this Agreement are also incorporated by reference and deemed a part hereof.

(d) **Section Headings.** The section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.

(e) **Partial Invalidity.** If any term, provision, or condition contained in this Agreement shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term, provision or condition to persons or circumstances other than those with respect to which it is invalid or unenforceable, shall not be affected thereby, and each and every other term, provision and condition of this Agreement shall be valid and enforceable to the fullest extent possible permitted by Law.

(f) **Drafting Presumption; Review Standard.** Each Party acknowledges and agrees that this Agreement has been agreed to by both Parties and that both Parties have consulted with attorneys with respect to the terms of this Agreement. Nothing in this Agreement shall be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of this Agreement. Any deletion of language from this Agreement prior to its execution by each Party shall not be construed to raise any presumption, canon of construction or implication, including, without limitation, any implication that the Parties intended thereby to state the converse of the deleted language.

(g) **Approval Standard.** Unless a different standard is expressly otherwise set forth in this Agreement, whenever in this Agreement the consent or approval of District, the Board, Executive Director of District, or Developer is required, such consent or approval may be given, withheld, or conditioned in the sole and absolute discretion of the applicable person or party.

(h) **Outreach.** During the Negotiating Period and when requested by District, Developer shall participate with District in public outreach efforts with respect to the Proposed Development, including stakeholder outreach, public Board meetings, and other outreach as necessary in connection with the Proposed Development. Developer agrees to provide District with two Business Days' advance written notice of any meetings with any governmental parties with respect to the Proposed Development. In addition, Developer agrees to not meet with or provide direction to any current District tenants, operators, vendors, property managers, and/or service providers regarding the Proposed Development without District's prior written approval, such approval not to be unreasonably withheld, conditioned, or delayed.

(i) **Time is of the Essence.** Time is of the essence of all the express conditions contained herein, and failure by Developer to so perform within the time limits stated shall automatically terminate Developer's rights hereunder.

(j) **Computation of Time Periods.** If any date or time period specified in this Agreement ends on a non-Business Day, such date will automatically be extended until 5:00 p.m. Pacific Time on the next Business Day. For purposes of this Agreement, "**Business Day**" means any day other than a Saturday, Sunday, federally recognized holiday, California State recognized holiday, or a day District is closed as part of an alternative work week.

(k) **Third Parties.** Nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than Developer and District and their respective permitted successors and assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provisions give any third persons any right of subrogation or action over or against any party to this Agreement.

(l) **Governing Law.** This Agreement and all of the rights and obligations of the Parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the internal Laws of the State of California without regard to conflict of laws principles. Venue for any legal proceeding shall be in San Diego County, California. For purposes of this Agreement, "**Laws**" shall mean present and future federal, California state, and local laws, rules, orders, ordinances, resolutions, regulations, statutes, requirements, policies, codes, and executive orders, and all rules, regulations and government orders with respect thereto, including without limitation any of the foregoing relating to hazardous materials, environmental matters (including, but not limited to, Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, Oil Pollution Act, the Toxic Substances Control Act and comparable and supplemental California laws), public health and safety matters and landmarks protection, as any of the same now exist or may hereafter be adopted or amended. Said Laws shall also include, but are not limited to, the Laws enacted by the San Diego Unified Port District Act; any applicable ordinances of the city in which the Property is located, including the building code thereof, and any governmental permits and approvals, including, without limitation, any California Coastal Development Permit.

(m) **Developer Authority.** Developer hereby represents and warrants that (i) Developer is a duly formed and existing limited liability company in the State of Delaware and Developer is qualified to do business in the State of California; (ii) Developer has the limited liability company power pursuant to Laws, its certificate of formation, and its limited liability company agreement to execute and deliver this Agreement and (iii) each person signing on behalf of Developer is duly authorized to sign and bind Developer to this Agreement.

(n) **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same agreement. Any facsimile or copies of original signatures or signatures delivered electronically (such as .pdf, .tif, or other electronic files or via DocuSign) shall be considered and treated as if they were original signatures.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties have executed this Amended and Restated Exclusive Negotiating Agreement as of the Effective Date.

APPROVED AS TO FORM AND LEGALITY
GENERAL COUNSEL

By: _____
David Jones, Deputy General Counsel

SAN DIEGO UNIFIED PORT DISTRICT

By: _____
Anthony Gordon,
Vice President, Business Operations

1HWY1, LLC,
a Delaware limited liability company

By: _____
Name: _____
Title: _____

Exhibit A - Property Depiction