

FREEDOM PARK ESCROW AGREEMENT

THIS FREEDOM PARK ESCROW AGREEMENT ("**Agreement**") is made as of _____, 2024 (the "**Effective Date**"), by and among SAN DIEGO UNIFIED PORT DISTRICT, a public corporation ("**District**"), USS MIDWAY MUSEUM, a California nonprofit corporation ("**Midway**"), and BANC OF CALIFORNIA, formerly PACIFIC WESTERN BANK, a California state-chartered bank ("**Escrow Holder**"). District and Midway are sometimes referred to herein individually as a "**Party**" and together as the "**Parties**". District, Midway, and Escrow Holder may be referred to collectively as the "**parties**".

RECITALS

A. Midway, District, and Contractor (as defined in the Construction Contract) are parties to that certain Construction Contract dated of even date herewith (the "**Construction Contract**") related to the demolition of certain improvements and the construction of a park at the Navy pier in downtown San Diego, California (the "**Project**").

B. The Construction Contract requires Midway to make progress payments directly to Contractor in accordance with the terms of the Construction Contract (each a "**Contractor Payment**", and together, the "**Contractor Payments**").

C. Pursuant to the Construction Contract, if Midway fails to make a Contractor Payment, District may, but has no obligation, legal or otherwise, to make such Contractor Payment.

D. In order to facilitate District making any required Contractor Payments, Midway agreed to fund an escrow account (the "**Escrow**") in the initial amount set forth in Section 2(a) below, as subject to future adjustment (the "**Escrowed Funds**"), for the purposes of funding any Contractor Payments District may elect to make.

E. Midway and District wish to establish the Escrow and appoint Escrow Holder to receive and disburse the Escrowed Funds in accordance with the provisions of this Agreement.

F. Escrow Holder is willing to accept such appointment and establish the Escrow, all as more fully set forth in this Agreement.

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants hereinafter set forth, the Parties hereto agree as follows:

AGREEMENT

1. Appointment and Deposit of Escrowed Funds into Escrow. Midway and District appoint Escrow Holder, and Escrow Holder accepts such appointment, to establish the Escrow to be governed by the terms set forth herein and, as between Midway and District, and subject to the terms and conditions of the Escrow Documentation (as defined below) and the applicable terms of the Construction Contract.

2. Deposit of Funds.

(a) Within five (5) business days of the Effective Date, Midway shall deposit with Escrow Holder the Escrowed Funds in the amount of One Million Eight Hundred Twenty Thousand Dollars (\$1,820,000), which amount represents the total, budgeted construction costs

for the Project (as reasonably determined by District and as reasonably approved by Midway) for the two (2) most costly months of the Project during the period commencing on the Effective Date and ending on the July 1, 2025. On or before May 1, 2025 and May 1st of each succeeding calendar year during the pendency of the Construction Contract, District shall deliver to Midway the total, budgeted construction costs for the Project for the two (2) most costly months of the Project (each, a "**Escrow Funds Budget**") during the period commencing on July 1st of such year and ending on June 30th of the following year (each, a "**Fiscal Year**"), which such Escrow Funds Budget shall be subject to Midway's written approval, not to be unreasonably withheld, conditioned or delayed. Midway shall review and approve or provide comments to an Escrow Funds Budget within ten (10) business days after receipt thereof. If Midway does not provide written approval or comment within such ten (10) business day period, the applicable Escrow Funds Budget shall be deemed approved. Any disagreement between District and Midway regarding a Escrow Funds Budget shall be resolved pursuant to the procedures set forth in Section 5 below. After Midway approves an Escrow Funds Budget and prior to the commencement of each Fiscal Year during construction of the Project, Midway shall deliver to Escrow Holder the difference (if any) between the approved Escrow Funds Budget for such Fiscal Year, less any Escrowed Funds then-remaining in the Escrow, and such Escrow Funds Budget approved by Midway shall be deemed the Escrowed Funds for the purposes of this Agreement for such Fiscal Year. If the Escrowed Funds remaining in the Escrow as of the end of each Fiscal Year exceeds the Escrow Funds Budget approved by Midway for the following Fiscal Year, then Escrow Holder shall release to Midway any such excess upon written demand from Midway. If Escrow Holder receives such written demand, it has no obligation to verify whether the Escrowed Funds, in fact, exceed the Escrow Funds Budget or the amount of such excess and may rely on any such written demand from Midway it receives and believes to be valid in good faith. Such written demand shall be specific as to the amount of Escrowed Funds that are to be released to Midway.

3. Investment of Funds. The Escrowed Funds shall, upon receipt, be invested by Escrow Holder in an interest-bearing account.

4. Disbursements from the Escrow.

(a) Disbursement to District. If Midway fails to timely make a Contractor Payment as and when due under the Construction Contract for any reason or no reason at all, District may draw upon the Escrowed Funds upon submission of written request to Escrow Holder with a copy to Midway (each, a "**Draw Request**") including a written signed statement that Midway failed to timely make a Contractor Payment and the amount thereof. Escrow Holder shall disburse the amount of the Escrowed Funds set forth in the Draw Request (to the extent such amount remains in the Escrowed Funds) within two (2) business days of Escrow Holder receiving the Draw Request. District agrees to utilize any funds received pursuant to a Draw Request submitted under this Section 4(a) to either make any Contractor Payments directly to Contractor or to reimburse District for any Contractor Payments made by District that Midway failed to timely make pursuant to the Construction Contract. Within five (5) business days of any disbursement of the Escrowed Funds to District, Midway agrees to deposit into the Escrow an amount equal to the difference between the Escrow Funds Budget for the applicable Fiscal Year and the then current balance of the Escrowed Funds. Escrow Holder is not responsible for ensuring that any deposit made to the Escrow is sufficient to comply with the terms hereunder.

(b) Disbursement to Midway. Upon the timely payment of all Contractor Payments due under the Construction Contract, Midway and District may collectively deliver written notice thereof to Escrow Holder (the "**Construction Completion Notice**"). If Escrow

Holder receives such a Construction Completion Notice, then Escrow Holder shall disburse all remaining Escrowed Funds to Midway at the address set forth in the Construction Completion Notice.

(c) Method of Payment. All payments shall be made in immediately available funds to the payee in accordance with the disbursement provisions set forth in this Section 4.

5. Dispute Resolution.

(a) In-Person Discussions. If there is a dispute between Midway and District arising from this Agreement and/or the Construction Contract, the Parties shall endeavor to hold an in person meeting as soon as practicable with each Party's respective president/CEO, chief engineers and/or Project engineers, counsel, and other persons as each Party may deem material to the resolution of the dispute. The Parties shall use best efforts to convene the meeting within seven (7) days after one Party delivers a written demand for the same. If the dispute is unresolved after a meeting as provided in this Section 5(a) and relates to a construction related item requiring the expertise of engineers (e.g., Contract Change Orders (as defined in the Construction Contract)), the Parties shall submit the matter to binding arbitration as set forth in Section 5(c)(ii) below. For any other unresolved disputes, the Parties shall submit the matter to mediation under Section 5(b). If a dispute is unresolved between the Parties and the Parties submit such matter to binding arbitration or mediation as set forth herein, Escrow Holder may terminate this Agreement upon the filing of an interpleader as set forth in Section 6. Except for the previous sentence, for the avoidance of doubt, this Section 5 shall apply only to Midway and District.

(b) Meditation. If a dispute is unresolved after a meeting as provided in Section 5(a) and calls for mediation under this Section 5(b), the Parties shall endeavor to resolve the matter by mediation through the current mediation guidelines of JAMS (or any successor to such organization) and administered by JAMS (or any successor to such organization). The mediation shall be convened within seven (7) business days after one Party delivers a written demand to mediate and shall conclude within twenty-one (21) business days after such written demand. The costs of the mediation shall be shared equally by the Parties.

(c) Arbitration.

(i) If the dispute subject to mediation under Section 5(b) above is unresolved after submission of the dispute to mediation as provided in Section 5(b), then the Parties shall submit the matter to final and finding arbitration in the County of San Diego, State of California under the auspices of JAMS (or any successor to such organization), according to the then existing streamlined arbitration rules of JAMS (or any successor organization). The arbitration shall be conducted by one qualified arbitrator, agreed to by the Parties, within ten (10) business days following notice by one Party that desires the matter be arbitrated. The Parties agree that an arbitrator shall be deemed qualified to serve hereunder only if the arbitrator is a retired federal judge or an attorney who is engaged in the private practice of law for at least fifteen years, specializing in real estate, commercial, or business law matters. If the Parties are unable to agree upon a qualified arbitrator, then one qualified arbitrator shall be selected by the San Diego office of JAMS. The arbitration hearing shall take place in San Diego County, California. The decision of the arbitrator will be final and binding on the Parties.

(ii) Construction related disputes requiring the expertise of engineers that remain unresolved after the in-person meeting set forth in Section 5(a) above shall be

resolved by submission to final and finding arbitration in the County of San Diego, State of California. The Parties hereby appoint Rick Engineering to be arbitrator to resolve the dispute. The decision of the arbitrator will be final and binding on the Parties. If any Party refuses to stipulate to an arbitration, the other Party may move the court to refer the action to arbitration as provided in this Section 5(c). The arbitration shall be conducted by at the San Diego offices of Rick Engineering (currently located at 5620 Friars Rd, San Diego, CA 92110) within ten (10) business days following notice by one Party that desires the matter be arbitrated.

(d) WAIVER. BY INITIALING IN THE SPACE BELOW, EACH PARTY AGREES TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS DESCRIBED IN THIS SECTION 5 DECIDED BY THE PROCEDURES AS PROVIDED HEREIN AND EACH PARTY IS GIVING UP ANY RIGHTS IT MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW, EACH PARTY MAY BE GIVING UP ITS RIGHTS TO DISCOVERY AND EACH PARTY IS GIVING UP ITS JUDICIAL RIGHTS TO APPEAL. IF EACH PARTY REFUSES TO SUBMIT TO THE PROCEDURES SET FORTH IN THIS SECTION 5 (INCLUDING, WITHOUT LIMITATION, ARBITRATION) AFTER AGREEING TO THESE PROVISIONS, SUCH PARTY MAY BE COMPELLED TO COMPLY WITH SUCH PROCEDURES (INCLUDING TO ARBITRATE) UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. EACH PARTY'S AGREEMENT TO THIS SECTION 5 (INCLUDING TO ARBITRATE) IS VOLUNTARY. AN ARBITRATOR SHALL DETERMINE THE PREVAILING PARTY, IF ANY, WHO WILL BE ENTITLED TO ITS ATTORNEYS' FEES AND OTHER COSTS.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS DESCRIBED IN THIS SECTION 5 TO THE PROCEDURES AS PROVIDED HEREIN, INCLUDING, BUT NOT LIMITED TO, NEUTRAL ARBITRATION.

Initials of Midway: _____ Initials of District: _____

6. Term and Termination. The Escrow shall be established by Escrow Holder as of the Effective Date set forth above and shall terminate (a) in Escrow Holder's discretion upon the sending of at least thirty (30) days' advance written notice to the other parties hereto, (b) upon the filing of an interpleader, (c) because of a material breach by Midway or District of any of the terms of this Agreement or any Escrow Documentation (as defined below) governing the Escrow, upon the sending of at least five (5) days' advance written notice to the other parties hereto, or (d) upon receipt by Escrow Holder of express written instructions from both Midway and District. The Parties agree to provide for such instructions upon the completion of the Project as set forth in the Construction Contract or the earlier termination of the Construction Contract. In connection with any such termination initiated by Escrow Holder under (a) or (c) in this Section 6, Escrow Holder will transfer all mail and checks in its possession and all collected and available balances in the Escrow on the date of such termination in accordance with joint instructions from both Midway and District.

7. Escrow Holder's Duties and Liabilities.

(a) Escrow Holder undertakes to perform only such duties as are expressly set forth in this Agreement. Escrow Holder may rely on and shall be protected in acting or refraining from acting upon any written notice, instruction, or request furnished to Escrow Holder hereunder and believed by it to be genuine and to have been signed or presented by the proper Party or Parties, including a Draw Request and/or a Construction Completion Notice. Escrow Holder shall be under no duty to inquire into or investigate the validity, accuracy, or content of any such

document. Escrow Holder shall have no duty to solicit any payments which may be due it hereunder.

(b) Escrow Holder shall not be liable for any action taken or omitted by it in good faith, including, but not limited to, making any disbursements from the Escrow, except for any liability arising from its own gross negligence or willful misconduct or material breach of its obligations hereunder.

(c) Midway and District hereby agree jointly and severally to indemnify Escrow Holder and its affiliates, and each of their respective officers, directors, representatives, agents, and employees for, and to hold them harmless against, any loss, liability or expense arising out of or in connection with this Agreement, including the costs and expenses of defending itself against any claim of liability or in connection with any interpleader proceeding arising out of this Agreement or incurred as a result of following the direction or instruction of any Party hereto, except in those cases where Escrow Holder has been deemed guilty of gross negligence or willful misconduct or material breach of its obligations hereunder by a court of competent jurisdiction.

(d) Escrow Holder will follow its usual procedures in the event that Midway, District, the Escrow or any check should be or become the subject of any writ, levy, order, or other similar judicial or regulatory order or process ("Legal Process") that is legally binding on Escrow Holder in its sole discretion. Escrow Holder will honor a Legal Process unless Midway and/or District obtain a release from the Legal Process or a court order issued by a court of competent jurisdiction binding on all parties prior to the due date of the Legal Process. Escrow Holder shall not be liable to any Party hereto for honoring a Legal Process in good faith.

8. No Third Party Beneficiaries. The Parties do not intend to create in any other individual or entity the status of a third-party beneficiary, and this Agreement shall not be construed to create such status. The rights, duties and obligations contained in this Agreement shall operate only between the Parties and Escrow Holder and shall inure solely to the benefit of the Parties and Escrow Holder. The provisions of this Agreement are intended only to assist the Parties and Escrow Holder in determining and performing their obligations under this Agreement. The Parties and Escrow Holder intend and expressly agree that only parties signatory to this Agreement shall have any legal or equitable right to seek to enforce this Agreement, to seek any remedy arising out of a party's performance or failure to perform any term or condition of this Agreement, or to bring an action for the breach of this Agreement.

9. Escrow Documentation. This Agreement supplements, rather than replaces, Escrow Holder's deposit account agreement, terms and conditions, and other standard documentation in effect from time to time with respect to the Escrow or the services provided in connection therewith (the "**Escrow Documentation**"), which Escrow Documentation will continue to apply to the Escrow and such services, and the respective rights, powers, duties, obligations, liabilities and responsibilities of the parties thereto and hereto, to the extent not expressly conflicting with the provisions of this Agreement (however, in the event of any such conflict, the provisions of this Agreement shall control). Escrow Holder agrees to provide to Midway the Escrow Documentation and any updates to the same. Prior to issuing any instructions, the Parties shall provide Escrow Holder with such documentation as Escrow Holder may reasonably request to establish the identity and authority of the individuals issuing instructions on behalf of such Party.

10. Miscellaneous.

(a) Notices. Any notices, consents, and/or approvals shall be addressed as set forth below (as such address may have been changed by subsequent notice given to the other

parties) 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 (return receipt requested); or (iv) sent via email (provided any notice sent via emails shall also be concurrently sent via another method provided in this Section 10(a)). Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the applicable party when received.

Midway Notice Address:

USS Midway Museum
Attn: Terry Craft, President/CEO
910 North Harbor Drive
San Diego, CA 92101
Email: tkraft@midway.org

with copies to:

USS Midway Museum
Attn: Len Santiago, Chief Engineer
910 North Harbor Drive
San Diego, CA 92101
Email: lsantiago@midway.org

Sheppard Mullin Richter & Hampton LLP
Attn: Mike Leake
501 West Broadway, 18th Floor
San Diego, CA 92101
Email: mleake@sheppardmullin.com

District Notice Address:

San Diego Unified Port District
Engineering Department
Attn: Noemi Aquino, Capital Project Manger
3165 Pacific Highway
San Diego, CA 92101
Email: naquino@portofsandiego.org

with a copies to:

San Diego Unified Port District
Attn: Anthony Gordon, Assistant Vice President, Real Estate
San Diego Unified Port District
3165 Pacific Highway
San Diego, CA 92101
Email: agordon@portofsandiego.org

San Diego Unified Port District
Office of the General Counsel
Attn: David Jones, Deputy General Counsel
3165 Pacific Highway

San Diego, CA 92101
Email: dajones@portofsandiego.org

Escrow Holder Notice Address:

Banc of California
Attn: _____

Email: _____

(b) Deposit Instructions. Each Party shall provide to Escrow Holder a completed W-9 Form and Escrow Holder's form of deposit instructions as necessary for the investment and/or disbursement of any Escrowed Funds.

(c) Modification. No provision of this Agreement may be modified, amended, supplemented, or terminated nor may the obligations of the parties hereunder be waived except by an agreement in writing signed by the parties hereto or their respective successors in interest.

(d) Recitals. The recitals set forth above are incorporated herein by reference.

(e) Assignment. Neither this Agreement nor any right or interest hereunder may be assigned in whole or in part by any party without the prior consent of all of the other parties.

(f) Charges. Midway shall compensate Escrow Holder for the opening and administration of the Escrow, including but not limited to, all attorneys' fees and expenses with respect to the Escrow, and any and all services provided hereunder in accordance with Escrow Holder's fee schedules from time to time in effect ("**Escrow Holder's Expenses**"). Payment will be effected by a direct debit to the Escrow. If Midway fails to reimburse Escrow Holder for Escrow Holder's Expenses, and Escrow Holder has complied with instructions of District with respect to the disbursement of funds from the Escrow which leaves the Escrow with insufficient funds for Escrow Holder to recoup Escrow Holder's Expenses, then District will reimburse Escrow Holder for Escrow Holder's Expenses. As a matter solely between District and Midway, it is agreed that Midway shall reimburse District for 50% of any such charges paid by District.

(g) Time of Essence. All terms provided for in this Agreement for the performance of any act will be strictly construed, time being of the essence.

(h) Further Assurances. Midway and District agree to execute such further instructions to Escrow Holder and such other instruments as may be reasonably necessary to carry out the provisions of this Agreement.

(i) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Each party may execute this Agreement by electronic means, including, without limitation, DocuSign or SignNow.

(j) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California, regardless of the laws that might otherwise govern under applicable principles of conflict of laws thereof. Unless otherwise prohibited by law,

all parties hereby waive all rights to a trial by jury in any action or proceeding relating to the Escrow or this Agreement.

(k) Attorneys' Fees. As to Midway and District only, if any action or proceeding (including arbitration) is instituted to enforce or to interpret any provision of this Agreement, the prevailing party therein shall be entitled to recover its attorneys' fees and costs from the losing party as determined by the arbitrator pursuant to Section 5 above.

(l) Entire Agreement. This Agreement and the instructions and notices required or permitted to be executed and delivered hereunder set forth the entire agreement of the parties with respect to the subject matter hereof and supersede any prior agreement and contemporaneous oral agreements of the parties concerning its subject matter.

(m) Severability. If any term or provision of this Agreement is determined to be illegal, unconscionable or unenforceable, all of the other terms, provisions and selections hereof will nevertheless remain effective and be in force to the fullest extent permitted by law.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, each of District, Midway, and Escrow Holder have executed this Freedom Park Escrow Agreement as of the Effective Date first above written.

"DISTRICT"

SAN DIEGO UNIFIED PORT DISTRICT,
a public corporation

By: _____
Name: _____
Title: _____

"MIDWAY"

USS MIDWAY MUSEUM,
a California nonprofit corporation

By: _____
Name: _____
Title: _____

"ESCROW HOLDER"

BANC OF CALIFORNIA,
a California state-chartered bank

By: _____
Name: _____
Title: _____