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San Diego Unified Port District
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EXCLUSIVE NEGOTIATING AGREEMENT

THIS EXCLUSIVE NEGOTIATING AGREEMENT ("Agreement") is made and entered into as of this 2nd day of October, 2017 by and between the **SAN DIEGO UNIFIED PORT DISTRICT**, a public corporation, hereinafter called "District" and **PROTEA WATERFRONT DEVELOPMENT, LLC**, a California limited liability company, hereinafter called "Developer" or "PWD" in the capacity as managing member of 1HWY1; and the District and Developer are collectively referred to herein as the "Parties" or individually at times referred to as a "Party".

WITNESSETH:

WHEREAS, on February 22, 2016, 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, generally shown on Exhibit "A" attached hereto and incorporated herein by reference, as such boundaries may be modified by the District following completion of a survey or plat map ("Property"); and

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

WHEREAS, the proposals from Gafcon, Inc. (on behalf of a yet to be formed entity 1HWY1 (as defined below)), 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 1HWY1 team to further evaluate the "Seaport San Diego World Class Waterfront Development" dated May 2, 2016 ("Seaport Proposal"), while not making a final selection or eliminating the other five proposals/proposers; and

WHEREAS, the 1HWY1 core team is comprised of Developer, ThrillCorp, RCI Group, and OdySea, all of which will be the members of 1HWY1, a California or Delaware limited liability company ("1HWY1") when it is formed; and

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WHEREAS, Developer will be the managing member of 1HWY1; and

WHEREAS, following the Board's direction staff conducted a preliminary due diligence phase and issued a supplemental information request to the 1HWY1 team and responses were provided between August 5 and September 19, 2016; and

WHEREAS, at its November 8, 2016 meeting, the Board selected 1HWY1 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 1HWY1, and

WHEREAS, following the Board's direction, staff worked with the 1HWY1 team to prepare a due diligence schedule, which included the list of recommended due diligence items that were included in the draft resolution attached to the November 8, 2016 agenda sheet; and

WHEREAS, the due diligence schedule was sent to the 1HWY1 team on January 5, 2017 requiring an update on March 17, 2017; and

WHEREAS, the 1HWY1 team provided the update on March 16, 2017 and a supplemental update on April 6, 2017; and

WHEREAS, 1HWY1 is the proposed ground lessee and developer for the Property; and

WHEREAS, the 1HWY1 operating agreement and associated documents will identify the roles and level of financial commitment of each of Developer, ThrillCorp, RCI Group, and OdySea; and

WHEREAS, Developer will submit to the District a certified written statement describing the roles and level of financial commitment of all of the members of 1HWY1 as provided herein; and

WHEREAS, in the interim, as the proposed managing member of 1HWY1, Developer has been acting as the lead on the Seaport Proposal; and

WHEREAS, on May 16, 2017, pursuant to Resolution 2017-078, the Board directed staff to enter into a two-year Exclusive Negotiating Agreement ("ENA") with Developer that requires that (1) Developer form, or cause the formation of, 1HWY1 within ninety (90) days of entering into the ENA; (2) Developer assigns all of its rights and obligations under the ENA to 1HWY1 once the entity has been formed; (3) Developer, or 1HWY1

once it is formed and assumes the rights and obligations of Developer under the ENA, submits a project description within one year of Developer entering into the ENA; and (4) Developer, or 1HWY1 once it is formed and assumes the rights and obligations of Developer under the ENA, submits regular progress reports on the financial feasibility of the Proposed Development (as defined below) and access to equity and debt sources and if such progress reports are not submitted or acceptable to the District, the District would have the option to delay, pause or terminate the ENA; and

WHEREAS, under the ENA, staff will work with Developer, until 1HWY1 is formed and Developer assigns its rights and obligations under this Agreement to 1HWY1, to: (1) complete post-selection due diligence, (2) refine the Proposed Development (defined below) program; and (3) refine development cost estimates and pro forma financial analysis for the Proposed Development; and

WHEREAS, this Agreement is the ENA contemplated in Resolution 2017-078; and

WHEREAS, the District and Developer are willing to exclusively negotiate, for the period set forth herein, a disposition and development agreement or another form of binding agreement that will specify the rights and obligations of the Parties with respect to the lease, development and operation of the Proposed Development (as defined in Section 4 below) on the Property (referred to herein as the "Definitive Agreement"); and

WHEREAS, the Property is currently leased by the District to third parties, or operated by the District, and will be used during the term of this Agreement as a specialty retail center, parking and other current or future proposed uses as the District deems acceptable (collectively, the "Interim Uses"), and the District intends that such Interim Uses will continue until such time as execution by the Parties of a lease for the Property.

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties hereto mutually agree as follows:

1. **INCORPORATION OF RECITALS.** The Recitals set forth above are hereby incorporated by reference and deemed a part of this Agreement.

2. **AGREEMENT TO NEGOTIATE.**

   a. **Period of Negotiations.** The negotiating period shall commence on October 2, 2017 ("Effective Date") and shall end on October 1, 2019 ("Negotiating Period").

b. **Extensions.** Notwithstanding the foregoing, the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, may extend the Negotiating Period and/or the deadlines for the delivery of the submittals described in Section 6 in writing by ninety (90)-day increments for a total Negotiating Period not to exceed five (5) years by delivering to Developer written notice of its election to exercise an extension no later than the expiration of the then existing Negotiating Period or submittal deadline under Section 6, upon which the Negotiating Period and/or the submittal deadline(s) shall be automatically extended to include such extensions. The District undertakes no commitment or obligation to the Developer to grant any extensions and shall incur no liability to Developer resulting from its election not to extend the Negotiating Period or submittal deadlines.

c. **Agreement to Negotiate.** During the Negotiating Period, District and Developer agree to negotiate in good faith the terms of a Definitive Agreement to enable the leasing, development and operation of the Proposed Development on the Property. The Definitive Agreement may include, as exhibits, a lease or another form of binding agreement, design criteria and minimum construction requirements and such additional documents and/or security instruments as the District or Developer may reasonably require in connection with the lease, development, financing, and operation of the Property including, but not limited to those described in Section 6 herein. During the Negotiating Period, the District and Developer shall make qualified and authorized personnel available to actively participate in negotiations and each Party shall review and provide comments on materials provided by the other Party. Subject to the terms of Section 14, if the terms of a Definitive Agreement are agreed to by the District and Developer during the Negotiating Period, the Developer shall execute the Definitive Agreement and the Definitive Agreement shall be presented to the Board for approval prior to expiration of the Negotiating Period. The Parties understand and agree that the Board has, in its sole and absolute discretion, the right to approve, condition or not to approve the Definitive Agreement.

d. **Exclusivity.** Except as permitted under Section 22, the District agrees during the Negotiating Period, to negotiate exclusively with the Developer regarding the leasing and development of the Property for the Proposed

Development and to not actively solicit any interest in the leasing or development of the Property. Developer agrees that the District is not precluded from negotiating with other parties for other developments on other District properties, including, but not limited to, those properties directly adjacent to the Property; provided, however, that nothing herein shall prohibit the District from using the Property as set forth in Section 22, including without limitation, for Interim Uses, or from soliciting, negotiating and entering into negotiations, leases, permits, licenses, operating agreements, management agreements, easements, parking agreements or other agreements for any current or future Interim Uses.

e. **End of Negotiating Period.** If, at the end of the Negotiating Period (as may be extended by the District pursuant to Section 2.b. of this Agreement, if applicable), Developer and District have not entered into the Definitive Agreement, then this Agreement shall automatically and immediately terminate without further written notice. Upon such automatic termination and expiration of the Negotiating Period and this Agreement, except as set forth in Section 11(e), neither Party shall have any further rights, remedies or obligations to the other under this Agreement and the Parties shall each be relieved and discharged from all further responsibility or liability under this Agreement.

3. **RIGHTS TO TERMINATE.** Except as permitted under Section 13, if at any time a Party determines in its sole discretion that the Proposed Development is not feasible or financeable or that it does not otherwise desire to proceed with negotiations for any or no reason, such Party shall provide written notice to the other Party of such determination. Within ten (10) days of delivery of such notice, the Parties shall meet to discuss the termination, but without commitment to withhold, waive or reverse its termination request. On the date of the meeting, or within two (2) days following the meeting, the notifying Party shall confirm whether it still desires to terminate the Agreement and if the notifying party makes such an election, the Negotiating Period and this Agreement shall automatically terminate on the date of the meeting (if notice is delivered on such date) or by delivery of written notice to the other Party after the meeting and, except as set forth in Section 11(e), neither Party shall have any further rights, remedies or obligations to the other Party under the Agreement and the Parties shall each be relieved and discharged from all further responsibility or liability under this Agreement.

4. **PROPOSED DEVELOPMENT.** Except as permitted under Section 6.g., for the purposes of the Parties' negotiations, as set forth in the Agreement the proposed development shall be in substantial conformance with the development concept described in the Seaport Proposal for the development and construction of a mixed-use master development, which includes, without limitation, retail, restaurants, hotels, incidental offices to support water-dependent or water-related uses, attractions (i.e., an aquarium, and an observation tower), a Public Trust Doctrine compliant educational component, parking, water oriented facilities (recreational and commercial fishing), multi-purpose open space and public realm uses (each, a "Programmatic Component") on the Property, as modified by the supplemental information request dated April 6, 2017 to connect the subterranean parking structures to create a larger floor plate and remove the pedestrian bridge that connected North and South Embarcadero Marina Parks, a water cut at the foot of Kettner Boulevard and the Embarcadero Marina Park North, and the pedestrian bridge over the tide pools on the inboard side of the Embarcadero Marina Park North(collectively, the "Proposed Development").

5. **FORMATION OF 1HWY1.** Within ninety (90)-days of the Effective Date of this Agreement ("Formation Deadline"), the Developer shall cause the formation of 1HWY1, which shall be a California or Delaware limited liability company and include (a) PWD, as managing member; and (b) ThrillCorp, Inc., a Delaware corporation ("ThrillCorp"), RCI SD, LLC, a Florida limited liability company ("RCI"), and OdySea, San Diego, LLC, an Arizona limited liability company ("OdySea") as the remaining members, each as individual members of 1HWY1. Upon Developer's formation of 1HWY1, but prior to the Formation Deadline, the Developer shall deliver written notice to the District of the formation of 1HWY1, which notice shall include for District's review and approval, in its sole and absolute discretion, the following items which shall form the "Formation Package": (i) a certified copy of the formation documents of 1HWY1 and each of its members, the operating agreement of 1HWY1, and a written statement certified by the Developer describing the roles and financial commitments of all of the members of 1HWY1; (ii) an organizational chart for 1HWY1 identifying all of the members; and (iii) a form of assignment and assumption of this Agreement between Developer and 1HWY1 ("Assignment & Assumption"), under which Developer shall assign to 1HWY1, and 1HWY1 shall assume, all of Developer's rights and obligations under this Agreement. Developer shall be in default under Section 12 of this Agreement if: (a) Developer fails to form 1HWY1 on or before the Formation Deadline; (b) Developer fails to deliver to the District the Formation Package, in a form satisfactory to the District, on or before the Formation

Deadline; (c) PWD is not the managing member of 1HWY1; (d) ThrillCorp, RCI, and OdySea are not each a member of 1HWY1, or (e) the form of Assignment & Assumption is not acceptable to the District. Provided this Agreement has not been terminated, Developer and 1HWY1 shall execute the Assignment & Assumption and deliver a fully executed Assignment & Assumption to the District within five (5) business days of receipt of District's approval of the Formation Package, upon which 1HWY1 shall replace PWD as the "Developer" under this Agreement as of the effective date of the Assignment & Assumption without the need for further amendment of this Agreement and PWD, acting as the Developer only under this Agreement prior to the effective date of the Assignment and Assumption, shall be released from liability under this Agreement as to all actions on and after the effective date of the Assignment & Assumption only in its capacity as the "Developer". In no event shall the effective date of the Assignment & Assumption be before the District's approval of the Formation Package.

6. **REQUIRED SUBMITTALS.** Submittal by Developer of the submittals listed below is necessary to further define the scope and evaluate the financial and market feasibility of the Proposed Development. Accordingly, Developer shall deliver the following submittals in accordance with the requirements and scheduled dates set forth below (as may be extended by the District pursuant to Section 2(b) of this Agreement). All submittals required by this Section 6 shall be complete and timely. Late or incomplete submittals shall result in a default under this Agreement.

a. **Market Demand and Feasibility Studies.** By no later than October 16, 2017, Developer shall submit to the District Market Demand and Feasibility Studies to:

i. Demonstrate support for each of the Programmatic Components listed below:

1. Restaurant and Retail
2. Office
3. Hotels
4. Attractions
   a. Aquarium (marine attractions)
   b. Observation Tower
5. Water Oriented Facilities
   a. Commercial Fishing
   b. Recreational Marina

ii. Validate the demand and revenue expense assumptions in the financial model.

b. Pre-Development and Feasibility Milestones. Within ten (10) business days after the dates listed in the Pre-Development and Feasibility Milestones Schedule outlined in Exhibit "B", attached hereto and incorporated herein by reference ("Schedule"), the Developer shall deliver a written report to the District detailing Developer's achievement of the respective milestone together with any supporting documentation described therein for the District's review and approval.

c. Project Description. By no later than the first anniversary of the Effective Date of this Agreement, Developer shall submit to the District a detailed project description for the Proposed Development. The project description shall be a concise written description of the Proposed Development with sufficient detail to understand the Proposed Development and related Programmatic Components and 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 Act Guidelines (codified as 14 California Code of Regulations §§15000) and the District's California Environmental Quality Act Guidelines (collectively, "CEQA"); provided, however, additional information and data may be requested by the District, in the District's sole and absolute discretion, which shall be provided by Developer, to enable the District to conduct CEQA review. At a minimum, the project description shall include the following information for each of the Programmatic Components proposed to be developed on the Property: total site area, building(s) square footage, building heights, number of floors, areas devoted to specific uses, number of hotel rooms, materials to be used and type of construction. Additionally, the project description shall include: construction information, including without limitation the length and phasing of demolition, construction or development and anticipated import and export of dirt; number of parking spaces (above-grade and/or below-grade); and type and location of public amenities and any proposed infrastructure improvements (land and water). All proposed uses and improvements shall be in compliance with the Public Trust Doctrine and the California Coastal Act (codified as California Public Resource Code §§ 30000, et seq.) ("Coastal Act").

The project description shall be accompanied at a minimum by the conceptual drawings for the overall Proposed Development and shall also be accompanied by conceptual drawings for each Programmatic Component proposed. The Parties acknowledge that the preliminary design materials to be provided by Developer pursuant to this Section are conceptual in nature and may be subject to revision and refinement throughout the Negotiating Period in order to achieve a plan for the Proposed Development acceptable to each of the Parties, and through the environmental review pursuant to CEQA. The Parties recognize that changes may occur in Developer's Proposed Development as additional information is obtained during the Negotiating Period. Conceptual drawings shall be in sufficient detail to clearly illustrate the Proposed Development and at a minimum shall include the following:

i. **Site/Floor Plans**. The site plan shall illustrate a comprehensive overview with sufficient detail to understand the scope of the entire Proposed Development and shall at a minimum clearly identify locations and size of building footprints for each Programmatic Component, areas proposed for public space, parking area layouts with estimated parking space counts and vehicular and pedestrian access. The site plan should clearly distinguish area allocations among commercial uses, the Public Trust Doctrine compliant educational component, water side uses (recreational vs commercial fishing uses), service/parking, circulation, view corridors, and public areas. Site plan and floor plans for each Programmatic Component, as applicable, that includes all levels (do not duplicate identical floor plans), subterranean levels and roof plans. Detailed floor plans are not required; however, general outlines and perimeter information to collaborate illustrated elevations must be provided (locations of windows, doors, shear walls, etc.).

ii. **Elevations.** Colored architectural exterior elevations that provide a comprehensive view of the entire Proposed Development and illustrate proposed building massing, height, materials and colors, and related architectural elements. Elevations must match rendering on perspective drawings. Elevations for each building face and enlarged elevations for all building frontages shall be included. All elevations should identify base datum used in height

measurements, colors, and materials.

iii. **Context/Perspective Drawings**. Three to five colored renderings and drawings approximately thirty inches (30") by forty-two inches (42") and hard backed that provide a representative illustration of the Proposed Development, clearly showing massing and the relationship of the Proposed Development in context to its surrounding environment with the adjacent building masses roughed in. Context elements do not need to be photo realistic but must accurately convey the bulk, scale, and character of the surrounding area. The Developer shall provide a minimum of one nighttime rendering for the overall Proposed Development.

iv. **Digital Format**. All conceptual drawings described in this Section 6 shall also be submitted in high resolution digital format(s) in addition to or as an alternative to the format(s) described above.

v. **General Requirements.** All conceptual drawings, including site/floor plans, elevations, and sections must be legible, drawn to scale, and be fully labeled and dimensioned and shall include the date of plan preparation. Plans should typically orient north up, one plan, elevation or perspective per sheet (other than those floor plans noted as "typical").

vi. **Additional Drawings.** The District reserves the right to request additional and more detailed drawings as necessary to conduct CEQA and Coastal Act review for the Proposed Development, each Programmatic Component and to clearly identify any proposed changes to the Proposed Development during the term of this Agreement.

d. Pro Forma. By no later than the first anniversary of the Effective Date of this Agreement and concurrently with the submittal of the detailed project description mentioned above, the Developer shall submit to the District a cost estimate and pro forma financial analysis (collectively, "Project Pro Forma") for the Proposed Development, with the same level of detail that a developer of a similar project would use for a pro forma in this stage of development when seeking pre-development equity investors and without a public subsidy. The Project Pro Forma shall include, at a

minimum, the following components and clearly note and explain any updates to the pro forma delivered to the District dated September 2016:

i. Estimated financing plan for the Proposed Development including: total project financing structure, anticipated equity and debt requirements, financing approach for each Programmatic Component, including infrastructure, and any letters of interest from potential financing partners which support the financing plan.

ii. Sources and uses for each Programmatic Component and the total Proposed Development for pre-development, construction and stabilized periods.

iii. Each Programmatic Component including, without limitation, for the hotel, office, retail, amenities, attractions and educational uses at a minimum the then projected: room count; food and beverage outlets; meeting space; spa, retail, office, recreational and ancillary facilities; building footprint; approximate net and gross building square feet enclosed by component; approximate net and gross leasable square feet for office and retail components; square footages for open air components such as terraces, pool decks, and other amenity areas; and surface and structured garage parking spaces expressed in number of spaces and square footage, slip mix and rental rates for recreational marina and commercial fishing components.

iv. Cost estimate for all Programmatic Components of the Proposed Development (at a minimum, all items listed in Section 6.c above), including, without limitation, direct costs such as site improvements, site building costs for each distinct programmable space, tenant improvements, furniture/fixtures/equipment, amenities, and parking; indirect costs such as architecture/engineering, entitlement costs, public permits and fees, legal, accounting, taxes, insurance, marketing/lease-up, pre-opening budget of supplies and expense, and Developer overhead fee; and financing costs such as loan fees, interest during construction and lease-up, and operating reserve and any costs associated with equity financing. Site improvements and infrastructure shall be allocated to each Programmatic Component. Development costs shall include an estimate of any temporary facilities or transition spaces proposed.

v. Assumed duration of pre-development and construction periods for each Programmatic Component. Assumptions and phasing plan for construction and associated assumptions for development and construction expenditures and matching funding sources and uses for such expenditures.

vi. A breakdown of the estimated rent to be paid to the District for each Programmatic Component, including basis, calculation and any assumed minimum rent for pre-development and construction periods and at a minimum the first 10-years of operations, which shall indicate the anticipated year of stabilization; provided, however, the District may request that that the Developer provide a long-term projection of rent (which could be up to 66-years) to be paid to the District for each Programmatic Component on an annual basis.

vii. Estimated gross revenues, operating expenses and net operating income ("NOI") (net of District rent) for each Programmatic Component and the total Proposed Development along with detailed revenue, expense, occupancy, lease-up, and inflation assumptions for each for at a minimum the first 10-years of operations, which shall indicate the anticipated year of stabilization. The Project Pro Forma should include all revenues anticipated for the Proposed Development. The estimate of NOI should be reasonably consistent with the Market Demand and Feasibility Studies referenced in Section 6(a) above.

viii. Projected capital reserve requirements and capital expenditures for each Programmatic Component and for the total Proposed Development.

ix. Assumptions concerning valuation/sale for each Programmatic Component and calculation of proceeds from disposition net of any associated expenses.

x. Estimated cash flow before debt service for each Programmatic Component and the total Proposed Development for the first 10-years of operations and calculation of unlevered Developer returns.

xi. Projected debt service requirements (construction and permanent financing) for each Programmatic Component (as applicable) and the total Proposed Development, including financing assumptions and calculations of debt service.

xii. Calculation of cash flows to equity for each Programmatic Component and the total Proposed Development and calculation of levered Developer returns.

xiii. All calculated levered and unlevered returns to Developer, which may include internal rates of return, cash multiples, and/or return on investment/cost shall be accompanied by a clear statement regarding the Developer's profit/return requirements.

xiv. Cost, market, and economic assumptions used by Developer to prepare such projections and the Project Pro Forma.

xv. Cash flow projection shall clearly indicate estimates of the required equity investment by Developer; all debt service obligations for construction, bridge, and/or permanent financing; and the economic return to Developer in terms of internal rate of return, cash multiple, and/or return on investment/cost requested by Developer.

xvi. Projection of the ground lease revenues payable to the District during construction and the initial ten (10)-year operating period.

xvii. Rental, monetary, financing and other concessions or incentives that are requested by Developer in order to achieve the projected investment and returns requested by Developer.

xviii. The Project Pro Forma shall be submitted in an editable Microsoft Excel format with all working formulas and assumptions. Cash flow projections shall be provided for pre-development and construction periods and the first ten (10)-years of operations. All cash flow values shall be based on Developer's assumptions provided in the Project Pro Forma and shall not make use of "hard-coded" values. The Project Pro Forma shall be presented and formatted in a manner that is reasonably acceptable to the District and readily enables the District to:

1. determine the feasibility of the Proposed Development;
2. verify the cost, market, and economic assumptions used by Developer; and
3. sensitivity test a range of alternative inputs.

The District reserves the right to request periodic updates to the Project Pro Forma after its submittal due to changes in the Proposed Development during the Negotiating Period. The District will provide reasonable time for Developer to obtain and submit to the District such updates.

e. Additional Submittals. In addition to the information described in Sections 6(a)-(d) above, Developer acknowledges and agrees that the District reserves the right at any time to reasonably request from Developer additional information, including data and financial documents to determine and/or confirm Developer's relevant experience with similar scale mixed use developments, its approach to financing and capability to construct, develop, and operate the Proposed Development. The District will provide reasonable time for Developer to obtain and submit to the District such additional information.

f. Periodic Financial Feasibility Updates. Every ninety (90) days during the Negotiating Period, without notice from the District, Developer shall deliver to the District a written progress report, in a form satisfactory to the District in its sole and absolute discretion, identifying the current status of the financing plan for the construction, development, financing and operation of the Proposed Development ("Financing Plan"). The written progress reports shall include without limitation, a description of the financing structure, funding responsibilities, and current equity and debt sources for the Proposed Development, updates to the last progress report, and copies of all valid letters of interest and/or financial commitment(s) related to funding for the Proposed Development. Prior to the District presenting the Board with the Definitive Agreement for their consideration, the Developer shall provide the District with a final progress report demonstrating that the Developer has an adequate Financing Plan to construct, develop, and operate the Proposed Development.

g. Changes to Proposed Development. The Parties acknowledge that the materials to be provided by the Developer pursuant to this Section 6 are conceptual in nature and the Parties recognize that changes may occur in Developer's Proposed Development as additional information is obtained by the Parties during the Negotiating Period and will be subject to revision, refinement throughout the Negotiating Period in order to achieve a plan for the Proposed Development acceptable to both of the Parties. As such, the Developer shall submit written documentation advising the District of any changes to the Proposed Development, including but not limited to, changes to Programmatic Components resulting from market demand and feasibility studies, development plan revisions, financial feasibility analyses, construction cost estimates, marketing studies, soils and hazardous materials investigations, test and reports, and other post-selection due diligence items and shall submit within a reasonable timeframe updates to the submittals previously delivered to the District under this Section 6 to clearly identify and reflect changes to the scope, scale or location of the Proposed Development for the District's consideration and approval.

h. Due Diligence and Ground Work. Upon written request from Developer, the District shall conduct environmental review pursuant to CEQA, and consider approval of necessary permits and entitlements, including without limitation Coastal Act permits or exclusions and one or more temporary District Right of Entry License Agreement ("ROE License") for those portions of the Property not subject to an agreement with a third party and under the immediate control of the District (collectively, "District Controlled Areas") permitting the Developer and its employees, contractors, subcontractors and agents to enter designated portions of the District Controlled Areas for the purposes of conducting soils tests and other due diligence tests, investigations and examinations in, on, under or about the District Controlled Areas (the "Work"), all at Developer's sole and absolute cost. In addition to other conditions that may be required through the CEQA, Coastal Act or other permitting processes, at a minimum, the following conditions shall apply to any ROE License authorizing Work requiring ground disturbance or consisting of any subsurface or invasive testing or investigations ("Ground Work")":

i. Developer shall submit a Work plan to the District for Ground Work and obtain District approval thereof, which shall be granted or withheld in the District's sole and absolute discretion; and

ii. A District appointed monitor with the experience in the type of Ground Work proposed to be conducted ("Monitor") shall be present to observe the Ground Work. Ground Work shall not proceed without the Monitor being present unless such requirement is waived by the Executive Director or her designee in writing. In the event of any exacerbation of a pre-existing hazardous materials condition, the Monitor shall determine whether the Ground Work was carried out in accordance with the Work plan, in a non-negligent manner and in accordance with commonly accepted industry standards.

a. Indemnity. Developer agrees, to the fullest extent provided by law, to defend, indemnify and hold the District, its agents, officers and employees, and the Property free from any and all liability as a result of the Work or the exercise of said ROE License, except to the extent arising out of:

i. Developer's discovery of any pre-existing condition unless Developer: (1) negligently exacerbates such condition; (2) performs the Work in a manner that is inconsistent with commonly accepted industry standards, or (3) performs the Ground Work in a manner inconsistent with the Work plan; or

ii. the District's sole negligence or willful misconduct.

b. CEQA Review of ROE License. Developer acknowledges and agrees that the ROE License may be subject to review under CEQA, the cost of which shall be borne by Developer. Prior to entering any portion of the District Controlled Areas, Developer agrees to obtain insurance as specified in the ROE License, which insurance shall, among other things, be endorsed to read that all policies are primary policies and to name the District as an additional insured.

c. Term of ROE License. The ROE License shall have a term reasonably necessary for Developer to conduct the Work, but in no event shall said term continue beyond the earlier of the termination of this Agreement or the expiration of the Negotiating Period.

7. DEVELOPER'S FINDINGS, STUDIES AND REPORTS.

a. Products. In connection with the Proposed Development, Developer shall be preparing or causing to be prepared design, architectural and engineering products, plans, reports, test, studies, cost estimates and investigations with respect to the Property and the Proposed Development, including, but not limited to, providing the District with development plan revisions, financial feasibility analyses, construction cost estimates, surveys, marketing studies, soils and hazardous materials investigations, tests and reports, engineering reports, geotechnical reports, plans and specifications, other due-diligence materials, material correspondence and work product documents (collectively, "Products"). Developer agrees to make written progress reports, in form satisfactory to the District, advising the District on all matters related to the Proposed Development and the Products. Developer shall provide the District copies of all final Products prepared or commissioned by Developer and/or obtained from third parties with respect to this Agreement and/or the Proposed Development. Developer further acknowledges that it may be necessary or desirable to share with the District drafts and progressions of the Products prepared or commissioned by Developer in order to meet the requirements of Sections 6 and 14, to permit the District to conduct is due diligence with respect to Developer and the Proposed Development and to carry out its planning and entitlement efforts with respect to the Proposed Development, and to otherwise further the purposes of this Agreement, and Developer agrees to cooperate with the District in making such drafts and document progressions available.

b. Transferable Products. "Transferable Products" shall mean all reports, plans, specifications, studies, estimates and other information or analysis generated by Developer and/or obtained by third parties pertaining to the physical condition of the Property, and shall include without limitation, the Products. Developer shall use commercially reasonable efforts to cause all contracts with its consultants and contractors for preparation of Transferable Products to require that such Transferable Products be prepared for the benefit of Developer and the District, and be transferable to and by the District in whole, and shall impose no restriction, cost or fee with respect to transfer of such Transferable Products to or by the District or use thereof by the District or

any person or entity to which the District transfers the Transferable Products. Upon termination of this Agreement without execution of a Definitive Agreement by the District and Developer, Developer shall be deemed to have transferred its interest in the Transferable Products to the District, without representation or warranty except as to the delivery of the most current form of the Transferable Product in whole to the District, such Transferable Products shall become the property of the District and shall be delivered to the District immediately if not delivered in whole previously, and the District shall have the right, in its sole discretion to use, grant, license or otherwise dispose of such Transferable Products to any person or entity for development of the Property or any other purpose at no cost or expense to the District provided that the Developer shall have no liability whatsoever to the District or any transferee of title to the Transferable Products regarding the accuracy or breadth of any information contained in the Transferable Products or the use of the Transferable Products (except as it relates to the transferability of the Transferable Products by the third party and the delivery of the Transferable Products to the District in whole). This Section 7 shall survive the expiration or earlier termination of this Agreement.

8. AGREEMENT TRANSFER. The expertise, experience and financial capability of (a) PWD as managing member of 1HWY1; and (b) ThrillCorp, RCI and OdySea as individual members of 1HWY1, to undertake development of the Property as contemplated by this Agreement are of significant importance to the selection by the District of 1HWY1 as the successful proposer pursuant to the RFP and the entry by the District into this Agreement. Any attempt to transfer or assign this Agreement or any rights or duties, or obligations hereunder (other than to 1HWY1 as expressly provided in this Agreement), whether by operation of law, through a pledge, hypothecation, or otherwise, shall be void and shall result in a default under this Agreement. In addition, during the Negotiating Period, if without the prior written consent of the District: (i) any assignment or transfer of any ownership interest in Developer prior to the date this Agreement is assigned to 1HWY1; (ii) PWD changes its form of entity from a California limited liability company; (iii) any assignment or transfer of any ownership interest in 1HWY1 after the Formation Package is delivered to the District; or (iv) if 1HWY1 changes its form of entity or place of incorporation, the transfer shall be void and Developer shall be in default under this Agreement. Notwithstanding the foregoing, after the effective date of the Assignment & Assumption approved by the District, but subject to the District's express right not to enter into a Definitive

Agreement with Developer, the District's consent for a direct or indirect transfer of membership interests in Developer or admission of new members into Developer shall not be required so long as after the transfer (i) PWD shall remain as the managing member of Developer with active and direct control and supervision of the operations of Developer, (ii) PWD, ThrillCorp, OdySea and RCI collectively hold at least 51% of the direct or indirect voting membership interests in Developer, (iii) the proposed transferee and its 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, (iv) if the proposed transferee or new member (or its principals) is a tenant of the District, such person or entity (or its principals) is then in good standing with the District under its agreements with the District, (v) there is no change in entity form of 1HWY1, (vi) Developer delivers to District prior written notice of such action listing the new member(s) and its principals, along with an updated organizational chart showing the new member(s), member (s) operating, partnership or other formation agreement and a certified copy of the formation documents for the new member(s), and (vii) any additional information on the new member(s) as is reasonably requested by District. In addition, at the request of the District from time to time, within thirty days (30) after a request from the District, the Developer shall provide to the District a detailed organizational chart and other information to determine the person(s) and entities holding a direct or indirect interest in Developer and who has control over Developer including information on beneficial ownership and voting rights to make such determination.

9. COSTS AND EXPENSES. Except as otherwise expressly set forth in this Agreement, 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, however, Developer, and not the District, shall be responsible for all fees associated with review and approval of a Proposed Development project as outlined in Board Policy No. 106 for Cost Recovery User Fee and all processing fees and costs associated with application for, and processing of, the environmental review set forth in Section 14 below, including, but not limited to, all of the District's costs of preparing any environmental studies as may be determined to be required by the District, in its sole and absolute discretion. Prior to assessing any fees under Board Policy No. 106, the District shall provide Developer with an estimate of the fees.

10. NOTICES. Notices given or to be given by the District or Developer to the other may be personally served upon the District or Developer or any person hereafter authorized by either in writing to receive such notice on its behalf or may be served by certified letter (return receipt requested) addressed to the appropriate address hereinafter set forth or to such other address as the District and Developer may hereafter designate by written notice, and shall be deemed delivered on the date of personal delivery, or if delivered by certified mail, upon the date shown for delivery in the returned receipt or three days after the deposit of the certified letter in the United States mail, whichever is earlier. All notices shall be in writing and shall be made as follows:

a. All notices to Developer shall be given or sent by certified mail to:

Protea Waterfront Development, LLC
Attention: Yehudi Gaffen
5960 Cornerstone Court West, Suite 100
San Diego, CA 92121

b. All notices to the District shall be given or sent by certified mail to:

Director, Real Estate
San Diego Unified Port District
3165 Pacific Highway
Post Office Box 120488
San Diego, CA 92112-0488

Any Party may designate a different address by giving written notice as set forth in this Section.

11. NEED FOR DEFINITIVE AGREEMENT.

a. Purpose of Agreement. The Parties acknowledge and agree that this Agreement is for the sole purpose of stating the intention of the Parties to negotiate and potentially enter into the Definitive Agreement. The Parties acknowledge that this Agreement establishes a process for the Parties to negotiate, exchange information and for the Developer to establish a project description for the Proposed Development to initiate the CEQA process and the Parties do not intend to be bound to carrying out the Proposed Development or any Programmatic Components thereof until

the Definitive Agreement is executed by both Parties. District's execution of this Agreement is merely an agreement to enter into the Negotiating Period, according to the terms presented herein, reserving full and final discretion and approval by the Board as to actions required, if any. This Agreement is not, and the Parties do not intend that this Agreement to be the Definitive Agreement. Subject to the obligations and rights expressed in this Agreement, unless and until a Definitive Agreement is approved as set forth in Section 11(c) and executed by both Parties, the Parties do not intend to be bound in any way to any other agreement. Each Party's acknowledgement of this Agreement is merely an agreement to enter into the Negotiating Period according to the terms presented herein, reserving final discretion and approval of any Definitive Agreement by the Board (or in the case of Developer, its principals) as to actions required, if any.

b. **Framework of Negotiations.** The 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 the Definitive Agreement, the time or manner of and significant terms related to the 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 its sole an absolute discretion, and executed by authorized representatives of each of the 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, 1HWY1 team and 1HWY1, and the terms and conditions of the lease of the Proposed Development, if any, will be of material concern to the District and comprise part of the essential terms that are not yet agreed upon by the Parties.

c. **Not Binding Until Formally Approved.** The Definitive Agreement shall not be approved or binding upon the Parties unless and until it is fully executed by Developer and the District, approved by counsel of each

Party as to form and legality, and approved by the authorized representatives of Developer and by the Board and following compliance with all laws, including without limitation, CEQA. The concurrence of the Executive Director or her designee with the terms and provisions of the Definitive Agreement shall not be construed or interpreted as the District approving or accepting such terms and shall not be relied on by Developer. If the Board disapproves the CEQA analysis for the Definitive Agreement or Proposed Development, disapproves the Definitive Agreement or any other permit requiring Board approval during the Negotiating Period, this Agreement will automatically and immediately terminate; provided that if the Board requests modifications to any of the foregoing, the Parties may mutually agree to extend the Negotiating Period, if necessary, to address the Board requested modifications and to permit resubmittal of the CEQA analysis and/or a Definitive Agreement to the Board.

d. **Outreach.** During the Negotiating Period, Developer shall participate with the District in public outreach efforts including stakeholder outreach and Board meetings and other outreach as necessary to promote the Proposed Development.

e. **Termination and Survival Provisions.** Notwithstanding any other provision of this Agreement, this Agreement and its terms are binding on the Parties until this Agreement terminates and, further, the provisions of Section 7 (Developer's Findings, Studies and Reports), Section 9 (Costs and Expenses) (as it relates to the obligation of Developer to pay specified fees and costs incurred by the District), Section 13 (Remedies for Breach of Agreement), Section 15 (Attorneys' Fees), Section 30 (No Broker), Section 31 (No Agreements with Third Parties), and Section 33 (OFAC Compliance) shall survive the termination of this Agreement and the Parties shall each remain liable with respect to each of such surviving provisions, as set forth in this subsection 11(e) for all obligations, fees, costs and expenses thereunder incurred during or as a result of matters arising during the Negotiating Period.

This Section 11 shall survive the expiration or earlier termination of this Agreement.

12. DEFAULT. Failure by either Party (a) to negotiate in good faith, (b) to negotiate exclusively, as provided in Section 2(c), or (c) perform any other of its obligations as provided in this Agreement, including without limitation, the delivery of the submittals set forth in Section 6, shall constitute an event of default under 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 the default remains uncured for twenty (20) days after the date of such notice it shall be deemed an "Uncured Default", and the non-defaulting Party may terminate this Agreement as set forth in Section 13(a) of this Agreement.

13. REMEDIES FOR BREACH OF AGREEMENT.

a. Termination. In the event of an Uncured Default by the District, Developer's sole remedy shall be to terminate this Agreement. In the event of an Uncured Default by Developer, the District's sole remedy shall be to terminate this Agreement. Except as set forth in Section 11(e), after termination of this Agreement by either Party, 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 the District would not have entered into this Agreement if the District could become liable for damages or specific performance under or with respect to this Agreement, the Definitive Agreement or the Proposed Development. Consequently, without limiting any other terms of this Agreement and notwithstanding any actual or alleged default, including without limitation, any Uncured Default, by the District or Developer:

i. the District shall have no liability for monetary damages or specific performance for the breach of this Agreement to Developer (except with respect to attorneys' fees awarded by a court pursuant to Section 15 herein) or any third party; and

ii. except with respect to claims arising under the sections described in Section 11(e), including without limitation, those payable by Developer with respect to Section 9, Developer shall have no liability to the District for monetary damages or specific performance for the breach of this Agreement.

c. **Release.** Without limiting the generality of the foregoing, except as set forth in Section 13(b), each Party hereby expressly waives, releases and relinquishes the right to any and all damages and/or monetary relief (whether based in contract or in tort), including, without limitation, any right to claim direct, compensatory, reliance, special, indirect or consequential damages with respect to or arising out of this Agreement and any other rights or claims it may otherwise have at law or at equity. In addition, Developer further expressly waives and irrevocably releases the District with respect to:

i. any right to specific performance for conveyance of, or to claim any right of title or interest in the Property or any portion thereof,

ii. any right to record a lis pendens or to otherwise place a lien or restriction of any type upon or affecting the Property, and

iii. any and all claims, damages, liabilities, costs, expenses that Developer may now or hereafter have or incur relating to or arising from:

1. the terms of this Agreement including, without limitation, the information set forth herein or the termination hereof, and

2. any action or inaction of the District in connection with this Agreement, including without limitation, the exercise by the District of its discretion, decision, judgment with respect to the foregoing or the failure of the District to enter into the Definitive Agreement.

With respect to all releases and waivers made by the Developer under or pursuant to this Agreement, the Developer hereby waives the application and benefits of California Civil Code § 1542 and hereby verifies that it has read and understands the following provision of California Civil Code § 1542:

> **"A general release does not extend to claims which the 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: _____

14. CEQA, ENTITLEMENTS AND RESERVATION OF DISCRETION. This Section 14 shall apply notwithstanding any other provision of this Agreement. The Parties agree and acknowledge that compliance with CEQA is a legal precondition to the District's or Board's commitment or approval of any discretionary District action for a project that may result in a direct or indirect physical change to the environment, including, without limitation the Definitive Agreement, a Port Master Plan Amendment ("PMPA"), if required and a Coastal Development Permit ("CDP") for the Proposed Development ("Discretionary Actions"). No approval of the Discretionary Actions shall be approved or deemed to be approved by the District or the Board, until after the CEQA analysis for the same and the Proposed Development is considered and approved by the District or Board in accordance with the requirements of CEQA. The Parties also acknowledge and agree to the following terms and conditions:

a. Preparation of a PMPA, CDP and CEQA analysis by a Consultant (defined below). If deemed necessary by the District, in its sole and absolute discretion, a PMPA and CDP under the Coastal Act for the Proposed Development may be required. CEQA analysis shall also be required. The District, in its sole and absolute discretion, may have the CEQA analysis, PMPA or CDP prepared by one or more private firms (collectively, "Consultant") under a three-party agreement executed by the District, Developer and the Consultant. If the District decides that such a three-party agreement is required, Developer shall enter into said agreement. The Parties intend that the three-party agreement include, at a minimum, the following provisions:

i. Developer agrees to pay for all of the District's Consultant cost, including, without limitation, the Consultant fees for preparing the CEQA analysis, PMPA, or a CDP and obtaining California Coastal Commission ("Coastal") approval of said entitlements, and any other required entitlements; and

ii. Developer will directly pay such costs as they are incurred within 30-days after Developer receives written request for payment from either the District or the Consultant. Developer shall fully and timely cooperate with the District and, if applicable, the Consultant, in furnishing information required for the District's consideration of its approval of the CEQA analysis, PMPA or CDP and the District's efforts to obtain approvals from the Coastal. Said cooperation shall

include, without limitation, submitting necessary and useful information at the request of the District or the Consultant and attending and presenting at community workshops or other public forums where issues relating to the CEQA analysis, PMPA, CDP or other entitlements are discussed. Developer shall have the right to review all costs including third party studies and documents and protest any unreasonable fees. Notwithstanding the above, if this Agreement is terminated, Developer shall have no liability to pay any future costs or expenses incurred pursuant to this Section 14(a) after the date of termination of the Agreement, but shall pay all costs and expenses up to the date of termination. Prior to incurring any fees, the District shall provide Developer with an estimate of the fees.

b. Review and Approval of the CEQA Analysis, PMPA, CDP and Proposed Development. The Parties agree and acknowledge that an approval of a project under CEQA Guideline Sections 15352 and 15378 has not occurred by the District's approval of this Agreement. The CEQA analysis, Discretionary Actions and Proposed Development may be reviewed and considered by the Board, in its sole and absolute discretion and the Parties acknowledge and agree that this Agreement is not and does not guarantee approval of the CEQA analysis, required findings, including without limitation a Statement of Overriding Considerations, a Mitigation Monitoring Reporting Program ("MMRP") or any permits, entitlements (including, without limitation, the Discretionary Actions), improvements or other projects (collectively, "Required Approvals") for the Proposed Development or the Proposed Development itself as contemplated by this Agreement or otherwise. The Parties further agree and acknowledge that the Board and District retain sole and absolute discretion to, among other things:

i. prepare, adopt, or disapprove an exemption, a Mitigated Negative Declaration ("MND") or an Environmental Impact Report ("EIR"), pursuant to CEQA for the Proposed Development, Discretionary Actions and other required permits and entitlements required to carry out the Proposed Development or any other project proposed by Developer on the Property;

ii. adopt, condition or disapprove any and all projects including, without limitation, any and all of the Required Approvals or the Proposed Development;

iii. adopt any and all feasible mitigation measures to lessen potentially significant environmental impacts from any project, including the Proposed Development;

iv. modify any project, including the Proposed Development, adopt any alternatives to the same, including the "no project" alternative, and adopt or refuse to adopt a Statement of Overriding Consideration, if applicable, in connection with the CEQA process.

Developer acknowledges that this Agreement shall not be construed as a direct or indirect commitment by the Board, the District or any other entity to take or to not take any action, whether under CEQA, the Coastal Act or otherwise, in connection with the Required Approvals or the Proposed Development or any other projects related to matters set forth in this Agreement or otherwise. Additionally, the Parties acknowledge and agree that the Discretionary Approvals and other permits, entitlements or project approvals shall not be presented to the District or Board for approval unless and until all environmental review under CEQA has been conducted and approved. Developer shall have no claim, cause of action, or right to compensation or reimbursement from District if the Proposed Development or Required Approvals are not adopted for any reason or an alternative, including the no project alternative is adopted, or if adopted, the item is subject to the performance of certain additional conditions or mitigation measures.

Developer fully assumes all the risk that the District, the Board or Coastal will not approve or adopt any or all of the Required Approvals or will impose conditions and mitigation measures to the Required Approvals or select an alternative, including the no project alternative. This Section 14 shall survive the expiration or earlier termination of this Agreement.

15. ATTORNEYS' FEES. In the event of any dispute between the Parties hereto 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 recover reasonable expenses, including attorneys' fees and costs.

16. ASSUMPTION OF RISK. The District and Developer each assume the risk that, notwithstanding this Agreement and good faith negotiations, the District and Developer may not enter into any Definitive Agreement due to their failure to

agree upon essential terms, the type of Definitive Agreement, the Definitive Agreement or any CEQA analysis required in connection with the foregoing and the Proposed Development. Accordingly, except as specifically set forth in this Agreement, neither Party will have any liability to the other in the event that the Parties are unable to agree upon the essential terms or to enter into any Definitive Agreement.

17. **ENTIRE AGREEMENT.** 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 between the Parties or their predecessors in interest with respect to all or any part of the subject matter hereof.

18. **TIME IS OF THE ESSENCE.** Time is of the essence with respect to all the express conditions contained herein.

19. **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 the 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.

20. **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.

21. **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 laws of the State of California.

22. **DISTRICT'S RIGHT TO USE PROPERTY.** Developer acknowledges that until such time as a lease is executed by the Parties, the District shall have the right, in its sole and absolute discretion and without consent of Developer, (a) to use, operate, manage or lease all or any portion of the Property itself or through a third party (which may include Developer, 1HWY1 or one of its affiliates) for any and all legal uses, including, without limitation, any Interim Uses, (b) to construct or to permit construction of infrastructure on the Property, including, without limitation, realignment of streets, and repaving and restriping of the parking, (c) to

demolish, or to permit demolition, of any improvements on the Property, (d) to construct, or to permit construction, on the Property, including, without limitation, tenant improvements, as may be needed, in the sole and absolute discretion of the District, to continue the operation of the Property after the expiration or earlier termination of any lease, permit, license, easement or other agreement with any third party or as required by any lease, permit, license, easement or other agreement with any third party, (e) to convey portions of the Property and/or grant easements in the Property to the City of San Diego or to any public or quasi-public entity or to any utility, as necessary or desirable for the development of the Property, (f) to issue temporary licenses or other grant of access rights to the Property to the City of San Diego and/or to any other third party, as necessary or desirable for the development of utilities and infrastructure on, above or under the Property; and/or (g) to amend, modify, or terminate any of the leases, permits, easements, licenses or other agreements related to the Property, and none of the foregoing shall be deemed a breach by the District of its obligations to negotiate set forth in Section 2. Notwithstanding the foregoing, the District shall, except with regard to any agreements related to or resulting from RFP 17-52ME (Waterfront Retail Opportunity):

i. provide Developer with written notice if the District enters into a lease, temporary use and occupancy permit, or easement following the Effective Date of this Agreement granting rights to use or occupy some or all of those portions of the Property excluding the Fish Market and the Headquarters leaseholds ("Notice Property") in excess of 1 year but less than 3 years; and

ii provide Developer with written notice ten (10) days' prior to entering into any lease, temporary use and occupancy permit, or easement granting rights to use or occupy some or all of the Notice Property in excess of three years to allow Developer to object to such lease, temporary use and occupancy permit, or easement within five (5) days of receiving District's notice and if Developer objects within the five (5) days, District shall reasonably consider Developer's objection prior to entering into such lease, temporary use and occupancy permit, or easement.

23. CONSENT/APPROVAL. Except as expressly provided elsewhere in this Agreement, wherever in this Agreement the consent or approval of the District, the Board, the Executive Director of the District, Developer or any of their designees is required, such consent or approval may be given or denied in the

sole and absolute discretion of the person or party to which such discretion is given.

24. **COMPUTATION OF TIME PERIODS.** If any date or time period specified in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, or on a day that the District is closed as part of an alternative work week, such date will automatically be extended until 5:00 p.m., Pacific Time, of the next District business day or of the next day which is not a Saturday, Sunday or federal, state or legal holiday.

25. **NO WAIVER.** The waiver or failure to enforce any provision of this Agreement by a Party will not operate as a waiver of such Party's right to enforce future defaults or breaches of any such provision or any other provision of this Agreement.

26. **PARTIAL INVALIDITY.** If any portion of this Agreement is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, that portion will be deemed severed from this Agreement and the remaining parts of this Agreement will remain in full force as fully as though the invalid, illegal, or unenforceable portion had never been part of this Agreement.

27. **AMBIGUITIES NOT HELD AGAINST THE DRAFTER.** This Agreement has been freely and voluntarily negotiated by all Parties and the Parties are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and that the decision of whether or not to seek the advice of counsel with respect to this Agreement is a decision which is the sole responsibility of each of the Parties. This Agreement shall not be construed in favor of or against either Party by reason of the extent to which each Party participated in the drafting of the Agreement.

28. **CAPACITY OF PARTIES.** Each signatory and Party to this Agreement warrants and represents to the other Party that it has the legal authority, capacity and direction from its principal(s) to enter into this Agreement and that all necessary resolutions, ordinances or other actions have been taken so as to enter into this Agreement.

29. **AMENDMENT TO THIS AGREEMENT.** Except as set forth in Section 2(b), the terms of this Agreement may not be modified or amended except by an instrument in writing executed by each of the Parties and if applicable, approved by the District.

30. **NO BROKER.** Developer represents and warrants that it has not engaged any broker, agent, or finder in connection with this Agreement and Developer agrees to hold the District and its representatives harmless from any losses and liabilities arising from or in any way related to any claim by any broker, agent, or finder retained by Developer, regarding this Agreement, the Definitive Agreement or the lease or development of the Property.

31. **NO AGREEMENTS WITH THIRD PARTIES.** Developer acknowledges and agrees that this Agreement does not grant, convey, or provide Developer with any interest, including without limitation, a possessory interest, in any portion of the Property. Developer shall not enter into or cause or direct any person or entity to enter into, any agreement with any person or entity related to the Property or this Agreement that (i) binds, or has the effect of binding, the District or any portion of the Property; (ii) clouds, or has the effect of clouding, title to the Property, including without limitation, any encumbrances or liens; or (iii) continues beyond the expiration of the Negotiating Period or earlier termination of this Agreement. Developer agrees to provide District at its regular coordination meetings with District staff a list of the meetings Developer anticipates it or its representatives will have before the next scheduled coordination meeting with any government entity or agency (excluding the District), the San Diego Foundation and District tenant(s) regarding the Proposed Development; and District shall advise Developer or Developer's representative at such coordination meeting which meeting or meetings the District desires to attend in person or by phone at no cost to Developer; provided, however, the District shall have the right to recover costs permitted under Section 9 of this Agreement, Board of Port Commissioners Policy No. 106 and pursuant to any other fee agreement entered into with Developer . If District identifies any such meeting that it wishes to attend in person or by phone, then Developer and District shall reasonably coordinate schedules so that one or more District representatives may attend in person or by phone. For purposes of clarity, the Developer's requirement to provide advance notice to the District regarding meetings with governmental entities or agencies do not apply to (i) general information, record, data or file requests to governmental entities or agencies except for State Lands Commission, California Coastal Commission, and San Diego Regional Airport Authority, or (ii) general information, record, data, file reviews as part of the City of San Diego Development Review Process. Notwithstanding anything in Section 13 to the contrary, Developer shall indemnify the District for all costs and expenses, including without limitation, any and all damages and/or monetary relief (whether based in contract or in tort), including, without limitation, any right

to claim direct, compensatory, reliance, special, indirect or consequential damages with respect to or arising out of Developer's breach of this Section 31. This Section 31 shall survive the expiration or earlier termination of this Agreement.

32. **NO RELATIONSHIP**. Developer and any agent, employee, or contractor of Developer shall act in an independent capacity and not as agents, officers or employees of the District. The District assumes no liability for Developer's actions and performance, nor assumes responsibility for taxes, bonds, payments or other commitments, implied or explicit by Developer. Developer shall not have authority to act as an agent on behalf of the District unless specifically authorized to do so in writing. Developer shall make clear to third parties that Developer is not an agent, employee, or independent contractor of the District. Nothing in this Agreement shall be deemed to create any form of business organization between the parties, including, without limitation, a joint venture or partnership.

33. **OFAC COMPLIANCE.** Developer represents and warrants to the District that (i) Developer and each person or entity owning an interest in Developer is not now, and shall not during the Negotiating Period become, a person or entity with whom District 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 ("OFAC") and/or on any other similar list pursuant to any authorizing statute, executive order or regulation, nor a Person (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, (ii) none of the funds or other assets of Developer constitute property of, or are beneficially owned, directly or indirectly, by any Prohibited Person, (iii) no Prohibited Person has any interest of any nature whatsoever in Developer (whether directly or indirectly), (iv) 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 (v) Developer has

implemented procedures, and will consistently apply those procedures, to ensure the foregoing representations and warranties remain true and correct at all times.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and the year written below.

APPROVED AS TO FORM AND LEGALITY:
GENERAL COUNSEL

By: _____
~~Assistant~~ Deputy

SAN DIEGO UNIFIED PORT DISTRICT,
a public corporation

By: _____
Tony Gordon,
Director,
Real Estate

Dated: 10/2/2017

PROTEA WATERFRONT DEVELOPMENT, LLC, a California limited liability company

By: _____
Signature

PRINT NAME: Yehudi Gefen

PRINT TITLE: CEO

DATED: September 28, 2017

SDUPD Docs No. ~~1196134~~ 1198108

(17)

Document No. 72137
Filed 1/11/2021
Office of the District Clerk

AGREEMENT FOR AMENDMENT OF EXCLUSIVE NEGOTIATING AGREEMENT AMENDMENT NO. 1

THIS AGREEMENT FOR AMENDMENT OF EXCLUSIVE NEGOTIATING AGREEMENT AMENDMENT NO. 1 ("**AMENDMENT NO. 1**") is made and entered into this **5** day of **January 2021**, ~~2020,~~ by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter called "District," and 1HWY1, LLC, a Delaware limited liability company, hereinafter called "1HWY1" or "Developer," WITNESSETH:

WHEREAS, District and 1HWY1 entered into that certain Exclusive Negotiating Agreement dated as of October 2, 2017 ("**ENA**") related to certain property located in the City of San Diego, California as more particularly described therein, which ENA is on file in the Office of the Clerk of District bearing Document No. 67343; and

WHEREAS, Section 2(b) of the ENA grants the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, the right to extend the Negotiating Period (as such term is defined in the ENA) in writing by 90-day increments for a total Negotiating Period not to exceed 5 years; and

WHEREAS, on September 24, 2018, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the deadline to submit the Project Description (as defined in the ENA) and Project Pro Forma (as defined in the ENA) to December 31, 2018; and

WHEREAS, on December 7, 2018, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the deadline to submit the Project Description and Project Pro Forma to March 31, 2019; and

WHEREAS, on March 26, 2019, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the deadline to submit the Project Description and Project Pro Forma to June 29, 2019; and

WHEREAS, on September 19, 2019, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to December 31, 2019; and

WHEREAS, on December 18, 2019, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to March 30, 2020; and

WHEREAS, on March 27, 2020, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to September 26, 2020; and

WHEREAS, on September 14, 2020, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to March 27, 2021; and

WHEREAS, District and 1HWY1 would now like to further extend the Negotiating Period to allow for continued due diligence and refinements to the Proposed Development, modify the termination provision under the ENA, and describe the additional submittals needed from

1HWY1 before the Proposed Development can be presented to the Board of Port Commissioners for approval to commence environmental review under CEQA; and

WHEREAS, 1HWY1 submitted a Project Description and Project Proforma to the District on June 29, 2019, which Project Description was supplemented on August 2, 2019; and

WHEREAS, on August 21, 2020, the District submitted the Project Description to the State Lands Commission and requested a preliminary Public Trust Doctrine consistency review of the Proposed Development; and

WHEREAS, the District and 1HWY1 are now mutually desirous of amending said ENA.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, said ENA is hereby amended in the following respects only and no others, and except as expressly amended, all terms, covenants and conditions of said ENA shall remain in full force and effect:

A. Said ENA is hereby amended by deleting Section 2(a) in its entirety and replacing it with the following Section 2(a):

"a. **Period of Negotiations**. The negotiating period shall commence on October 2, 2017 ("Effective Date") and shall end on October 1, 2024 ("Negotiating Period")."

B. Said ENA is hereby amended by deleting Section 2(b) in its entirety and replacing it with the following Section 2(b):

"b. **Extensions**. Notwithstanding the foregoing, upon the written request of the Developer or at the election of the Executive Director of the District, the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, may extend, without the approval of the Board, the deadlines for the delivery of the submittals described in Section 6 and Section 6.1 in writing by up to 180 day increments at a time provided that the Negotiating Period does not extend beyond October 1, 2024 ("Original Expiration Date"). In addition, upon written request of the Developer, the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, may extend the Negotiating Period by up to an additional year not to exceed October 1, 2025 without the approval of the Board; provided, however, the Executive Director of the District, on behalf of him/her and his/her designees, reserves the right, and Developer acknowledges and agrees that the Executive Director of the District and his/her designees have the right, to require the Developer to pay the District a non-refundable extension fee as a condition precedent to each time the Executive Director of the District or his/her designee grants an extension of the Negotiating Period to Developer between the Original Expiration Date and October 1, 2025, that if exercised by the Executive Director of the District or his/her designee, shall be based on the fee adopted by the District through administrative policy, Board Policy, or ordinance for the extension of the term of an agreement, and if such adopted fee does not exist, in such amount as shall be negotiated by the Parties at the time the request for extension is made to the Executive Director of the District or his/her designee. In no event shall the Developer deliver to the District written notice of its request for an extension later than the

applicable expiration of the applicable and then existing Negotiating Period or submittal deadline under Section 6 or Section 6.1. If the District grants an extension of the Negotiating Period and/or the submittal deadline(s), the Negotiating Period and/or the submittal deadline(s), as applicable, but subject to the District's receipt of an extension fee (if applicable), shall be automatically extended to include such extensions granted by the Executive Director of the District and/or his/her designee upon the delivery of notice to the Developer and without further amendment to this Agreement. The District undertakes no commitment or obligation to the Developer to grant any extensions and shall incur no liability to the Developer resulting from the election to extend or not extend the Negotiating Period or submittal deadlines nor its election to extend or not extend the Negotiating Period or submittal deadlines for period(s) less than 180 days at a time."

C. Said ENA is hereby amended by deleting Section 3 in its entirety and replacing it with the following Section 3:

"3. **RIGHTS TO TERMINATE**. In addition to each Party's right to terminate this Agreement in accordance with Section 13 for an Uncured Default, the District and the Developer shall each have the 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 is not feasible. For purposes of this Section 3, the phrase "not feasible" may be interpreted by the terminating Party, in its sole and absolute discretion, to mean one or more of the following potential factors, among others: (i) the Proposed Development does not comply with the Public Trust Doctrine, the Coastal Act, or any other federal, state, or local law, policy, ordinance, regulation, or requirement, including without limitation those of the District; (ii) the Proposed Development cannot be financed without a financial subsidy from the District; (iii) the minimum rent proposed by Developer is less than $22.5M in Year 8 of stabilization for the Proposed Development; (iv) the Developer is unable to secure financing sufficient to complete construction of the Proposed Development; (v) adverse changes to the financial capacity of Developer; (vi) an Uncured Default by the non-terminating Party, or (vii) any other reason the result of which is that the Party will be adversely affected economically. If a Party makes a determination that the Proposed Development is not feasible and desires to terminate the Agreement, the terminating Party shall provide written notice to the non-terminating Party of such determination; provided, that, if the terminating Party is terminating under Section 13 for an Uncured Default or because the Proposed Development is "not feasible" under (vi) above, the terminating Party need only follow the procedures set forth in Section 13 to terminate the Agreement without consultation from the Board required herein or the meet and confer process set forth in the last two sentences of this Section 3. Except as provided in the foregoing sentence, the District shall consult with the Board prior to delivering a notice of such determination to Developer. Within forty-five (45) days after delivery of such notice by either Party, the Parties shall meet to discuss the termination, but without commitment to withhold, waive or reverse its termination request. On the date of the meeting, or within five (5) business days following the meeting, the terminating Party shall confirm in writing to the other Party whether it still desires to terminate the Agreement and if the terminating Party elects to terminate the Agreement, the Negotiating Period and this Agreement shall automatically terminate on the date of the meeting (if notice is delivered on such date) or on the date of delivery of written notice of such election to the non-terminating

Party after the meeting and, except as set forth in Section 11(e), neither Party shall have any further rights, remedies or obligations to the other Party under the Agreement and the Parties shall each be relieved and discharged from all further responsibility or liability under this Agreement."

D. Said ENA is hereby amended by adding Section 6.1 as follows:

"**6.1 POST-DELIVERY OF PROJECT DESCRIPTION SUBMITTALS.** Submittal by Developer of the deliverables listed in this Section 6.1 is necessary to further refine the Proposed Development prior to conducting CEQA review and to advance the Parties' negotiations of the economic terms for the Definitive Agreement. Accordingly, Developer shall deliver to the District the following submittals specified in Sections 6.1(a), 6.1(b), 6.1(c), 6.1(d), 6.1(e) and 6.1(f) below no later than December 31, 2021. The District reserves the right to request periodic updates to the materials submitted by Developer under Sections 6.1(a)-(f) below due to changes in the Proposed Development during the Negotiating Period. In addition to the information requested in 6.1(a)-(f) below, Developer acknowledges and agrees that the District reserves the right at any time to reasonably request from the Developer additional information related to the Proposed Development. Developer shall from time to time submit updates or supplements to any materials previously submitted to the District in response to questions or comments from the District and may from time to time submit general updates on matters related to the Property or the Proposed Development. In the event that Developer is required to make changes to the Proposed Development in order to prevent the Proposed Development from being not feasible (as defined in Section 3), the Developer shall submit written documentation advising the District of any changes to the Proposed Development, including but not limited to, changes to Programmatic Components to clearly identify and reflect changes to the scope, scale or location of the Proposed Development for the District's consideration and approval. The Developer acknowledges and agrees that the District's consideration of any proposed changes to the Proposed Development shall not limit, modify, or amend the Executive Director's, or his or her designee's, right to terminate this Agreement under Section 3. The Executive Director of the District, or his or her designee, shall have the authority to determine in his or her sole and absolute discretion whether any of the submittals delivered by Developer under Section 6 and Section 6.1 satisfactorily meet the requirements specified in Section 6 and Section 6.1, as applicable, and shall have the authority to waive, modify, or substitute any of the requirements under Section 6 and Section 6.1, without amendment to this Agreement or the consent or approval of the Board. Notwithstanding the foregoing, the Executive Director may elect, in his or her sole and absolute discretion, to consult with the Board prior to determining whether any deliverables under Section 6 and Section 6.1 satisfactorily meet the requirements of Section 6 and Section 6.1, as applicable, or waiving, modifying, or substituting any of the requirements under Section 6 and Section 6.1. Once all of the deliverables set forth in Section 6 and Section 6.1 have been submitted and the District, in its sole and absolute discretion, has deemed the submittals to satisfactorily meet the requirements specified in Section 6 and Section 6.1, the Parties will commence negotiations of a non-binding term sheet; provided that the Executive Director of the District, or his or her designee, may in his or her discretion elect to commence negotiation of such non-binding term sheet at an earlier date. Once negotiated, the non-binding term sheet may

be the basis for the economic terms of any Definitive Agreement entered into by the Parties pursuant to this Agreement.

a. Project Description for CEQA. A project description shall be a concise written description of the Proposed Development with sufficient detail to understand the Proposed Development and related Programmatic Components in order and to start the environmental review in accordance with CEQA. At a minimum, the initial submission by the Developer shall include the following:

A project description shall include detailed narratives and exhibits for each of the Programmatic Components proposed to be developed on the Property, as applicable:

- Total site area including land and water;
- Building dimensions, including square footages, heights, and number of floors;
- Land and water areas devoted to specific uses;
- Number of hotel rooms (overall and by each hotel);
- Building materials to be used and type of construction;
- Vehicle site access and internal circulation;
- Parking details, including number of proposed parking spaces for each use and locations;
- Number and size of boat slips and moorings, if applicable;
- Public docks;
- Removal of any in-water components and structures;
- Square footage of overwater coverage ("shading") and occupied water column or pilings' footprints ("fill" as defined by the Coastal Act);
- Massing diagrams from public viewing areas;
- Comparison diagrams of the proposed development profile against existing development, including existing and proposed grades;
- View corridors from North Harbor Drive, Pacific Highway, Kettner Boulevard, and waterfront promenades and parks;
- Location, size and characteristics of each public open space and park (categorized by on-grade and above-grade);
- Summary of signage (private signage and public wayfinding);
- Summary of lighting planned for each Programmatic Component;
- Public access and activation description that demonstrates how the development will provide, manage, and report on access and activation to the general public throughout the site (including water and land uses), including areas and/or amenities offered to the general public free-of-charge, at low-cost, and at market-rate;
- Description and location of any other public amenities; and any proposed land and water infrastructure improvements; and
- Proposed relocation of utility improvements and facilities (on and off-site) including electric power, natural gas, water, wastewater, stormwater, solid waste, telecommunications, and renewable energy.

At a minimum, a project description shall include the following construction information, as applicable:

- Land and water construction information, including without limitation the length and phasing of demolition and construction;
- Construction methods and equipment to be used;
- Anticipated import and export of dirt and proposed disposal site(s);
- Anticipated temporary stockpiling (anticipated duration, location and height);
- Haul routes; and
- Description and location(s) of any impacted public access areas including parks, promenades, and parking.

At a minimum, a project description shall include sufficient information related to:

- Sea-level rise based on the best available science;
- Geologic safety;
- An obstruction evaluation (determination of no hazard to air navigation) provided by the federal aviation administration (FAA) for construction cranes and permanent structures (see FAA 7460 guide);
- Site drainage including on and off-site; and
- Estimates on the anticipated amounts used/generated at full-build out: electricity, natural gas, water, wastewater, and solid waste.

A project description shall include a listing of all proposed uses on the site and a consistency statement that all proposed uses and improvements are in compliance with the Public Trust Doctrine and the Coastal Act.

- A project description shall be accompanied by conceptual drawings for the overall Proposed Development and shall also be accompanied by conceptual drawings for each Programmatic Component.

Conceptual drawings and information shall be in sufficient detail to clearly illustrate the Proposed Development and, at a minimum, shall include the following:

- Site and Floor Plans: Site plans shall illustrate a comprehensive overview with sufficient detail to understand the scope of the entire Proposed Development on land and in water, and shall at a minimum clearly identify locations and size of building footprints for each Programmatic Component, areas proposed for public space, and parking area layouts with estimated parking space counts and vehicular and pedestrian access. The site plan shall clearly distinguish area allocations among proposed uses, including commercial uses, Public Trust Doctrine compliant uses, and water side uses (recreational vs commercial fishing uses), in addition to service delivery, parking, circulation, view corridors, boat slips, public docks, stormwater outfalls, public areas, and public infrastructure. Site plan and floor plans for each Programmatic Component, as applicable, that includes typical floor plans, subterranean levels, and roof plans. Detailed floor plans are not required; however, general outlines and perimeter information to collaborate illustrated elevations must be provided (locations of windows, doors, shear walls, etc.). Additional plans shall

be included showing conceptual construction phasing, staging, laydown, and haul routes for the course of anticipated development; description and location(s) of any impacted public access areas including parks, promenades, and parking; and alternate temporary public access to be provided during construction.

- Elevations: Initial colored architectural exterior elevations that provide a comprehensive view of the entire Proposed Development and illustrate proposed building massing, height, materials and colors, primary exterior lighting, roof-mounted mechanical and telecommunication equipment, and related architectural elements. Elevations must match rendering on perspective drawings. Elevations for each building face and enlarged elevations for all building frontages shall be included. All elevations should identify base datum used in height measurements.
- Context and Perspective Drawings: A series of colored renderings and/or drawings approximately thirty inches (30") by forty-two inches (42") that sufficiently provide a representative illustration of the Proposed Development, clearly showing massing and the relationship of the Proposed Development in context to its surrounding environment with the adjacent building masses roughed in. Additional comparisons of the Proposed Development profile against existing development shall be included. Context elements do not need to be photo realistic but must accurately convey the bulk, scale, and character of the surrounding area with an emphasis on perspectives from key public viewing locations. The Developer shall include nighttime renderings for the overall Proposed Development.

- Digital Format: All conceptual drawings described in this Section 6.1 shall also be submitted in high resolution digital format(s) in addition to or as an alternative to the format(s) described above.

- General Requirements: All conceptual drawings, including site and floor plans, elevations, and sections must be legible, drawn to scale, and be fully labeled and dimensioned and shall include the date of plan preparation. Plans should typically orient north up, one plan, elevation or perspective per sheet (other than those floor plans noted as "typical").

During the CEQA process the following items, at a minimum, will be required to conduct the environmental analysis and data, if any, and shall be provided by the Developer within thirty (30) days of request by the District:

- Public access and activation plan/program that demonstrates how the development will provide, manage, and report on access and activation to the general public throughout the site (including water and land uses), including areas and/or amenities offered to the general public free-of-charge, at low-cost, and at market-rate;
- Proposed stormwater best management practices (BMPs);
- Shoring information (temporary and permanent);
- Estimated number and location of construction-related parking spaces;
- Estimated number of daily vehicle (e.g., workers, site supervisors, etc.) and truck (e.g., construction equipment, deliveries, etc.) trips anticipated to occur at the height

of construction (Note: one vehicle arriving and departing the site is considered two trips);

- Alternate temporary public access to be provided during construction;
- Estimated amount of construction-related debris including percent to be recycled and anticipated disposal site(s);
- Construction laydown area and locations;
- An eelgrass survey, including amounts and locations;
- A Public Access and Activation Plan that demonstrates, conceptually, how the Proposed Development will provide, manage, and report on public access and activation (including plazas, promenades, and other areas) available to the general public throughout the site. The plan shall describe areas and/or visitor-serving amenities offered to the general public free-of-charge, at low-cost, and at market-rate, including physical improvements, services, and event programming. The plan shall also include key locations for public wayfinding signage; descriptions and locations for multi-modal access to the site including but not limited to parking, transit, vehicle drop-off, bicycle, pedestrian, and shuttle service.
- Conceptual Transportation Demand Management Plan (TDM) that considers existing off-site conditions that affect travel demand including street and freeway access, transit services, bicycle and pedestrian facilities; TDM program strategies for the Proposed Development such as accessibility, curbside management, bicycle and pedestrian connections, bicycle parking, electric vehicle parking and charging, parking policies, commute trip reduction, transit incentives, transit system improvements, on-site TDM coordinator, etc.
- Parking analysis shall provide a sufficient determination of parking requirements based on Proposed Development uses, transit services, and public amenities.
- Site plan and floor plans for each Programmatic Component, as applicable, that includes all levels (do not duplicate identical floor plans), subterranean levels, and roof plans; and
- Proposed colors and materials for structures.

Additional information and data may be requested by the District, in the District's sole and absolute discretion, which shall be provided by Developer, to enable the District to conduct CEQA review, including compliance with the Public Trust Doctrine and the Coastal Act. Developer shall use reasonable diligence to provide the requested additional information within thirty (30) days of obtaining the request.

b. Updated Pro Forma. Concurrently with the submittal of a project description described in Section 6.1(a), Developer shall submit an updated and complete cost estimate and pro forma financial analysis consistent with the requirements outlined in Section 6(d)(i)-(xviii), but based on the project description submitted under Section 6.1(a) ("Updated Pro Forma").

c. Development Phasing Plan. Concurrently with the submittal of a project description described in Section 6.1(a), Developer shall submit a detailed development phasing plan for the Proposed Development, that includes without

limitation, an outline of when each Programmatic Component and infrastructure of the Proposed Development will be constructed.

d. Final Market Demand and Feasibility Study. Concurrently with the submittal of the Updated Pro Forma, Developer shall submit an updated Market Demand and Feasibility Study consistent with the requirements outlined in Sections 6(a)(i) and 6(a)(ii) that demonstrates support for the Proposed Development and validates the demand, revenue, expense, and development cost assumptions in the Updated Pro Forma.

e. Financing Strategy. Concurrently with the submittal of the Updated Pro Forma, Developer shall submit an outline of its financing strategy which shall include an analysis of its anticipated debt and equity requirements, a proposed financing structure and/or segmentation of future financing offerings (i.e., if financing is to be broken down by each Programmatic Component or blocks of a project description), a proposed leasing structure for each of the Programmatic Components detailing any proposed tenants or subtenants, and a list of milestones and corresponding dates that Developer will be tracking in order to effectively attract and secure financing partners and finance the Proposed Development (collectively, the "Updated Financing Plan"). Developer shall also include letters of interest from potential financing partners that Developer is considering as well as a detailed description of the proposed financing structure and funding responsibilities that will satisfy Developer's funding amounts necessary through the Negotiating Period.

f. Organization Chart. Concurrently with the submittal of the Updated Pro Forma, Developer shall submit a current organization chart for Developer and explain any proposed changes during the Negotiating Period."

E. Said ENA is hereby amended by deleting Section 7(b) in its entirety and replacing it with the following Section 7(b):

"**b. Transferable Products**. "Transferrable Projects" shall mean all drafts and final versions of any reports, studies, and surveys, or any other due diligence materials related to the Property (including any structures currently located thereon), generated by, or caused to be generated by, Developer and/or obtained by Developer from third parties, that pertain to the physical condition of the Property, such as soil reports, geotechnical reports, engineering reports, environmental or hazardous materials reports or studies, title reports and land surveys. Developer shall use commercially reasonable efforts to cause all contracts with its consultants and contractors for preparation of Transferable Products to require that such Transferable Products be prepared for the benefit of Developer and the District, and be transferable to and by the District in whole, and shall impose no restriction, cost or fee on the District, or the person or entity to which the District transfers the Transferrable Products, with respect to the transfer of such Transferable Products to or by the District or the use thereof by the District or any person or entity to which the District transfers the Transferrable Products. Upon termination of this Agreement with or without execution of a Definitive Agreement by the District and Developer, Developer shall be deemed to have transferred its interest in the Transferable Products to the District without representation or warranty except as

to the delivery of the most current complete form of the Transferable Products generated by Developer or caused to be generated by Developer, whereupon the Transferable Products shall become the property of the District and shall be delivered to the District immediately if not delivered in whole previously and the District shall have the right, in its sole discretion, to use grant, license, or otherwise dispose of such Transferable Products to any person or entity for future development of the Property or any other purpose at no cost or expense to the District; provided, however, that Developer shall have no liability whatsoever to the District or any transferee of title to the Transferable Products regarding the accuracy or breadth of any information contained in the Transferable Products or the use of the Transferable Products (except as it relates to the transferability of the Transferable Products by the Developer or third party and the delivery of the Transferable Products to the District in whole). As between Developer and the District, all Products other than the Transferable Products (the "Other Products") shall be and remain the sole property of Developer and will not be deemed to have been transferred to the District upon any termination of this Agreement; provided, that, nothing herein shall prohibit or limit the District's ability to disclose and provide copies of any of the Other Products to a third party as the District determines such disclosure and/or production is required in its sole and absolute discretion pursuant to the California Public Records Act or any other requirement under federal, state, or local laws, regulations, ordinances, requirements, or policies, including those of the District. This Section 7 shall survive the expiration or earlier termination of this Agreement."

F. Said ENA is hereby amended by deleting Section 11(e) in its entirety and replacing it with the following Section 11(e):

"e. **Termination and Survival Provisions.** Notwithstanding any other provision of this Agreement, this Agreement and its terms are binding on the Parties until this Agreement terminates and, further, the provisions of Section 7 (Developer's Findings, Studies and Reports), Section 9 (Costs and Expenses) (as it relates to the obligation of Developer to pay specified fees and costs incurred by the District), Section 13 (Remedies for Breach of Agreement), Section 14 (CEQA, Entitlements and Reservation of Discretion), Section 15 (Attorneys' Fees), Section 30 (No Broker), Section 31 (No Agreements with Third Parties), and Section 33 (OFAC Compliance) shall survive the termination of this Agreement and the Parties shall each remain liable with respect to each of such surviving provisions, as set forth in this subsection 11(e) for all obligations, fees, costs and expenses thereunder incurred during or as a result of matters arising during the Negotiating Period.

This Section 11 shall survive the expiration or earlier termination of this Agreement."

G. Said ENA is hereby amended by deleting Section 12 in its entirety and replacing it with the following Section 12:

"12. **DEFAULT.** Failure by either Party (a) to negotiate in good faith, (b) to negotiate exclusively, as provided in Section 2(c), or (c) perform any other of its obligations as provided in this Agreement, including without limitation, the delivery of the

submittals set forth in Section 6 and Section 6.1, shall constitute an event of default under 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 the default remains uncured for twenty (20) days after the date of such notice it shall be deemed an "Uncured Default", and the nondefaulting Party may terminate this Agreement as set forth in Section 13(a) of this Agreement."

H. Said ENA is hereby amended by adding the following as Section 13(d):

"d. **Indemnity**. Without limitation of the Developer's other obligations under this Agreement, the Developer agrees, at its sole cost and expense, to indemnify, defend and hold harmless the District and its officers, directors, commissioners, employees, partners, affiliates, agents, contractors, successors and assigns (collectively with the District, the "District Parties") from any claims, demands, actions, causes of action, suits (collectively, "Claims") and any costs, damages (of all kinds including punitive damage, diminution in value and loss of use), liabilities, expenses (including reasonable attorneys', consultants' and experts' fees), losses, fines, penalties and court costs related to the subject matter of such costs (collectively, the "Related Costs") and amounts paid in settlement of any claims or actions related to the subject matter of the Related Costs (as determined by the District), initiated, commenced, or filed by third parties arising out of:

(a) the performance by Developer of its obligations under the Agreement;
(b) any actions taken by the Developer or its officers, directors, employees, partners, affiliates, agents, contractors, successors and assigns (collectively, the "Developer Affiliates") in connection with this Agreement;
(c) the consideration or approval of the Agreement and any amendments to this Agreement;
(d) the consideration or approval of permits or approvals sought by or granted to the Developer or Developer Affiliates related to the Property or Proposed Development during the Negotiation Period, including, but not limited to, approvals or permits for any due diligence activities (collectively, "Related Approvals");
(e) the granting or failure to grant any amendments to the Agreement, Discretionary Actions or Related Approvals;
(f) the granting or failure to grant any extensions of the Negotiating Period or submittal deadlines under Section 6 and Section 6.1; and
(g) alleged non-compliance with CEQA or the National Environmental Policy Act for the Agreement, any amendments to the Agreement, the Proposed Development, Property, Related Approvals or Discretionary Actions.

The District shall 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 the defense of the District Parties from any Claims and the costs and expenses incurred by the District in such defense (including, without limitation, reasonable attorneys' fees and costs) shall be covered by the indemnification, hold harmless and defense obligations of Developer under this Section 13(d) and be subject to immediate payment once incurred. The District's participation in its defense of the District Parties from any Claims shall not relieve the Developer of any of its obligations under this Section 13. The terms of this Section 13 shall survive the expiration or earlier termination of this Agreement. The foregoing indemnity obligations of the

Developer are in addition to, and not in limitation of, any other indemnity obligations of Developer contained in this Agreement or otherwise."

I. Said ENA is hereby amended by deleting Section 14 in its entirety and replacing it with the following Section 14:

"**14. CEQA, ENTITLEMENTS AND RESERVATION DISCRETION.** This Section 14 shall apply notwithstanding any other provision of this Agreement; provided, that, if either Party terminates this Agreement pursuant to Section 3 or Section 13, Section 11(e) shall control as to the Parties remaining obligations under this Agreement. The Parties agree and acknowledge that compliance with CEQA is a legal precondition to the District's or Board's commitment or approval of any discretionary District action for a project that may result in a direct or indirect physical change to the environment, including, without limitation the Definitive Agreement, a Port Master Plan Amendment ("PMPA"), and a Coastal Development Permit ("CDP") for the Proposed Development ("Discretionary Actions"). No Discretionary Action shall be approved or deemed to be approved by the District or the Board, until after the CEQA analysis for the same is completed and the Proposed Development is considered and approved by the District or Board in accordance with the requirements of CEQA. The Parties acknowledge and agree that the District is in the process of updating the Port Master Plan ("Port Master Plan Update") and that a project Description for the Proposed Development, including land and water uses, is not sufficiently defined to include the Proposed Development in the Port Master Plan Update, and any Discretionary Actions for the Proposed Development shall be subject to the Port Master Plan then in existence and controlling as of the time the Discretionary Action is considered by the Board. The Parties also acknowledge and agree to the following terms and conditions:

a. Preparation of a PMPA, CDP and CEQA analysis by a Consultant (defined below). If deemed necessary by the District, in its sole and absolute discretion, a PMPA and CDP under the Coastal Act for the Proposed Development may be required. CEQA analysis shall also be required. The District, in its sole and absolute discretion, may have the CEQA analysis, PMPA or CDP prepared by one or more private firms (collectively, "Consultant") under a three-party agreement executed by the District, Developer and the Consultant. If the District decides that such a three-party agreement is required, Developer shall enter into said agreement. The Parties intend that the three-party agreement include, at a minimum, the following provisions:

i. District shall control and direct the Consultant without any influence from Developer; and

ii. Developer agrees to pay on the terms provided in the three party agreement for all of the Consultant cost, including, without limitation, the Consultant fees for preparing the CEQA analysis, PMPA, or a CDP and obtaining California Coastal Commission ("Coastal") approval of said entitlements, and any other required entitlements; and

iii. Developer will directly pay such costs as they are incurred within 30 days after Developer receives written request for payment from either the District or the Consultant. Developer shall fully and timely cooperate with the District and, if applicable, the Consultant, in furnishing information required for the District's consideration of its approval of the CEQA analysis, PMPA or CDP and the District's efforts to obtain approvals from Coastal. Said cooperation shall include, without limitation, submitting necessary and useful information at the request of the District or the Consultant and attending and presenting at community workshops or other public forums where issues relating to the CEQA analysis, PMPA, CDP or other entitlements are discussed. Developer shall have the right to review all costs including third party studies and documents and protest any unreasonable fees. Notwithstanding the above, if this Agreement is terminated, Developer shall have no liability to pay any future costs or expenses incurred pursuant to this Section 14(a) after the date of termination of the Agreement but shall pay all costs and expenses up to the date of termination. Prior to incurring any fees, the District shall provide Developer with an estimate of the fees.

b. Review and Approval of the CEQA Analysis, PMPA, CDP and Proposed Development. The Parties agree and acknowledge that an approval of a project under CEQA Guideline Sections 15352 and 15378 has not occurred by the District's approval of this Agreement. The CEQA analysis, Discretionary Actions and Proposed Development may be reviewed and considered by the Board, in its sole and absolute discretion, and the Parties acknowledge and agree that this Agreement is not and does not guarantee approval of the CEQA analysis, required findings, including without limitation a Statement of Overriding Considerations, a Mitigation Monitoring Reporting Program ("MMRP") or any permits, entitlements (including, without limitation, the Discretionary Actions), improvements or other projects (collectively, "Required Approvals") for the Proposed Development or the Proposed Development itself as contemplated by this Agreement or otherwise. The Parties further agree and acknowledge that the Board and District retain sole and absolute discretion to, among other things:

i. prepare, adopt, or disapprove an exemption, a Mitigated Negative Declaration ("MND") or an Environmental Impact Report ("EIR"), pursuant to CEQA for the Proposed Development, Discretionary Actions and other required permits and entitlements required to carry out the Proposed Development or any other project proposed by Developer on the Property;

ii. adopt, condition or disapprove any and all projects including, without limitation, any and all of the Required Approvals or the Proposed Development;

iii. adopt any and all feasible mitigation measures to lessen potentially significant environmental impacts from any project, including the Proposed Development; and

iv. modify any project, including the Proposed Development, adopt any alternatives to the same, including the "no project" alternative, and adopt or refuse to adopt a Statement of Overriding Consideration, if applicable, in connection with the CEQA process.

Developer acknowledges that this Agreement shall not be construed as a direct or indirect commitment by the Board, the District or any other entity to take or to not take any action, whether under CEQA, the Coastal Act or otherwise, in connection with the Required Approvals or the Proposed Development or any other projects related to matters set forth in this Agreement or otherwise. Additionally, the Parties acknowledge and agree that the Discretionary Actions and other permits, entitlements or project approvals shall not be presented to the District or Board for approval unless and until all environmental review under CEQA has been completed and certified. Developer shall have no claim, cause of action, or right to compensation or reimbursement from District if the Proposed Development or Required Approvals are not adopted for any reason or an alternative, including the no project alternative is adopted, or if adopted, the item is subject to the performance of certain additional conditions or mitigation measures.

Developer fully assumes all the risk that the District, the Board or Coastal will not approve or adopt any or all of the Required Approvals or will impose conditions and mitigation measures to the Required Approvals or select an alternative, including the no project alternative. This Section 14 shall survive the expiration or earlier termination of this Agreement."

J. Said ENA is hereby amended by deleting Section 15 in its entirety and replacing it with the following Section 15:

"**ATTORNEYS' FEES**. In the event of any dispute between the Parties hereto 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 losing party reasonable attorneys' fees and costs of suit, including, without limitation, any and all costs incurred in enforcing, perfecting and executing such judgment."

K. 1HWY1 hereby reaffirms all of the releases and waivers of 1HWY1, as the "Developer" (defined in the ENA), under or pursuant to the ENA, releases the District from any claims arising out of the ENA, waives the application and benefits of California Civil Code §1542, and verifies that it has read and understands the following provision of California Civil Code § 1542:

> "A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

UG
_____
1HWY1

L. Capitalized terms not defined herein shall have the meaning ascribed thereto in the ENA.

M. The Parties acknowledge that this Amendment No. 1 has been agreed to by both of the Parties, that both the District and 1HWY1 have consulted with attorneys with respect to the terms of this Amendment No. 1 and that no presumption shall be created against the drafting party. Any deletion of language from this Amendment No. 1 prior to its execution by the District and 1HWY1 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.

N. Developer acknowledges and agrees that the concurrence of the Executive Director or his or her designee with the terms and provisions of this Amendment No. 1 shall not be construed or interpreted as the District approving or accepting such terms and shall not be relied on by Developer.

O. This Amendment No. 1 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.

P. Each signatory and party to this Amendment No. 1 warrants and represents to the other party that it has the legal authority, capacity and direction from its principal(s) to enter into this Amendment No. 1 and that all resolutions, ordinances or other actions have been taken so as to enter into this Amendment No. 1.

Q. Time is of the essence with respect to all the express conditions contained herein.

R. This Amendment No.1 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 laws of the State of California.

S. The waiver or failure to enforce any provision of this Amendment No. 1 by a Party will not operate as a waiver of such Party's right to enforce future defaults or breaches of any such provision or any other provision of this Amendment No. 1.

T. If any portion of this Amendment No. 1 is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, that portion will be deemed severed from this Amendment No. 1 and the remaining parts of this Amendment No. 1 will remain in full force as fully as though the invalid, illegal, or unenforceable portion had never been part hereof.

U. Nothing in this Amendment No. 1, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Amendment No. 1 on any persons other than Developer and the District and their respective permitted successors and assigns, nor is anything in this Amendment No. 1 intended to relieve or discharge the obligation or liability of any third persons to any Party hereto, nor shall any provisions

give any third persons any right of subrogation or action over or against any Party hereto.

V. Except as modified by this Amendment No. 1, the ENA is hereby ratified and confirmed.

(Remainder of Page Intentionally Left Blank.)

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 1 as of the day and the year first above written.

APPROVED AS TO FORM AND LEGALITY:
GENERAL COUNSEL

By: Elizabeth Alonso
Assistant/Deputy

SAN DIEGO UNIFIED PORT DISTRICT,
a public corporation

By: _____
Tony Gordon
Director, Real Estate

1HWY1, LLC,
a Delaware limited liability company

By: Yehudi Gaffen
Signature

PRINT NAME: Yehudi Gaffen

PRINT TITLE: CEO