

AGREED MODIFICATIONS TO GROUND LEASE

THE STATE OF TEXAS §
 §
COUNTY OF NUECES §

THESE AGREED MODIFICATIONS TO GROUND LEASE are agreed to on _____, 2013, by and between the CITY OF CORPUS CHRISTI, a Texas home-rule municipal corporation, known herein as “Landlord,” and FDL – CC, LLC, a Texas limited liability company, known herein as “Tenant.” Landlord and Tenant are sometimes collectively referred to herein as the “Parties” and, in the singular, as a “Party.”

WITNESSETH:

WHEREAS, the Parties previously entered into that certain Ground Lease dated April 14, 2013 (the “Lease”), pursuant to which Landlord agreed, subject to the terms and provisions set forth therein, to lease such parcel of land to Tenant and to grant specified rights and privileges in connection therewith;

WHEREAS, in connection with Tenant’s financing of the development and construction contemplated under the terms of the Lease, Tenant’s lender has requested that certain modifications be made to the Lease in order to clarify the respective rights, duties and obligations of the Parties, insofar as the same affects or otherwise concerns the sublease of such parcel of land by the General Services Administration; and

WHEREAS, in furtherance thereof, the Parties now desire to modify certain terms and provisions of the Lease as hereinafter provided.

NOW, THEREFORE, for and in consideration of the premises and mutual covenants herein contained and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Conflicts with Government Lease. In the event of any conflict or inconsistencies between the terms, provisions and requirements of the Lease and the terms, provisions and requirements of the Government Lease with respect to the use and occupancy of the Premises and Tenant’s obligations to be performed under the Government Lease, the terms, provisions and requirements of the Government Lease shall govern and control; provided, however, in no event shall Tenant be excused from the payment to Landlord of any rents or other charges reserved under the Lease or from its goals to use local construction resources, as set forth in Section 1(c) of Exhibit A to the Lease. All rights, remedies and privileges afforded either Landlord or Tenant under the terms and provisions of the Lease (including those afforded to or exercisable by the Director on behalf of Landlord) shall in all events be subject to any limitations or restrictions thereon arising under or created by the terms and provisions of the Government Lease, so long as the Government Lease is in effect. Further, Tenant shall not be required to cause the Government-Tenant to obtain and maintain any insurance policies or coverage, to indemnify any Landlord-Related Party or to take any other action that is not addressed or otherwise contemplated under the terms and provisions of the Government Lease. In addition, in the event that the Government-Tenant shall fail to comply with any provisions of the Lease (including, without limitation, the terms and provisions of Sections 8, 21, 22 and 23), such failure shall in no event constitute or be deemed to be a default by Tenant under the Lease.

2. Conflicts with Construction Financing. The Parties acknowledge and agree that, notwithstanding anything to the contrary in the Lease, so long as the Premises is subject to a Leasehold Mortgage securing the repayment of the Construction Financing, Tenant shall be permitted to observe, perform and comply with each of the obligations required of Tenant under the terms and provisions of the Construction Financing and the Government Lease, and such observance, performance and compliance shall not constitute a default or render Tenant in default of the terms of the Lease, provided that Tenant (i) does not default in the payment to Landlord of any rents or other charges reserved under the Lease and (ii) otherwise complies with the terms and provisions of

the Lease. In any circumstance where both the terms of the Construction Financing and the terms of the Lease require Tenant to observe, perform or comply with any similar obligation (by way of example, the carrying of insurance or maintenance of the Premises), Tenant's obligations shall be deemed satisfied under both the Construction Financing and the Lease if Tenant observes, performs or complies with the greater or more stringent of the requirements of the two similar obligations. Tenant acknowledges and agrees that any right, privilege or benefit afforded Tenant under the terms of the Lease may not be exercised or enjoyed if such right, privilege or benefit is prohibited or otherwise limited or restricted under the terms of the Construction Financing or requires the prior consent of Tenant's Lender.

3. Definitions. Notwithstanding anything to the contrary in the Lease, the following terms shall have the following meanings rather than the meanings initially ascribed to them under the Lease:

a. "*Premises*" means that certain tract of land situated on and comprising a portion of the Airport, including any and all buildings, structures and other improvements now existing or hereafter constructed thereon, such land being more specifically described or depicted on Exhibit B attached to the Lease and incorporated herein for all purposes.

b. "*Subtenant*" means the Government-Tenant and, after the expiration or earlier termination of the Government Lease (including any renewals or replacements thereof), any other third party to whom the Premises has been subsequently subleased by Tenant (or by any Leasehold Mortgagee, in the event that such Leasehold Mortgagee has succeeded to the rights of Tenant hereunder) under the terms of an Approved Sublease.

c. "*Approved Sublease*" means the Government Lease and, after the expiration or earlier termination of the Government Lease (including any renewals or replacements thereof), any subsequent sublease agreement between Tenant (or any Leasehold Mortgagee, in the event that such Leasehold Mortgagee has succeeded to the rights of Tenant hereunder) and a third party for the sublease of the Premises which has been approved by Landlord in accordance with the terms of the Lease.

Unless otherwise specifically defined (or redefined) in this document, capitalized terms used in this document shall have the meanings ascribed to them in the Lease.

4. Term.

a. Notwithstanding anything to the contrary in the Lease, the initial term of this Lease shall begin on the Effective Date and shall end on the expiration of the fortieth (40th) year following the Government Lease Commencement Date under the Government Lease, unless earlier terminated by Landlord in accordance with the terms and conditions of this Lease. Promptly after the Effective Date, the Parties shall each execute a written agreement confirming the Effective Date and, promptly after the Government Lease Commencement Date, the Parties shall each execute a written agreement confirming the date on which the Lease is scheduled to expire.

b. Tenant shall have the right, benefit and option, to be exercised at its sole and absolute discretion, to terminate the Lease effective as of either (i) the twentieth (20th) anniversary of the Government Lease Commencement Date, (ii) the twenty-fifth (25th) anniversary of the Government Lease Commencement Date, (iii) the thirtieth (30th) anniversary of the Government Lease Commencement Date or (iv) the thirty-fifth (35th) anniversary of the Government Lease Commencement Date, any such termination to be effectuated by the delivery of written notice to Landlord of such termination at least six (6) months prior to the applicable anniversary on which Tenant desires to terminate the Lease; provided, however, if Tenant is then in negotiations with the Government-Tenant for the renewal or re-lease of the Government Lease, such termination notice to be provided by Tenant hereunder may be deferred until such time as the Government-Tenant affirmatively elects to not renew or re-lease the Government Lease, and the then applicable termination right shall be extended for a period of fifteen (15) days after such affirmative election by the Government-Tenant. Except for the deferral described above, if Tenant fails to timely terminate the Lease as provided herein, then Tenant shall be deemed to have

waived and released the then applicable termination right, it being agreed, however, that all subsequent rights of termination shall continue in full force and effect.

5. Base Rent. The Parties agree that, notwithstanding anything to the contrary in the Lease, (i) the Base Rent described in Section 4.a. (ii) of the Lease shall be applicable only during the initial term of the Government Lease, and (ii) the Base Rent described in Section 4.a. (iii) shall be applicable only to that portion of the term of the Lease occurring after the expiration of the initial term of the Government Lease. Promptly after the execution of the Government Lease, the Parties agree to execute a statement setting forth the annual Base Rent to be paid by Tenant under the Lease during the initial term of the Government Lease.

6. Percentage Rent. Notwithstanding anything to the contrary in the Lease, the Parties agree that the following terms shall have the following meanings rather than the meanings initially ascribed to them under the Lease (all other terms being defined in Section 4.b of the Lease remaining unchanged):

a. “*Net Profits*” shall mean, with respect to the applicable period for which such determination is being made, an amount equal to the remainder arrived at by subtracting (A) the sum of Operating Expenses, Cash Flow Reimbursements, Excess Rental Reimbursements, Reserve Replenishment, Capital Expenditures (but not Capital Expenditures that are to be paid from the Reserve Account or which are covered by insurance proceeds paid to Tenant) and debt service payments under the Construction Financing for such period from (B) Gross Revenues for such period.

b. “*Reserve Account*” shall mean a separately identified fund or account, initially funded by Tenant from Construction Financing in the amount of not less than One Hundred Thousand Dollars (\$100,000), as may be replenished from time to time, to be used for major maintenance or emergency capital replacements.

c. “*Reserve Replenishment*” shall mean, with respect to the applicable period for which such determination is being made, the amount necessary to either replenish or increase the Reserve Account and any other reserve required by the Construction Financing during such period in accordance with the Annual Budget.

d. “*Capital Expenditures*” shall mean, with respect to the applicable period for which such determination is being made, expenditures made by Tenant during such period in accordance with the Annual Budget or as otherwise required by the Government Lease that, for federal tax purposes, are not expensed but are capitalized.

7. Late Payments. Notwithstanding anything to the contrary in the Lease, payments required to be made by Tenant to Landlord under the Lease shall not be deemed late unless Tenant shall fail to make such payment within three (3) days after Landlord provides written notice to Tenant that a payment was not received on or before the due date therefor.

8. Budgeting, Reporting and Audit. Notwithstanding anything to the contrary in the Lease, the Parties agree that (i) the initial annual operating budget will include the initial funding of all reserve accounts, including the Reserve Account, required by the Construction Financing; (ii) Landlord may, within thirty (30) days after its receipt thereof, approve or disapprove of any proposed budget in whole or in part, except that Landlord shall not disapprove of amounts required to be paid pursuant to the Government Lease or pursuant to the Construction Financing; and (iii) if Landlord disapproves a part of any proposed budget and specifically approves the balance in writing, Tenant shall implement the approved portion. The Parties further agree that, if any audit and/or program review performed by Landlord under the terms of the Lease reflects that Tenant has overpaid Landlord, Landlord shall promptly reimburse Tenant for such overpayment; and if such audit and/or program review reveals that Tenant has underpaid Landlord, Tenant shall promptly pay Landlord the amount of such underpayment.

9. Use. The Parties agree that, notwithstanding anything to the contrary in the Lease, (i) the limitation on Tenant's use of the Premises solely for the construction and operation of the DHS Facilities shall be applicable only for so long as the Government Lease is in effect; and (ii) Tenant's obligation to observe, comply with and execute the provisions of any federal, state and municipal laws, ordinances, rules, regulations, requirements, orders and directions applicable to the use and occupancy of the Premises (collectively, "*Applicable Laws*") shall in all events be subject to the occupancy of the Premises by the Government-Tenant, and Tenant shall not be required to cause the Government-Tenant to observe, comply with and execute the provisions of any Applicable Laws.

10. Termination Rights. Notwithstanding anything in the Lease to the contrary, the Parties hereby agree that (i) Landlord shall not have the right to terminate the Lease at any time that the Government Lease is in effect or the Premises is subject to a Leasehold Mortgage, except (a) for Tenant's failure to pay of rent or other charges due under the Lease which continues beyond any required notice and applicable cure periods, or (b) in the event the Government Lease terminates due to casualty or condemnation; and (ii) if Tenant is in default of any term, provision, covenant or condition of the Lease which would permit Landlord to terminate the Lease, Landlord agrees that, before it exercises any right of termination hereunder, it shall give written notice to the Subtenant and Tenant's Lender in accordance with any NDA or SNDA executed by Landlord and the Subtenant or Tenant's Lender and the Subtenant and/or Tenant's Lender shall have the right to cure Tenant's default as set forth in the NDA or SNDA, respectively. In addition, the Parties further agree and stipulate that Tenant shall have no right to terminate the Lease at any time that the Premises is subject to a Leasehold Mortgage.

11. Leasehold Mortgages. Notwithstanding anything to the contrary in the Lease, the Parties agree that (i) any Leasehold Mortgagee entitled to notice hereunder shall have (a) any and all rights of Tenant with respect to the curing of any default hereunder by Tenant and (b) additional time to affect such cure as specified in an SNDA between the Leasehold Mortgagee and Landlord; (ii) the Parties must provide any Leasehold Mortgagee with notice of any proposed modification, it being agreed, however, that the material terms of the Lease will not be modified without the prior written consent of such Leasehold Mortgagee; and (iii) in the event that the Leasehold Mortgagee is entitled, under the terms of the Leasehold Mortgage, to take possession of the Premises, Landlord shall permit the Leasehold Mortgagee to take physical possession of the Premises, provided that all curable defaults under the Lease have been cured. In addition, the Parties agree that, notwithstanding anything to the contrary in the Lease, no Leasehold Mortgage shall affect or diminish Landlord's interest in the Premises or relieve Tenant of any of its obligations under the Lease, and in no event shall Landlord's interest in the Lease be subordinate to such Leasehold Mortgage.

12. Force Majeure. The Parties acknowledge and agree that the term "Force Majeure" under the Lease shall include any other act, event or circumstance specifically constituting force majeure under the terms of the Government Lease.

13. Damages. The Parties agree that, notwithstanding anything to the contrary in the Lease, in no event shall either Party be liable to the other, whether pursuant to an obligation of indemnity or otherwise, for any consequential, special or exemplary damages of any kind.

14. Counterparts. This document may be executed in any number of duplicate counterparts, each of which shall be deemed to be an original of this document for all purposes.

15. Ratification. Except as expressly modified by this document, the Lease is ratified and affirmed and shall remain in full force and effect in accordance with the terms and provisions thereof. In the event of any inconsistencies between this document and the terms of the Lease, the terms set forth in this document shall govern and control.

EXECUTED to be effective the day and year first above written.

LANDLORD:

Attest:

CITY OF CORPUS CHRISTI

Armando Chapa
City Secretary

By: _____
Ronald L. Olson
City Manager

TENANT:

FDL-CC, LLC, a Texas limited liability company

By: _____
Name: _____
Title: Manager