

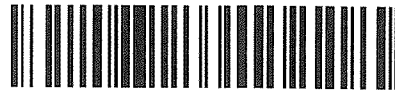


DENNIS DRAEGER
ASSESSOR - RECORDER - CLERK
631 City of Ontario City Clerk

**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

City of Ontario
303 E. B Street
Ontario, California 91764
Attn: Economic Development Director

Doc #: **2014-0125831**



Titles:	1	Pages:	20
Fees			.00
Taxes			.00
Other			.00
PAID			.00

Space above line for Recorder's use only
Exempt from recording fees per Govt. Code § 27383
Exempt from Documentary Transfer Tax per Rev. &
Tax. Code § 11911

CITY OF ONTARIO

**OPERATING COVENANT AGREEMENT
(BMW/MINI of Ontario)**

This Operating Covenant Agreement (BMW/MINI of Ontario) ("Covenant Agreement") is dated February 18, 2014, for reference purposes only and is entered into by and between the CITY OF ONTARIO, a California municipal corporation ("City"), and PAG ONTARIO B1, INC., a Delaware corporation ("Tenant"). City and Tenant enter into this Covenant Agreement with reference to the following recited facts (each a "Recital"):

RECITALS

A. Tenant leases property located 1251 Auto Center Drive and 1301 Auto Center Drive, in the City of Ontario, California, on which Tenant currently operates two automobile dealership and service businesses more commonly referred to as MINI of Ontario and BMW of Ontario (collectively, the "Businesses").

B. Tenant desires to also lease that certain real property located at 1350 S. Auto Center Drive, in the City of Ontario, California ("Property"), which is located across the street from the current location of the Businesses (1251 Auto Center Drive, 1301 Auto Center Drive and 1350 S. Auto Center Drive, in the City of Ontario, California are collectively referred to herein as the "Business Site").

C. Tenant desires to lease the Property in order to expand the operation of the Businesses but it is not financially feasible to do so at this time based on the current market rental value of the Property.

D. The City has determined that Tenant's lease of the Property and expansion of the Businesses to the Property would result in substantial benefits to the City and its citizens including, without limitation, the creation of significant new numbers of employment opportunities, property tax revenues, sales tax revenues and other ancillary benefits. Accordingly, the City has also determined that its entry into this Covenant Agreement serves a significant public purpose, while providing only incidental benefits to a private party.

E. As an incentive for the expansion and operation of the Businesses within the City, and to assist Tenant with the leasing of the Property, Tenant has requested financial assistance from the City for a period of up to ten (10) years in an amount equal to fifty percent (50%) of all sales tax revenue in excess of \$650,000 per year that is generated from the Business Site, not to exceed \$2,000,000, subject to the limitations set forth in this Covenant Agreement;

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES AND COVENANTS SET FORTH IN THIS COVENANT AGREEMENT, CITY AND TENANT AGREE, AS FOLLOWS:

TERMS

1. EFFECTIVE DATE; PARTIES; DEFINITIONS

1.1 Effective Date of Covenant Agreement. This Covenant Agreement will not become effective until the date ("Effective Date") on which all of the following are true:

1.1.1 This Covenant Agreement has been approved and executed by the appropriate authorities of Tenant, as defined herein, and delivered to the City;

1.1.2 Following all legally required notices and hearings, this Covenant Agreement has been approved by the City Council; and

1.1.3 This Covenant Agreement has been executed by the appropriate authorities of the City and delivered to Tenant.

The Effective Date shall be confirmed in writing by the parties.

If all of the foregoing conditions precedent have not been satisfied by August 1, 2014, then this Covenant Agreement may not thereafter become effective and any prior signatures and approvals of the Parties will be deemed void and of no force or effect, unless the date set forth in this paragraph is extended by written agreement of the representatives of Tenant and City.

1.2 Parties to Covenant Agreement.

1.2.1 The City. Notices shall be sent to the City as follows:

To the City:	City of Ontario Attn: City Manager 303 East B Street Ontario, CA 91764
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With a copy to:	Best Best & Krieger LLP Attn: Ontario City Attorney 2855 E. Guasti Road, Suite 400 Ontario, CA 91761
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1.2.1.1 The City represents and warrants to Tenant that, to the City's actual current knowledge:

(a) The City is a public body, corporate and politic, exercising governmental functions and powers and organized and existing under the laws of the State of California;

(b) The City has taken all actions required by law to approve the execution of this Covenant Agreement;

(c) The City's entry into this Covenant Agreement and/or the performance of the City's obligations under this Covenant Agreement does not violate any contract, agreement or other legal obligation of the City;

(d) The City's entry into this Covenant Agreement and/or the performance of the City's obligations under this Covenant Agreement does not constitute a violation of any state or federal statute or judicial decision to which the City is subject;

(e) There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of the City's obligations under this Covenant Agreement;

(f) The City has the legal right, power and authority to enter into this Covenant Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Covenant Agreement has been duly authorized and no other action by the City is requisite to the valid and binding execution, delivery and performance of this Covenant Agreement, except as otherwise expressly set forth herein; and

(g) The individual executing this Covenant Agreement is authorized to execute this Covenant Agreement on behalf of the City.

1.2.1.2 The representations and warranties set forth above are material consideration to Tenant and the City acknowledges that Tenant is relying upon the representations set forth above in undertaking Tenant's obligations set forth in this Covenant Agreement.

1.2.1.3 As used in this Covenant Agreement, the term "City's actual current knowledge" shall mean, and shall be limited to, the actual current knowledge of the City Manager as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

1.2.1.4 All of the terms, covenants and conditions of this Covenant Agreement shall be binding on and shall inure to the benefit of the City and its nominees, successors and assigns.

1.2.2 Tenant. Notices shall be sent to Tenant as follows:

To Tenant: PAG Ontario B1, Inc.
Attn: Bernie Wolfe, Chairman
7015 E. Chauncey Lane
Phoenix, AZ 85054

With copies to: Penske Automotive Group, Inc.
Attn: General Counsel
2555 Telegraph Road
Bloomfield Hills, MI 48302

Ballard Spahr LLP
Attn: Stephen M. Savage, Esq.
1 East Washington Street, Suite 2300
Phoenix, AZ 85004

1.2.2.1 Tenant represents and warrants to the City that, to its actual current knowledge:

(a) Tenant is a duly formed Delaware corporation, qualified and in good standing to do business under the laws of the State of California;

(b) The individual(s) executing this Covenant Agreement is/are authorized to execute this Covenant Agreement on behalf of Tenant;

(c) Tenant has taken all actions required by law to approve the execution of this Covenant Agreement;

(d) Tenant's entry into this Covenant Agreement and/or the performance of its obligations under this Covenant Agreement does not violate any contract, agreement or other legal obligation of Tenant;

(e) Tenant's entry into this Covenant Agreement and/or the performance of its obligations under this Covenant Agreement does not constitute a violation of any state or federal statute or judicial decision to which Tenant is subject;

(f) There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of Tenant's obligations under this Covenant Agreement;

(g) Tenant has the legal right, power and authority to enter into this Covenant Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Covenant Agreement have been duly authorized and no other action by Tenant is requisite to the valid and binding execution, delivery and performance of this Covenant Agreement, except as otherwise expressly set forth herein; and

(h) Tenant has executed a lease agreement for the Property for a period of no less than ten (10) years, a copy of which has been provided to the City; provided, however, that the lease agreement contains a provision authorizing Tenant to terminate the lease

agreement within sixty (60) days after signing based on Tenant's finding pursuant to its due diligence investigations. In the event that Tenant terminates the lease agreement during this sixty day period based on its due diligence investigations, this Covenant Agreement shall automatically terminate.

1.2.2.2 The representations and warranties set forth herein are material consideration to the City and Tenant acknowledges that the City is relying upon the representations set forth above in undertaking the City's obligations set forth above.

1.2.2.3 As used in this Covenant Agreement, the term "actual current knowledge of Tenant" shall mean, and shall be limited to, the actual current knowledge of George W. Brochick, as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

1.2.2.4 All of the terms, covenants and conditions of this Covenant Agreement shall be binding on and shall inure to the benefit of Tenant and its permitted nominees, successors and assigns. Wherever the term "Tenant" is used herein, such term shall include any permitted nominee, assignee, successor, or subtenant of Tenant.

1.2.2.5 The qualifications and identity of PAG Ontario B1, Inc. are of particular concern to the City, and it is because of such qualifications and identity that the City has entered into this Covenant Agreement with PAG Ontario B1, Inc. No voluntary or involuntary successor-in-interest of PAG Ontario B1, Inc. shall acquire any rights or powers under this Covenant Agreement without the City's prior written consent, which consent shall not be unreasonably withheld or delayed.

1.2.3 The City and Tenant are sometimes individually referred to as "Party" and collectively as "Parties."

1.3 Definitions.

1.3.1 "Base Amount" means the amount of Six Hundred Fifty Thousand Dollars (\$650,000) in Sales Tax received by the City from the Property during each calendar year.

1.3.2 "Businesses" means the operation of MINI of Ontario and BMW of Ontario on the Business Site as a permanent new and pre-owned automobile sales dealership with related service and parking and other ancillary functions, in accordance with the terms and conditions of this Covenant Agreement. The Businesses shall be operated pursuant to an agreement with the manufacturer of BMW and MINI automobiles for sales and service of new and pre-owned automobiles, or pursuant to an agreement with another manufacturer of automobiles, which manufacturer has been approved by the City, in its reasonable discretion, in addition to the sale of parts for such brand(s) of automobiles and related sales of pre-owned automobiles.

1.3.3 "Business Activities" means and refers to activities of Tenant on the Business Site, over the internet, or otherwise that result in the sale or lease of any tangible

personal property (including, but not limited to, new and used automobiles) through the Businesses where such sale or lease is subject to sales or use tax pursuant to the Sales Tax Law.

1.3.4 “City” means the City of Ontario, a California municipal corporation, and any nominee, assignee of, or successor to, its rights, powers and responsibilities.

1.3.5 “Operating Year” means and refers to the twelve (12) month period starting on the Effective Date and each consecutive subsequent twelve (12) month period until the 10th anniversary of the Effective Date. Each Operating Year may be referred to in this Covenant Agreement in numerical succession as “Operating Year 1,” “Operating Year 2” and so on up to “Operating Year 10.”

1.3.6 “Covenant Payment(s)” means those contingent payments to be made by the City to the Tenant pursuant to Section 2.2 of this Covenant Agreement for the purchase of the Covenants and Tenant’s timely and faithful performance thereunder.

1.3.7 “Covenants” means those covenants described in Section 2.1 herein.

1.3.8 “Eligibility Period” means the period commencing as of the first (1st) day of Operating Year 1 and ending on the last day of Operating Year 10.

1.3.9 “Liquidated Damages” means, for purposes of Section 2.7, as follows:

1.3.9.1 If the breach occurs during Operating Years 1 through 5, an amount equal to sixty-six percent (66%) of the Covenant Payments paid to Tenant at any time prior to the Operating Year in which the breach occurs.

1.3.9.2 If the breach occurs during Operating Years 6 through 10, an amount equal to thirty-three percent (33%) of the Covenant Payments paid to Tenant at any time prior to the Operating Year in which the breach occurs.

1.3.10 “Penalty Assessments” means and refers to penalties, assessments, collection costs and other costs, fees or charges resulting from late or underpaid payments of Sales Tax and which are levied, assessed or otherwise collected from Tenant.

1.3.11 “Property” means that certain real property located at 1350 S. Auto Center Drive, Ontario, California.

1.3.12 “Sales Tax” means and refers to all sales and use taxes levied under the authority of the Sales Tax Law attributable to the Business Activities excluding that which is to be refunded to Tenant because of an overpayment of such tax.

1.3.13 “Sales Tax Law” means and refers to: (a) California Revenue and Taxation Code Section 7200 et seq., and any successor law thereto; (b) any legislation allowing City or other public agency with jurisdiction in City to levy any form of local Sales Tax on the operations of Tenant; and (c) regulations of the BOE and other binding rulings and interpretations relating to (a) and (b) of this Section 1.3.13.

1.3.14 “Sales Tax Revenues” means the net Sales Tax actually received by the City from the BOE pursuant to the application of the Sales Tax Law (as such statutes may hereafter be amended, substituted, replaced, re-numbered, moved or modified by any successor law) attributable to the Business Activities in a particular Operating Year, including, without limitation, net Sales Tax actually received by the City and attributable to the leasing of motor vehicles as part of the Business Activities in a particular Operating Year even if the Sales Taxes are paid and/or collected and paid by lessors unaffiliated with Tenant. Sales Tax Revenues shall not include: (a) Penalty Assessments; (b) any Sales Tax levied by, collected for or allocated to the State of California, the County of San Bernardino, or a district or any entity (including an allocation to a statewide or countywide pool) other than City; (c) any administrative fee charged by the BOE; (d) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local (except City’s) law, rule or regulation; (e) any Sales Tax attributable to any transaction not consummated within the Eligibility Period; or (f) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City’s general fund.

1.3.15 “Tenant” means and refers to PAG Ontario B1, Inc., a Delaware corporation, and its successors and assigns, cumulatively.

2. COVENANTS RUNNING WITH THE LAND; COVENANT PAYMENTS; REMEDIES FOR BREACH.

2.1 Covenants Running with the Land.

2.1.1 Operating and Use Covenant. Tenant covenants and agrees that, for a period of no less than ten (10) years following the Effective Date (unless terminated sooner pursuant to specific provisions of this Covenant Agreement), Tenant shall operate, or cause to be operated upon the Property, the Business Activities in a commercially reasonable business manner, consistent with all applicable provisions of federal, state and local laws and regulations. Subject to Section 3.8, the Business Activities shall be operated in accordance with the reasonable and customary practices in surrounding communities. Tenant will operate, or cause to be operated, the Businesses in a commercially reasonable and prudent manner, with the objective of generating the greatest feasible amount of Sales Tax Revenues. Tenant’s obligations pursuant to the immediately preceding sentence include, without limitation, the obligation to obtain or cause to be obtained all federal, state and local licenses and permits required for the operation of the business and to advertise, market and promote the business in a commercially reasonable fashion, consistent with the objective of maximizing the amount of Sales Tax Revenues. For the term of this Operating Covenant, the Tenant may use the Property, or allow a third party to use the Property, only for the purposes of the operation of the Business Activities in accordance with this Covenant Agreement, unless otherwise agreed to in writing by the City Manager, in his or her sole and exclusive discretion.

2.1.2 Covenant to Designate City as Point of Sale. Tenant covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 2.1.1, Tenant shall consummate or cause to be consummated at the Business Site all taxable sales transactions

resulting from the Business Activities and identify the City as such in all reports to the California State Board of Equalization (“BOE”) in accordance with the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue and Taxation Code 7200, et seq.), as it may be amended or substituted. Tenant shall be solely responsible for ensuring that all taxable sales transactions for Business Activities are consummated at the Business Site, consistent with all applicable statutory and BOE regulatory requirements applicable to the Business Activities and the designation of the City as the “point of sale” for all taxable sales occurring as a result of the Business Activities.

2.1.3 Tenant’s Additional Obligations Regarding Repairs and Alterations to the Property. Tenant covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 2.1.1, the Tenant shall maintain, or cause to be maintained, the Property and the Businesses in good condition, ordinary wear and tear excepted, and free from the accumulation of trash or other debris and agrees to promptly remove, or cause the removal of, all graffiti upon the Property. Tenant shall also maintain or cause to be maintained the landscaping upon the Businesses and Property in a good condition.

2.1.4 Covenant Against Solicitation and Acceptance of Economic Incentives During the Term of the Operating Use Covenant. Tenant covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 2.1.1, Tenant will not directly or indirectly solicit or accept any “Financial Assistance” from any other public or private person or entity, if such Financial Assistance is given for the purpose of causing or would result in Tenant’s breach of any of the Covenants. For purposes of this Section 2.1.4 the term “Financial Assistance” means any direct or indirect payment, subsidy, rebate, or other similar or dissimilar monetary or non-monetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, public financings, property or sales tax relief, rebates, exemptions or credits, relief from public improvement obligations, and payment for public improvements to or for the benefit of Tenant or any subtenant of Tenant.

2.1.5 Use of Property. Tenant covenants and agrees that the Property shall be put to no use other than those uses specified in the City’s General Plan, the Specific Plan, zoning ordinances, and this Covenant Agreement, as the same may be amended from time to time. Nothing in this Section 2.1.5 shall limit, expand, modify or otherwise affect any right of the Tenant to continue any legal nonconforming use upon the Property following changes in the City’s General Plan or zoning ordinances.

2.2 Covenant Payments.

2.2.1 Statement of Intent. The consideration to be paid to the Tenant in exchange for the Covenants and Tenant’s performance of its obligations set forth in this Covenant Agreement, and subject to satisfaction of all conditions precedent thereto, shall consist of City’s payment to the Tenant for each Operating Year during the Eligibility Period that the City receives Sales Tax Revenue, an amount equal to the sum of fifty percent (50%) of the Sales Tax Revenues received by the City in excess of the Base Amount for that Operating Year (“Covenant Payment”). Notwithstanding any other provision of this Covenant Agreement, the cumulative total of any and all Covenant Payments paid by the City pursuant to this Covenant Agreement shall not exceed Two Million Dollars (\$2,000,000).

2.2.2 City's Notice of Determination of Operating Year Local Sales Tax Revenues and Covenant Payment. Within one hundred twenty (120) calendar days following an Operating Year within the Eligibility Period, the City will determine the Local Sales Tax Revenues applicable to that Operating Year and send the Covenant Payment due for that Operating Year to Tenant ("Notice of Determination").

2.3 Tenant's Notice of Appeal; Negotiation Period. Notwithstanding any other provision of law, including, without implied limitation, any statutes of limitation provided therefore in the California Government Code or the California Code of Civil Procedure, the City's determination of each Covenant Payment shall be deemed final, conclusive, and non-appealable unless, within sixty (60) calendar days from the receipt of the Covenant Payment by Tenant, Tenant notifies the City in writing that Tenant appeals the Covenant Payment, which notice must specifically identify the matter appealed and all of the bases for such appeal and include the following documentation: (i) certified copies of quarterly reports to the BOE which set forth the amount of sales tax paid to the BOE during the Operating Year in connection with Business Activities; (ii) any and all bills, invoices, schedules, vouchers, statements, receipts, cancelled checks, and any other documents evidencing the amount of sales tax paid from the Business Activities during such Operating Year; and (iii) any and all invoices, and inventory records for such Operating Year, certified as accurate and complete by an authorized official of the party submitting such records ("Notice of Appeal"). Any Covenant Payment that is not appealed in the manner and within the time limits set forth above shall be final and conclusive as against Tenant and all others claiming by or through Tenant. The provisions of this Section 2.3 shall be strictly construed and Tenant waives, to the maximum legal extent, any statutory or judicially created right to institute any administrative or judicial proceeding to contest any matter set forth in a Notice of Appeal that is not timely appealed in strict accordance with this Section 2.3. If Tenant files a timely Notice of Appeal with the City, the City and Tenant shall negotiate in good faith to resolve their dispute for a period of no less than thirty (30) calendar days ("Negotiation Period"). If, by the end of the Negotiation Period, the City and Tenant are unable to resolve the dispute set forth in the Notice of Appeal, each of them may exercise any judicial remedy available to them pursuant to this Covenant Agreement for the resolution of such dispute; provided, however, that any provision of law to the contrary notwithstanding, such judicial remedy must be instituted (defined as the filing of an action in a court of competent jurisdiction in strict accordance with the terms of this Covenant Agreement) within one hundred twenty (120) calendar days following the end of the Negotiation Period or be barred forever. In connection therewith, the City and Tenant irrevocably consent to the appointment of a referee to resolve such dispute in accordance with California Code of Civil Procedure Section 638 et seq., and to pay equal amounts of the cost of such referee.

2.3.1 No Accrual of Interest for Disputed Covenant Payment(s). The City and Tenant agree that any disputed amount shall not accrue interest during the pendency of any Negotiation Period or subsequent legal proceeding (including any appeals filed in connection therewith), unless the court makes a determination upon recommendation of the referee that the City acted in bad faith with regard to the dispute, in which case, any amount ultimately adjudged to be owing by the City shall be deemed to have accrued interest at the rate of six percent (6%) simple interest per annum, commencing on the ninetieth (90th) calendar day following the end of the Negotiation Period and continuing thereafter until paid. Tenant hereby waives, to the

maximum legal extent, the right to the imposition of any different rate of interest in accordance with any provision of law.

2.3.2 Covenant Payment Paid From Any Source of City Funds. Any Covenant Payment due under this Section 2.2 may be payable from any source of any funds of the City legally available for such purpose. The City covenants to reasonably consider such actions as may be necessary to include all payments owed hereunder in each of its annual budgets during the Eligibility Period and to reasonably consider the necessary annual budgetary appropriations for all such payments.

2.3.3 Making Covenant Payment Is A Contingent Obligation of City. The City's obligations under this Section 2.2 are contingent on a fiscal year to fiscal year basis and, for each Operating Year within the Eligibility Period, the City's obligations to make any payments to Tenant under this Covenant Agreement are expressly contingent upon Tenant, for the entirety of such Operating Year, completely fulfilling its material obligations under this Covenant Agreement. If for any reason Tenant fails to authorize the release or use of all or any part of sales tax information regarding the Businesses in a manner satisfactory to the BOE or provide any information reasonably required by the City to perform the City's obligations under this Covenant Agreement, or if all or any part of the sales tax information of Tenant is unavailable to the City or the City is not legally authorized to use such information for the purposes of performing its obligations under this Covenant Agreement, the Covenant Payment shall be based solely upon the information so received, if any.

2.3.4 BOE Determination of Improperly Allocated Local Sales Tax Revenues. If, at any time during or after the Eligibility Period of this Covenant Agreement, the BOE determines that all or any portion of the Sales Tax Revenues received by the City were improperly allocated and/or paid to the City, and if the BOE requires repayment of, offsets against future sales tax payments, or otherwise recaptures from the City those improperly allocated and/or paid Sales Tax Revenues, then Tenant shall, within thirty (30) calendar days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to Tenant which are attributable to such repaid, offset or recaptured Sales Tax Revenues. If Tenant fails to make such repayment within thirty (30) calendar days after the City's written demand, then Tenant shall be in breach of this Covenant Agreement and such obligation shall accrue interest from the date of the City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. Additionally, the City may deduct any amount required to be repaid by Tenant under this Section 2.3.4 from any future Covenant Payments otherwise payable to Tenant under this Covenant Agreement. This Section 2.3.4 shall survive the expiration or termination of this Covenant Agreement.

2.4 Default.

2.4.1 Tenant Default. City shall provide Tenant with written notice of Tenant's failure ("Tenant Default") to strictly abide by any material provision of this Covenant Agreement, including, without limitation, the Covenants. Tenant shall have thirty (30) days from the date of such notice to either cure such Tenant Default, or, if such Tenant Default cannot

be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.

2.4.2 City Default. Tenant shall provide City with written notice of City's failure ("City Default") to strictly abide by any material provision of this Covenant Agreement. City shall have thirty (30) days from the date of such notice to either cure such City Default, or, if such City Default cannot be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.

2.5 General Remedies for Default. Except as provided in Section 2.7, upon either a City or an Tenant Default (as defined in Section 2.4) uncured within the applicable cure period, Tenant or City (as applicable) shall have the right to seek all available legal and equitable remedies, including, without implied limitation, general and consequential damages, unless otherwise expressly provided to the contrary herein. Unless prohibited by law or otherwise provided by a specific term of this Covenant Agreement, the rights and remedies of the City and the Tenant under this Covenant Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively, and the City may simultaneously pursue inconsistent and/or alternative remedies. Either Party may, upon the Default of the other Party uncured within the applicable cure period and in addition to pursuing all remedies otherwise available to it, terminate this Covenant Agreement and all of its obligations hereunder without cost, expense or liability to itself. Notwithstanding the foregoing or anything to the contrary in this Covenant Agreement, in the event of a City Default, Tenant shall only be permitted to pursue collection of the Covenant Payments on an Operating Year-to-Operating Year basis as such Covenant Payments become due hereunder. Tenant hereby expressly waives any right Tenant may have to seek, demand or collect, on an accelerated basis, any Covenant Payments that may be due after the date of any City Default.


2.6 The City's Rights to Terminate its Obligations under Section 2.2. The City's obligations under Section 2.2 shall automatically terminate without cost, expense, or liability to City, upon the occurrence of any one or more of the following: (i) Tenant Default; (ii) the end of the Eligibility Period; (iii) the aggregate sum of the Covenant Payments being equal to Two Million Dollars (\$2,000,000); or (iv) upon the final determination by a court of competent jurisdiction that any one or more of the Covenants are void, voidable, invalid, or even unenforceable for any reason whatsoever, including, without limitation, legal infirmity. Termination of the City's obligations under Section 2.2 in accordance with subsection (i) of this Section 2.6 shall not operate to forgive, modify, discharge or excuse Tenant's obligations arising under this Covenant Agreement.

2.7 Liquidated Damages.


2.7.1 Tenant Default With Respect to Obligations Under Sections 2.1.1 and 2.1.2. The Parties acknowledge that the consideration to the City for its entry into this Covenant Agreement and the performance of its obligations hereunder include the City's receipt of Sales Tax Revenues, employment and other payroll taxes, property taxes, and other direct and indirect financial and non-financial benefits arising from the operation of the Business Activities and the location of the Businesses at the Property, located within the City. Tenant agrees that the City

will suffer damages if Tenant commits any Tenant Default with respect to any of its obligations arising under Sections 2.1.1 and 2.1.2 that is uncured within the applicable cure period. The Parties agree that the exact determination of such damages would be impracticable and extremely difficult to quantify. Accordingly, the Parties have determined that Liquidated Damages represents a reasonable estimate of the damages which would be suffered by the City if Tenant commits any Tenant Default with respect to any of its obligations set forth in Sections 2.1.1 and 2.1.2 that is uncured within the applicable cure period. Accordingly, as its sole and exclusive monetary remedy for an Tenant Default with respect to any of its covenants and obligations set forth in Sections 2.1.1 and 2.1.2 that is uncured within the applicable cure period, the City shall be entitled to: (1) terminate this Covenant Agreement and the entirety of its obligations hereunder, including any accrued and unpaid Covenant Payments, and (2) receive from Tenant the applicable amount of Liquidated Damages.

2.7.2 ACKNOWLEDGEMENT OF REASONABLENESS OF LIQUIDATED DAMAGES. UPON AN TENANT DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 2.1.1 AND 2.1.2, FOLLOWING NOTICE AND OPPORTUNITY TO CURE PURSUANT TO SECTION 2.4.1, THE CITY AND TENANT ACKNOWLEDGE AND AGREE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE AMOUNT OF DAMAGES THAT WOULD BE SUFFERED BY THE CITY WITH RESPECT TO SUCH DEFAULT. HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES THE CITY WOULD SUFFER, THE PARTIES AGREE THAT THE LIQUIDATED DAMAGES AMOUNT REPRESENTS A REASONABLE ESTIMATION OF THOSE DAMAGES. THEREFORE, UPON AN TENANT DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 2.1.1 AND 2.1.2, AS ITS SOLE AND EXCLUSIVE REMEDY FOR SUCH DEFAULT, THE CITY SHALL BE ENTITLED TO (1) RECEIPT OF THE LIQUIDATED DAMAGES, WHICH TENANT SHALL PAY WITHIN TEN (10) DAYS FOLLOWING WRITTEN DEMAND FROM THE CITY, AND (2) TERMINATE THIS COVENANT AGREEMENT AND THE ENTIRETY OF ITS OBLIGATIONS HEREUNDER, INCLUDING ANY ACCRUED BUT YET UNPAID COVENANT PAYMENTS.



Initials of Authorized
City Representative



Initials of Authorized
Tenant Representative

3. GENERAL TERMS

3.1 Tax Consequences. Tenant acknowledges that it may experience tax consequences as a result of its receipt of the payments provided for in this Covenant Agreement and agrees that it shall bear any and all responsibility, liability, costs, and expenses connected in any way therewith.

3.2 Rights Not Granted Under Covenant Agreement. This Covenant Agreement is not, and shall not be construed to be, a Development Agreement under Government Code Section 65864 et seq. This Covenant Agreement is not, and shall not be construed to be, an approval or an agreement to issue permits or a granting of any right or entitlement by the City

concerning the Property, Business Activities, Businesses, or any other project, development, or construction by the Tenant in the City. This Covenant Agreement does not, and shall not be construed to, exempt Tenant from the application and/or exercise of the City's or City's power of eminent domain or its police power, including, but not limited to, the regulation of land uses and the taking of any actions necessary to protect the health, safety, and welfare of its citizenry.

3.3 Consent. Whenever consent or approval of any party is required under this Covenant Agreement, that party shall not unreasonably withhold, delay or condition such consent or approval unless otherwise allowed by a specific provision of this Covenant Agreement.

3.4 Notices and Demands. All notices or other communications required or permitted between the City and Tenant under this Covenant Agreement shall be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, (iii) sent by telecopier, or (iv) sent by nationally recognized overnight courier service (e.g., Federal Express), addressed to the Parties at the addresses provided in Section 1.2, subject to the right of either party to designate a different address for itself by notice similarly given. Any notice so given by registered or certified United States mail shall be deemed to have been given on the second business day after the same is deposited in the United States mail. Any notice not so given by registered or certified mail, such as notices delivered by telecopier or courier service (e.g., Federal Express), shall be deemed given upon receipt of the same by the party to whom the notice is given.

3.5 Nonliability of the City or City Officials and Employees. No board member, official, contractor, consultant, attorney or employee of the City or City shall be personally liable to Tenant, any voluntary or involuntary successors or assignees, or any lender or other party holding an interest in the Property, in the event of any default or breach by the City, or for any amount which may become due to the Tenant or to its successors or assignees, or on any obligations arising under this Covenant Agreement.

3.6 Conflict of Interests. No board member, official, contractor, consultant, attorney or employee of the City or City shall have any personal interest, direct or indirect, in this Covenant Agreement nor shall any such board member, official or employee participate in any decision relating to this Covenant Agreement which affects his/her personal interests or the interests of any corporation, partnership or association in which he/she is directly or indirectly interested.

3.7 Entire Agreement; Good Faith Negotiations. This Covenant Agreement contains all of the terms and conditions agreed upon by the Parties and supersedes any previous agreements between the Parties concerning the subject matter of this Covenant Agreement. No other understanding, oral or otherwise, regarding the subject matter of this Covenant Agreement shall be deemed to exist or to bind any of the parties hereto. All prior written or oral offers, counteroffers, memoranda of understanding, proposals and the like are superseded by this Covenant Agreement.

The Parties acknowledge that this Covenant Agreement is the product of mutual arms-length negotiations and that each party has been, or has had the opportunity to have been,

represented by legal counsel in the negotiation and drafting of this Covenant Agreement. Accordingly, the rule of judicial construction which provides that ambiguities in a document are to be construed against the drafter of that document shall have no application to the interpretation or enforcement of this Covenant Agreement. In any action or proceeding to interpret and/or enforce this Covenant Agreement, the trier of fact may refer to extrinsic evidence not in conflict with any specific provision of this Covenant Agreement to ascertain and give effect to the intent of the Parties hereto.

3.8 Time Deadlines Critical; Extensions and Delays; No Excuse Due to Economic Changes. Time is of the essence in the performance of the City's and Tenant's obligations under this Covenant Agreement. In addition to specific provisions of this Covenant Agreement providing for extensions of time, times for performance hereunder shall be extended where delays or defaults are due to war; insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation; acts of a public enemy; referenda; acts of governmental authorities (except that the failure of the City to act as required hereunder shall not excuse its performance); moratoria; epidemics; quarantine restrictions; and freight embargoes (collectively, "Enforced Delays") provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the default; and, provided further, that the extension of time shall be only for the period of the Enforced Delays.

3.8.1 ANYTHING IN THIS COVENANT AGREEMENT TO THE CONTRARY NOTWITHSTANDING, TENANT EXPRESSLY ASSUMES THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES AND/OR MARKET DEMAND/CONDITIONS AND WAIVES, TO THE GREATEST LEGAL EXTENT, ANY DEFENSE, CLAIM, OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, FRUSTRATION OF PURPOSE, CHANGED ECONOMIC CIRCUMSTANCES OR SIMILAR THEORIES.

3.8.2 TENANT EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF TENANT SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN THE MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF EACH AND EVERY OF THE OBLIGATIONS, COVENANTS, CONDITIONS AND REQUIREMENTS OF THIS COVENANT AGREEMENT. TENANT EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF TENANT'S EXECUTION OF THIS COVENANT AGREEMENT.

INITIALS OF AUTHORIZED TENANT REPRESENTATIVE

3.9 Attorneys' Fees. In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Covenant Agreement or any other dispute between the Parties concerning this Covenant Agreement or the Property, then, in that event, the prevailing party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to have and recover of and from the other Party all costs and expenses of suit or claim, including

actual attorneys' fees. Any judgment, order or award entered in any final judgment or award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including actual attorneys' fees (collectively, the "Costs") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 3.9, "Costs" shall include, without implied limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii) garnishment, levy and debtor and third party examination, (iv) discovery; and (v) bankruptcy litigation. This Section 3.9 shall survive any termination of this Covenant Agreement.

3.10 Amendments to This Covenant Agreement. Any amendments to this Covenant Agreement must be in writing and signed by the appropriate authorities of both the City and Tenant. The City Manager is authorized on behalf of the City to approve and execute minor amendments to this Covenant Agreement, including, but not limited to, the granting of extensions of time to Tenant, not to exceed ninety (90) days in the aggregate.

3.11 Jurisdiction and Venue. Any legal action or proceeding concerning this Covenant Agreement shall be filed and prosecuted in the appropriate California state court in the County of San Bernardino, California. Both Parties hereto irrevocably consents to the personal jurisdiction of that court. The City and Tenant each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between the City and Tenant, due to the fact that the City is a party to such action or proceeding or due to the fact that a federal question or federal right is involved or alleged to be involved. Without limiting the generality of the foregoing, the City and Tenant specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Tenant acknowledges that the provisions of this Section 3.11 are material consideration to the City for its entry into this Covenant Agreement, in that the City will avoid the potential cost, expense and inconvenience of litigating in a distant forum.

3.12 Counterpart Originals; Integration. This Covenant Agreement may be executed in duplicate originals, each of which is deemed to be an original, but when taken together shall constitute but one and the same instrument. This Covenant Agreement and any exhibits represent the entire understanding of the Parties and supersedes all negotiations, letters of intent, memoranda of understanding or previous agreements between the parties with respect to all or any part of the subject matter hereof.

3.13 No Waiver. Failure to insist on any one occasion upon strict compliance with any of the terms, covenants or conditions hereof shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers hereunder at any one time or more times be deemed a waiver or relinquishment of such other right or power at any other time or times.

3.14 Successors and Assigns. This Covenant Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, executors, administrators, legal representatives, successors and assigns.

3.15 No Third Party Beneficiaries. The performance of the respective obligations of the City and Tenant under this Covenant Agreement are not intended to benefit any party other than the City or Tenant, except as expressly provided otherwise herein. No person or entity not a signatory to this Covenant Agreement shall have any rights or causes of action against any party to this Covenant Agreement as a result of that party's performance or non-performance under this Covenant Agreement, except as expressly provided otherwise herein.

3.16 Warranty Against Payment of Consideration for Covenant Agreement. Tenant warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Covenant Agreement. Third parties, for the purposes of this Section 3.16, shall not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects and the like when such fees are considered necessary by Tenant.

3.17 Severability. The City and Tenant declare that the provisions of this Covenant Agreement are severable. If it is determined by a court of competent jurisdiction that any term, condition or provision hereof is void, voidable, or unenforceable for any reason whatsoever, then such term, condition or provision shall be severed from this Covenant Agreement and the remainder of the Covenant Agreement enforced in accordance with its terms.

3.18 Further Acts and Releases. The City and Tenant each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of their obligations hereunder.

3.19 Estoppels. At the request of Tenant or any holder of a mortgage or deed of trust secured by all or any portion of the Property, the City shall promptly execute and deliver to Tenant or such holder a written statement of the City as to any of the following matters as to which Tenant or such holder may inquire: (i) that no default or breach exists, or would exist with the passage of time, or giving of notice, or both, by Tenant pursuant to this Covenant Agreement, if such be the case; (ii) the total amount of Covenant Payments made by the City to Tenant pursuant to this Covenant Agreement prior to the date of such written statement; (iii) the amount of any Covenant Payments earned by or due and owing to Tenant pursuant to this Covenant Agreement as of the date of such written statement; (iv) the Covenant Payments for a particular Operating Year; (v) if the City has determined that Tenant is in default or breach hereunder, the nature of such default and the action or actions required to be taken by Tenant to cure such default or breach; and (vi) any other matter affecting the rights or obligations of Tenant hereunder as to which Tenant or such holder may reasonably inquire. The form of any estoppel letter shall be prepared by Tenant or such holder at its sole cost and expense and shall be reasonably acceptable in form and content to the City and Tenant. The City may make any of the representations described above based on the actual current knowledge of the then-current City Manager.

3.20 Joint Defense of Third Party Attack Upon Covenant Agreement. If any third party should commence any action or proceeding to set aside, annul, void or attack this Covenant Agreement or any provisions hereof, Tenant and City agree to reasonably and mutually cooperate in the defense of such action or proceeding. For purposes of this Covenant Agreement, third party shall mean any action, lawsuit, administrative action or judicial

proceeding including those for injunctive relief brought by including but not limited to residents, taxpayers, taxpayer associations, business entities, municipalities, or any other person, entity or public entity that may bring such an action. The parties shall select mutually acceptable legal counsel to jointly represent them and shall share equally the expense of such legal counsel and litigation costs.

3.21 State of California Legislation Impact on Covenant Payment. Tenant acknowledges that the California legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Sales Tax Revenues which were otherwise payable to the City. Tenant acknowledges that it is possible that the legislature may enact similar legislation in the future which would cause a corresponding reduction of and/or delay in the payment of the Sales Tax Revenues and that such reduction will cause Tenant a corresponding reduction and/or delay in the payment of the Covenant Payments due to Tenant during such time as such legislation is in effect. Furthermore, Tenant acknowledges that it is possible that the legislation described above, or some variant thereof, may be enacted and effective during one or more subsequent times during the Eligibility Period and may materially and negatively impact the amount of Sales Tax Revenues and, accordingly, Covenant Payments. The City does not make any representation, warranty or commitment concerning the future actions of the California legislature with respect to the allocation of Sales Tax Revenues to the City. Tenant agrees that it is undertaking its obligations under this Covenant Agreement after having considered, and is expressly assuming the risk of, the possibility of the enactment of such legislation.

The foregoing paragraph notwithstanding, City acknowledges that the California legislature may provide for the payment to City of other revenues for the purpose of offsetting any losses in Sales Tax Revenues resulting from the enactment of legislation of the type described in the immediately preceding paragraph. City agrees that, should the California legislature provide for such offsetting revenues, then for purposes of this Covenant Agreement and the computation of any Covenant Payments which may become due to Tenant hereunder, City will consider, on an Operating Year-to-Operating Year basis, any such offsetting revenues which are (i) indexed to Sales Tax and offset the loss of Sales Tax Revenues to the City on a dollar for dollar basis, (ii) actually received by the City, and (iii) not subject to any restrictions on use beyond those which are otherwise generally applicable to sales tax revenues received by California municipalities, to be Sales Tax Revenues within the meaning of this Covenant Agreement. Notwithstanding anything herein to the contrary, to the extent the City's receipt of Sales Tax Revenue is impaired or restricted in any way or otherwise eliminated for any reason, the City shall not be obligated to make any Covenant Payments during the period within which the City's receipt of Sales Tax Revenue is so restricted, impaired or eliminated.

[Signatures on the following page]

**SIGNATURE PAGE TO THE
OPERATING COVENANT AGREEMENT
(BMW/MINI of Ontario)**

Tenant and City sign and enter into this Covenant Agreement by and through the signatures of their authorized representatives set forth below:

CITY:

CITY OF ONTARIO,
a California municipal corporation

By: _____

Al C. Boling
City Manager

TENANT:

PAG ONTARIO B1, INC.,
a Delaware corporation

By: _____

George W. Brochick,
Executive Vice President

Attest:

By: _____

Sidni Kasad, MMC, Asst. City Clerk
for Mary E. Wirtes, MMC
City Clerk

Approved as to form:

Best Best & Krieger LLP

By: _____

City Attorney

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

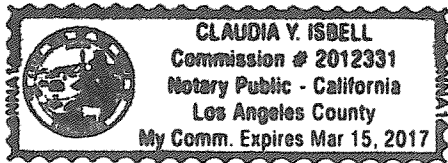
CIVIL CODE § 1189

State of California

County of San Bernardino

On April 7, 2014 before me, Claudia Y. Isbell, Notary Public

personally appeared Al C. Boling



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: Claudia Y. Isbell

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____ Signer's Name: _____

☐ Corporate Officer — Title(s): _____ ☐ Corporate Officer — Title(s): _____

☐ Individual ☐ Individual

☐ Partner — ☐ Limited ☐ General ☐ Partner — ☐ Limited ☐ General

☐ Attorney in Fact ☐ Attorney in Fact

☐ Trustee ☐ Trustee

☐ Guardian or Conservator ☐ Guardian or Conservator

☐ Other: _____ ☐ Other: _____

Signer Is Representing: _____ Signer Is Representing: _____

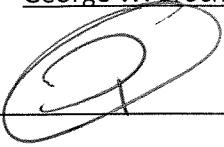
Acknowledgment

State of Arizona

County of Maricopa

The foregoing instrument was acknowledged before me this 4th of April, 2014

by George W. Brochick (person).



NOTARY PUBLIC

Print Name: Patricia Tafoya

My Commission Expires

3/20/17

