

LOCATION AGREEMENT

between

**THE CITY OF ONTARIO
a California municipal corporation**

and

eTail Direct LLC

[Dated July 7, 2009 for reference purposes only]

This LOCATION AGREEMENT ("Agreement") is entered into between THE CITY OF ONTARIO, a California municipal corporation ("City") and eTail Direct LLC, a Delaware limited liability company ("eTail"). The City and eTail are sometimes each, individually, referred to in this Agreement as a "Party" and, collectively, as the "Parties." The City and eTail enter into this Agreement with reference to the following facts ("Recitals"):

RECITALS

WHEREAS, eTail intends to lease certain real property in the City of Ontario, County of San Bernardino ("Property"); and

WHEREAS, eTail desires to operate a retail and internet service facility on the Property ("Project"); and

WHEREAS, eTail expects to generate significant service-related revenues as a result of the Project, all of which will result in the generation of significant new local sales tax revenues; and

WHEREAS, eTail has agreed to operate the Project within the City for a period of fifteen (15) years after establishment of the Project; and

WHEREAS, the City, in consideration of the new and additional local sales tax revenues, property taxes, employment benefits, and other tangible and intangible benefits to be received by City arising from the completion of the Project and the operation of the Project within the City as described in this Agreement, desires to provide certain payments to eTail as an incentive for completing the development of the Project and operating the Project within the City; and

WHEREAS, the operation of the Project will provide significant public benefits to the City because, among other matters, additional sales tax revenues generated by such activities represent a significant source of new and additional public revenue for the City, which may be used by the City for the funding of necessary public services and facilities, including public safety services and facilities. The City has further determined that the guaranteed operation of the Project serves the additional public purpose of fostering a business and civic environment which may attract additional businesses and investment in the community due to the availability of the increased public and private services and economic activity resulting there from.

NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES SET FORTH IN THIS AGREEMENT, THE CITY AND ETAIL AGREE AS FOLLOWS:

1. **Incorporation of Recitals.** The Recitals of fact set forth above are true and correct and are incorporated into this Agreement in their entirety by this reference.
2. **Effective Date of this Agreement.**

2.1 This Agreement is dated TBD for reference purposes only. This Agreement will not become binding on either of the Parties unless and until the first date on which all of the following occur, if at all ("Effective Date"):

2.1.1 eTail has approved this Agreement, this Agreement has been executed by eTail authorized representative(s), and eTail has delivered three (3) fully executed copies of this Agreement to the City;

2.1.2 This Agreement is approved by the City Council of the City at a public meeting of the City and such approval is evidenced by a resolution adopted by the City Council of the City; and

2.1.3 This Agreement is executed by the authorized representative(s) of the City and delivered to eTail.

2.2 If all conditions precedent to the Effective Date are not satisfied on or before TBD, then no part of this Agreement shall become binding on or enforceable against any Party and any prior signatures or approvals of this Agreement by either the City or eTail shall be void and of no force or effect.

3. Representations and Warranties of the City.

3.1 The City represents and warrants to eTail that, to the City's actual current knowledge:

3.1.1 The City's entry into this Agreement and/or the performance of the City's obligations under this Agreement does not violate any contract or agreement to which the City is a party;

3.1.2 There are no pending claims or lawsuits against the City that will delay or prevent the performance of the City's obligations under this Agreement;

3.1.3 The City has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated by this Agreement; and in making the Covenant Payments herein for provided, the City will not be in violation of any spending or debt restrictions arising under Article XIIB of the California Constitution.

3.2 The representations and warranties of the City set forth in this Section 3 are material consideration to eTail and the City acknowledges that eTail is relying upon the representations of the City set forth in this Section 3 in undertaking its obligations under this Agreement.

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

4. Representations and Warranties of eTail.

4.1 eTail represents and warrants to the City that, to eTail actual current knowledge:

4.1.1 eTail is a limited liability company, in good standing to do business in the State of California and in the City;

4.1.2 The individual(s) executing this Agreement on behalf of eTail is/are authorized to execute this Agreement on behalf of eTail;

4.1.3 eTail entry into this Agreement and/or the performance of eTail obligations under this Agreement do not violate any contract, agreement or other legal obligation of eTail;

4.1.4 There are no pending lawsuits or other actions or proceedings which would delay, prevent or impair the timely performance of eTail obligations under this Agreement; and

4.1.5 eTail has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated by this Agreement, and the execution, delivery and performance of this Agreement have been duly authorized by eTail and no other action by eTail is requisite to the valid and binding execution, delivery and performance of this Agreement, except as otherwise expressly set forth in this Agreement.

4.2 The representations and warranties of eTail set forth in this Section are material consideration to the City and eTail acknowledges that the City is relying upon the representations of eTail set forth in this Section 4 in undertaking its obligations under this Agreement.

4.3 As used in this Agreement, the term "eTail Corporation's actual current knowledge" shall mean, and shall be limited to, the actual current knowledge of eTail as of the date of the making of the representation or warranty, 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.

5. **Definitions.** All initially capitalized terms used in this Agreement shall have the meanings set forth below or, if not set forth below, where such terms first appear in this Agreement.

5.1 **BOE"** means the State of California Board of Equalization and any successor agency.

5.2 **"CEQA"** means and refers to the California Environmental Quality Act, California Public Resources Code Sections 21000, *and et seq.*

5.3 **"City"** means and refers to the City of Ontario, a California municipal corporation.

5.4 **"City Attorney"** means and refers to the City Attorney of the City of Ontario, California.

5.5 **"City Council"** means and refers to the City Council of the City of Ontario, California.

5.6 **“City Manager”** means and refers to the City Manager of the City of Ontario, California.

5.7 **“Covenant Payment(s)”** means and refers to payments made to eTail in accordance with Section 9 of this Agreement.

5.8 **“Effective Date”** shall have the meaning ascribed to the term in Section 2 of this Agreement.

5.9 **“Eligibility Period”** means and refers to the fifteen (15) consecutive twelve (12) month period commencing on the first calendar day of Project Operating Year 1 and ending on the last calendar day of Project Operating Year 15.

5.10 **“Enforced Delay”** means and refers to delays or defaults in performance due to war; acts of terrorism; 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 under this Agreement shall not excuse its performance); moratoria; epidemics; quarantine restrictions; and freight embargoes.

5.11 **“Local Sales Tax Revenues”** means the net Sales Tax 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 Project Activities in a particular Project Operating Year. Local Sales Tax Revenues shall not include: (i) Penalty Assessments, (ii) 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, (iii) any administrative fee charged by the BOE, (iv) 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, (v) any Sales Tax attributable to any transaction not consummated within the Eligibility Period, or (vi) 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.

5.12 **“Maintenance Deficiency”** means and refers to an occurrence of an adverse condition on any area of the Property that is subject to public view in contravention of the general maintenance standard described in Section 13.

5.13 **“Negotiation Period”** means and refers to a period of no less than thirty (30) calendar days.

5.14 **“Notice of Appeal”** shall have the meaning ascribed to the term in Section 9.3.

5.15 **“Notice of Determination”** shall have the meaning ascribed to the term in Section 9.2.

5.16 **[INTENTIONALLY OMITTED]**

5.17 **“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 eTail.

5.18 **“Prohibited Financial Assistance”** means and refers to 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, financial incentives, public financing, property or sales tax relief or rebates, relief from public improvement obligations, and payment for public improvements to or for the benefit of eTail by any public or private person or entity.

5.19 **“Project”** means and refers to eTail establishment and operation of an internet and retail sales facility on the Property

5.20 **“Project Activities”** means and refers to on-site and internet activities of eTail officers, directors, employees, agents or consultants which result in the sale or lease of any tangible personal property and which are subject to the payment of local sales and use taxes pursuant to the Sales Tax Law.

5.21 **“Project Opening Date”** means and refers to the date on which the Project first opens for business to the public.

5.22 **“Project Operating Year”** means and refers, individually, to each of fifteen (15) consecutive three hundred sixty-five (365) day periods following the Project Opening Date, with the first Project Operating Year commencing on the first day of the BOE-designated reporting cycle immediately following the Project Opening Date and with each such three hundred sixty-five (365) day period referred to in this Agreement in consecutive numerical order as Project Operating Year 1, Project Operating Year 2, etc.

5.23 **“Sales Tax”** means all sales and use taxes levied under the authority of the Sales Tax Law attributable to Project Activities, excluding Sales Tax which is to be refunded to eTail because of an overpayment of Sales Tax.

5.24 **“Sales Tax Law”** means (i) California Revenue and Taxation Code Section 7200 et seq., and any successor law thereto, (ii) any legislation allowing City or other public agency with jurisdiction in City to levy any form of local Sales Tax on the operations of eTail, and (iii) regulations of the BOE and other binding rulings and interpretations relating to (i) and (ii) hereof

5.25 **“XXXXXXXXXX”** means and refers to, eTail, and includes any affiliate or subsidiary of eTail, any purchasing company established by and under the control of eTail, and any permitted nominee, assignee or successor to eTail rights, powers and responsibilities.

5.26 **“Term”** means and refers to the period commencing on the Effective Date and ending on the last day of the Eligibility Period, unless sooner terminated pursuant to this Agreement.

6. Restrictions on Assignment and Change in Control.

6.1 The qualifications and identity of eTail are of particular concern to the City. The City would not enter into this Agreement were it not for the qualifications and identity of eTail. eTail shall promptly notify the City in writing of any and all changes whatsoever in the identity of the business entities or individuals either comprising or in control of eTail, as well as any and all material changes in the interest or the degree of control of eTail by any such person, of which information eTail or any of its principals, shareholders, members or officers are notified or may otherwise have knowledge or information. This Agreement may be terminated by the City if there is any significant or material change, whether voluntary or involuntary, in membership, ownership, management or control of either of eTail (other than such changes occasioned by (i) the death or incapacity of any individual, (ii) changes for estate planning purposes which do not effect an actual change of ultimate control prior to the death of the individual whose estate is being dealt with, or (iii) employee stock option exercises which, when considered in the aggregate with all prior stock option exercises, do not result in more than a twenty-five percent (25%) change in control), that have not been approved by the City Manager (or designee) in his or her reasonable discretion prior to the time of such change, or the City may seek other appropriate relief; provided, however, that (A) the City shall first notify eTail in writing of its intention to terminate this Agreement or to exercise any other remedy, and (B) eTail shall have twenty (20) calendar days following receipt of such written notice to commence and thereafter diligently and continuously proceed to cure the default of eTail and submit evidence of the initiation and satisfactory completion of such cure to the City, in a form and substance reasonably satisfactory to the City.

6.2 eTail shall not sell, assign, convey, create any trust estate with respect to or otherwise transfer, assign or encumber (all of the foregoing, collectively, "Transfer") any of their rights or interests in this Agreement, provided that "Transfer" shall not be deemed to include an assignment or other transfer of this Agreement between the entities included in the definition of eTail. Any actual or attempted Transfer shall be a Default of eTail.

7. **eTail Covenant to Establish and Open the Project.** eTail covenants and agrees for itself, its successors and assigns, for the sole and exclusive benefit of the City, that, promptly following receipt of all necessary City and other governmental approvals for the establishment of the Project, eTail shall establish the Project and open it for business to the general public, all in conformity with all applicable laws. eTail shall cause the occurrence of the Project Opening Date to occur on or before _____. The City, acting by and through its City Manager, may extend the Project Opening Date for up to an additional ninety (90) calendar days in the City Manager's sole discretion.

8. **eTail Tax Information.** eTail acknowledges and agrees that the sales and use tax reporting and payment information related to sales and use taxes attributable to Project Activities may become a public record as a result of the covenants of eTail contained in Section 12 and the Covenant Payments to be made by the City to eTail (as further described in Section 9). eTail hereby authorizes the City to use the sales and use tax reporting and payment information related to Project Activities to allow the City to perform its obligations under this Agreement and to disclose such information when, in the City Attorney's reasonable opinion, such disclosure is required by law.

9. **Determination of Local Sales Tax Revenues and Covenant Payments.** In consideration for eTail obligations set forth in this Agreement, and subject to satisfaction of all conditions precedent thereto, the City shall, for each Project Operating Quarter during the Eligibility Period, pay to eTail an amount equal to fifty percent (50%) of the Local Sales Tax Revenues received by the City in such Project Operating Quarter ("**Covenant Payment**"). However, during the first year of the Eligibility Period, the Covenant Payment will be equal to twenty-five percent (25%) of the Local Sales Tax Revenues received by the City.

9.1 **State of California Legislation Impact on Covenant Payment.** Without limiting the generality of the foregoing paragraph, eTail acknowledges that the State of California legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Local Sales Tax Revenues which were otherwise be payable to the City. eTail acknowledges that it is possible that the State of California legislature may enact similar legislation in the future which would cause a corresponding reduction of and/or delay in the payment of the Local Sales Tax Revenues and that such reduction will cause eTail a corresponding reduction and/or delay in the payment of the Covenant Payments due to eTail during such time as such legislation is in effect. Furthermore, eTail 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 Local Sales Tax Revenues and, accordingly, the Covenant Payments. The City does not make any representation, warranty or commitment concerning the future actions of the State of California legislature with respect to the allocation of Local Sales Tax Revenues to the City. eTail agrees that it is undertaking its obligations under this Agreement after having considered, and is expressly assuming the risk of, the possibility of the enactment of such legislation. The City acknowledges that the State of California legislature may provide for the payment to City of other revenues for the purpose of offsetting any losses in Local 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 Agreement and the computation of any Covenant Payments which may become due to eTail hereunder, City will consider 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 Local Sales Tax Revenues within the meaning of this Agreement.

9.2 **City's Notice of Determination of Local Sales Tax Revenues and Covenant Payment.** Within thirty (30) calendar days following the end of each BOE reporting quarter within the Eligibility Period, eTail shall submit to City: (i) certified copies of eTail quarterly reports to the BOE which set forth the amount of sales tax paid to the BOE during the prior quarter of the Project Operating Year in connection with Project activities, and (ii) any and all bills, invoices, schedules, vouchers, statements, receipts, cancelled checks, and any other documents evidencing the amount of sales tax paid by eTail, certified as accurate and complete by an authorized official of eTail. Within one hundred twenty (120) calendar days following its receipt of the foregoing information from eTail, the City will determine the Local Sales Tax Revenues applicable to that reporting quarter of the Project Operating Year and the Covenant

Payment due and provide eTail with written notice of the City's determination ("**Notice of Determination**"), together with reasonable supporting documents and calculations.

9.3 eTail 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 the matters set forth in the Notice of Determination shall be deemed final, conclusive, and non-appealable unless, with thirty (30) calendar days from the receipt of the Notice of Determination by eTail, eTail notifies the City in writing that eTail appeals one or more of the matters set forth in the Notice of Determination, which notice must specifically identify the matter appealed and all of the bases for such appeal ("**Notice of Appeal**"). Any matter set forth in the Notice of Determination that is not appealed in the manner and within the time limits set forth above, shall be final and conclusive as against eTail and all others claiming by or through eTail. The provisions of this Section 9.3 shall be strictly construed and eTail 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 Determination that is not timely appealed in strict accordance with this Section. If eTail does not file a Notice of Appeal, the City shall tender the Covenant Payment due within forty-five (45) calendar days from the issuance of the Notice of Determination by eTail. If eTail files a timely Notice of Appeal with the City, the City and eTail shall negotiate in good faith to resolve their dispute for a Negotiation Period. If, by the end of the Negotiation Period, the City and eTail 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 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 Agreement) within ninety (90) calendar days following the end of the Negotiation Period or be barred forever. In connection therewith, the City and eTail 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.

9.4 No Accrual of Interest on Disputed Covenant Payment(s). The City and eTail 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 four percent (4%) simple interest per annum, commencing on the ninetieth (90th) calendar day following the end of the Negotiation Period and continuing thereafter until paid. eTail 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.

9.5 Covenant Payment Paid From Any Source of City Funds. Any Covenant Payment due under Section 9 may be payable from any source of any legally available funds of the City. 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.

9.6 Making Covenant Payment Is A Contingent Obligation of City. The City's obligations under Section 9 are contingent on a year to year basis and, for each Project Operating Year within the Eligibility Period, the City's obligations to make any payments to eTail under this Agreement are expressly contingent upon eTail, for the entirety of such Project Operating Year, completely fulfilling their material obligations under this Agreement. If for any reason eTail fails to authorize the release or use of sales tax information regarding the Project in a manner satisfactory to the BOE or provide any information reasonably required by the City to perform the City's obligations under this Agreement, the City shall have no obligation to make any Covenant Payment to eTail for the period during which such information 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 Agreement. Additionally, during any period in which the sales tax information of eTail 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 Agreement, Covenant Payments shall be deemed suspended.

9.7 Covenant Payment Calculated on Quarterly Basis. The City and eTail agree that the calculation and determination of all financial components of the Parties' rights and obligations under this Agreement shall be computed on a quarterly basis within each Project Operating Year and may not be carried forward or back to any prior or future Project Operating Year, it being the express understanding of the Parties that for each Project Operating Year the financial obligations of the Parties and satisfaction of the conditions precedent to such obligations shall be determined and made independently of any other Project Operating Year.

9.8 BOE Determination of Improperly Allocated Local Sales Tax Revenues. If, at any time during or after the Eligibility Period of this Agreement, the BOE determines that all or any portion of the Local 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 Local Sales Tax Revenues, then eTail, shall, within thirty (30) calendar days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to eTail which are attributable to such repaid, offset or recaptured Local Sales Tax Revenues. If eTail fail to make such repayment within thirty (30) calendar days after the City's written demand, then eTail shall be in breach of this 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. This Section 9.8 shall survive the expiration or termination of this Agreement.

10. eTail Covenant Not to Accept Prohibited Financial Assistance. eTail covenants to the City that during the Term, eTail will not directly or indirectly solicit, accept or enter into any agreement concerning any Prohibited Financial Assistance from any other public or private person or entity, to the extent such Prohibited Financial Assistance is given for the purpose of causing or would result in: (i) the relocation of the point of sale for Project Activities from the City, (ii) a material (i.e., five percent (5%) or greater) reduction in the amount of Local Sales Tax Revenues which would be generated from the Project Activities in the absence of such an

agreement, or (iii) any event of Default by eTail. Failure of eTail to comply with the covenant of this Section 10 shall be deemed to be a material breach of this Agreement by eTail and the City shall be entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.

11. eTail Covenant to Maintain Property on Tax Rolls during the Eligibility Period. eTail covenants to the City that, throughout the Term, eTail shall cause the Property to remain on the County of San Bernardino, California, secured real property tax rolls, shall pay all property tax bills with respect to the Property and all improvements thereon on or before the last calendar day for the timely payment of each property tax installment on each December 10 and April 10, and shall timely pay all supplemental tax bills regarding such property issued by the County of San Bernardino, California. eTail further covenants to the City that, throughout the Term, eTail shall not use or otherwise sell, transfer, convey, assign, lease, leaseback or hypothecate the Property or any portion thereof to any entity or party, or for any use of the Property, that is partially or wholly exempt from the payment of real property taxes or that would cause the exemption of the payment of all or any portion of real property taxes otherwise assessable regarding the Property, without the prior written consent of the City, given or withheld in the City's sole and absolute discretion. Failure of eTail to comply with the covenant of this Section 11 shall be deemed to be a material breach of this Agreement by eTail and the City shall be entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.

12. Continuous Operation and Designation Covenant. eTail covenants to the City to cause the Project to be open for business to the general public and to continuously operate the Project on the Property throughout the entirety of the Eligibility Period. For purposes of this Section 12 "continuously operate" means the Project shall not cease to operate for a period of ninety (90) consecutive calendar days. eTail shall, in all reports to the BOE, designate the City as the "point of sale" for all Project Activities occurring on the Property. eTail shall, for the full Eligibility Period, at its sole cost and expense, maintain all permits, contractual arrangements, licenses, and registrations necessary for eTail to lawfully conduct Project Activities and to designate the City as the "point of sale" in all reports and returns submitted to the BOE. Failure of eTail to comply with the covenant of this Section 12 shall be deemed to be a material breach of this Agreement by eTail and the City shall be entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.

13. Covenant to Maintenance Condition of the Property. eTail covenants to the City that areas of the Property that are subject to public view (including all existing improvements, paving, walkways, landscaping, exterior signage and ornamentation) shall be maintained in good repair and a neat, clean and orderly condition, ordinary wear and tear excepted. Graffiti, as this term is defined in Government Code Section 38772, that has been applied to any exterior surface of a structure or improvement on the Property that is visible from any public right-of-way adjacent or contiguous to the Property, shall be removed within seventy two (72) hours following its placement by either painting over the evidence of such vandalism with a paint that has been color-matched to the surface on which the paint is applied, or by removal with solvents, detergents or water, as appropriate. Failure of eTail to comply with the covenant of this Section 13 shall be deemed to be a material breach of this Agreement by eTail and the City shall be

entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.

14. Covenant Not to Discriminate. eTail covenants to the City that they will not discriminate against any employee or applicant for employment because of sex, marital status, race, color, religion, creed, national origin, or ancestry, and that they will comply with all applicable local, state and federal fair employment laws and regulations. eTail further covenants and agrees that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, ancestry or national origin in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Property, nor shall eTail itself, or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use of occupancy of tenants, lessees, subtenants, sublessee or vendees of the Property. Failure of eTail to comply with the covenant of this Section 14 shall be deemed to be a material breach of this Agreement by eTail and the City shall be entitled to pursue any remedy or damages available under this Agreement, at law, or in equity for such breach.


15. Payment of Prevailing Wages.

15.1 eTail acknowledges that the City has made no representation, express or implied, to eTail or any person associated with the eTail regarding whether or not laborers employed relative to the installation of the Project, if any, must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to Labor Code Sections 1720, *et seq.* eTail agrees with the City that eTail shall assume the responsibility and be solely responsible for determining whether or not laborers employed relative to any construction pertaining to the Project must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to Labor Code Sections 1720, *et seq.*

15.2 eTail, on behalf of itself, its successors, and assigns, waive and release the City from any right of action that may be available to any of them pursuant to Labor Code Sections 1726(c) and 1781. eTail acknowledges the protections of Civil Code Section 1542 relative to the waiver and release contained in this Section 15.2, which reads as follows:

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

BY INITIALING BELOW, eTail KNOWINGLY AND VOLUNTARILY WAIVES THE PROVISIONS OF SECTION 1542 SOLELY IN CONNECTION WITH THE WAIVERS AND RELEASES OF THIS SECTION 14:



eTail Initials

Additionally, eTail shall indemnify, defend with counsel acceptable to the City and hold harmless the City against any claims pursuant to Labor Code Sections 1726(c) and 1781 arising from this Agreement or the installation of the Project on the Property, in accordance with the terms of Section 16 of this Agreement.

Notwithstanding any other provision of this Agreement, the City shall not be under any duty to monitor or ensure the compliance of eTail with any State of California labor laws, including, without limitation, prevailing wage laws.

16. Indemnification. The Parties hereby agree to indemnify and save and hold one another harmless from and against all "damages" (which term shall mean actual cash expenditures arising out of, resulting from, or relating to any damage, liability, loss, cost or deficiency, including, but not limited to, reasonable attorneys' fees and other costs and expenses incident to proceedings or investigations for the defense of any claim) incurred by any of the Parties arising out of, resulting from, or relating to any failure by any of the Parties to duly perform and observe any term, provision or covenant to be performed by any of the Parties pursuant to this Agreement.

17. Defense of this Agreement. eTail acknowledges that the City is a "public entity" as defined under applicable California law. Therefore, the City must satisfy the requirements of certain California statutes relating to the actions of public entities, including, without limitation, CEQA. Also, as a public body, the City's action in approving this Agreement may be subject to proceedings to invalidate this Agreement, injunctive relief or damages. eTail assumes the risk of delays and damages that may result to eTail from any third-party legal actions related to the City's approval of this Agreement or the pursuit of the activities contemplated by this Agreement, even in the event that an error, omission or abuse of discretion by the City is determined to have occurred. If a third-party files a legal action regarding the City's approval of this Agreement or the pursuit of the activities contemplated by this Agreement, the City may terminate this Agreement on thirty (30) days' written notice to eTail of the City's intent to terminate this Agreement, referencing this Section 17 without any further obligation to perform the terms of this Agreement and without any liability to eTail resulting from such termination, unless eTail unconditionally agrees to indemnify and defend the City against such third-party legal action, as provided hereinafter in this Section 17. Within thirty (30) days of receipt of the City's notice of intent to terminate this Agreement, as provided in the preceding sentence, eTail may offer to defend the City in the third-party legal action and pay all of the court costs, attorney fees, monetary awards, sanctions, attorney fee awards, expert witness and consulting fees, and the expenses of any and all financial or performance obligations resulting from the disposition of the legal action. Any such offer from eTail must be in writing and in a form reasonably acceptable to the City. Nothing contained in this Section 17 shall be deemed or construed to be an express or implied admission that the City is or may be liable to eTail or any other person or entity for damages alleged from any alleged or established failure of the City to comply with any statute, including, without limitation, CEQA.

18. No Effect on City's Legislative Authority. Nothing in this Agreement shall limit or restrict the authority of the City Council to take any other actions with respect to the Property and/or eTail without notice to or consent from eTail, except as may otherwise be expressly provided by applicable law.

19. **Non-liability of the City or City Officials and Employees.** No council member, official, contractor, consultant, attorney or employee of the City shall be personally liable to eTail, 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 eTail or to its successors or assignees, or on any obligations arising under this Agreement.

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

21. **Defaults - General.** Subject to any extensions of time provided for in this Agreement for event of enforced Delay, the occurrence of any of the following shall constitute a "Default."

21.1 The failure by any Party to perform any obligation of such Party under this Agreement for the payment of money, if such failure is not cured within ten (10) days after the non-performing Party's receipt of written notice from the injured Party that such obligation was not performed when due; or

21.2 The failure by any Party to perform any of its obligations set forth in this Agreement other than obligations subject to subsection 21.1, if such failure is not cured within thirty (30) days after the non-performing Party's receipt of written notice from the injured Party that such obligation was not performed when due or, if such failure is of a nature that cannot reasonably be cured within thirty (30) days, the failure by such Party to commence such cure within thirty (30) days after receipt of such notice and to, thereafter, diligently prosecute such cure to completion; or

21.3 Any representation or warranty by a Party set forth in this Agreement proves to have been false or misleading in any material respect when made and said Party does not take the necessary action, following notice pursuant to subsection 21.2, to remedy said misrepresentation or breach of warranty within the time period set forth in subsection 21.2, such that the original representation or warranty becomes truthful and accurate.

21.4 Any failure or delays by any Party in asserting any of their rights and/or remedies as to any default shall not operate as a waiver of any default or of any such rights or remedies. Delays by any Party in asserting any of their rights and/or remedies shall not deprive any Party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert or enforce any such rights or remedies.

22. **City Offset Remedy.** In addition to those rights and remedies provided by Section 21, the City's rights and remedies for a Default by eTail include the right to off-set any amount of money due to the City from eTail following the notice and opportunity to cure provided in Section 21, against any Covenant Payment(s) due or becoming due to eTail

23. **Legal Actions.** In addition to any other rights or remedies, any Party may institute legal action to cure, correct or remedy any Default by the other Party, to recover general or

consequential damages for any default, or to obtain any other remedy available to that Party under this Agreement or at law or in equity.

24. **Governing Law.** The procedural and substantive laws of the State of California shall govern the interpretation and enforcement of this Agreement, without regard to its conflicts of laws principles.

25. **Rights and Remedies are Cumulative.** Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties under this Agreement are cumulative and the exercise by any Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by another Party.

26. **Notices, Demands and Communications between the Parties.**

26.1 Any and all notices, demands or communications submitted by a Party to the other Party pursuant to or as required by this Agreement shall be proper, if in writing and dispatched by messenger for immediate personal delivery, by a nationally recognized overnight courier service or by registered or certified United States mail, postage prepaid, return receipt requested, to the principal office of the Party, as designated in subsection 26.2. Such written notices, demands and communications may be sent in the same manner to such other addresses as the Party may from time to time designate. Any such notice, demand or communication shall be deemed to be received by the addressee, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, on the day that it is dispatched by messenger for immediate personal delivery, on the date of delivery by a nationally recognized overnight courier service or three (3) calendar days after it is placed in the United States mail, as provided in this subsection 26.1.

26.2 The following are the authorized addresses for the submission of notices, demands or communications to the Parties:

To eTail:	eTail
To the City:	City of Ontario 303 East "B" Street Ontario, California 91764 Attention: City Manager
With courtesy copy to:	Best Best & Krieger LLP 3750 University Avenue Suite 400 Riverside, California 92501 Attention: John Brown

Notwithstanding the foregoing, for the purpose of this Agreement, any and all notices, demands or communications submitted by eTail to the City pursuant to or as required by this Agreement shall be deemed to be from eTail. Conversely, any and all notices, demands or

communications submitted by the City to eTail shall be deemed to be submitted by the City to eTail.

27. **Attorneys' Fees.** In the event of the bringing of an arbitration, action or suit by a Party to this Agreement against the other Party to this Agreement 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 Party arising out of this Agreement or any other dispute between the Parties concerning this Agreement, 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 or Parties all costs and expenses of suit or claim, including reasonable 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 reasonable attorneys' fees (collectively, the "Costs") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 27, Costs shall include, without implied limitation, reasonable 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 27 shall survive any termination of this Agreement.

28. **Jurisdiction and Venue.** Any legal action or proceeding concerning this Agreement shall be filed and prosecuted in the appropriate state or federal court in the State of California. All Parties to this Agreement irrevocably consent to the personal jurisdiction of that court.

29. **Interpretation.** The Parties acknowledge that this Agreement is the product of arms-length negotiation and drafting and that each of the Parties have been represented by legal counsel in the negotiation and drafting of this Agreement. Accordingly, any rule of construction that the ambiguities in a document shall be construed against the drafter of that document shall have no application to the interpretation and enforcement of this Agreement. In any action or proceeding to interpret or enforce this Agreement, the finder of fact may refer to any extrinsic evidence not in direct conflict with any specific provision of this Agreement to determine and give effect to the intention of the Parties.

30. **Counterpart Originals; Integration; Amendments.** This Agreement may be executed in duplicate originals, each of which is deemed to be an original, but all of which taken together shall constitute one and the same instrument. This Agreement and the Exhibits attached to this Agreement 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 of this Agreement. This Agreement may not be amended except by a written instrument executed by both Parties. The City Manager is authorized, with the consent of the City Attorney, to make minor, non-substantive amendments to this Agreement on behalf of the City without the need for formal City Council approval.

31. **No Waiver.** Failure to insist on any one occasion upon strict compliance with any of the terms, covenants or conditions of this Agreement shall not be deemed a waiver of such term, covenant or condition, nor shall any waiver or relinquishment of any rights or powers under this Agreement 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.

32. **Time is of the Essence/Force Majeure.** Time is of the essence in the performance of the Parties' obligations under this Agreement. In addition to specific provisions of this Agreement providing for extensions of time, times for performance under this Agreement 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 under this Agreement shall not excuse its performance); moratoria; epidemics; quarantine restrictions; and freight embargoes (each, an "Enforced Delay"), provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the Enforced Delay within thirty (30) days from the occurrence thereof; and, provided further, that the extension of time shall be only for the period of the Enforced Delay.

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

32.2 eTail EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF eTail SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN 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 AGREEMENT. eTail EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF THE EFFECTIVE DATE.

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eTail Initials

33. **No Third Party Beneficiaries.** The performance of the Parties' respective obligations under this Agreement is not intended to benefit any party other than the City and eTail, except as may be expressly provided otherwise in this Agreement. No person or entity not a signatory to this Agreement shall have any rights or causes of action against any Party to this Agreement as a result of that Party's performance or non-performance under this Agreement.

34. **No Effect on Eminent Domain Authority.** Nothing in this Agreement shall be deemed to limit, modify, or abridge or affect in any manner whatsoever the City's eminent domain powers with respect to the Property, the Project or any other improvements on the Property.

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

36. **Warranty against Payment of Consideration for Agreement.** eTail 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 Agreement. Third parties, for the purposes of this Section 36, shall not include persons to whom fees are paid for professional services if rendered by attorneys, consultants, accountants, engineers, architects and the like when such fees are considered necessary by eTail.

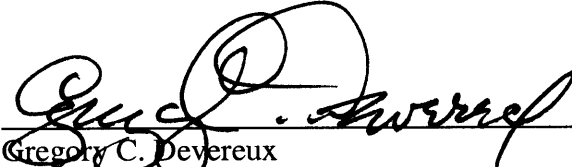
[Signatures on Following Pages]

SIGNATURE PAGE
TO
LOCATION AGREEMENT

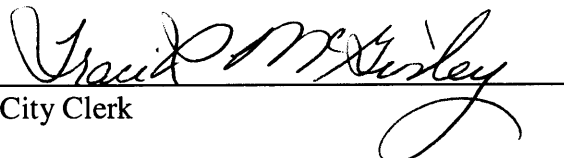
CITY:

THE CITY OF ONTARIO
a California municipal corporation

By:


Gregory C. Devereux
City Manager

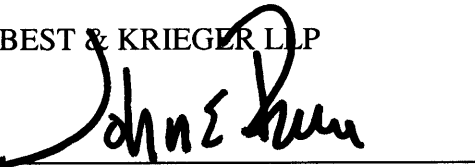
ATTEST:


City Clerk

APPROVED AS TO LEGAL FORM:

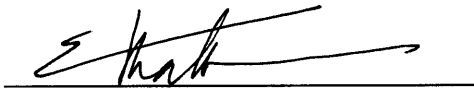
BEST BEST & KRIEGER LLP

By:


City Attorney

eTail Direct LLC:

By:



Its: Vice President of Tax _____

Date: 6/25/2009