

## **OPERATING COVENANT AGREEMENT** **(Kienle Motor Sports, LLC)**

This OPERATING COVENANT AGREEMENT ("Agreement") is entered into by and between the CITY OF ONTARIO, a California municipal corporation ("**City**"), and Kienle Motor Sports, LLC, a California Limited Liability Corporation ("**Company**"). City and Company are sometimes, individually, referred to in this Agreement as a "**Party**" and, collectively, as the "**Parties.**" The City and Company enter into this Agreement with reference to the following facts ("**Recitals**"):

### **RECITALS**

WHEREAS, Company intends to establish a new state-of-the-art, 72,433-square foot Porsche automobile sales and service center in the City ("**Dealership**"), as more particularly described in the Scope of Development set forth in Exhibit B attached to this Agreement.

WHEREAS, Company desires to construct its Dealership in the City of Ontario for the reason that Company can obtain a site that is adequate in size for its operation of the Dealership. Company desires to construct the Dealership on that certain real property consisting of approximately three (3) acres, and generally located at 2262 East Inland Empire Blvd., in the City of Ontario, California, as more particularly described in Exhibit A attached hereto ("**Property**").

WHEREAS, in consideration of the new and additional local sales tax revenues, property taxes, employment benefits, and other tangible and intangible benefits that are expected to be received by City arising from the Dealership within the City, City agrees to provide certain payments to Company to assist with the development and operation of the Dealership within the City.

WHEREAS, as an incentive for the development and operation of Dealership, Company has requested from the City assistance for development and operation costs associated with the Dealership in an amount equal to fifty percent (50%) of all sales tax revenue above \$100,000 annually for years 1-4 and \$125,000 annually for years 5-8 that is generated by the Dealership for a period of up to eight (8) years or a maximum amount of eight hundred thousand dollars (\$800,000), subject to the limitations set forth in this Agreement.

WHEREAS, the City has further determined that the covenanted operation of the Dealership serves the additional public purpose of fostering a business and civic environment that may attract additional businesses and investment in the community due to the availability of the increased public and private services and economic activity resulting therefrom. Accordingly, the City has also determined that its entry into this Agreement serves a significant public purpose, while providing only incidental benefits to a private party.

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

**1. 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.

1.1 “**CDTFA**” means the California Department of Tax and Fee Administration.

1.2 “**CEQA**” means and refers to the California Environmental Quality Act, Public Resources Code Section 21000 *et seq.*

1.3 “**Certificate of Completion**” means and refers to the written certification of the City that the Dealership is complete and in compliance with the terms and conditions of this Agreement, in substantially the form of Exhibit “D” attached to this Agreement and incorporated herein by this reference.

1.4 “**City**” means and refers to the City of Ontario, a California municipal corporation.

1.5 “**Company**” means and refers to Kienle Motor Sports, LLC, a California Limited Liability Corporation, and its successors and assigns, cumulatively.

1.6 “**County**” means and refers to the County of San Bernardino, California.

1.7 “**Covenant Payment(s)**” means and refers to payments made to Company in accordance with Section 7.3.

1.8 “**Dealership**” means and refers to a permanent full-service new Porsche automobile sales dealership and service center and parking that Company is to construct and operate on the Property in accordance with the terms and conditions of this Agreement, as further described in the Scope of Development. The Dealership shall be operated pursuant to an agreement with the manufacturer of “Porsche” automobiles for sales and service of new automobiles manufactured under the “Porsche” brand name, or pursuant to an agreement with a manufacturer of automobiles similar to Porsche, which manufacturer has been approved by the City, in its reasonable discretion, in addition to the sale of parts for such brand of automobiles and related sales of used automobiles.

1.9 “**Dealership Activities**” means and refers to activities of Company on the Property, 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 Dealership where such sale or lease is subject to sales or use tax pursuant to the Sales Tax Law.

1.10 “**Dealership 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 eighth anniversary of the Effective Date. Each Dealership Operating Year may be referred to in this Agreement in numerical succession as “Dealership Operating Year 1,” “Dealership Operating Year 2” and so on up to “Dealership Operating Year 8.”

1.11 **“Default”** shall have the meaning ascribed to the term in Section 19 of this Agreement.

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

1.13 **“Eligibility Period”** means and refers to the time period commencing on the Effective Date and ending on the earlier of: (a) the last calendar day of Dealership Operating Year 8; or (b) the date on which the City has made the maximum amount of Covenant Payments to Company in accordance with Section 7.3.

1.14 **“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 including terrorist activities; 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.

1.15 **“Entitlements”** shall have the meaning ascribed to the term in Section 6.

1.16 **“Environmental Laws”** shall mean all Federal, State, local or City laws, rules, orders, regulations, statutes, ordinances, codes, decrees or requirements of any governmental entity in effect on or enacted after the Effective Date, regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance, the regulation or protection of the environment, including ambient air, soil, soil vapor, groundwater, surface water, or land use or pertaining to occupational health or industrial hygiene or occupational or environmental conditions on, under or about the Property, as now or may at any later time be in effect, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”) [42 USC Section 9601 *et seq.*]; the Resource Conservation and Recovery Act of 1976 (“RCRA”) [42 USC Section 6901 *et seq.*]; the Clean Water Act, also known as the Federal Water Pollution Control Act (“FWPCA”) [33 USC Section 1251 *et seq.*]; the Toxic Substances Control Act (“TSCA”) [15 USC Section 2601 *et seq.*]; the Hazardous Materials Transportation Act (“HMTA”) [49 USC Section 1801 *et seq.*]; the Insecticide, Fungicide, Rodenticide Act [7 USC Section 6901 *et seq.*]; the Clean Air Act [42 USC Section 7401 *et seq.*]; the Safe Drinking Water Act [42 USC Section 300f *et seq.*]; the Solid Waste Disposal Act [42 USC Section 6901 *et seq.*]; the Surface Mining Control and Reclamation Act [30 USC Section 101 *et seq.*]; the Emergency Planning and Community Right to Know Act [42 USC Section 11001 *et seq.*]; the Occupational Safety and Health Act [29 USC Section 655 and 657]; the California Underground Storage of Hazardous Substances Act [California Health & Safety Code Section 25288 *et seq.*]; the California Hazardous Substances Account Act [California Health & Safety Code Section 25300 *et seq.*]; the California Safe Drinking Water and Toxic Enforcement Act [California Health & Safety Code Section 24249.5 *et seq.*]; or the Porter-Cologne Water Quality Act [California Water Code Section 13000 *et seq.*]; together with any regulations promulgated under the authorities referenced in this Section 1.16.

1.17 **“Equity Interest”** means and refers to all or any part of any equity or ownership interest(s) (whether stock, partnership interest, beneficial interest in a trust, membership interest

in a limited liability company, or other interest of an ownership or equity nature) in any entity, at any tier of ownership, that directly owns or holds any ownership or equity interest in a Person.

1.18 **“Federal”** means and refers to the federal government of the United States of America.

1.19 **“Hazardous Substances”** shall mean any flammable substance, explosive, radioactive material, asbestos, asbestos-containing material, polychlorinated biphenyl, chemical known to cause cancer or reproductive toxicity, pollutant, contaminant, hazardous waste, medical wastes, toxic substance or related material, explosive, petroleum, petroleum product or any “hazardous” or “toxic” material, substance or waste that is defined by those or similar terms or is regulated as such under any Law, including any material, substance or waste that is: (a) defined as a “hazardous substance” under Section 311 of the Water Pollution Control Act (33 U.S.C. § 1317), as amended; (b) designated as “hazardous substances” pursuant to 33 U.S.C. § 1321; (c) defined as a “hazardous waste” under Section 1004 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901, *et seq.*, as amended; (d) defined as a “hazardous substance” or “hazardous waste” under Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Reauthorization Act of 1986, 42 U.S.C. § 9601, *et seq.*, or any so-called “superfund” or “superlien” law; (e) defined as a “pollutant” or “contaminant” under 42 U.S.C. § 9601(33); (f) defined as “hazardous waste” under 40 C.F.R. Part 260; (g) defined as a “hazardous chemical” under 29 C.F.R. Part 1910; (h) any matter within the definition of “hazardous substance” set forth in 15 U.S.C. § 1262; (i) any matter, waste or substance regulated under the Toxic Substances Control Act (“TSCA”) [15 U.S.C. Sections 2601, *et seq.*]; (j) any matter, waste or substance regulated under the Hazardous Materials Transportation Act, 49 U.S.C. Sections 1801, *et seq.*; (k) those substances listed in the United States Department of Transportation (DOT) Table [49 C.F.R. 172.101 ]; (l) any matter, waste or substances designated by the EPA, or any successor authority, as a hazardous substance [40 C.F.R. Part 302]; (m) defined as “hazardous waste” in Section 25117 of the California Health and Safety Code; (n) defined as a “hazardous substance” in Section 25316 of the California Health and Safety Code; (o) that is subject to any other Law regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source; or (p) that is or becomes regulated or classified as hazardous or toxic under Law or in the regulations adopted pursuant to Law.

1.20 **“Law”** means every law, ordinance, requirement, order, proclamation, directive, rule or regulation of any Federal, State or local government applicable to the Property in any way, including relating to any development, renovation, construction, use, maintenance, taxation, operation, occupancy of or environmental conditions affecting the Property or the Dealership, or relating to any taxes, or otherwise relating to this Agreement or any Party’s rights, obligations or remedies under this Agreement, or any Transfer of any of the foregoing, whether in force on the Effective Date or passed, enacted, modified, amended or imposed at some later time, subject in all cases, however, to any applicable waiver, variance or exemption.

1.21 **“Local Sales Tax Revenues”** means the net Sales Tax actually received by the City from the CDTFA 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 Dealership in a particular Dealership 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 CDTFA; (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.

1.22 **"Maintenance Deficiency"** means and refers to an occurrence of a material adverse condition on any area of the Property that is subject to public view and which is in contravention of any of the general maintenance standard described in Section 10.

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

1.24 **"Notice of Appeal"** shall have the meaning ascribed to the term in Section 7.6.

1.25 **"Notice of Determination"** shall have the meaning ascribed to the term in Section 7.5.

1.26 **"Opening Date"** means and refers to the date on which the Dealership is open for business to the general public, which shall occur no later than the date set forth in the Schedule of Performance. Company shall provide written notice to City of the Opening Date at least three (3) business days prior to the Opening Date. City shall provide written verification to Company that the date provided by Company is recognized as the Opening Date or, if it is not recognized by the City as the Opening Date, what date shall be recognized as the Opening Date, which verification shall not be unreasonably withheld or delayed.

1.27 **"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 Company.

1.28 **"Person"** means and refers to any association, corporation, governmental entity or agency, individual, joint venture, joint-stock company, limited liability company, partnership, trust, unincorporated organization or other entity of any kind.

1.29 **"Prohibited Financial Assistance"** means and refers to any direct or indirect payment, subsidy, rebate or other similar or dissimilar monetary or nonmonetary 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 Company by any public or private person or entity.

1.30 **"Property"** means and refers to that certain real property located at 2262 East Inland Empire Blvd., in the City of Ontario, County of San Bernardino, California and legally described in Exhibit A attached hereto.

1.31 **"Recorded, record or recordation"** mean the recordation of the specified document(s) in the official records of the Recorder of the County of San Bernardino, California.

1.32 **"Sales Tax"** means and refers to all sales and use taxes levied under the authority of the Sales Tax Law attributable to the Dealership, excluding that which is to be refunded to Company because of an overpayment of such tax.

1.33 **"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 Company; and (c) regulations of the CDTFA and other binding rulings and interpretations relating to (a) and (b) of this Section 1.33.

1.34 **"Schedule of Performance"** means and refers to the schedule for the performance of certain actions by the City or Company, pursuant to this Agreement, as may be amended or extended from time to time attached to this Agreement as Exhibit C and incorporated herein by this reference.

1.35 **"Scope of Development"** means and refers to the detailed description of the primary elements of the Dealership attached to this Agreement as Exhibit B, as may be amended or modified from time to time, and incorporated herein by this reference.

1.36 **"State"** means and refers to the State of California.

1.37 **"Transfer"** means and refers to, regarding any property, right or obligation, any of the following, whether by operation of law or otherwise, whether voluntary or involuntary and whether direct or indirect: (a) any assignment, conveyance, grant, hypothecation, mortgage, pledge, sale, or other transfer, whether direct or indirect, of all or any part of such property, right or obligation, or of any legal, beneficial, or equitable interest or estate in such property, right or obligation or any part of it (including the grant of any easement, lien, or other encumbrance); (b) any conversion, exchange, issuance, modification, reallocation, sale, or other transfer of any Equity Interest(s) in the owner of such property, right or obligation by the holders of such Equity Interest(s); or (c) any transaction that is in substance equivalent to any of the foregoing. A transaction affecting Equity Interests, as referred to in clauses "(b)" or "(c)" of this Section 1.37, shall be deemed a Transfer by Company, even though Company is not technically the transferor. A "Transfer" shall not, however, include any of the following (provided that the other Party has received written notice of such occurrence) relating to the Property or any Equity Interest: (i) a mere change in form of ownership with no material change in beneficial ownership and constitutes a tax-free transaction under Federal income tax law and the State real estate transfer tax law; (ii) a conveyance only to member(s) of the immediate family(ies) of the transferor(s) or trusts for their benefit; or (iii) a conveyance only to any Person that, as of the Effective Date, holds an Equity Interest in the entity whose Equity Interest is being transferred.

**2. Effective Date of this Agreement.** This Agreement is dated as of the date first written above 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 Company has approved this Agreement, this Agreement has been signed by Company's duly authorized representative(s), and Company has delivered two (2) signed originals of this Agreement to the City; and

2.2 This Agreement is approved by the City Council of the City at a public meeting of the City.

**3. Representations and Warranties of the City.**

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

(a) 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;

(b) 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; and

3.2 The representations and warranties of the City set forth in Section 3.1 are material consideration to Company and the City acknowledges that Company is relying upon the representations of the City set forth in Section 3.1 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 Scott Ochoa (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 Company.**

4.1 Company represents and warrants to the City that, to Company's actual current knowledge:

(a) Company is a duly formed California Limited Liability Corporation, organized, qualified and in good standing to do business in the State of California and in the City;

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

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

(d) Company is not “relocating” to the Property from the territorial jurisdiction of another local agency in the same “market area,” as those terms are defined in California Government Code Section 53084 and decisional case law, such that this Agreement would violate the prohibitions of California Government Code Section 53084;

(e) This Agreement does not result in a reduction in the amount of Local Sales Tax Revenue that, in the absence of this Agreement, would be received by another local agency where Owner maintains a physical presence, if applicable, such that this Agreement would violate the prohibitions of California Government Code Section 53084.5;

(f) Company’s entry into this Agreement and/or the performance of Company’s obligations under this Agreement does not constitute a violation of any state or federal statute or judicial decision to which Company is subject;

(g) There are no pending lawsuits or other actions or proceedings which would delay, prevent or impair the timely performance of Company’s obligations under this Agreement; and

(h) Company 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 Company and no other action by Company 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 Company set forth in Section 4.1 are material consideration to the City and Company acknowledges that the City is relying upon the representations of Company set forth in Section 4.1 in undertaking its obligations under this Agreement.

4.3 As used in this Agreement, the term “Company’s actual current knowledge” shall mean, and shall be limited to, the actual current knowledge of Steven C. Kienle, 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. Restrictions on Assignment or Transfer of this Agreement, the Property and the Dealership.** During the Eligibility Period, Company shall not sell, assign, convey, create any trust estate with respect to or otherwise transfer, assign or encumber any of their rights or interests in this Agreement, the Property, or the Dealership without the prior written consent of the City and unless the transferee is another legal entity that Company has the right to control by ownership (controlling interest) or contract. The City’s approval of any such transfer shall not be unreasonably withheld, delayed or conditioned. In deciding to give or withhold its approval, the City may consider the extent or strength of ownership or contractual control Company has over the legal entity, the financial strength of the proposed transferee and the demonstrated experience and qualifications of the proposed transferee and its senior management personnel to undertake and faithfully carry out the assigned rights and obligations.

**6. Company's Covenant to Undertake the Dealership.** Company covenants and agrees for itself, its successors and assigns, for the sole and exclusive benefit of the City that Company shall obtain all necessary City and other governmental approvals and entitlements for the Dealership (collectively, "**Entitlements**"), and that promptly following receipt of all such Entitlements, Company shall carry out the construction of the Dealership in accordance with the Schedule of Performance and, thereafter, shall diligently proceed to complete the construction of the Dealership, in a good and workmanlike manner in accordance with the approved plans, specifications and conditions for the Dealership as reasonably approved by the City. The Dealership shall be constructed in conformity with all applicable laws, the Scope of Development and the Schedule of Performance, and any and all other plans, specifications and similar development documents required by this Agreement. The covenants of this Section 6 shall run with the land of the Property, until the date on which Certificates of Completion for the Dealership are recorded.

**6.1 Completion of Dealership.** Company shall complete the Dealership in accordance with the Schedule of Performance. Company shall, promptly upon completion of the Dealership, cause the Dealership to be inspected by each governmental body with jurisdiction over the Property, shall correct any defects and deficiencies that may be disclosed by any such inspection and shall cause to be duly issued all occupancy certificates and other licenses, permits and authorizations necessary for the operation and occupancy of the completed Dealership. Company shall do and perform all of the foregoing acts and things and cause to be issued and executed all such occupancy certificates or permit approvals, licenses and authorizations in accordance with the Schedule of Performance. After commencement of the construction of the Dealership, Company shall not permit the construction of the Dealership to cease or be suspended for a time period in excess of thirty (30) calendar days, either consecutively or in the aggregate, for any reason other than as a result of an Enforced Delay.

**6.2 Compliance with Laws; Environmental Laws; Hazardous Substances.** All work performed in connection with the Dealership shall comply with all applicable laws, ordinances, rules and regulations of federal, state, county or municipal governments or agencies now in force or which may be enacted or amended hereafter (including but not limited to CEQA), and with all applicable directions, rules and regulations of the fire department, health department, building department or other departments of every governmental agency now having or hereafter acquiring jurisdiction over the Property or construction or operation of the Dealership. Company shall be responsible for: (a) cleaning-up, removing or disposing of any and all Hazardous Substances located on, under or about the Property in accordance with all applicable Environmental Laws; and (b) paying all costs and expenses associate with or related to such clean-up, removal or disposal.

**6.3 Dealership Costs and Charges to be Paid by Company.** Company and the City agree that the City shall not provide any financial assistance to Company in connection with the construction and operation of the Dealership. Company shall be solely responsible for paying for the costs of all demolition, design work, construction, labor, materials, relocation costs, fees and permit expenses related to or associated with the Dealership. Company shall pay any and all fees pertaining to the review and approval of the Dealership by the City and any other governmental bodies and utility service providers, including the cost and preparation of all required construction, planning and other documents reasonably required by governmental bodies pertinent to the

construction of the Dealership including, but not limited to, specifications, drawings, plans, maps, permit applications, land use applications, zoning applications, environmental review and disclosure documents and design review documents. Company shall pay for any and all costs, including, but not limited to, the costs of design, construction, relocation and securing of permits for sewer or utility improvements and connections, that may be required in construction of the Dealership, whether located on or off of the Property. Company shall obtain any and all necessary approvals, prior to the commencement of applicable portions of said construction.

**6.4 Dealership Subject to City Regulatory Approval.** No action by the City with reference to this Agreement or related documents shall be deemed to constitute a waiver of any Law regarding the Property, the Dealership, Company, any successor-in-interest of Company or any successors-in-interest to the Property. Notwithstanding any provision to the contrary in this Agreement, Company agrees to accept and comply fully with any and all reasonable and lawful conditions of approval applicable to all approvals, permits and other governmental actions or Entitlements regarding the renovation or operation of the Business on the Property, consistent with the Scope of Development and this Agreement. Company shall prepare and submit a complete development application and any other required application or document (including, without limitation, deposit, fund or surety) for the Dealership, consistent with the Scope of Development, to the City, within the time period(s) for such actions set forth in the Schedule of Performance.

**6.5 Company Attendance at City Meetings.** Company agrees to have one (1) or more of its employees or consultants who are knowledgeable regarding this Agreement and the Dealership, such that these person(s) can meaningfully respond to the City's questions regarding the progress of the Dealership, attend meetings of the City Council, when requested to do so by City staff, and upon at least 48 hours' written notice from the City.

**6.6 City Right to Inspect Dealership.** For purposes of this Agreement, officers, employees, agents or representatives of the City shall have the right of reasonable access to the Property, without the payment of charges or fees, during normal construction hours, during the period of construction of the Dealership. Such officers, employees, agents or representatives of the City shall be those persons who are designated by the City Manager. Any and all officers, employees, agents or representatives of the City who enter the Property for purposes of this Agreement shall identify themselves at the construction management office or apparent on the Property, upon their entrance on to the Property. Company shall make a representative of Company available for this purpose at all times during normal construction hours, upon reasonable notice from the City. The City shall indemnify and hold Company harmless from injury, property damage or liability arising out of the exercise by the City of the right of access to the Property provided in this Section 6.6, other than injury, property damage or liability arising from the negligence or willful misconduct of Company or its officers, agents or employees. The City shall inspect relevant portions of the Property, prior to issuing any written statements reflecting adversely on Company's compliance with the terms and conditions of this Agreement pertaining to construction of the Dealership. If in the City's reasonable judgment it is necessary, the City shall have the further right, from time to time, to retain a consultant or consultants, at no expense to the Company, to inspect the work and verify compliance by Company with the provisions of this Agreement. Company understands and agrees that any such City inspections are for the sole purpose of protecting the City's rights under this Agreement, are made solely for the City's benefit, that the City's inspections may be general in nature, and are for the purposes of informing the City of the

progress of the construction of the Dealership and the conformity of the Dealership with the terms and conditions of this Agreement, and that Company shall not be entitled to rely on any such inspection(s) as constituting the City's approval, satisfaction or acceptance of any materials, workmanship, conformity of the Dealership with this Agreement or otherwise. Company agrees to make its own regular inspections of the work of construction of the Dealership to determine that the quality of the Dealership and all other requirements of the work of construction of the Dealership are being performed in a manner satisfactory to Company. Company also agrees to immediately notify the City in writing should Company's inspections show any matters that will prevent the Dealership from being completed in accordance with the Schedule of Performance. Without limiting the foregoing, Company, upon at least 48 hours' written notice from the City and at no expense to Company, shall permit the City to examine and copy all books and account records and other papers relating to the Property and the construction of the Dealership. Company will use commercially reasonable efforts to cause all contractors, subcontractors and materialmen to cooperate with the City to enable such examination.

#### **6.7 Certificate of Completion.**

(a) Following the completion of construction of the Dealership, excluding any normal and minor building "punch-list" items to be completed by Company, and written request from Company for issuance of a Certificate of Completion for the Dealership, the City shall promptly inspect the completed Dealership to determine whether or not the Dealership has been completed in compliance with this Agreement. If the City determines that the Dealership is complete and in compliance with this Agreement, the City shall promptly furnish Company with a Certificate of Completion for the Dealership, executed in recordable form. If the City determines that the Dealership is not in compliance with this Agreement, the City shall send written notice of each non-conformity to Company.

(b) A Certificate of Completion shall be evidence of the City's conclusive determination of satisfactory completion of the Dealership, pursuant to the terms of this Agreement. After the recordation of Certificates of Completion for the Dealership, any person then owning or thereafter purchasing, leasing or otherwise acquiring any interest in the Property shall not (because of such ownership, purchase, lease or acquisition) incur any obligation or liability under this Agreement regarding construction of the Dealership, except that such person shall be bound by any reservations, covenants, conditions, restrictions and other interests recorded against the Property pursuant to this Agreement.

(c) If the City fails or refuses to issue a Certificate of Completion pursuant to Section 6.7(a) after written request from Company, the City shall, within fifteen (15) calendar days of Company's written request or within seven (7) calendar days after the next regular meeting of the City Council, whichever date occurs later, provide Company with a written statement setting forth the reasons for the City's failure or refusal to issue a Certificate of Completion. The statement shall also contain the City's opinion of the action(s) Company must take to obtain a Certificate of Completion from the City. If the reason for such refusal is confined to the immediate unavailability of specific items or materials for construction or landscaping at a price reasonably acceptable to Company or other minor building "punch-list" items, the City may issue its Certificate of Completion upon the posting of a bond or irrevocable standby letter of credit by Company in a form reasonably acceptable to the City in an amount representing the fair value of the work not

yet completed, as reasonably determined by the City. If the City fails to provide such written statement, within the foregoing time period, Company shall be deemed conclusively and without further action of the City to have satisfied the requirements of this Agreement with respect to the completion of the Dealership, as if a Certificate of Completion had been issued by the City pursuant to this Agreement.

(d) A Certificate of Completion shall not constitute evidence of compliance with or satisfaction of any obligation of Company to any holder of a mortgage, or any insurer of a mortgage securing money loaned to finance the Dealership, or any part thereof. A Certificate of Completion shall not be deemed to constitute a notice of completion under California Civil Code Section 3093, nor shall it act to terminate the continuing covenants, restrictions or conditions subsequent contained in any instruments recorded against the Property pursuant to this Agreement. A Certificate of Completion is not evidence of the compliance of the Dealership with any Laws of a governmental entity with jurisdiction over the Property.

**6.8 No Foreclosure by Senior Lienholders.** Mortgages, deeds of trust, or any other form of lien required for any reasonable method of financing the construction of the Dealership on the Property are permitted, however, the City's rights under this Agreement shall be senior to any and all such forms of lien; provided that if reasonably requested by Company's construction lender, City shall agree that its foreclosure of its lien shall not defeat or impair such lender's financing deed of trust or mortgage. Company shall notify the City in writing in advance of any mortgage, deed of trust, or other form of lien for financing if Company proposes to enter into the same before the recordation of Certificates of Completion for the Dealership. The words "mortgage" and "deed of trust" as used herein shall be deemed to include all customary and appropriate modes of financing real estate construction and land development.

**6.9 Agreement Contingent on Dealership Construction.** This Agreement is contingent on the completed construction of the Dealership and issuance of Certificate(s) of Completion for the Dealership.

**7. Company's Covenant Regarding the Opening and Operation the Dealership.** Company covenants to the City to open the Dealership to the public in accordance with the Schedule of Performance and to continuously operate the Dealership on the Property throughout the entirety of the Eligibility Period. For purposes of this Section 7 "continuously operate" means not ceasing operation for a time period in excess of ninety (90) consecutive calendar days.

**7.1 Designation of City as Point of Sale.** Company shall designate the City as the "point of sale" in all reports to the CDTFA for all Dealership Activities. Company shall, for the full Eligibility Period, at its sole cost and expense, maintain all permits, contractual arrangements, licenses, and registrations necessary for it to lawfully conduct the Dealership Activities and to designate the City as the "point of sale" in all reports and returns submitted to the CDTFA regarding the Dealership Activities by the Dealership. The provisions of this Section 7.1 shall survive any Default by Company.

**7.2 Company Sales Tax Information.** Company acknowledges and agrees that the sales and use tax reporting and payment information related to sales and use taxes attributable to Dealership Activities by the Dealership may become a public record as a result of the covenants

of Company contained in Section 7.1 and the Covenant Payments to be made by the City to Company (as further described in Section 7.3). Company hereby authorizes the City to use the sales and use tax reporting and payment information related to the Dealership Activities by the Dealership 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.

**7.3 City's Covenant Payment to Company.** In consideration of Company's performance of its obligations set forth in this Agreement, and subject to satisfaction of all conditions precedent thereto, the City shall, for each Dealership Operating Year during the Eligibility Period that the City receives Local Sales Tax Revenues, starting on the Effective Date of this Agreement, pay to Company: (1) for Dealership Operating Years 1-4, an amount equal to the sum of fifty percent (50%) of the Local Sales Tax Revenues received above the annual base amount of One Hundred Thousand Dollars (\$100,000); and (2) for Dealership Operating Years 5-8, an amount equal to the sum of fifty percent (50%) of the Local Sales Tax Revenues received above the annual base amount of One Hundred and Twenty Five Thousand Dollars (\$125,000) annually (collectively, the "**Covenant Payment**"). In no event shall Company be entitled to any Covenant Payment(s) during a Dealership Operating Year until both (a) the Company completes the sale of a new Porsche vehicle, or similar model which model has been approved by the City, in its reasonable discretion and (B) all Dealership construction activities have been completed and all applicable City approvals for the Dealership have been obtained. The cumulative total of any and all Covenant Payments paid by the City pursuant to this Agreement shall not exceed Eight Hundred Thousand Dollars (\$800,000) ("**Maximum Covenant Payment Amount**").

**7.4 State of California Legislation Impact on Covenant Payment.** Company 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. Company 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 Company a corresponding reduction and/or delay in the payment of the Covenant Payments due to Company during such time as such legislation is in effect. Furthermore, Company 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. Company agrees that they are undertaking their obligations under this Agreement after having considered, and is expressly assuming the risk of, the possibility of the enactment of future 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 Company hereunder, City shall treat any such offsetting revenues which are: (a) indexed to Sales Tax and offset the loss of Sales Tax revenues to the City on a dollar for dollar basis; (b) actually received by the City; and (c) 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.

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

**7.6 Company'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 and Notice of Determination by Company, Company notifies the City in writing that Company 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 CDTFA which set forth the amount of sales tax paid to the CDTFA during the Dealership Operating Year in connection with Dealership Activities; (ii) any and all bills, invoices, schedules, vouchers, statements, receipts, cancelled checks, and any other documents evidencing the amount of sales tax paid by Company during such Dealership Operating Year; and (iii) any and all invoices, and inventory records for such Dealership 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 Company and all others claiming by or through Company. The provisions of this Section 7.6 shall be strictly construed and Company 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 7.6. If Company files a timely Notice of Appeal with the City, the City and Company shall negotiate in good faith to resolve their dispute for a Negotiation Period. If, by the end of the Negotiation Period, the City and Company 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 one hundred twenty (120) calendar days following the end of the Negotiation Period or be barred forever. In connection therewith, the City and Company irrevocably consent to the appointment of a referee (who shall be a retired judge) 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.

**7.7 No Accrual of Interest for Disputed Covenant Payment(s).** The City and Company 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. Company 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.

**7.8 Covenant Payment Paid From Any Source of City Funds.** Any Covenant Payment due under Section 7.3 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.

**7.9 Making Covenant Payment Is A Contingent Obligation of City.** The City's obligations under Section 7.3 are contingent on a fiscal year to fiscal year basis and, for each Dealership Operating Year within the Eligibility Period, the City's obligations to make any payments to Company under this Agreement are expressly contingent upon Company, for the entirety of such Dealership Operating Year, completely fulfilling its material obligations under this Agreement. If for any reason Company fails to authorize the release or use of all or any part of sales tax information regarding the Dealership in a manner satisfactory to the CDTFA or provide any information reasonably required by the City to perform the City's obligations under this Agreement, or if all or any part of the sales tax information of Company 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, the Covenant Payment shall be based solely upon the information so received, if any.

**7.10 CDTFA Determination of Improperly Allocated Local Sales Tax Revenues.** If, at any time during or after the Eligibility Period of this Agreement, the CDTFA 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 CDTFA 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 Company shall, within thirty (30) calendar days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to Company which are attributable to such repaid, offset or recaptured Local Sales Tax Revenues. If Company fails to make such repayment within thirty (30) calendar days after the City's written demand, then Company 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. In the event Company in good faith contests or appeals any such determination by the CDTFA of improper allocation or payment of Local Sales Tax Revenues to Company, the provisions of this section requiring repayment of the Covenant Payments to City shall not apply until such time as Company's contest or appeal has been finally determined in accordance with applicable law. This Section 7.10 shall survive the expiration or termination of this Agreement.

**7.11 Covenants Run With the Property.** The covenants of this Section 7 shall run with the Property and shall remain in effect at all times during the Eligibility Period.

**8. Company's Covenant Not To Accept Prohibited Financial Assistance.** Company covenants to the City that during the Eligibility Period, Company 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 Dealership 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 Dealership Activities in the absence of such an agreement, or (iii) any event of default by Company. The covenants of this Section 8 shall run with the Property and shall remain in effect at all times during the Eligibility Period.

**9. Company's Covenant To Maintain the Property on Tax Rolls During the Eligibility Period.** Company covenants to the City to maintain the Property on the County of San Bernardino, California, secured real property tax rolls throughout the Eligibility Period.

9.1 During the Eligibility Period, Company, and its successors and assigns, covenants and agrees to 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 to timely pay all supplemental tax bills regarding such property issued by the County of San Bernardino, California.

9.2 The covenants of this Section 9 shall run with the Property and shall remain in effect for the Eligibility Period.

**10. Company's Covenant to Maintain the Property in Good Condition.** Company covenants to the City that during the Eligibility Period it shall maintain areas of the Property that are subject to public view (including all existing improvements, paving, walkways, landscaping, exterior signage and ornamentation) in good repair and a neat, clean and orderly condition, ordinary wear and tear excepted. If, at any time during the Eligibility Period, City reasonably determines that there is a Maintenance Deficiency, then the City may notify Company in writing of the Maintenance Deficiency. If Company fails to cure or commence and diligently pursue to cure the Maintenance Deficiency within thirty (30) calendar days of receipt of notice of the Maintenance Deficiency, the City may conduct a public hearing, following transmittal of written notice of the hearing to Company, at least, ten (10) calendar days prior to the scheduled date of such public hearing, to verify whether a Maintenance Deficiency exists and whether Company has failed to comply with the provisions of this Section. If, upon the conclusion of the public hearing, the City finds that a Maintenance Deficiency exists and that there appears to be non-compliance with the general maintenance standard described above, the City shall have the right to enter the Property and perform all acts necessary to cure the Maintenance Deficiency, or to take any other action at law or in equity that may then be available to the City to accomplish the abatement of the Maintenance Deficiency.

10.1 During the Eligibility Period, Graffiti, as this term is defined in California 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 by Company 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

graffiti may be removed with solvents, detergents or water, as appropriate. If any such graffiti is not removed within five (5) business days following the time of the discovery of the graffiti, the City shall have the right to enter the Property and remove the graffiti, without notice.

10.2 The City and Company further mutually understand and agree that the rights conferred upon the City under Section 10 expressly include the power to establish and enforce a lien or other encumbrance against the Property (individually or collectively), or any portion thereof, in the manner provided under California Civil Code Sections 2924, 2924b and 2924c in an amount reasonably necessary to restore the Property to the maintenance standard required under Section 10, including the reasonable attorneys' fees and costs of the City associated with the abatement of the Maintenance Deficiency or removal of graffiti. For the purposes of the preceding sentence the words "reasonable attorneys' fees and costs of the City" mean and refer to the salaries, benefits and costs of the City Attorney and the lawyers employed in the office of the City Attorney. Nothing in Section 10 shall be deemed to preclude Company from making any alteration, addition, or other change to any structure or improvement or landscaping on the Property, provided that such changes comply with applicable Law.

10.3 The covenants of this Section 10 shall run with the Property and shall remain in effect for the Eligibility Period.

**11. Company's Covenant to Use Property In Accordance With Agreement.** Company covenants and agrees for itself, its successors and assigns and all voluntary and involuntary successors in interest to the Property or any part thereof, that the Property shall, for the Eligibility Period, be put to no use other than construction of the Dealership and operation of the Dealership Activities. The covenant of this Section 11 shall run with the interest in the Property and shall remain in effect for the Eligibility Period.

**12. Company's Covenant Not to Discriminate.** Company covenants by and for itself, himself or herself, its, his or her heirs, executors, administrators, and assigns, and all Persons claiming under or through it, him or her, and this Agreement is made and accepted upon and subject to the following conditions:

12.1 **Standards.** That there shall be no discrimination against or segregation of any Person or group of Persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the Property nor shall Company, itself, himself or herself, or any Person claiming under or through it, him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use, or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the Property.

**13. Payment of Prevailing Wages.**

13.1 Company acknowledges that the City has made no representation, express or implied, to Company or any person associated with Company regarding whether or not laborers employed relative to the construction and installation of improvements on the Property, if any,

must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to California Labor Code Sections 1720, *et seq.* Company agrees with the City that Company shall assume the responsibility and be solely responsible for determining whether or not laborers employed relative to any construction of capital improvements on the Property must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to California Labor Code Sections 1720, *et seq.*

13.2 Company, on behalf of itself, its successors, and assigns, waives and releases the City from any right of action that may be available to any of them pursuant to California Labor Code Sections 1726 and 1781. Company acknowledge the protections of California Civil Code Section 1542 relative to the waiver and release contained in this Section 13.2, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

BY INITIALING BELOW, COMPANY KNOWINGLY AND VOLUNTARILY WAIVES THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 SOLELY IN CONNECTION WITH THE WAIVERS AND RELEASES OF THIS SECTION 13:

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Company

13.3 Additionally, Company shall indemnify, defend with counsel acceptable to the City and hold harmless the City against any claims pursuant to California Labor Code Section 1781 arising from this Agreement or the construction or installation of any improvements on the Property, in accordance with the terms of Section 13 of this Agreement.

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

**14. 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.

**15. Defense of this Agreement.** Company acknowledges that the City is a “public entity” as defined under applicable State of California law. Therefore, the City must satisfy the requirements of certain State of California statutes relating to the actions of public entities, including, without

limitation, CEQA and certain economic development provisions set forth in Title 5, Division 2, Part 1, Chapter 1, Article 4 of the California Government Code. 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. Company assumes the risk of delays and damages that may result to Company 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) calendar days' written notice to Company of the City's intent to terminate this Agreement, referencing this Section 15, without any further obligation to perform the terms of this Agreement and without any liability to Company resulting from such termination, unless Company unconditionally agree to indemnify and defend the City against such third-party legal action, as provided hereinafter in this Section 15. Within thirty (30) calendar days of receipt of the City's notice of intent to terminate this Agreement, as provided in the preceding sentence, Company 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 Company must be in writing and in a form reasonably acceptable to the City. Nothing contained in this Section 15 shall be deemed or construed to be an express or implied admission that the City is or may be liable to Company or any other person or entity for damages alleged from any alleged or established failure of the City to comply with any statute.

**16. 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 Company without notice to or consent from Company, except as may otherwise be expressly provided by applicable law.

**17. Nonliability 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 Company, 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 Company or to its successors or assignees, or on any obligations arising under this Agreement.

**18. 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.

**19. 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."

19.1 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) calendar days

after the non-performing Party's receipt of written notice from the injured Party that such obligation was not performed when due; or

19.2 The failure by any Party to perform any of its obligations set forth in this Agreement, other than obligations subject to Section 19.1, if such failure is not cured within thirty (30) calendar 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) calendar days, the failure by such Party to commence such cure within thirty (30) calendar days after receipt of such notice and to, thereafter, diligently prosecute such cure to completion; or

19.3 Any representation or warranty by any Party in this Agreement proves to have been false and misleading in any material respect when made and said Party does not take the necessary action, following notice pursuant to Section 19.2, to remedy said misrepresentation or breach of warranty within the time period set forth in Section 19.2, such that the original misrepresentation or warranty becomes truthful and accurate.

19.4 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 action or proceedings that it may deem necessary to protect, assert or enforce any such rights or remedies.

**20. City Remedies.** The City's rights and remedies for a Default by Company shall be any one or more of the following, as applicable:

20.1 For any Default, pursue any available legal or equitable action or remedy to (1) recover damages to the City arising from such Default, including, without limitation, to collect any amount of money due to the City from Company, or (2) preclude a breach of this Agreement or compel Company to perform in accordance with the requirements of this Agreement, following the notice and opportunity to cure provided in Section 19.1; and

20.2 For any Default, off-set any amount of money due to the City from Company, following the notice and opportunity to cure provided in Section 19.1 or 19.2, as applicable, against any Covenant Payment(s) due or becoming due to Company; and

20.3 For any Default of an obligation arising under any of Sections 4, 5, 6, 7, 8, 9, 10, 11, or 12, suspend any Covenant Payments due hereunder during any period during which such a Default exists. If two consecutive Covenant Payments are suspended in accordance with this Section 20.3, then the City may, at its option, elect to immediately terminate this Agreement and all of its obligations hereunder, including any obligations concerning unaccrued and suspended Covenant Payments, without cost, expense or liability; and

20.4 For any Default which consists of the failure by Company to complete all material elements of the Dealership in accordance with the Schedule of Performance, or any extension as may be provided per this Agreement, immediately terminate this Agreement and all of the City's obligations hereunder, including any obligations concerning unaccrued and suspended Covenant Payments, without cost, expense or liability; provided, however, that City first gives Company written

notice of its intent to terminate this Agreement, specifying the nature and extent of the claimed default hereunder, and Company has not cured such Default within thirty (30) days of its receipt of such notice in instances where the right to cure is contemplated by this Agreement; and

20.5 For any Default, the City may, at its option, require Company to pay to City an amount equal to the Local Sales Tax Revenue paid by City to Company during each Operating Year in which the Default occurred.

**21. Legal Actions.** In addition to any other rights or remedies, any Party may institute legal action to cure, correct or remedy any Default, 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.

**22. 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.

**23. 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.

**24. Incorporation of Recitals.** The Recitals of fact set forth in this Agreement are true and correct and are incorporated into this Agreement in their entirety by this reference.

**25. Notices, Demands and Communications Between the Parties.**

25.1 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 Section 25.2. 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 calendar 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 Section 25.1.

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

To Company:

Kienle Motor Sports LLC  
3213 Adams St  
Riverside, CA 92504  
Attn: Steven C. Kienle

With courtesy copy to:

ScaliRasmussen, P.C. 800 Wilshire Blvd.,  
Suite 400 Los Angeles, CA 90017  
Attn: Bob Daniels  
Attn: Christian J. Scali

To the City:

City of Ontario  
303 East B Street Ontario  
California 91764  
Attn: Scott Ochoa, City Manager

With courtesy copy to:

Best Best & Krieger LLP  
18101 Von Karman Avenue, Suite 10000  
Irvine, CA 92612  
Attn: Elizabeth Hull, Special Counsel

**26. 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 26, 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 26 shall survive any termination of this Agreement.

**27. Conflict of Interest.** No member, official or employee of the City having any conflict of interest, direct or indirect, related to this Agreement or the construction of the Dealership on the Property shall participate in any decision relating to this Agreement. The Parties represent and warrant that they do not have knowledge of any such conflict of interest.

**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 County of San Bernardino, State of California. All Parties to this Agreement irrevocably consent to the personal jurisdiction of that court.

**29. Interpretation.** No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Agreement. The Parties have both participated substantially in the negotiation, drafting, and revision of this Agreement, with advice from legal and other counsel and advisers of their own selection. 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.** 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.

**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 when there occurs 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) calendar 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, COMPANY 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, CHANGED ECONOMIC CIRCUMSTANCES, FRUSTRATION OF PURPOSE, OR SIMILAR THEORIES.

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Company

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

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Company

**33. No Third Party Beneficiaries.** Except as may be expressly provided otherwise in this Agreement, (a) the performance of the Parties' respective obligations under this Agreement is not intended to benefit any party other than the City and Company, and (b) 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 Dealership or any other improvements on the Property.

**35. Tax Consequences.** Company 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.** Company 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, financial consultants, accountants, engineers, architects and the like when such fees are considered necessary by Company.

**37. Exhibits.** The following is a list of the Exhibits attached to this Agreement. Each of the exhibits referenced in this Section 37 are incorporated by this reference into the text of this Agreement.

<u>Exhibit A</u>	Legal Description of Property
<u>Exhibit B</u>	Scope of Development
<u>Exhibit C</u>	Schedule of Performance
<u>Exhibit D</u>	Form of Certificate of Completion

**38. Amendment.** This Agreement may be amended only by a written instrument executed by Company and the City.

**39. Severability.** If any provision of this Agreement shall be declared invalid, inoperative or unenforceable by a final judgment or decree of a court of competent jurisdiction such invalidity or unenforceability of such provision shall not affect the remaining provisions of this Agreement, which are hereby declared by the City and Company to be severable from any other provision that is found by a court to be invalid or unenforceable.

**40. Titles and Headings for Reference Only.** The titles and headings of the Sections of this Agreement have been inserted for convenience of reference only and are not to be considered a part of this Agreement and shall not in any way modify or restrict the meaning of any of the terms or provisions of this Agreement.

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

**42. Progress Meetings.** The Parties agree to meet on the 3<sup>rd</sup> and 5<sup>th</sup> anniversary of the signing of this Agreement. The intent of this meeting is to review the progress of the Company in meeting the financial and development goals of this Agreement.

**43. Entire Agreement.** This Agreement contains the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements.

**[Signatures on following Page]**

**SIGNATURE PAGE  
TO  
OPERATING COVENANT AGREEMENT  
(Kienle Motor Sports, LLC)**

**CITY:**

CITY OF ONTARIO  
a California Municipal Corporation

By: 

Name: Scott Ochoa

Title: City Manager

**COMPANY:**

By: 

Name: Steven C. Kienle

Title: \_\_\_\_\_

**ATTEST:**

  
City Clerk

**APPROVED AS TO LEGAL FORM:**

By: 

Name: Ruben Duran

Title: City Attorney

**APPROVED AS TO LEGAL FORM:**

By: \_\_\_\_\_

Name: Robert Daniels

Title: Company Counsel

**SIGNATURE PAGE  
TO  
OPERATING COVENANT AGREEMENT  
(Kienle Motor Sports, LLC)**

**CITY:**

CITY OF ONTARIO  
a California Municipal Corporation

**COMPANY:**

\_\_\_\_\_

By: \_\_\_\_\_

Name: Scott Ochoa

Title: City Manager

By: \_\_\_\_\_

Name: Steven C. Kienle

Title: \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
City Clerk

**APPROVED AS TO LEGAL FORM:**

By: \_\_\_\_\_

Name: Ruben Duran

Title: City Attorney

**APPROVED AS TO LEGAL FORM:**

By: \_\_\_\_\_

Name: Robert Daniels

Title: Company Counsel

**EXHIBIT B  
TO  
LOCATION AGREEMENT  
(Kienle Motor Sports, LLC)**

Scope of Development

**[Attached Behind This Page]**

## **EXHIBIT B**

### **Scope of Development**

The Dealership consists of sales, service and display facilities totaling approximately 72,000 square feet. The buildings include a 62,850-square foot, two-story building consisting of 16,688 square feet of show room and office area, and 19,591 square feet of warehouse and service facilities.

The project has been designed to provide maximum exposure to the street frontage on Inland Empire Boulevard to the north as well as the freeway ( Interstate 10) to the south. The building design is based on the signature Porsche dealership prototype which incorporates a modern style of clean lines and materials. The architecture of the building complements the Audi Ontario dealership to the east of the site, with its contemporary design and finishes. The two primary materials for the building include perforated metal aluminum composite (ACM) panel siding and trapezium corrugated metal panels.

In addition to the on-site structures, a 16,337 square foot outdoor automobile display area is located along the Inland Empire Boulevard street frontage. Furthermore, 128 customer and employee parking spaces are distributed throughout the project site, and 70 service and sales (site) inventory parking spaces are provided at the front of the site and at the rear display area.

A single primary access to the project site is located on Inland Empire Boulevard. The main entrance to the automobile dealership faces north, toward Inland Empire Boulevard. Three reciprocal access points through the adjacent parcel to the east (Audi Ontario) provides additional shared accesses to the site. The southeast (rear) and northeast (front) reciprocal access points also provide shared fire lane access through the proposed Porsche and existing Audi Ontario sites.

**EXHIBIT C  
TO  
LOCATION AGREEMENT  
(Kienle Motor Sports, LLC)**

Schedule of Performance

**[Attached Behind This Page]**

## EXHIBIT C

### SCHEDULE OF PERFORMANCE

	<b>Action</b>	<b>Date Action to be Completed By</b>
1.	Company Completes Construction of Dealership	August 31, 2020
2.	Opening Date for Dealership to General Public and Sale of First New Porsche or Similar Model	Within 120 days after final Certificate of Occupancy is issued

**EXHIBIT D  
TO  
LOCATION AGREEMENT  
(Kienle Motor Sports, LLC)**

Form of Certificate of Completion

**[Attached Behind This Page]**

## EXHIBIT D

### FORM OF CERTIFICATE OF COMPLETION

I, the City Manager of the City of Ontario ("City"), hereby certify as follows:

Section 1. The Dealership required to be constructed in accordance with that certain Location Agreement ("Agreement") dated [INSERT DATE] by and between the City and, a ("Company") on certain real property, as more specifically described in the Agreement ("Property"), has been completed in accordance with the provisions of the Agreement.

Section 2. This Certificate of Completion shall constitute a conclusive determination by the City of Company's satisfaction of its obligation under the Agreement to complete the construction of the Dealership on the Property, excluding any normal and customary tenant improvements and minor building "punch-list" items. The Agreement is an official record of the City and a copy of the Agreement may be inspected in the office of the City Clerk located at 303 East B Street, Ontario, California 91764, during the regular business hours of the City.

DATED AND ISSUED this \_\_\_\_\_ calendar day of \_\_\_\_\_, \_\_\_\_\_.

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Scott Ochoa, City Manager