

# **OPERATING COVENANT AGREEMENT**

**between**

**THE CITY OF FONTANA**

**a California municipal corporation and general law city,**

**and**

**Sika Corporation,  
a New Jersey Corporation**

[Dated as of **July 1, 2025**, for reference purposes only]

## **RECITALS**

**WHEREAS**, Sika Corporation ("Sika"), in connection with the incentives provided here, is leasing a facility of approximately 294,000 square feet in distribution space, to be occupied as a packaging and distribution facility ("Facility"), within the City of Fontana ("City"); and

**WHEREAS**, the incentives provided in this Agreement are intended to incentivize Sika to lease the new Facility of approximately 294,000 square feet for purposes of the Facility within the City and remain in the City for a period of a maximum of 10 years (120 months), comprised of an initial 5-year term (60 months) and one (1) 5-year extension (60 months) subject to the terms contained herein; and

**WHEREAS**, entering into this Agreement will generate substantial revenue for the City, create and/or maintain approximately 40 at will jobs and generate a minimum of \$50 Million in taxable sales revenue annually over the first five (5) years of Facility operation that will revitalize an underserved area of the City, and result in community and public improvements that might not otherwise be available to the community for many years; and

**WHEREAS**, Sika wishes to locate in the City because of the operational advantages including, but not limited to, a qualified workforce, cost advantages, access to customers, and capacity to staff a certain number of jobs in said City; and

**WHEREAS**, the incentives herein are intended exclusively to reward and encourage Sika for job creation within the City of Fontana. The incentives are available to Sika for job creation regardless of where within the City the jobs are located (excluding jobs created at retail storefronts).

**NOW, THEREFORE**, in consideration of the mutual promises contained herein, and for such other good and valuable consideration, the receipt of which is hereby acknowledged, Sika and City agree as follows:

### **ARTICLE 1. EFFECTIVE DATE; PARTIES; DEFINITIONS**

**1.1 Effective Date of Covenant Agreement.** This Sika Corporation and City Operating Covenant Agreement ("Covenant Agreement") is dated July 1, 2025, for reference purposes only. This Covenant Agreement will not become effective until the date ("Effective Date") on which all of the following are true:

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

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

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

If all of the foregoing conditions precedent have not been satisfied by December 1, 2025 (or another date mutually agreed upon by the Parties), then this Covenant Agreement may not thereafter become effective and any prior signatures and approvals of the Parties will be deemed void and of no force or effect.

## **1.2 Parties to Covenant Agreement.**

**1.2.1 The City.** The address of the City is 8353 Sierra Avenue, Fontana, CA 92335, Attention: Ray Ebert, Deputy City Manager; telephone 909-350-6739, [rebert@fontanaca.gov](mailto:rebert@fontanaca.gov); with copies to Ruben Duran, City Attorney, 2855 E Guasti Rd, Fontana, CA, 91761, Telephone: (909) 989-8584.

The City represents and warrants to Sika that, to the best of City's actual current knowledge:

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

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

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

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

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

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

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

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

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

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

**1.2.2 Sika.** The US address of Sika Corporation for purposes of this Covenant Agreement is 201 Polito Ave. Lyndhurst, New Jersey 07071;

Sika represents and warrants to the City that, to the best of its actual current knowledge:

- (a) Sika is a duly formed New Jersey corporation, qualified and in good standing to do business under the laws of the State of California;
- (b) The individual(s) executing this Covenant Agreement is/are authorized to execute this Covenant Agreement on behalf of Sika;
- (c) Sika has taken all actions required by law to approve the execution of this Covenant Agreement;
- (d) Sika's entry into this Covenant Agreement and/or the performance of its obligations under this Covenant Agreement does not violate any contract, agreement or other legal obligation of Sika;
- (e) Sika's entry into this Covenant Agreement and/or the performance of its obligations under this Covenant Agreement does not constitute a violation of any state or federal statute or judicial decision to which Sika is subject;
- (f) There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of Sika's obligations under this Covenant Agreement;
- (g) Sika has the legal right, power and authority to enter into this Covenant Agreement and to consummate the transactions contemplated hereby, and the execution, delivery and performance of this Covenant Agreement have been duly authorized and no other action by Sika is requisite to the valid and binding execution, delivery and performance of this Covenant Agreement, except as otherwise expressly set forth herein; and
- (h) Sika and its managerial personnel possess sufficient experience and qualifications necessary to conduct Sika's Sales Activities (hereinafter defined) as required by this Covenant Agreement.

(i) Sika covenants that nothing in this Agreement or the implementation thereof shall violate the provisions or intent of Government Code Section 53084.5.

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

As used in this Covenant Agreement, the term "actual current knowledge of Sika" shall mean, and shall be limited to, the actual current knowledge of the Executive Vice President, Operations of Sika Corporation as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

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

The qualifications and identity of Sika are of particular concern to the City, and it is because of such qualifications and identity that the City has entered into this Covenant Agreement with Sika. No voluntary or involuntary successor-in-interest of Sika shall acquire any rights or powers under this Covenant Agreement except as expressly set forth herein.

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

### **1.3 Definitions.**

**1.3.1 "Affiliate"** means, as defined by the Internal Revenue Code (IRC) Section 1504, any corporation included in Sika Corporation affiliated group.

**1.3.2 "CDTFA"** means the California Department of Tax and Fee Administration.

**1.3.3 "City"** means the City of Fontana, a California municipal corporation, and any nominee, assignee of, or successor to, its rights, powers and responsibilities.

**1.3.4 "Computation Quarter"** means each calendar quarter beginning on January 1, April 1, July 1, or October 1, as applicable, and ending on the succeeding March 31, June 30, September 30, or December 31, as applicable. The first Computation Quarter within the Eligibility Period shall commence up City Council approval and execution of this agreement, and is referred to herein as "Computation Quarter 1," with each succeeding Computation Quarter within the Eligibility Period being consecutively numbered, concluding with Computation Quarter 46 unless the lease for the Facility is extended, or any additional option to extend is approved by the Parties, in which instance the Computation Quarters will extend sequentially after Computation Quarter 46. In the event the lease of the Facility is terminated or expires after Computation Quarter 22 or before Computation Quarter 46, the final Computation Quarter shall be appropriately adjusted subject to the terms and obligations of

this Agreement.

**1.3.5 "Covenant Payment(s)"** means those contingent payments to be made by the City to Sika pursuant to Section 3.2 of this Covenant Agreement for the purchase of the Covenants and Sika's timely and faithful performance thereunder.

**1.3.6 "Covenant Term"** means, a period of a maximum of 12 years (120 months), comprised of an initial 7-year term (84 months) and two (2) 5-year extensions (60 months each) commencing upon the first day of the first Computation Quarter (unless terminated sooner pursuant to specific provisions of this Covenant Agreement). Sika will have the option to extend this Agreement past the Covenant Term in concert with the underlying lease of Facility.

**1.3.7 "Covenants"** means those five (5) covenants described in Section 3.1 herein.

**1.3.8 "Eligibility Period"** means the period commencing as of the first (1st) day of the calendar year and ending the last day of the calendar year, for the duration contemplated by the lease of the Facility as set forth in 1.3.4, subject to extension pursuant to the terms of this Agreement.

**1.3.9 "Facility"** means that certain facility of approximately 294,000 square feet in distribution space, located at 14090 Slover Avenue, Fontana, CA 92335, to be leased within the City of Fontana, that Sika will lease for 7-years (84 months) with an option to renew two (2) additional 5-year (60 months) terms with capital investments being made to improve the facility. Facility, at Sika's option and upon prior notice to City, may also include other distribution type facilities leased or owned by Sika within the City from which Sika and/or affiliate product is sold including through Sika's and/or its affiliates' internet websites and sold directly to an end-user consumer so long as such affiliate sales are completed in compliance with Sections 1.3.12 and 4.27.

**1.3.10 "Liquidated Damages"** means, for purposes of Section 3.6, as follows: If the breach occurs during Computation Quarters 1 through 20, an amount equal to fifty percent (50%) of the Covenant Payments paid to Sika during the Computation Quarter in which the uncured breach occurs.

**1.3.11 "Sika"** means and refers to Sika Corporation a New Jersey Corporation, and its successors and assigns, cumulatively.

**1.3.12 "Sika's Sales Activities"** means the commercially reasonable business practices and activities associated with the sale of products from the Facility directly to end-user consumers, whether at the Facility or over the internet that results in Sales Tax Revenues relating to personal property which is shipped or distributed from Facility, but excluding sales occurring within Sika's retail stores in other physical locations or any facilities other than Facility, and pursuant to the terms contained herein. "Sika's Sales Activities" also include any of the above-described activities at the Facility which are conducted by a parent, subsidiary or wholly or partially owned affiliate of Sika, provided that such parent, subsidiary or affiliate did not previously conduct such activities in the City.

**1.3.13 "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 Sika.

**1.3.14 "Sales Tax"** means and refers to all sales and use taxes levied under the authority of the Sales Tax Law attributable to the Facility in City and Sika's Sales Activities excluding that which is to be refunded to Sika because of an overpayment of such tax.

**1.3.15 "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 Sika; and (c) regulations of the CDTFA and other binding rulings and interpretations relating to (a) and (b) of this Section 1.3.14.

**1.3.16 "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 Facility in City in a particular Computation Quarter. Sales Tax Revenues shall not include: (i) Penalty Assessments; (ii) any Sales Tax levied by, collected for or allocated to the State of California other than the Bradley Burns tax, the County of San Bernardino, or a district or any entity (including an allocation to a statewide or countywide pool); (iii) any administrative fee charged by the CDTFA; (iv) any Sales Tax received by the City which is thereafter 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; (vi) the Transactions and Use Tax approved by the passage of Measure T in 2024; or (vii) 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.

## **ARTICLE 2. ADDITIONAL RECITALS**

**2.1** The previously stated Recitals are incorporated herein and made a part hereof as though fully set forth.

**2.2** The City has determined that the long-term operation of the Facility will result in substantial benefits to the City, and its citizens including, without limitation, the creation of significant new numbers of employment opportunities, property tax revenues, sales tax revenues and other ancillary benefits. Accordingly, the City has also determined that its entry into this Covenant Agreement and its purchase of the Covenants serve a significant public purpose, while providing only incidental benefits to a private party.

## **ARTICLE 3. COVENANTS UPON SIKA; COVENANT PAYMENTS; REMEDIES FOR BREACH.**

### **3.1 Covenants Upon Sika.**

**3.1.1 Operating and Use Covenant.** Sika covenants and agrees that for the Covenant Term Sika shall operate, or cause to be operated upon the Property, the Facility in City in a commercially reasonable business manner, consistent with all applicable provisions of federal, state and local laws and regulations including City's approved permits for the Facility.

(a) Sika will operate its business in a commercially reasonable and prudent manner, with the effect of generating a reasonable amount of Sales Tax Revenues. Sika's obligations pursuant to the immediately preceding sentence include, without limitation, the obligation to obtain all federal, state and local licenses and permits required for the operation of the business and to advertise, market and promote the business in a commercially reasonable fashion. For the term of this Operating Covenant, Sika may use the Property only for the purposes of the operation of the Facility, related business uses and conducting Sika's Sales Activities in accordance with this Covenant Agreement.

**3.1.2 Covenant to Designate City as Point of Sale.** Sika covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 3.1.1, Sika shall maintain such licenses and permits as may be required by any governmental agency to conduct Sika's Sales Activities related to the Facility and shall consummate at the Facility all taxable sales transactions resulting from Sika's Sales Activities at the Facility and identify the City as such in all reports to the CDTFA in accordance with the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue and Taxation Code 7200, et seq.), as it may be amended or substituted. Sika shall designate City as the sole point of sale for all of Sika's products sold, including but not limited to, through Sika's internet website, which are fulfilled from the Facility and sold directly from the Facility to an end-user customer within California. Sika shall maintain the appropriate master sales permits applicable to and required for the operation of the Facility. Sika shall consummate all taxable sales transactions for Sika's Sales Activities at the Facility consistent with all applicable statutory and CDTFA regulatory requirements applicable to Sika's Sales Activities and the designation of the City as the "point of sale" for all Sika's taxable sales occurring as a result of Sika's Sales Activities at the Facility.

**3.1.3 Sika's Additional Obligations Regarding Repairs and Alterations to Facility.** Sika covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 3.1.1, Sika shall maintain, or cause to be maintained, the Facility in good condition, ordinary wear and tear excepted, and free from the accumulation of trash or other debris and agrees to promptly remove, or cause the removal of, all graffiti upon the Facility.

**3.1.4 Covenant Against Solicitation and Acceptance of Economic Incentives During the Term of the Operating Use Covenant.** Sika covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 3.1.1, Sika will not directly or indirectly solicit or accept any "Financial Assistance" related to the Facility from any



other public agency, if such Financial Assistance is given for the purpose of causing or would result in Sika's moving the operations from the Facility to outside of Fontana, California. For purposes of this Section 3.1.4 the term "Financial Assistance" means any direct or indirect payment, subsidy, rebate, or other similar or dissimilar monetary or non-monetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, public financings, property or sales tax relief, rebates, exemptions or credits, relief from public improvement obligations, and payment for public improvements to or for the benefit of Sika. Financial Assistance does not include any property tax challenges or reduction in taxes resulting from such challenges nor any rebates or incentives related to solar or other environmental incentives or adjustments.

**3.1.5 Use of Property.** Sika covenants and agrees that Sika will not use the Facility for any purpose other than those uses specified in the City's General Plan, the Specific Plan, zoning ordinances, and this Covenant Agreement as the same may be amended from time to time. Nothing in this Section 3.1.5 shall limit, expand, modify or otherwise affect any right of Sika to continue any legal nonconforming use upon the real property upon which the Facility sits following changes in the City's General Plan or zoning ordinances.

## **3.2 Covenant Payments.**

**3.2.1 Statement of Intent.** The consideration to be paid to Sika by the City in exchange for the Covenants and Sika meeting total annual sales generated of \$50 Million will be a fifty percent (50%) share of the city's one percent (1%) of all such sales tax reported to the State of California as being fulfilled from Fontana, California. Obligations set forth in this Covenant Agreement, and subject to satisfaction of all conditions precedent thereto, shall consist of City's payment to Sika for each Computation Quarter during the Eligibility Period that the City receives Sales Tax Revenue ("Covenant Payment"), an amount equal to the sum of the Sales Tax Revenues attributable to annual taxable sales at the Facility received by the City. The City's obligations under this Section 3.2 are contingent on a Computation Quarter-to-Quarter basis and, for each Computation Quarter, City's obligations to make any payments hereunder are expressly contingent upon Sika having, for the entirety of such Computation Quarter, completely fulfilled its material obligations under this Covenant Agreement, including, without limitation, the Covenants. Should such condition precedent not be satisfied for each Computation Quarter, then City shall have no obligation under this Section 3.2 to make any Covenant Payments to Sika in such Computation Quarter. There shall be no sales tax revenue share unless Sika's total sales generated at least \$50 Million on an annual basis. Sika has not guaranteed any minimum amount of sales and there shall be no penalty or breach of this Agreement for failure to meet any sales amounts from the Facility though it will affect Sika's eligibility for the sales tax revenue share. For the purposes of determining eligibility for Covenant Payments, cumulative taxable sales by Sika shall be measured beginning on the Effective Date of this Agreement, based on sales reported to the California Department of Tax and Fee Administration (CDTFA) as fulfilled from a location within the City of Fontana. No Covenant Payment shall be owed or due unless and until Sika has achieved at least Fifty Million Dollars (\$50,000,000) in cumulative taxable sales as reported to CDTFA. Once such sales threshold is met, as reasonably determined by the City, the City shall calculate Covenant Payments in accordance with Section 3.2.2, and shall include in its calculation on all qualifying sales occurring in the preceding four (4) Computation Quarters (or less in the event Sika meets the threshold prior to four (4) Computation Quarters from the Effective Date) in

which the threshold is first met. So long as Sika has achieved or is on target to achieve the \$50,000,000 cumulative taxable sales threshold, Sika shall be entitled to Covenant Payments as described herein.

**3.2.2 Computation Quarter Covenant Payments.** Within forty-five (45) days following the end of each Computation Quarter, Sika shall submit to City that portion of Schedule C (information not relevant and limited to Fontana will be redacted before submission) of its quarterly reports to the CDTFA which sets forth the amount of sales taxes paid to the CDTFA during the Computation Quarter arising from Sika's Sales Activities conducted at the Facility. Within one hundred twenty (120) days following the end of each Computation Quarter, City shall pay to Sika any Computation Quarter Covenant Payment due for such Computation Quarter based upon quarterly state filings submitted to the CDTFA by Sika. Additionally, City will pay to Sika all Covenant Payments for previous Computation Quarters once the \$50,000,000 cumulative taxable sales threshold is met to the extent those Covenant Payments were not previously paid to Sika. By way of example, if Sika does not meet the \$50,000,000 cumulative taxable sales threshold by the end of Q4 of 2025 but does meet the \$50,000,000 cumulative taxable sales threshold by the end of Q1 of 2026, the Covenant Payment to Sika for Q1 of 2026 shall include payment for Q1 of 2026, Q4 of 2025, and Q3 of 2025. By further example, if Sika achieves the following sales, the Covenant Payments shall be calculated as follows:

Time Period	Facility Taxable Sales	Cumulative (for previous four quarters)
Q3 2025	\$5,000,000	\$5,000,000
Q4 2025	\$20,000,000	\$25,000,000
Q1 2026	\$26,000,000	\$51,000,000

In the above example, no Covenant Payments would be due until 120 days after the end of Q1 2026. However, the Covenant Payments would be calculated based upon 50% of the tax received by the City for the full \$51,000,000.

**3.2.3 No Carry Forward or Back.** The determination of the Covenant Payment(s) shall be determined and calculated on a Computation Quarter to Computation Quarter basis. Except as provided in Section 3.2.4, no Sales Tax Revenue which is generated in a Computation Quarter other than the Computation Quarter for which the Covenant Payment is being determined shall be used or considered in the calculation of any Covenant Payment which may be due for that Computation Quarter.

**3.2.4 CDTFA Determination of Improperly Allocated Local Sales Tax Revenues.** If, at any time during or after the Eligibility Period of this Covenant Agreement, the CDTFA determines that all or any portion of the Sales Tax Revenues received by the City were improperly allocated and/or paid to the City, and if the CDTFA requires repayment of, offsets against future sales tax payments, or otherwise recaptures from the City those improperly

allocated and/or paid Sales Tax Revenues, will be adjusted by the City in the following quarter unless Sika vacates the Facility in which case Sika shall, within sixty (60) calendar days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to Sika which are attributable to such repaid, offset or recaptured Sales Tax Revenues. Sika may instead provide to City information supporting Sika's belief of any error on the part of CDTFA and Sika and City will thereafter work together in good faith. If Sika provides sufficient information to support the CDTFA error, the Parties shall work together to seek a correction from CDTFA. If Sika does not provide such information or does not dispute the CDTFA determination and thereafter fails to make such repayment within sixty (60) calendar days after the City's written demand, then Sika shall be in breach of this Covenant Agreement and such obligation shall accrue interest from the date of the City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. Additionally, the City may deduct any amount required to be repaid by Sika under this Section 3.2.4 from any future Covenant Payments otherwise payable to Sika under this Covenant Agreement. This Section 3.2.4 shall survive the expiration or termination of this Covenant Agreement.

**3.2.5 Not a Pledge of Sales Tax.** Sika acknowledges that the City is not making a pledge of Sales Tax Revenues, or any other particular source of funds; the definition of Sales Tax Revenues, as used herein, is used merely as a measure of the amount payment due hereunder and as means of computing the City's payment in consideration for the Covenants. It is acknowledged by Sika that the City's obligation to make payments is specifically contingent upon receipt by the City of the Sales Tax Revenues derived from operation of the Facility.

### **3.3 Default.**

**3.3.1 Sika Default.** City shall provide Sika with written notice of Sika's failure ("Sika Default") to strictly abide by any material provision of this Covenant Agreement, including, without limitation, the Covenants. Sika shall have thirty (30) days from the date of such notice to either cure such Sika Default, or, if such Sika Default cannot be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.

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

**3.4 General Remedies for Default.** Except as provided in Section 3.6, upon either a City or a Sika Default (as defined in Section 3.3), Sika or City (as applicable) shall have the right to seek all available legal and equitable remedies, including, without implied limitation, direct damages, unless otherwise expressly provided to the contrary herein. Under no circumstances will either Sika or City be liable for indirect, consequential, special or punitive damages other than as set forth in Section 3.6 below. Unless prohibited by law or otherwise provided by a specific term of this Covenant Agreement, the rights and remedies of the City

and Sika under this Covenant Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively, and the City may simultaneously pursue inconsistent and/or alternative remedies. Either Party may, upon the Default and failure to cure of the other Party and in addition to pursuing all remedies otherwise available to it, terminate this Covenant Agreement and all of its obligations hereunder without cost, expense or liability to itself.

**3.5 The City's Rights to Terminate its Obligations under Section 3.2.** The City's obligations under Section 3.2 shall automatically terminate without cost, expense, or liability to City, upon the occurrence of any one or more of the following: (i) uncured Sika Default; (ii) the end of the Eligibility Period; or (iii) upon the final determination by a court of competent jurisdiction that any one or more of the Covenants are void, voidable, invalid, or even unenforceable for any reason whatsoever, including, without limitation, legal infirmity.

### **3.6 Liquidated Damages.**

**3.6.1 Sika Default With Respect to Obligations Under Sections 3.1.1 through 3.1.5.** The Parties acknowledge that the consideration to the City for its entry into this Covenant Agreement and the performance of its obligations hereunder include the City's receipt of Sales Tax Revenues, employment and other payroll taxes, property taxes, and other direct and indirect financial and non-financial benefits arising from the operation Sika's Sales Activities and the location of the Facility in the City in accordance with Article 3 of this Covenant Agreement. Sika agrees that the City will suffer damages if Sika commits any Sika Default and fails to cure the same with respect to any of its obligations arising under Sections 3.1.1 through 3.1.5. The Parties agree that the exact determination of such damages would be impracticable and extremely difficult to quantify. Accordingly, the Parties have determined that Liquidated Damages (as determined pursuant to Section 1.3.9) represents a reasonable estimate of the damages which would be suffered by the City if Sika commits any Sika Default with respect to any of its obligations set forth in Sections 3.1.1 through 3.1.5. Accordingly, as its sole and exclusive remedy for an Sika Default with respect to any of its covenants and obligations set forth in Sections 3.1.1 through 3.1.5, the City shall be entitled to **(1)** terminate this Covenant Agreement and the entirety of its obligations hereunder, including any accrued and unpaid Covenant Payments, and **(2)** receive from Sika the applicable amount of Liquidated Damages only for that period of time during which there was an uncured Default as provided by Section 1.3.10.

**3.6.2 ACKNOWLEDGEMENT OF REASONABLENESS OF LIQUIDATED DAMAGES.** UPON AN UNCURED SIKI DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 3.1.1 THROUGH 3.1.5, FOLLOWING NOTICE AND OPPORTUNITY TO CURE PURSUANT TO SECTION 3.3.1, THE CITY AND SIKI ACKNOWLEDGE AND AGREE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE AMOUNT OF DAMAGES THAT WOULD BE SUFFERED BY THE CITY WITH RESPECT TO SUCH DEFAULT. HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES THE CITY WOULD SUFFER; THE PARTIES AGREE THAT THE LIQUIDATED DAMAGES AMOUNT AS DETERMINED IN ACCORDANCE WITH SECTION 1.3.10 REPRESENTS A REASONABLE ESTIMATION OF THOSE DAMAGES. THEREFORE, UPON A SIKI DEFAULT WITH RESPECT TO

ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 3.1.1 THROUGH 3.1.5, AS ITS SOLE AND EXCLUSIVE REMEDY FOR SUCH DEFAULT, THE CITY SHALL BE ENTITLED TO (1) RECEIPT OF THE LIQUIDATED DAMAGES AMOUNT CALCULATED IN ACCORDANCE WITH SUBSECTION 1.3.10, WHICH SIKI SHALL PAY WITHIN SIXTY (60) DAYS FOLLOWING WRITTEN DEMAND FROM THE CITY, AND (2) TERMINATE THIS AGREEMENT AND THE ENTIRETY OF ITS OBLIGATIONS HEREUNDER, INCLUDING ANY ACCRUED BUT YET UNPAID COVENANT PAYMENTS.

Initials of Authorized City Representative \_\_\_\_\_

Initials of Authorized Sika Representative \_\_\_\_\_

#### **ARTICLE 4. GENERAL TERMS**

**4.1 Tax Consequences.** Sika acknowledges that it may experience tax consequences as a result of its receipt of the payments provided for in this Covenant Agreement and it is Sika's responsibility to determine the appropriate tax treatment of such payments as applicable to Sika. The City may also have tax responsibilities with respect to the payments under this Covenant Agreement and it is the City's responsibility to determine the appropriate treatment as applicable to the City..

**4.2 Rights Not Granted Under Covenant Agreement.** This Covenant Agreement is not, and shall not be construed to be, a Development Agreement under Government Code Section 65864 et seq., or a disposition and development agreement under Health and Safety Code Section 33000 et seq. This Covenant Agreement is not, and shall not be construed to be, an approval or an agreement to issue permits or a granting of any right or entitlement by the City concerning the Facility, Sika's Sales Activities or any other project, development, or construction by Sika in the City. This Covenant Agreement does not, and shall not be construed to, exempt Sika from the application and/or exercise of the City's or City's power of eminent domain or its police power, including, but not limited to, the regulation of land uses and the taking of any actions necessary to protect the health, safety, and welfare of its citizenry.

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

**4.4 Notices and Demands.** All notices or other communications required or permitted between the City and Sika under this. Covenant Agreement shall be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, (iii) sent by telecopier, or (iv) sent by nationally recognized overnight courier service (e.g., Federal Express), addressed to the Parties at the addresses provided in Article 1, subject to the right of either party to designate a different address for itself by notice similarly given. Any notice so given by registered or certified United States mail shall be deemed to have been given on the second business day after the same is deposited

in the United States mail. Any notice not so given by registered or certified mail, such as notices delivered by telecopier or courier service (e.g., Federal Express), shall be deemed given upon receipt of the same by the party to whom the notice is given.

**4.5 Nonliability of Individuals.** No board member, official, contractor, consultant, attorney or employee of the City or City shall be personally liable to Sika, 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 Sika or to its successors or assignees, or on any obligations arising under this Covenant Agreement. No officer, director, representative, consultant, attorney or employee of Sika shall be personally liable to City, any voluntary or involuntary successors or assignees, or any lender or other party holding an interest related to the City, in the event of any default or breach by Sika, or for any amount which may become due to the City or to its successors or assignees, or on any obligations arising under this Covenant Agreement.

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

**4.7 Pledge or Hypothecation of Covenant Payments.** Sika may assign any Covenant Payment(s) due in accordance with the terms of this Covenant Agreement (but not any other right or obligation of this Covenant Agreement) upon thirty (30) days' prior written notice to City as collateral for any loan or financing obtained by Sika in connection with the Facility; provided that nothing in this Section 4.7 shall be deemed to limit the operation of Section 4.16. Without limiting the general applicability of the foregoing, Sika acknowledges that Sika's lender and any transferee of Sika's lender shall be subject to the transfer restrictions of Section 4.16.

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

The Parties acknowledge that this Covenant Agreement is the product of mutual arms-length negotiations and that each party has been, or has had the opportunity to have been, represented by legal counsel in the negotiation and drafting of this Covenant Agreement. Accordingly, the rule of judicial construction which provides that ambiguities in a document are to be construed against the drafter of that document shall have no application to the interpretation or enforcement of this Covenant Agreement. In any action or proceeding to interpret and/or enforce this Covenant Agreement, the trier of fact may refer to extrinsic evidence not in conflict with any specific provision of this Covenant Agreement to ascertain

and give effect to the intent of the Parties hereto.

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

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

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

**SIKA'S INITIALS** \_\_\_\_\_

**4.10 Attorneys' Fees.** In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Covenant Agreement or any other dispute between the Parties concerning this Covenant Agreement or the Property, then, in that event, the prevailing party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to have and recover of and from the other Party all costs and expenses of suit or claim, including actual attorneys' fees. Any judgment, order or award entered in any final judgment or award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including actual attorneys' fees (collectively, the "Costs") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section

4.10, "Costs" shall include, without implied limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii) garnishment, levy and debtor and third-party examination, (iv) discovery; and (v) bankruptcy litigation. This Section 4.10 shall survive any termination of this Covenant Agreement.

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

**4.12 Jurisdiction and Venue.** Any legal action or proceeding concerning this Covenant Agreement shall be filed and prosecuted in the appropriate California state court in the County of San Bernardino, California. Both Parties hereto irrevocably consents to the personal jurisdiction of that court. The City and Sika each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between the City and Sika, due to the fact that the City is a party to such action or proceeding or due to the fact that a federal question or federal right is involved or alleged to be involved. Without limiting the generality of the foregoing, the City and Sika specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Sika acknowledges that the provisions of this Section 4.12 are material consideration to the City for its entry into this Covenant Agreement, in that the City will avoid the potential cost, expense and inconvenience of litigating in a distant forum.

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

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

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



power at any other time or times.

**4.16 Successors and Assigns.** The terms, covenants and conditions of this Covenant Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and assigns. Except as provided in this Section 4.16, Sika shall neither transfer nor convey Sika's interest in the Facility without the express written consent of the City, which shall not be unreasonably withheld, conditioned or delayed. In determining whether to approve of such a sale, transfer, conveyance or assignment of Sika's interest in the Property, the City shall evaluate: (i) the financial ability of the proposed transferee to own and operate the Facility, or portion so transferred, and to meet Sika's obligations under this Covenant Agreement; (ii) the fitness and experience of the proposed transferee and its managerial personnel to own and operate the Facility or portion so transferred thereof; and (iii) the ability of the proposed transferee to maintain a level of quality and service comparable to that maintained by Sika for the Facility. Upon the permitted sale, transfer or conveyance by Sika of its interest therein, such Sika shall thereupon be relieved of its obligations under this Covenant Agreement from and after the date of sale, transfer or conveyance except with respect to any defaults in the performance of its obligations hereunder or thereunder which occurred prior to such sale, transfer or conveyance, and the transferee shall thereafter be solely responsible for the performance of all of the duties and obligations of Sika under this Covenant Agreement.

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

**4.18 No Effect on Eminent Domain Authority.** Nothing in this Covenant Agreement shall be deemed to limit, modify, or abridge or affect in any manner whatsoever the City's or City's eminent domain powers with respect to the Facility, or any other property owned by the Facility.

**4.19 Warranty Against Payment of Consideration for Covenant Agreement.** Sika warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Covenant Agreement. Third parties, for the purposes of this Section 4.19, 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 Sika.

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

**4.21 Further Acts and Releases.** The City and Sika each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the

performance of their obligations hereunder.

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

#### **4.23 Indemnity.**

**4.23.1** Sika shall defend (using counsel of City's reasonable choosing), indemnify and hold harmless the City, its elected officials, officers, employees and agents from and against any and all third party claims, losses, proceedings, damages, causes of action, liability, cost and expense (including reasonable attorney's fees) arising from Sika's actions in connection with or related to this Agreement or the functions or operations of the Facility (other than to the extent arising as a result of the City's negligence or willful misconduct). The City shall fully cooperate in the defense of any such actions and upon written request of Sika shall provide to Sika such documents and records in possession of the City that are relevant to such actions and not otherwise protected by law. Notwithstanding the foregoing, should any third party bring any such action or proceeding Sika shall have the right to terminate this Agreement, and as of such date of termination, all unaccrued liabilities of the parties under this Agreement shall cease except for Sika's obligation of indemnity owed to the City as provided in this Section 4.23.1. For purposes of clarification, should Sika exercise its termination right as provided in this Section 4.23.1, the same shall not be considered a Default and the City shall have no claims against Sika for liquidated damages.

#### **4.24 Public Benefits.**

**4.24.1 Community Participation.** As additional consideration for the benefits conferred under this Agreement, Sika will use commercially reasonable efforts to participate in supporting community benefit events and activities consistent with Sika's practices and policies.

**4.24.2 State of California Legislation Impact on Covenant Payment.** Sika acknowledges that the California Legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Sales Tax Revenues which were otherwise payable to the City. Sika acknowledges that it is possible that the legislature may enact similar

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

(a) The foregoing paragraph notwithstanding, City acknowledges that the California legislature may provide for the payment to City of other revenues for the purpose of offsetting any losses in Sales Tax Revenues resulting from the enactment of legislation of the type described in the immediately preceding paragraph. City agrees that, should the California legislature provide for such offsetting revenues, then for purposes of this Covenant Agreement and the computation of any Covenant Payments which may become due to Sika 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 Sales Tax Revenues within the meaning of this Covenant Agreement.

**4.24.3 Anti-Bribery.** City and its representatives, including but not limited to its elected officials, officers and directors: (i) have complied and will comply with all applicable anti-bribery and anti-corruption laws and regulations in connection with this Agreement; (ii) have not directly or indirectly offered, paid, promised, requested, or accepted a bribe, kickback, or other improper benefit in connection with this Agreement; and (iii) will not directly or indirectly offer, pay, promise, request, or accept a bribe, kickback, or other improper benefit in connection with this Agreement. If City or its representatives become aware of any violation of the foregoing provisions or any anti-bribery or anti-corruption laws or regulation in connection with this Agreement, City shall give notice to Sika. City has undertaken and will undertake reasonable measures to ensure compliance with the foregoing provisions by City and its representatives, including but not limited to its executive officers and directors. The above representations are an inducement to Sika to enter into this Agreement. In the event City breaches the representations in this clause or violates applicable law related thereto, Sika may terminate this Lease without penalty or prejudice to any of its rights under law.

**4.24.4 Addition of Affiliates.** At such time as an Affiliate of Sika desires to locate an e-commerce distribution facility in the City of Fontana, Sika shall request approval in writing from the City to have any sales tax generated by the Affiliate included in the Sales Tax Revenues attributable to Sika for calculation of the Covenant Payment. Said written request shall be submitted to the City Manager for review and consideration by the City Council, following any legally required noticing and public hearings. Said review shall be in the City's sole and unfettered discretion. As condition precedent to the City consideration of the request, Sika and

the Affiliate shall make and attest to all representation and warranties required by this Agreement, including but not limited to that inclusion of the Affiliate in this Agreement or the implementation thereof will not violate Government Code Section 53084.5. Additionally, City shall only make a Covenant Payment to Sika. Sika shall be prohibited from sharing the Covenant Payment with Affiliate and Affiliate shall be prohibited from requesting the City enter into a separate Operating Covenant Agreement with Affiliate directly. City shall have no liability to Affiliate for the distribution of Covenant Payments.

**[Signatures on the following pages]**

**SIGNATURE PAGE TO THE SIKA CORPORATION OPERATING COVENANT  
AGREEMENT**

CITY OF FONTANA  
a California Municipal Corporation

Sika Corporation,  
a New Jersey Corporation

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Matthew C. Ballantyne  
City Manager

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Authorized Sika Representative

Sika Corporation,  
a New Jersey Corporation

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Authorized Sika Representative

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Ruben Duran  
City Attorney