

WHEN RECORDED RETURN TO:

City of Mesa
Attn: Real Estate Services Director
20 E. Main Street #750
Mesa, Arizona 85211

**FIRST AMENDMENT TO
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT**

(Empire Southwest Campus)

By, between and among

**CITY OF MESA, ARIZONA,
an Arizona municipal corporation; and**

**EMPIRE SOUTHWEST, LLC,
a Delaware limited liability company, and**

**MESA CAMPUS, LLC, a Delaware limited
Liability company**

Dated to be effective as of July 1, 2016

**FIRST AMENDMENT TO
PRE-ANNEXATION AND DEVELOPMENT AGREEMENT
(EMPIRE SOUTHWEST CAMPUS)**

THIS FIRST AMENDMENT TO PRE-ANNEXATION AND DEVELOPMENT AGREEMENT (EMPIRE SOUTHWEST CAMPUS) (the “**First Amendment**”) is entered into as of July 1, 2016 (“**Effective Date**”), by and among the CITY OF MESA, ARIZONA, an Arizona municipal corporation (the “**City**”), EMPIRE SOUTHWEST, LLC, a Delaware limited liability company (“**Empire**”), and MESA CAMPUS, LLC, a Delaware limited liability company (“**Mesa Campus**”). Empire and Mesa Campus are referred to herein collectively as “**Owners**” or each individually as an “**Owner**.” The City, Empire and Mesa Campus are sometimes referred to herein collectively as the “**Parties**” or individually as a “**Party**.”

RECITALS

As background to this First Amendment, the Parties recite, state and acknowledge the following, each of which is a material term and provision of this First Amendment and is fully incorporated into this First Amendment for all purposes:

A. Empire and the City are parties to the Pre-Annexation and Development Agreement dated July 7, 2008, as recorded on July 10, 2008, in the Official Records of Maricopa County as Document No. 2008-0605694 (the “**Development Agreement**”). The John Whiteman Trust A, an Arizona trust (the “**Trust**”), and BCH Management, LLC, an Arizona limited liability company (“**BCH**”) consented to the recordation of the Development Agreement, but are no longer owners of the property that is the subject of the Development Agreement.

B. The Owners own that certain real property that is the subject of the Development Agreement, as described and depicted on the attached **Exhibit A** (the “**Property**”). The portions of the Property not owned by Empire are leased to Empire by Mesa Campus. Mesa Campus’ predecessor in interest acknowledged and consented to the Development Agreement solely to consent to the recordation of the Development Agreement on the portion of the Property owned by it; and Mesa Campus, as a successor owner of a portion of the Property, now acknowledges and consents to this First Amendment solely to consent to the recordation of this First Amendment on the portion of the Property owned by it.

C. Among other matters, Empire and Trust agreed and consented to permit the annexation of their property into the City in accordance with the terms of the Development Agreement, which annexation was not compelled by the City but which consent by Empire and Trust, in addition to the other promises and performance of the Owners, provided valuable consideration to support the City’s entering into the Development Agreement and performing thereunder.

D. The Property is currently used as Empire’s principal corporate offices and heavy equipment facility. As of the date of this First Amendment, Empire has satisfied each of the Empire Covenants and all other obligations of Empire under the Development Agreement.

However, due to market conditions and other factors, the City has not made a Reimbursement to Empire pursuant to the Development Agreement.

E. As of the date of this First Amendment, the City has fully and timely performed each of its obligations arising under the Development Agreement.

F. The City desires that Empire continue to use the Property as its principal corporate offices and heavy equipment facility and other transaction tax-generating uses related, appurtenant or ancillary thereto beyond the current Economic Incentive Period, and the City wishes to facilitate and encourage Empire's continued use of the Property as its corporate offices and heavy equipment facility. Empire has represented to the City, expressly with the intent that the City rely on such representation, that Empire would not continue its current operations or contemplate expansion of its operations on the Property absent this First Amendment.

G. The Owners and the City are entering into this First Amendment pursuant to the provisions of A.R.S. § 9-500.05, which (among other terms and provisions) authorizes the City to enter into and amend a development agreement with a landowner or any other person having an interest in real property located in the City.

H. The Development Agreement was authorized and entered into in accordance with the provisions of A.R.S. § 9-500.11, and at the time of its approval of the Development Agreement, the City had entered into a notice of intent and made the findings required by A.R.S. § 9-500.11, all of which are incorporated into this First Amendment.

I. The City Council hereby finds and determines that for Empire to continue to operate its facilities at the Property as Empire's principal corporate and sales offices will assist in the creation or retention of jobs and will improve or enhance the economic welfare of the inhabitants of the City of Mesa.

J. This First Amendment is for the limited purpose of extending the Economic Incentive Period and clarifying the computation method for the Taxable Revenue Minimum as set forth in the Development Agreement, but retaining all other terms and conditions of the Development Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, premises and representations and the mutual promises and agreements set forth in this First Amendment, the Parties state, confirm and agree as follows:

1. **Extension of the Economic Incentive Period.** Section 2.5 of the Development Agreement is hereby revised to read in its entirety as follows:

Economic Incentive Period. In no event shall any Reimbursement be payable by the City to Empire beyond the two hundred tenth (210th) month following the Effective Date of this First Amendment (the "**Economic Incentive Period**").

2. **Taxable Revenue Minimum Calculation.** Notwithstanding anything in Section 2.3 of the Development Agreement to the contrary, the Taxable Revenue Minimum for the fiscal year of the City ending June 30, 2017, shall be Eighty-Five Million and no/100 Dollars (\$85,000,000.00); and further, the Taxable Revenue Minimum shall increase five hundred thousand dollars (\$500,000), each fiscal year of the City thereafter.

3. **Empire's Principal Office and Facility.** For the balance of the Economic Incentive Period, Empire shall continue to operate its facilities at and on the Property as Empire's principal corporate and sales offices. To satisfy the requirement of being "Empire's principal corporate and sales offices," Empire must employ 800 full-time employees at Empire's principal corporate and sales office for not less than 32 weeks in that fiscal year of the City. "Full-time employees," as used in the prior sentence, means individuals who work for Empire at least thirty-two (32) hours per week. Empire shall provide to the City reasonable and sufficient evidence of satisfying this requirement each fiscal year of the City in order to be eligible for a Reimbursement. If Empire does not satisfy, or does not provide evidence of satisfying, the requirement that the Property its principal corporate office and principal sales office (as set forth above), the City shall have no obligation to provide, and will not provide, any Reimbursement or Reimbursements to Empire for that fiscal year.

4. **Violation of Law.** If the Arizona Attorney General, or a court of competent jurisdiction determines that this First Amendment, or any of its provisions, or the Development Agreement, or any of its provisions, violates any state law or Arizona Constitutional provision, the City may, with 20 days' advance written notice to Empire, terminate this First Amendment or the Development Agreement, and the Parties shall have no further obligations under this First Amendment or the Development Agreement.

5. **General Provisions.**

5.1. **Counterparts.** This First Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.

5.2. **Headings.** The descriptive headings of the Paragraphs of this First Amendment are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

5.3. **Exhibits and Recitals.** Any exhibit attached hereto shall be deemed to have been incorporated herein by this reference with the same force and effect as if fully set forth in the body hereof. The Recitals set forth at the beginning of this First Amendment are hereby acknowledged and incorporated herein and the Parties hereby confirm the accuracy thereof.

5.4. **Good Standing; Authority.** Each of the Parties confirms and represents to the other (i) that it knows of no defaults of any Party under the Development Agreement; (ii) that all representations and warranties of each such Party set forth in the Development Agreement remain accurate as of the Effective Date; and (iii) that the individual(s) executing this First

Amendment on behalf of the respective parties are authorized and empowered to bind the Party on whose behalf each such individual is signing.

5.5. Recordation. This First Amendment shall be recorded in its entirety in the Official Records of Maricopa County, Arizona not later than ten (10) days after this First Amendment is executed by the City and the Developer.

5.6. Mortgagee Rights. The Parties confirm that all of Developer's rights and benefits under the Development Agreement, as amended by this First Amendment, shall inure to the benefit of any party acquiring title to the Property or any portion thereof under or pursuant to a mortgage foreclosure, trustee's sale or deed in lieu of foreclosure or trustee's sale, or otherwise, in accordance with the terms of Section 7.10 of the Development Agreement.

6. Effect of First Amendment. This First Amendment shall be deemed to amend and supersede the Development Agreement with respect to the terms, provisions and changes expressly set forth in this First Amendment. To the extent of any conflict between the Development Agreement and this First Amendment, including all Exhibits, the First Amendment shall control. Except as amended by this First Amendment, all terms, provisions and conditions of the Development Agreement shall remain in full force and effect. Any capitalized terms used but not defined in this First Amendment shall have the meaning set forth in the Development Agreement.

IN WITNESS WHEREOF, the Parties have executed this First Amendment to be effective as of the Effective Date.

[Signatures are on the following three (3) pages.]

CITY:

CITY OF MESA, ARIZONA, an Arizona
municipal corporation

By: _____
Its: City Manager

ATTEST:
By: _____
City Clerk

APPROVED AS TO FORM

By: _____
Mesa City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this ____ day of _____,
2016, by _____, the _____ of the City of Mesa, Arizona,
an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument
on behalf of the City.

Notary Public

My commission expires:

EMPIRE:

EMPIRE SOUTHWEST, LLC, a Delaware limited liability company

By: _____

Its: _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this ____ day of _____, 2016, by _____, the _____ of Empire Southwest, LLC, a Delaware limited liability company.

Notary Public

My commission expires:

OWNER ACKNOWLEDGMENT AND CONSENT

The undersigned owner of and interest in the Property acknowledges and agrees to the recordation of this First Amendment on the Property.

MESA CAMPUS, LLC, a Delaware limited liability company

By: _____

Title: _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing instrument was acknowledged before me this ____ day of _____, 2016, by _____, the _____ of Mesa Campus, LLC, a Delaware limited liability company.

Notary Public

My commission expires:

LIST OF EXHIBITS

A Legal Description of the Property