

**FIFTH AMENDMENT TO CONCESSION AGREEMENT BETWEEN THE
CITY OF SAN JOSE
AND
HOST INTERNATIONAL, INC.**

This Fifth Amendment to Concession Agreement is made and entered into this _____ day of _____ 2009, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City") and HOST INTERNATIONAL, INC., a Delaware corporation ("Concessionaire").

RECITALS

WHEREAS, on January 29, 1999, City and Concessionaire entered into that certain Concession Agreement ("Agreement") under which Concessionaire was granted exclusive rights to conduct food and beverage service operations in certain public locations at the Norman Y. Mineta San José International Airport ("Airport"); and

WHEREAS, on June 29, 1999, City and Concessionaire entered into a First Amendment to the Agreement to, among other things, temporarily abate a portion of the Minimum Annual Guarantee ("MAG") as described in the Agreement; and

WHEREAS, on October 15, 1999, City and Concessionaire entered into a Second Amendment to the Agreement to, among other things, provide for reimbursement of Concessionaire by City for the cost of certain additional utility connections to the Concession Areas in order to support its Concession Operations at the Airport; and

WHEREAS, on June 25, 2002, City and Concessionaire entered into a Third Amendment to the Agreement, to, among other things, provide for reimbursement of Concessionaire by City for certain construction costs attributable to the correction of structural defects and construction of various upgrades in the Concession Area and to add two new sub-Concession areas to Concessionaire's operations for the Interim Federal Inspection Service facility ("Interim FIS Facility"); and

WHEREAS, as of January 15, 2004, pursuant to Section 4.5 of the Agreement, the San José International Gateway Lounge was removed by the City in order to accommodate changes associated with the construction of the North Concourse, and also pursuant to Section 4.5 of the Agreement, City paid Concessionaire One Hundred Twelve Thousand Five Hundred Seventy Dollars and Fourteen Cents (\$112,570.14) for the improvements and equipment associated with the San José International Gateway Lounge in the Interim FIS Facility, which represents full payment for all improvements and equipment associated with the San José International Gateway Lounge; and

WHEREAS, on April 19, 2004, pursuant to Section 4.5 and Subsection 22.5.1 of the Agreement, City paid Concessionaire Ninety-Six Thousand Five Hundred Sixty-Four Dollars and Twenty-Five Cents (\$96,564.25) for all improvements and equipment related to Togo's restaurant space, which represents the entire amount owed to Concessionaire for that specific concession; and

WHEREAS, on May 10, 2006, City and Concessionaire entered into a Fourth Amendment to the Agreement to, among other things, add a new Concession Area for a new Food/Bar Concept, to provide that a portion of the mid-term refurbishment monies could be used to add new concepts, and to reimburse Concessionaire for the costs of certain improvements constructed by Concessionaire; and

WHEREAS, City and Concessionaire desire to further amend the amended Agreement, to, among other things, extend the term of this Agreement, revise Contraction and Expansion language and the Concession Areas, and amend the Concession Fee; and

WHEREAS, City and Concessionaire intend that the Agreement will remain in effect until the earlier of June 30, 2011 or the decommissioning of Terminal C.

NOW, THEREFORE, the parties agree to further amend the amended Agreement as follows:

Section 1 SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS" Subsection entitled "**Concession Area**" is amended to read as follows:

"Concession Area" (Section 3 – Authorized Activities) means the areas in Terminal A, Terminal A Addition, and Terminal C designated as food and beverage locations on **REVISED EXHIBIT A.**"

Section 2 Effective July 1, 2009, SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS" Subsection entitled "**Concession Fee**" is amended to read as follows:

"Concession Fee" (Section 6.1): Concessionaire shall pay a Percentage Fee 8% of Gross Revenues on branded food and beverage (excluding alcohol); 12% of Gross Revenues on generic food and beverage (excluding alcohol); and 18% of Gross Revenues on alcohol."

Section 3 SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS" Subsection entitled "**Concession Improvements**" is amended to read as follows:

"Concession Improvements" (Section 22 – Alterations and Improvements) means: those fixtures and other permanent improvements set forth in

Concessionaire's Proposal, which Concessionaire is permitted to construct in, on or about the Concession Area, subject to the requirements of this Agreement and such other fixtures and other improvements authorized by Director in writing.

Section 4 SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS" Subsection entitled "**Expiration Date**" is amended to read as follows:

"Expiration Date" (Section 2.1 Term): the earlier of (i) June 30, 2011; or (ii) thirty (30) days after written notice of termination is provided by City, subject to earlier termination as provided in this Agreement.

Section 5 SECTION 1 - "SUMMARY OF TERMS AND DEFINITIONS" Subsection entitled "**Term**" is amended to read as follows:

"Term" (Section 2.1): commences on the Effective Date and shall continue until the Expiration Date, unless sooner terminated in accordance with the terms of this Agreement."

Section 6 SECTION 2 - "TERM OF AGREEMENT" Subsection 2.1 "**Term**" is amended to read as follows:

"2.1 Term. This Agreement shall be binding on both parties from the Effective Date set forth in the Summary. The term of this Agreement shall commence on the Effective Date and shall continue until the Expiration Date, unless sooner terminated in accordance with the terms of this Agreement."

Section 7 SECTION 4 - "RESTRICTIONS ON ACTIVITIES" Subsection 4.5 "**Relocation, Contraction or Expansion of Operations**" is amended to read as follows:

"4.5 Contraction or Expansion of Operations. In the event that implementation of the City's requirements for the Airport necessitates the expansion or contraction of the Concession Area, or any part thereof, Concessionaire shall contract or expand the size of the Concession Area in an expeditious manner only as may be permitted, directed or required by the Director.

All of Concessionaire's Allowable Improvements shall be fully amortized as of June 30, 2009, and City shall not be responsible for any unamortized costs after this date.

The expansion, or contraction of the Concession Area conducted pursuant to this Section, or the relocation of any airlines or any airlines' gate shall not affect Concessionaire's obligation to pay the Concession Fee.

Concessionaire may close one food and beverage concession location in Terminal C on or after September 1, 2009. If two or more airlines move their entire operations from Terminal C after execution of this Fifth Amendment, Concessionaire may close one additional food and beverage concession location in Terminal C. The specific concession location(s) to be closed must be approved in advance by the Director in his sole discretion.

Amendments to this Agreement which change or modify the description of the Concession Area as set forth in **REVISED EXHIBIT A** to specify in writing increases or decreases of the Concession Area at the Airport may be executed on behalf of the City by the Director.”

Section 8 SECTION 4 – “RESTRICTIONS ON ACTIVITIES” Subsection 4.16 “Hours of Operation” is amended to read as follows:

“4.16 Hours of Operation.

4.16.1 The Concessionaire must be open for business at the designated operating hours, unless otherwise authorized in writing by Director. The minimum hours of operation shall be 365 days a year, with Concession Areas open to the public at least one and one half (1 ½) hours prior to the first scheduled flight departure of the day, with continuous operation until the last flight in the terminal has boarded. Coffee units are required to open two (2) hours before the first scheduled departure of the day. Concession Operations must be flexible enough to provide extended hours to accommodate the additional business and customer service opportunities generated as a direct result of flight delays or airline schedule changes. Concessionaire shall provide for full and complete service at all times during the Hours of Operation. Any reduced service shall be requested in writing to the Director, and must be approved in writing by the Director prior to such reduction.

4.16.2 Specific requests for exceptions to these operating hours for holidays and other reasons (e.g., refurbishments) must be submitted to the Director at least sixty (60) days before the proposed change, and the Director shall provide his or her approval or disapproval of the request, in part or total, within fifteen (15) business days of receipt of such request. The Director reserves the right to modify Hours of Operation based on flight schedule and/or customer demand. Concessionaire and its Subconcessionaires shall not unilaterally modify operating hours. Due to unusual circumstances (e.g., delayed flights, weather), the Director reserves the right to direct the Concessionaire to direct select Concession Locations to remain open beyond the designated operating hours. The Concessionaire shall work with its Subconcessionaires to establish reasonable procedures for adjusting concession opening and closing times based on daily flight schedules, and incorporating those schedules into shift schedules for Subconcessionaires’ staff, as well as for receiving

and disseminating schedule changes, weather or maintenance delays or other flight information that will require adjustments in Subconcessionaires' operations. Such requirements for operating hours and flexibility shall be included in all Concessionaire subconcession agreements.

4.16.3 Concessionaire will work with its Subconcessionaires to ensure that they are aware of what the peak hours are for each location and that they will staff the facility appropriately to provide excellent customer service and avoid lengthy service lines. Concession staffing levels must reflect both the hourly and seasonal fluctuations in passenger traffic."

Section 9 Effective July 1, 2009, **SECTION 6 – "FEES & DEPOSITS"** is amended to read as follows:

"6.1 Concession Fee. Commencing upon execution of this Agreement by City, Concessionaire agrees to pay to City a monthly Concession Fee, as defined herein. The Concession Fee is an amount equal to the amount set forth in the Summary as the Concession Fee, for each month during the term of this Agreement.

6.1.1 Monthly Fee:

6.1.1.1 Concession Fee Calculation. Concessionaire shall pay to the City on a monthly basis the Percentage Fee, as set forth under the definition of Concession Fee in **SECTION 1 – "SUMMARY OF TERMS AND DEFINITIONS."**

6.1.1.2 Payment of Concession Fee. No later than twenty (20) days after the end of each month, Concessionaire shall pay to City the Concession Fee for the preceding month.

6.1.1.3 Monthly Concession Report. No later than twenty (20) days after the end of each month, Concessionaire shall deliver to the City a Concession Report for the preceding month's activity, even if no money is due.

If the monthly Concession Report is not provided on or before the twentieth (20th) day of each month as required herein, Concessionaire shall pay for administrative expenses incurred by City for delays and invoices a fee of Twenty-Five Dollars (\$25.00) per day for each day that the report is late until such date as the monthly Concession Report is submitted to the Director. This fee is established by City Council Resolution and may be adjusted from time to time in accordance with City Council Resolution.

6.1.1.4 Concessionaire shall be required to pay a late payment fee equal to one percent (1%) per month of the amount that is late, calculated monthly, for each month that payment is not timely received by City.

6.1.1.5 City assessment of the late payment shall be in addition to any other remedies City may have in law or in equity, including termination and revocation of the Concession Agreement.

6.1.1.6 Taxes and Assessments. Concessionaire shall pay, or cause the payment of, any and all other fees and charges, including, without limitation, all taxes, charges and assessments, interest payments, public agency fees and charges, insurance premiums and bond payments that are due and payable by Concessionaire under the provisions of this Agreement or under any laws.

6.2 Payment Location. The Concession Fee payable by Concessionaire shall be paid by check made payable to the "City of San José" and delivered or mailed to the following address, or to such other address as the Director may notify Concessionaire in accordance with **Section 31 - NOTICES:**

Payment Processing – Airport
Finance Department
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

6.3 Security Deposit. Concessionaire shall maintain with City a security deposit in an amount and in a form as determined by the Director and shall be payable to the "City of San José". The amount of the Security Deposit shall be Eight Hundred Seventy-Five Thousand Dollars (\$875,000.00). The Director, in his sole discretion, may adjust such deposit requirement from time to time as the Concession Area is contracted.

The Security Deposit shall be held by City and may be applied against any unpaid fees, rates or charges due and owing to City under this Agreement. If City makes such deduction, Concessionaire shall restore the Security Deposit to the full amount required by Director, within thirty (30) days of a written demand by Director. A failure to do so shall entitle City to terminate this Agreement on thirty (30) days notice. City shall not be required to keep the Security Deposit separate from its funds, and Concessionaire shall not be entitled to interest on the Security Deposit. Any amounts remaining from the Security Deposit (after deductions for delinquent or unpaid fees, costs, or charges as specified above) at the expiration or earlier termination of this Agreement shall be returned to Concessionaire, without interest, after a determination

by the Director that all amounts owed to City under this Agreement have either been paid in full or have been deducted from the Security Deposit.”

Section 10 **Section 22.7 “Removal”** is amended to read as follows:

“22.7 Removal. During the Term, Concessionaire shall not remove the Concession Improvements and/or Equipment in whole or in part, without the Director’s prior written consent. The Director may exercise his absolute discretion and condition such consent upon the obligation of Concessionaire to replace the same by other improvements or equipment specified in such consent.

22.7.1 Upon installation, the City shall have title to the Concession Improvements provided that City shall have the right in the Director’s sole discretion to require Concessionaire to remove any or all Concession Improvements upon termination or expiration of this Agreement or contraction of the Concession Area pursuant to Section 4.5. The Equipment shall remain the property of Concessionaire and shall be removed from the Airport upon termination or expiration of this Agreement or contraction of the Concession Area pursuant to Section 4.5, unless Concessionaire obtains Director’s written consent to leave Equipment at the Airport. Concessionaire shall ascertain from the Director, at least thirty (30) days prior to the Expiration Date or as soon as possible if this Agreement is terminated earlier or if the Concession Area is contracted, whether City will require Concessionaire to remove any Concession Improvements or, if Concessionaire desires to leave Equipment at the Airport, whether the City will accept such Equipment.

22.7.2 Any Concession Improvements or Equipment left by Concessionaire at the Airport shall be free and clear of any liens and Concessionaire shall execute any documents conveying title to City, at City’s request. Any removal shall be at Concessionaire’s sole cost and expense. In the event of an early termination of this Agreement by City for cause, or contraction of the Concession Area, the Director shall give notice of removal of Concession Improvements, if removal is required by City. Removal shall occur within thirty (30) days following Concessionaire’s receipt of such notice, but in no event later than the Expiration Date or earlier termination date.

22.7.3 In the event Concessionaire fails to remove or expresses an intention not to remove any Concession Improvements and/or Equipment required to be removed by the Director pursuant to this **Section 22**, City may enter upon the Concession Area and remove such Concession Improvements or Equipment at the sole cost and expense of Concessionaire. Concessionaire agrees to promptly reimburse City for all costs and expenses of removal, plus ten percent (10%) thereof for administrative overhead as such percentage is approved and established from time to time by the City Council. The obligation to reimburse City for such expenditures shall survive the termination of this Agreement. Any receipt showing payment by City of expenditures associated with

the removal of Concession Improvements and/or Equipment shall be prima facie evidence that the amount of such payment was necessary and reasonable and made by City on Concessionaire's behalf.

22.7.4 Concessionaire shall repair at its sole cost and expense any and all damage to the Concession Area, the Terminals or any part of the Airport occasioned by the removal of the Concession Improvements and/or Equipment, or Concessionaire's property from the Concession Area or any other area of the Airport, and shall leave all of the remaining improvements in good and clean condition and repair, ordinary wear and tear excepted, and shall appropriately "cap off" all utility connections. City may also require Concessionaire to remove any and all special equipment and any installations which are unique to Concessionaire, and Concessionaire shall comply with such requirement."

Section 11 EXHIBIT A is replaced with REVISED EXHIBIT A, attached and incorporated into this Fifth Amendment.

Section 12 EXHIBIT B is replaced with REVISED EXHIBIT B, attached and incorporated into this Fifth Amendment.

Section 13 EXHIBIT D is hereby deleted.

Section 14 The term "Agreement" as used in the Agreement, shall refer to the Amended Agreement, as modified by the First, Second, Third, Fourth and this Fifth Amendment.

Section 15 All of the terms and conditions of the Agreement not modified by the First, Second, Third, Fourth and this Fifth Amendment shall remain in full force and effect.

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Executed on the day and year first written above.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal
corporation

SANDRA LEE
Deputy City Attorney

By: _____
LEE PRICE, MMC
City Clerk

HOST INTERNATIONAL, INC.
a Delaware corporation

By: _____

Name: _____

Title: _____

Date: _____

CORPORATE SECRETARY CERTIFICATE

This certificate shall be executed by the secretary or assistant secretary of the corporation.

I, _____ certify that I
Name of Secretary or Assistant Secretary

am the Secretary or Assistant Secretary of the corporation named in the

attached agreement; that _____
Name of Person that Signed Agreement

signed the agreement on behalf of the corporation as the _____
Title of Person that Signed the Agreement

of the corporation; and that the agreement was duly signed for and in behalf of the corporation by authority of its Board of Directors, and is within the scope of its corporate powers.

Signature of Secretary or Assistant Secretary

Corporate Seal

Date