

**FIRST AMENDMENT  
TO AMENDED AND RESTATED AGREEMENT  
FOR LEASE OF REAL PROPERTY (WATER SYSTEM)**

This First Amendment ("**Amendment**") to the Amended and Restated Agreement for Lease of Real Property (Water System), dated December 17, 2019 ("**Lease**"), is entered into on the date of full execution of this Amendment ("**Effective Date**"), by and between the City of Cupertino, a California municipality ("**City**") and San Jose Water Company, a California corporation ("**Lessee**") (individually, a "**Party**" and collectively, the "**Parties**") with reference to the following recitals:

**RECITALS**

- A. Any capitalized terms not otherwise defined in this Amendment have the same meaning as specified in the Lease.
- B. Pursuant to Lease Section 2 (Term of Lease), the Lease Term shall expire on September 30, 2022.
- C. The City intends to initiate a new request for proposals ("**RFP**") process pursuant to Public Utilities Code section 10061, to solicit proposals for leasing the Water System following expiration of the Lease.
- D. Because the timing and outcome of the RFP process cannot be predicted, the City wishes to have the option of extending the Term of the current Lease long enough to allow the City to transition to whichever course of action the City adopts at the conclusion of the RFP process, depending on the City's determination of the best interest for the Water System.
- E. The best interest for the Water System, as determined by the City Council for the City following the RFP process, may include transitioning to a new lease agreement, transitioning to City operation of the Water System, or seeking to sell the Water System.
- F. Therefore, the Parties have agreed to amend the Lease in order to extend the Term of the Lease, upon request by the City, for an additional six months, two years, or three years, depending on the City's best interest determination and associated transition needs, with a commensurate extension of Lessee's obligations regarding the Capital Improvements Funds.

- G. Based on the foregoing and for good and valuable mutual consideration, the receipt and adequacy of which is acknowledged by both Parties, the Parties agree to amend the Lease as set forth below.

### **TERMS**

1. **Term Extension.** Upon written request by City, submitted to Lessee no later than April 30, 2022 in accordance with Lease Section 21 (Notices), Lease Section 2 (Term of Lease) shall be amended as specified in the City's written request for one of the three options set forth below, with all remaining provisions in Lease Section 2, including the option for earlier termination, to remain in full force and effect.

A. *Six-Month Extension.* If the City requests a six-month Term extension, the Term shall be extended from twenty-five (25) years to twenty-five (25) years and six (6) months ("**Six-Month Extension**").

B. *Two-Year Extension.* If the City requests a two-year Term extension, the Term shall be extended from twenty-five (25) to twenty-seven (27) years ("**Two-Year Extension**").

C. *Three-Year Extension.* If the City requests a three-year Term extension, the Term shall be extended from twenty-five (25) to twenty-eight (28) years ("**Three-Year Extension**").

2. **Capital Improvements Funds.** Lessee's obligations with respect to Capital Improvement Funds as set forth in Lease Section 7 (Operation of Water System) shall be amended as follows, depending on whether City requests a Six-Month Extension, Two-Year Extension, or a Three-Year Extension:

A. *Amendments to Subsection 7.A(2).* Lease subsection 7.A(2) (Lessee's Capital Improvements) shall remain in full force and effect, except as follows:

(1) *Six-Month Extension.* If the City requests a Six-Month Extension, the second paragraph in Lease subsection 7.A(2) (Lessee's Capital Improvements) shall be modified to require Lessee to expend an additional three hundred fifty thousand dollars (\$350,000), for a total expenditure of five million three hundred fifty thousand dollars (\$5,350,000) for Capital Improvements Funds, and to do so by March 31, 2023 instead of by September 30, 2022.

(2) *Two-Year Extension.* If the City requests a Two-Year Extension, the second paragraph in Lease subsection 7.A(2) (Lessee's Capital Improvements) shall be modified to require Lessee to expend an additional one million six hundred thousand dollars (\$1,600,000), for a total expenditure of six million six hundred thousand dollars (\$6,600,000) for Capital Improvements Funds, and to do so by September 30, 2024 instead of by September 30, 2022.

(3) *Three-Year Extension.* If the City requests a Three-Year Extension, the second paragraph Lease subsection 7.A(2) (Lessee's Capital Improvements) shall be modified to require Lessee to expend an additional two million five hundred thousand dollars (\$2,500,000), for a total expenditure of seven million five hundred thousand dollars (\$7,500,000) for Capital Improvements Funds, and to do so by September 30, 2025 instead of by September 30, 2022.

B. *Amendments to Subsection 7.A(10).* Lease subsection 7.A(10) (Capital Improvements Funds) shall remain in full force and effect, except as follows:

(1) *Six-Month Extension.* If the City requests a Six-Month Extension, Lessee must, within 45 days following the date of City's request, submit a scope of work for expenditure of three hundred fifty thousand dollars (\$350,000) in addition to the five million dollars (\$5,000,000) specified therein for Capital Improvement Projects for City authorization; and the second to last sentence shall be amended to provide that Lessee shall not be obligated to expend any amount in excess of the amended total of five million three hundred fifty thousand dollars (\$5,350,000) of the Capital Improvements Funds on Capital Improvement Projects. If the City terminates the Lease before the expiration of the Six-Month Extension, Lessee shall only be responsible for a prorated amount of the additional expenditure, calculated as one-sixth (1/6) of three hundred fifty thousand dollars (\$350,000) for each month, including partial months, that the Six-Month Extension is in effect. If Lessee has invested more than the three hundred fifty thousand dollars (\$350,000) at expiration of the Lease or more than the prorated portion in the case of early Lease termination due to an emergency event requiring additional expenditure of Capital Improvement Funds authorized in writing in advance by the City, the City shall remit to Lessee an amount equal to the difference between such amount and the actual amount that Lessee invested pursuant to the City's

authorization within thirty (30) days of Lease expiration. The terms and conditions set forth in this paragraph will survive termination or expiration of the Lease.

(2) *Two-Year Extension.* If the City requests a Two-Year Extension, Lessee must, within 45 days following the date of City's request, submit a scope of work for expenditure of one million six hundred thousand dollars (\$1,600,000) in addition to the five million dollars (\$5,000,000) specified therein for Capital Improvement Projects for City authorization; and the second to last sentence shall be amended to provide that Lessee shall not be obligated to expend any amount in excess of the amended total of six million six hundred thousand dollars (\$6,600,000) of the Capital Improvements Funds on Capital Improvement Projects. If the City terminates the Lease before the expiration of the Two-Year Extension, Lessee shall only be responsible for a prorated amount of the additional expenditure, calculated as one twenty-fourth ( $1/24$ ) of one million six hundred thousand dollars (\$1,600,000) for each month, including partial months, that the Two-Year Extension is in effect. If Lessee has invested more than the one million six hundred thousand (\$1,600,000) at expiration of the Lease or more than the prorated portion in the case of early Lease termination due to an emergency event requiring additional expenditure of Capital Improvement Funds authorized in writing in advance by the City, the City shall remit to Lessee an amount equal to the difference between such amount and the actual amount that Lessee invested pursuant to the City's written authorization, within thirty (30) days of Lease expiration. The terms and conditions set forth in this paragraph will survive termination or expiration of the Lease.

(3) *Three-Year Extension.* If the City requests a Three-Year Extension, Lessee must, within 45 days following the date of City's request, submit a scope of work for expenditure of two million five hundred thousand dollars (\$2,500,000) in addition to the five million dollars (\$5,000,000) specified therein for Capital Improvement Projects for City authorization; and the second to last sentence shall be amended to provide that Lessee shall not be obligated to expend any amount in excess of the amended total of seven million five hundred thousand dollars (\$7,500,000) of the Capital Improvements Funds on Capital Improvement Projects. If the City terminates the Lease before the expiration of the Three-Year Extension, Lessee shall only be responsible for a prorated amount of the additional expenditure, calculated as one thirty-sixth ( $1/36$ ) of two million

five hundred thousand dollars (\$2,500,000) for each month, including partial months, that the Three-Year Extension is in effect. If Lessee has invested more than the two million dollars five hundred thousand (\$2,500,000) at expiration of the Lease or more than the prorated portion in the case of early Lease termination due to an emergency event requiring additional expenditure of Capital Improvement Funds authorized in writing in advance by the City, the City shall remit to Lessee an amount equal to the difference between such amount and the actual amount that Lessee invested pursuant to the City's written authorization, within thirty (30) days of Lease expiration. The terms and conditions set forth in this paragraph will survive termination or expiration of the Lease.

**4. Addendum.** The City's written request for a Term extension shall be deemed an addendum to this Amendment and incorporated by reference herein.

**5. General Provisions.**

A. *Limitations.* Except as expressly modified by this Amendment, all provisions of the Lease shall remain in full force and effect.

B. *Recitals.* The recitals to this Amendment are true and correct and are hereby made part of this Amendment.

C. *Interpretation and Severability.* The terms of this Amendment have been negotiated by the Parties and the language used in this Amendment is deemed to be the language chosen by the Parties to express their mutual intent. This Amendment shall be construed without regard to any presumptions or rules of construction against the drafting party. In the event of any ambiguity or inconsistency affecting interpretation of this Amendment, this Amendment shall be interpreted to effectuate the Parties' intent as set forth in the recitals. If any provision in this Amendment, or portion thereof, is determined by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remaining provisions or portions thereof, shall remain in full force and effect.

D. *Effective Date.* The Effective Date of this Amendment is the date of full execution of this Amendment by the Parties, as set forth in the initial paragraph of this Amendment.

*[Signature page follows.]*

WHEREFORE, the Parties agree to the terms of this Amendment as witnessed by their signatures below.

**CITY OF CUPERTINO**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Darcy Paul, Mayor

ATTEST:

By: \_\_\_\_\_  
Kirsten Squarcia, City Clerk

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Christopher D. Jensen, City Attorney

**LESSEE: SAN JOSE WATER COMPANY**

By: Andrew R. Gere Date: Oct 22, 2021  
[name, title]  
Andrew R. Gere  
President and COO

**AMENDED AND RESTATED AGREEMENT  
FOR LEASE OF REAL PROPERTY (WATER SYSTEM)**

THIS AMENDED AND RESTATED AGREEMENT FOR LEASE OF REAL PROPERTY (WATER SYSTEM) ("Lease") is entered into as of 12/11/14, between the CITY OF CUPERTINO (hereinafter referred to as "City"), and SAN JOSE WATER COMPANY, a California corporation ("Lessee") (collectively "Parties") with reference to the following facts and intentions:

RECITALS:

WHEREAS, prior to City's incorporation in 1955, and continuing thereafter, the Cupertino area was provided with water service by investor-owned private utility companies including San Jose Water Works, the predecessor to Lessee; and

WHEREAS, in 1958, City granted San Jose Water Works (the former name of Lessee) a franchise to construct, operate, maintain, and improve a portion of the water system within the City of Cupertino, which Lessee privately owns and operates in exchange for payment of a franchise fee set by Chapters 6.16 and 6.20, respectively, of the Cupertino Municipal Code; and

WHEREAS, from about 1960 until October 1, 1997, in the areas not already served by the private water companies, City provided water service to approximately 4,200 (currently approximately 4,400) metered customers in the service area described in **Exhibit A** attached hereto (as such service area may change from time to time in accordance with this Lease, the "Service Area"); and

WHEREAS, as a result, Cupertino was served by three roughly equal-size water systems: a city-owned system within the Service Area and two others owned and operated by investor-owned utilities; and

WHEREAS, within the Service Area, City is the owner of certain real property, easements and rights of way and those certain pipes, mains, pumps and appurtenant facilities (including without limitation buildings, pump houses, sheds and other structures) constituting all of City's water system (the "Water System") as generally depicted in **Exhibit B** attached hereto and may be updated from time to time, and

WHEREAS, City has no legal obligation to provide public water service to its residents and desired to terminate its role in the provision of water service and allow those services to be provided city-wide exclusively by investor-owned utilities; and

WHEREAS, City may lease property to private parties pursuant to California Constitution Article XI Section 9; Government Code Sections 37350, 37380 and 37395; and Public Utilities Code Sections 10003, 10004, and 10061, and

WHEREAS, pursuant to the requirements of Public Utilities Code Section 10061, in 1997 City considered two lease proposals from existing investor-owned utilities operating in Cupertino to operate the Water System. As a result, the City Council found that Lessee was the best qualified operator that could continue to provide equal or better service to the customers of the Water System for just compensation; and on that basis granted a concession to Lessee; and

WHEREAS, the Parties entered into an Agreement for Lease of Real Property (Water System) dated October 1, 1997 ("**Original Lease**"), which provided for a twenty-five (25) year term, a concession fee of \$6,800,000, and other terms and conditions as contained in the Original Lease; and

WHEREAS, City and Lessee mutually desire to amend and restate the Original Lease in its entirety to reflect updated terms and conditions agreed to by the Parties; and

WHEREAS, the amendments are intended, among other things, to clarify the intent of the Parties in providing compensation, provide for capital investments in the Water System, and simplify SJWC's rate setting procedure with regard to the Lease; and

WHEREAS, City has determined that these revised terms and conditions of the Lease assure that the Water System will continue to be operated and maintained, and that water service will be provided within the Service Area in a manner that benefits the public and fulfills the public purposes of the Water System; and

WHEREAS, such public benefits and public purposes will be preserved by, among others, requirements that the Water System be operated and maintained, and the utility services be performed, in accordance with this Lease, and in a manner consistent with the operational and maintenance standards applicable to Lessee's own regulated water system, such as General Order 103 A and Lessee's existing tariffs as approved by the California Public Utilities Commission ("**CPUC**") for domestic water and fire flow service, as may be amended from time to time (the "**Operational Standards**"); and

WHEREAS, City and Lessee met and conferred about amending the Original Lease, shared relevant information and, with the aid of competent counsel and advisors, mutually negotiated the amendments in an arm's length transaction, taking into account what constitutes fair and reasonable compensation for the value of the governmental property, rights, and privileges being conveyed to a private party; and

WHEREAS, this Lease supersedes and replaces the Original Lease in its entirety.



## **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and for good and valuable consideration, the receipt and adequacy of which the Parties hereby acknowledge, City and Lessee hereby agree as follows:

### **Section 1.     Lease of Water System and Grant of Concession.**

City hereby leases to Lessee, and Lessee hereby leases from City, the Water System as described on Exhibit B. The Water System is leased in an "as is" condition. City also grants a concession to Lessee to provide water service within the Service Area, and in connection therewith, to use, possess, operate, manage, maintain, rehabilitate, expand, and improve the Water System in exchange for those rates and charges Lessee establishes in accordance with and pursuant to this Lease. In conveying this interest in governmental property to a private party, neither City nor any of its agents has made any representation or warranties with respect to the Water System except as specifically set forth in this Lease. City provided Lessee with copies of maps, drawings, plans and specifications of the 1997 system, along with customer service and account records prior to the Closing Date (defined below). Lessee agrees to use its best efforts keep all customer information confidential, whether received from City or developed during the Term of the Lease.

### **Section 2.     Term of Lease.**

The term of the Lease of the Water System shall be twenty-five (25) years unless terminated earlier as provided in this Lease (the "**Term**"), beginning on October 1, 1997 (the "**Closing Date**").

### **Section 3.     Use of Water System.**

Subject to the provisions of this Lease, Lessee agrees to use the Water System for the purpose of furnishing potable water service to customers connected to the Water System. Lessee agrees to furnish water, including water service for fire protection, to all customers in the Service Area in accordance with the applicable Operational Standards relating to service at all times during the Term of the Lease.

Lessee has no authority to and shall not retire, sell, transfer, convey, or encumber any real property of the Water System without prior written permission of the City. Lessee has no authority to retire, sell or otherwise dispose of any personal property of the Water System without prior written permission of the City.

City retains the right to utilize or continue to utilize any portion or portions of the Water System, including easements, tanks, buildings, and appurtenances for any legal purpose which does not interfere with Lessee's use of the Water System to furnish potable domestic water service to customers connected to the Water System.

**Section 4. Title.**

All existing and future capital improvements shall be deemed part of the Water System and title to such Capital Improvements shall vest in City following inspection and written approval by the City Engineer and formal acceptance by the City. Any other installed water utility infrastructure added to or incorporated into the Water System by Lessee pursuant to its obligations under this Lease or which are added by new developments shall be deemed part of the Water System and title to such property shall vest in City following inspection and written approval by the City Engineer and formal acceptance by the City. Lessee shall not own the Water System or any part thereof or any interest therein during the Term of this Lease.

**Section 5. Concession Fee.**

This Lease sets forth that the Water System be leased and the potable domestic water service be supplied exclusively by Lessee, a regulated utility, as a concession. As partial consideration for the property, rights, and privileges granted under this Lease (along with the consideration provided for in Section 6 and Section 28), Lessee and City met and conferred about this matter in good faith and mutually negotiated a concession fee, taking into account the fair market value of the Water System being leased and the service accounts, among other relevant factors in determining what constitutes fair and reasonable compensation under the terms and conditions of this Lease. Lessee agreed to pay and did pay the City a one-time concession fee (the "**Concession Fee**") of 6.8 million dollars (\$6,800,000.00) upon the execution of this Lease. The Parties understand and acknowledge that the Concession Fee was not a levy imposed by City on Lessee in its governmental capacity; it was voluntarily paid, negotiated compensation resulting in a fair and reasonable payment for a valuable interest in the Water System and water service. The Concession Fee is not a security deposit and is not refundable. The Concession Fee was legally incident on Lessee and the legal duty to pay remained with Lessee regardless of how Lessee opted, in its sole discretion, to fund the Concession Fee.

**Section 6. Base Rent.**

As additional consideration (along with the consideration provided for in Section 5 and Section 28), for the property, rights, and privileges granted under this Lease, Lessee agrees to pay to City as annual rental (hereinafter called the "**Base Rental**") for the use of the Water System, the sum of one dollar per year (\$1.00/year). The Base Rental shall be paid to City on the basis of City's fiscal year which commences July 1 and ends on June 30. City and Lessee agree that this rent provides sufficient consideration considering the benefits and burdens placed upon the Parties under the terms and conditions of this Lease. The Parties understand and acknowledge that the Base Rental is not a levy imposed by City on Lessee in its governmental capacity; it is voluntarily paid, negotiated compensation resulting in a fair and reasonable payment for a valuable interest in the Water System. The Base Rental shall be legally incident on Lessee and the legal duty to pay shall remain with Lessee regardless of how Lessee opts, in its sole discretion, to fund the Base Rental.

**Section 7. Operation of Water System.**

**A. Repair, Maintenance, Operation and Capital Improvement.**

(1) Repair, Maintenance, and Operation. Lessee shall at its own expense throughout the Term of this Lease, undertake any utility plant addition, betterment, replacement, improvement, and repair and also perform routine and emergency maintenance of the Water System in accordance with all applicable Operational Standards and any federal, state or local law, rule, regulation, code, or ordinance (collectively "**System Maintenance**"), and shall manage and operate the Water System and pay all costs and expenses of operating the same (including the costs of all utilities, plant improvements, water and all public charges, taxes and assessments of any nature whatsoever) (collectively "**System Operation**"), it being understood and agreed that City shall be under no obligation to pay any cost or expense of any kind or character in connection with or related to the System Maintenance or System Operation during the Term of this Lease.

(2) Lessee's Capital Improvements. In addition to the foregoing System Maintenance and System Operation obligations, Lessee shall be responsible for all capital improvements with respect to the Water System required to be designed, constructed and completed during the Term in accordance with the terms of this Lease, including those Capital Improvements as required by the applicable Operational Standards, and as required by any federal, state or local law, rule, regulation, code, or ordinance. For the purposes of this Lease, "**Capital Improvement**" is defined as any project having an estimated cost in excess of one thousand dollars (\$1,000), which constitutes an expansion to or addition, betterment, replacement, improvement and/or repair of the Water System that will either enhance the Water System's overall value, increase its useful life or adapt it to new uses, and has a useful life of ten (10) years for pumps, mechanical and electrical equipment, forty (40) years for above-ground buildings and structures, and fifty (50) years for underground pipes and lines.

Further, to amicably resolve a dispute between the Parties regarding the adequacy of Lessee's investment in the Capital Improvement of the Water System during the time period prior to the amendment and restatement of this Lease, and subject to the terms and conditions below, Lessee shall also be exclusively responsible for expending up to five million dollars (\$5,000,000) of Lessee's funds ("**Capital Improvements Funds**") prior to September 30, 2022 to remove and legally dispose of existing facilities, and to design, construct and complete Water System Capital Improvement projects approved by the City, in the City's sole discretion, and reasonably necessary as determined by the City for System Maintenance and System Operation (each a "**Capital Improvement Project**"). To facilitate the timely initiation of Capital Improvement Projects, during the Term of this Lease, City and Lessee shall meet and confer from time to time in good faith to make reasonable efforts to coordinate on the Capital Improvement Projects that shall be initiated pursuant to this Section..

Lessee's cost to design, bid and manage a Capital Improvement Project paid for with the Capital Improvement Funds shall be consistent with other capital projects constructed in Lessee's regulated water system.

The design and construction of a Capital Improvement Project paid for with Capital Improvement Funds shall be based upon and incorporate the applicable Operational Standards, and any federal, state or local law, rule, regulation, code, or ordinance, and shall provide a minimum design life of ten (10) years for pumps, mechanical and electrical equipment, forty (40) years for above-ground buildings and structures, and fifty (50) years for underground pipes and lines.

(3) True-Up of Capital Improvement Funds. Following the completion of each Capital Improvement Project paid for with the Capital Improvement Funds, the Lessee and the City shall confer in good faith regarding any true-up of the Capital Improvement Fund that may be necessary or appropriate based on the total costs, fees and expenses incurred by the Lessee on such project. Once an individual Capital Improvement Project paid for with the Capital Improvement Funds is complete, any unused or unapproved amounts shall be returned to the Capital Improvement Funds defined in Paragraph (10) below. The Parties shall proceed in good faith to negotiate and agree upon the true-up of the Capital Improvement Funds.

(4) Contractors. The City acknowledges and agrees that Lessee may engage contractors to perform some or all of the services associated with the design and construction of Capital Improvements to the Water System. The Lessee may, at its sole discretion, subcontract to contractors all or portions of the services to be provided regarding the design and construction of the Capital Improvements, provided, however, that Lessee shall remain liable for any work so subcontracted. If any contractor defaults on its contract, the Lessee shall make all reasonable efforts to enforce its rights under such contract, but such default shall not relieve the Lessee of its obligation to complete the Capital Improvements in accordance with this Lease.

(5) Progress Schedule. City and Lessee shall meet and confer from time to time in good faith to negotiate and mutually agree upon schedules to execute the Capital Improvement Projects.

(6) Project Cost. A minimum of thirty (30) days prior to beginning any work on a Capital Improvement Project paid for with Capital Improvement Funds, Lessee shall submit to the City a written schedule of anticipated costs for all Lessee design, labor, material, overhead and subcontractor costs for each Capital Improvement Project identified in paragraph (2) above.

(7) Design Plans/As Built Plans. The Lessee shall provide a set of "as-built" plans for each of the Capital Improvement Projects completed, all manuals required for operation and maintenance of the Capital Improvement, and copies of warranties issued by the manufacturer of the equipment and materials installed as part of the Capital Improvement. A copy of the "as-built" plans for each of the Capital Improvement Project shall be provided to the City by Lessee in electronic form. The Lessee shall make available for review by the City, a paper copy of the "as-built" plans and specifications for each of the Capital Improvements, all manuals required for operation and maintenance of the Capital Improvement, and copies of warranties issued by the manufacturer of the equipment and materials installed as part of the Capital Improvements.

(8) Capital Improvement Startup. The Lessee shall provide all necessary services in connection with planning, direction and supervision, and shall provide all materials, supplies and

equipment required for the start-up, testing, commissioning and performance of the Capital Improvements.

(8) Cooperation. The Lessee and City shall, in good faith, cooperate in any and all actions necessary or appropriate for the completion of the design, construction, start up, testing, commissioning and performance of the services relating to Capital Improvements.

(9) Reports. The Lessee shall prepare quarterly reports describing the progress with respect to the design, construction and cost of each Capital Improvement Project paid for with Capital Improvement Funds. In addition, the Lessee shall keep, and furnish to the City, at the City's request, such information on the design, construction and cost of Capital Improvement Projects as the City may reasonably request. Upon the commencement of construction of a Capital Improvement Project paid for with Capital Improvement Funds, the Lessee and the City shall hold regularly scheduled construction progress meetings. The frequency of the regularly scheduled construction progress meetings shall not be more than once per quarter unless otherwise agreed upon between the Parties. The Lessee shall prepare and submit information regarding progress of construction, dollars expended to date as a percentage of the total project, and percent project is complete to the City at least five (5) days prior to the regularly scheduled construction progress meetings. The information to be prepared by the Lessee shall generally include the following: (i) updates regarding the costs and expenses incurred with respect to the design and construction of each Capital Improvement Project, and any updates of the cost estimate for each Capital Improvement Project; (ii) update and narrative with respect to progress schedules; (iii) overview of the work performed on each Capital Improvement Project currently being constructed; (iv) narrative of any expected upcoming issues or changes in the design of a Capital Improvement Project; and (v) updated list of any outstanding issues and action items.

(10) Capital Improvement Funds. No later than thirty (30) days after the execution of this Amended and Restated Lease, Lessee shall remit to the City the sum of five million dollars (\$5,000,000) which shall be used by the City to reimburse Lessee for fees and costs to be incurred for the Capital Improvement Projects to be undertaken after the effective date of this Lease. The five million dollars in Capital Improvement Funds are to be maintained by the City solely for the benefit of City and the Lessee, free from any lien or claim of any creditor of City or the Lessee. Lessee shall invoice City monthly for reimbursement from the Capital Improvement Fund for costs incurred with respect to a Capital Improvement Project meeting the requirements under this Lease. Provided that the invoices reflect costs that are consistent with other capital projects constructed in Lessee's regulated water system, such invoices shall be due and payable by City after thirty (30) days of receipt by City. Invoices that are disputed shall be addressed as part of the true-up procedure described in subsection (3) above. Lessee shall not be obligated to expend any amounts in excess of the \$5,000,000 Capital Improvement Funds on Capital Improvement Projects. If monies remain in the Capital Improvement Funds upon the termination or expiration of the Lease, the money shall vest with the City and be used for Water System expenditures which may include, but are not limited to, costs to complete any Capital Improvement Project that is incomplete.

B. Customer Services Obligations.

Except in the case of developer projects, Lessee shall at its own expense throughout the

Term of this Lease be exclusively responsible for satisfying any and all customer service obligations pursuant to the Operating Standards, associated with Lessee's provision of water service in the Service Area. Pursuant to the Operating Standards, these customer service obligations include, but are not limited to: rendering periodic bills to all customers receiving water service in the Service Area; payment processing; responding to customer inquiries on water service, bills, leaks or other concerns; collecting bills; processing applications for new or transfer of service; collection of customer deposits for new service; collection of construction meter deposits; and investigation of customer complaints.

C. Emergency Service Obligations.

Lessee shall at its own expense throughout the Term of this Lease be exclusively responsible for maintaining twenty-four (24) hour on-call response to emergency calls or customer inquiries; providing an emergency or natural disaster operations plan; maintaining an emergency communications system; providing or having access to equipment required to perform emergency repair work to vital system equipment and water mains; including evaluating and if necessary providing emergency diesel powered backup generator at critical pumping stations.

D. Water Quality Testing Obligations.

Lessee shall at its own expense throughout the Term of this Lease be exclusively responsible for performing, or causing to be performed, by a State of California certified laboratory, any and all water sampling, analysis, testing and reporting as required for water sources, distribution mains or customer premises, testing and reporting as required for water sources, distribution mains or customer premises, by the U.S. Environmental Protection Agency, State of California Department of Health Services and Office of Drinking Water and the County Environmental Health Department or acts of the U.S. Congress or California Legislature; scheduling and collecting water samples to test for microbiological, inorganic and organic constituents; transportation to certified lab; preparation of monitoring plans; sample collection training; reporting to appropriate regulators; record keeping; analysis interpretation; special or emergency sample collection and analysis emergency notification to affected customers, if required; preparation and distribution of any and all published and distributed customer reports on water quality; management of a cross-control program; new well or water source sampling and analysis; response to customer inquiries on water quality issues; conducting annual system survey with California State Department of Health Services; obtaining permits and compliance with appropriate air district; providing hazardous materials control program, and ensuring all operator certification is in compliance with State and Federal requirements.

E. Other Service Obligations.

Lessee shall at its own expense throughout the Term of this Lease be exclusively responsible for implementing any City, County, Valley Water, State or Federal water conservation program; maintaining distribution system maps and plat maps; preparing any required urban water management plans; and in general, doing all such acts and performing all such services as required to operate the Water System in a manner similar to that in which it operates its own district systems, subject, however, to the provisions of this Lease. All maps, plans and records required by this

section and/or through the operation, maintenance and improvement of the Water System shall be transmitted to City at a minimum frequency as specified in the following subsection regarding reports.

F. Reports: Lessee shall at its own expense throughout the Term of this Lease be exclusively responsible for providing City written reports, in a form suitable to both Parties, related to Lessee's operation and maintenance of the Water System, as described herein. The frequency and contents of the reports shall be as follows:

(1) Annually. Summary of extraordinary maintenance, capital improvements completed and in design, developer installations with job description, percentage of completion and pertinent comments relative to the project; service and complaint report with listing of customer complaints and inquiries, reason for customer contact and resolution of the matter; water quality analysis of microbiological testing; and status of operation and maintenance activities.

(2) Periodically. Any other report or information that is reasonably requested by City in connection with the operation, maintenance and betterment of the Water System as contemplated under the terms of this Lease.

(3) Confidential Information. The Parties acknowledge and agree that the Non-Disclosure, Limited Use, and Confidentiality Agreement by and between the Parties dated June 13, 2016, as amended (the "**Confidentiality Agreement**") shall determine the rights and obligations with respect to "Information" as such term is defined in the Confidentiality Agreement.

G. General Operation.

Unless inconsistent with the specific terms of this Lease, Lessee shall operate the Water System according to the procedures and administrative rules by which it operates its other water systems in the City of Cupertino.

H. Transition Period.

Lessee shall fully cooperate and not hinder in any way with City's efforts to operate, lease, and/or sell the Water System to a party other than the Lessee. All records required under this Lease shall be made current by the Lessee at the frequency previously defined or as reasonably requested by City and without undue burden or cost to Lessee. All customer billing information shall be kept current and coordinated with City during the last twelve (12) months of the Lease Term.

**Section 8. Rates and Charges.**

Lessee shall, in its sole and exclusive discretion, be responsible for setting, levying, and providing notice of any and all of the rates, surcharges, surcredits and other service charges and/or fees and penalties that Lessee will apply to water service to be delivered to the customers served by the Water System.

To ensure that the property interests, rights, and privileges granted by City to Lessee hereunder are not abused, the rates, surcharges and other service charges and/or fees and penalties levied by Lessee on Water System customers shall not exceed the rates, surcharges, surcredits and other service charges and/or fees and penalties approved and/or authorized by the CPUC and in effect on Lessee's CPUC regulated water system located in areas of City (hereinafter "**Regulatory Cap**"). City and Lessee agree that this Regulatory Cap affords Lessee with sufficient flexibility to establish rates and charges while ensuring Lessee's customers are subject to just, reasonable, and nondiscriminatory rates and charges regardless of whether they are receiving water service from the leased Water System or Lessee's CPUC regulated water system. The Regulatory Cap applicable to Water System customers shall not include the "Surcharge to Fund Public Utilities Commission Reimbursement Fee" an administrative fee imposed by the CPUC on the tariffed system.

Provided that Lessee is in material compliance with this Section 8, City shall have no authority or obligation to impose, set, modify, approve, or provide notice of the rates and charges levied by Lessee on Water System customers. Lessee shall notify City of any proposed modifications to Lessee's rates, surcharges and other service charges and/or fees and penalties at least thirty (30) days prior to their effective date and provide documentation to demonstrate that the proposed rates, surcharges and other service charges and/or fees and penalties will be at or below the Regulatory Cap as described above. City, acting in its regulatory capacity, may confirm that Lessee is in compliance with this substantive requirement. In the event of a discrepancy, City may request additional information for clarification, which Lessee shall provide within fifteen (15) business days. If, in City's reasonable determination, Lessee's rates, surcharges and other service charges and/or fees and penalties exceed the Regulatory Cap and Lessee cannot demonstrate that its rates are in compliance, City may order Lessee to revise its rates to achieve compliance with this Section 8. Such a revision may require that Lessee provide a refund and/or credit to the customers to make them whole, as applicable.

Notwithstanding the foregoing, the City reserves the right to impose and collect fees for new or expanded water service connections on the Water System such as connection fees and development impact fees.

In the event, that rates, surcharges and other service charges and/or fees and penalties are reduced by order of the CPUC, including any determinations necessitating a refund or credit, or voluntarily by Lessee on Lessee's CPUC regulated water system located in areas of the City, Lessee shall forthwith reduce its rates, surcharges and other service charges and or fees and penalties within the Service Area of the Lease consistent with such reductions, refunds or credits.

No charge will be made for water delivered to Cupertino fire department facilities. No charge will be made for firefighting activities. All municipal properties using water service will be charged generally applicable rates as described herein.

In the event of mandatory water rationing imposed by Valley Water, State of California, or any other authorized public utility and other authorized public authority and to the extent allowed by law, Lessee may impose water conservation, mandatory water rationing, and applicable penalties on Water System customers that violate duly authorized restrictions.



**Section 9. Evaluation of System/Arbitration.**

Lessee, upon written request of City or City's agent, shall permit City or City's agent to conduct a comprehensive inspection of the Water System, including, but not limited to, field inspections, maintenance records and reports, customer complaints, capital improvement installations, schedules, and plans, in order to assess the condition of the Water System.

In the event that City determines that all or part of the Water System is not being operated or maintained in accordance with applicable Operational Standards, or other applicable requirements of this Lease, City shall provide written notice to Lessee describing the deficiencies which City wishes to be corrected. Lessee shall, within sixty (60) days thereafter, file with City its written response describing which deficiencies Lessee agrees are valid together with a plan to correct said deficiencies. Failure of Lessee to provide said written response within said period shall be deemed by City as an admission that said deficiencies exist and City may through an action for specific performance or other legal action compel Lessee to perform the work necessary to correct said deficiencies.

In the event that Lessee, in its written response to City disagrees with any or all of the deficiencies described in City's notice or in the event that City does not agree to the plan for deficiency corrections, then, in that event, the parties shall meet in good faith, in an attempt to resolve all issues.

In the further event that agreement cannot be reached between the parties or any or all issues, then the parties agree to submit the unsolved issues to arbitration under the rules of the American Arbitration Association or such other association as selected by the Presiding Judge of the Santa Clara County Superior Court, State of California.

**Section 10. Water Supply.**

Lessee shall not modify or take water supply wells out of permanent service without the express written permission of the City's Director of Public Works.

**Section 11. Customer Billing and Collections.**

**A. Lessee's Obligation.**

Lessee shall at its own expense throughout the Term of this Lease be exclusively responsible for rendering periodic bills to and collecting all rates and fees from all customers receiving water through the Water System. Lessee shall own, keep and retain all proceeds from such collections as the sole property of Lessee. Lessee may propose payment and credit rules substantially similar to those imposed by Lessee in similar adjacent localities, and more particularly to customers served by Lessee in other parts of the City. City shall have no role in the rendering of periodic bills or collection of rates and fees, or the frequency thereof.

B. Utility User's Tax.

To the extent required by law, Lessee shall bill and collect on behalf of City from customers receiving water through the Water System any additional amounts which City may assess as a utility user's tax on such customers and shall promptly pay all such amounts to City.

C. Unpaid / Delinquent Accounts.

Lessee shall at its own expense throughout the Term of this Lease be exclusively responsible for the collection of unpaid and/or delinquent accounts. City shall have no role in collection of unpaid/delinquent accounts. City shall not be obligated to pursue collection on behalf of the Lessee of any such amounts unpaid by customers.

D. Transition Periods.

City and Lessee jointly read the meters of all customers in the Service Area within fifteen (15) business days preceding the Closing Date and allocated all monies for services rendered and water sold prior to the Closing Date as property of City. All monies for services rendered and water sold after the Closing Date meter readings through the expiration or termination of the Lease shall be and remain the property of Lessee. Accrued expenses will be allocated in a similar manner. All monies for services rendered after the expiration or termination of the Lease shall be the property of City.

**Section 12. Insurance.**

A. Obligations of Lessee. During the term of this Lease, Lessee at its own cost and expense shall maintain insurance, issued by a carrier or carriers acceptable to City, as follows:

(1) Commercial general liability insurance in the single limit amount of not less than \$5,000,000 which amount may be satisfied by any excess liability insurance carried by Lessee, written on an occurrence basis. Such insurance shall include coverage for injury (including death) or damage to persons and/or property arising out of the operations of Lessee pursuant to this Lease. The policy shall include coverage for liability assumed under this Lease for personal injury, property damage and all other insurable claims as an "insured contract" for the performance of Lessee's indemnity obligations under this Lease.

(2) Workers' compensation insurance, or a certificate of self-insurance, insuring against liability under the Workers' Compensation Insurance and Safety Act now in force in California, or any act hereafter enacted as an amendment or supplement thereto or in lieu thereof. Such insurance shall fully cover all persons employed by Lessee in connection with its operations under this Lease for claims of death or bodily injury arising in connection with their employment by Lessee pursuant to its operations under this Lease.

(3) Automobile (vehicle) liability insurance on an occurrence basis for bodily injury and/or property damage in a single limit amount of not less than one million dollars (\$1,000,000)

B. Lessee's commercial general liability policy of insurance shall contain an endorsement in favor of City and its officers, agents and employees listing them as additional insureds.

C. The parties shall periodically review the insurance required hereby for the purpose of agreeing on increases in the minimum limits of such insurance, from time to time, to amounts which may be reasonable and customary for similar facilities of like size and operation.

D. All insurance shall be affected under policies issued by insurers of recognized responsibility, licensed or permitted to do business in the State of California and reasonably acceptable to City.

E. All policies of insurance issued by the respective insurers shall provide that such policies shall not be canceled or materially changed without at least thirty (30) days' prior written notice to Lessee and to City. Evidence of all renewed or new policies, together with evidence of payment, shall likewise be deposited with City prior to expiration dates of expiring or non-renewed policies.

F. The limits of insurance required by this Lease or as carried by Lessee shall not limit the liability of Lessee nor relieve Lessee of any obligation hereunder.

G. Lessee shall cause each insurance policy obtained by it to provide that the insurance company waives all rights of recovery by way of subrogation against City in connection with any damage covered by any policy.

**Section 13. Liens and Encumbrances.**

City agrees to keep the Water System free and clear of all liens, security interests and encumbrances except for those consented to by Lessee. Lessee agrees to keep the Water System free and clear of all liens, security interests and encumbrances, except for those consented to by the City.

**Section 14. Surrender Upon Expiration or Termination.**

Upon expiration or termination of the Lease, Lessee agrees that it shall surrender to City the Water System in good order and condition and in a state of repair that is consistent with the applicable Operational Standards. After expiration or termination of the Lease, Lessee shall provide City with an updated Water System map (ArcGIS or equivalent), the accuracy of which Lessee cannot provide verification to the extent information was or is provided by City or third parties or to the extent of changes of such information with the passage of time, showing spatial location of all surface and subsurface assets including all asset types, age, diameter and to the extent known by Lessee. Notwithstanding the foregoing, City acknowledges and agrees that Lessee shall not be liable to City or any third party based upon the information provided hereunder nor shall City rely on any information provided to City under in this Section.

## **Section 15. Default and Remedies.**

### **A. Default.**

The occurrence of any of the following shall constitute a default by Lessee:

(1) If Lessee fails to make any payment to City or to any third party required by this Lease as and when due, or to obtain and maintain any insurance required by this Lease, where such failure continues for ten (10) days following receipt of written notice from City specifying the failure;

(2) If Lessee fails to perform any of its other covenants or agreements herein contained, where such failure continues for thirty days following receipt of written notice from City specifying the failure;

(3) Notwithstanding subsection (2) above, if a failure to perform cannot feasibly be cured within thirty (30) days, for example, a major repair, if then Lessee fails to commence and diligently proceed toward full performance of the cure within thirty (30) days following receipt of written notice from City specifying the failure, or if Lessee fails to complete such performance within a reasonable time; or

(4) (a) If Lessee is or becomes bankrupt or insolvent or makes any general arrangement or assignment for the benefit of creditors; (b) if Lessee becomes a "debtor" as defined in 11 U.S.C. Section 101 or any successor statute thereto (unless, in the case of a petition filed against Lessee, the same is dismissed within ninety (90) days); (c) if a trustee or receiver is appointed to take possession of substantially all of Lessee's assets or of Lessee's interest in this Lease and possession is not restored to Lessee within sixty (60) days; or (d) if a writ of attachment or execution is levied on, or there is a judicial seizure of, substantially all of Lessee's assets or of Lessee's interest in this Lease and such seizure is not discharged within sixty (60) days.

### **B. Notice and Cure.**

If City shall default in the performance of any of its covenants or agreements contained herein and such default shall continue for a period of thirty (30) days after receipt by City from Lessee of written notice specifying the nature of the default, then Lessee may at its option, upon thirty (30) days written notice, cancel and terminate this Lease. In the case of a default which cannot reasonably be cured within thirty (30) days, if City fails to commence performance and diligently proceed toward full performance within thirty (30) days after receipt of notice by Lessee of City's failure to perform or fails to complete performance within a reasonable time thereafter, Lessee may, upon fifteen (15) days' notice, terminate this Lease.

### **C. Remedies.**

City shall have the following remedies if Lessee commits a default. These remedies are not exclusive; they are cumulative in addition to any remedies now or later allowed by law or provided for elsewhere in this Lease.

(1) Lessee's Right to Possession Not Terminated. In the event of a default by Lessee, during the continuance of the default and for so long thereafter as any damages or other sums payable by Lessee in connection with such default remain unpaid, City may continue this Lease in full force and effect, and the Lease will continue in effect as long as City does not terminate Lessee's right to possession, and City shall have the right to collect the rent when due. In the event that Lessee ceases to operate the Water System, City can enter the Water System and relet the Water System and the groundwater, or any part of it, to third parties for Lessee's account. Lessee shall be liable immediately to City for all costs City incurs in reletting the Water System and the groundwater. Reletting may be for a period shorter or longer than the remaining Term of this Lease. Lessee shall pay to City the rent due under this Lease on the dates the rent is due, less the rent City receives from any reletting. No act by City allowed by this section shall terminate this Lease unless City notifies Lessee that City elects to terminate this Lease.

(2) Termination of Lessee's Right to Possession. In the event of a default by Lessee, during the continuance of the default and for so long thereafter as any damages or other sums payable by Lessee in connection with such default remain unpaid, if Lessee is not taking prompt and reasonable efforts to cure the default in City's reasonable discretion, City may terminate Lessee's right to possession of the Water System and the groundwater upon fifteen (15) days' notice. No act by City other than giving formal written notice to Lessee shall terminate this Lease. Acts of maintenance, efforts to relet the Water System and the groundwater or the appointment of a receiver on City's initiative to protect City's interest under this Lease (other than the appointment of a receiver to perform all of Lessee's obligations hereunder) shall not constitute a termination of Lessee's right to possession. On termination, City has the right to recover from Lessee any amount necessary to compensate City for all detriment proximately caused by Lessee's default.

(3) City's Right to Cure Lessee's Default. City, at any time after Lessee commits a default, may cure the default at Lessee's cost, provided that Lessee has not provided City notice that it will need additional time to cure the default and Lessee is not using reasonable efforts to cure the default in City's reasonable discretion, unless immediate action is necessary to ensure uninterrupted operation of the Water System. If City, at any time, by reason of Lessee's default, pays any sum or does any act that requires the payment of any sum, the sum paid by City shall be due immediately from Lessee to City at the time the sum is paid, and if not paid within fifteen (15) days of notice shall bear interest at the maximum rate an individual is permitted by law to charge from the date the sum is paid by City until City is reimbursed by Lessee.

D. Corrective Action. Notwithstanding any provision of this Section 15 to the contrary, if a default or failure to perform by Lessee poses a threat to public health or safety, City shall so notify Lessee, and if Lessee fails to take corrective action within the time specified in such notice, City may enter the Water System and take all necessary action at Lessee's expense. Lessee shall promptly reimburse City for its costs.

#### **Section 16. Force Majeure.**

Each Party's respective obligations under this Lease shall be suspended only to the extent that and only for the duration in which the performance of its obligations hereunder is precluded

by acts of nature; war; riots; civil insurrection; acts of civil or military authority taken to protect public health and safety; fires; floods; earthquakes or other natural phenomena; labor strikes, accidents or incidents; laws; rules and regulations of any federal, state, or other governmental agency; changes in law, rules, or regulations of any federal, state or other governmental agency; or other cause of the same or other character, any of which are beyond the reasonable control of such Party (collectively, a "**Force Majeure**"). In the event of a suspension due to the foregoing, the Party whose obligations are suspended shall promptly notify the other Party in writing of such suspension and the cause and estimated duration of such suspension.

The Party providing such notice shall be excused from fulfilling its obligations under this Lease only until such time and only to the extent that the Force Majeure has ceased to prevent performance or other remedial action is taken, at which time the Party shall promptly notify the other Party(s) in writing of the resumption of its obligations under this Lease. Any Party rendered unable to fulfill any of its obligations by reason of a Force Majeure shall exercise due diligence to remove such inability with reasonable dispatch within a reasonable time period and mitigate the effects of the Force Majeure. The relief from performance shall be of no greater scope and of no longer duration than is required by the Force Majeure.

#### **Section 17. Assignment.**

Lessee agrees not to assign this Lease or sublet the Water System or any portion thereof without the consent of City, which consent shall not be unreasonably withheld; provided, however, that City's consent shall not be required in connection with any assignment by Lessee of all of its rights and obligations hereunder to an affiliated company which is controlled by, controls, or under common control with Lessee.

#### **Section 18. Discharge of Liens.**

Lessee agrees to pay and discharge all claims for materials, parts, labor, water, power and other consumables and supplies furnished at Lessee's instance or request upon or to the Water System and to keep the Water System free and clear of all liens resulting from such claims. City agrees to pay and discharge all claims and obligations for materials, parts, labor, water, power and other consumables and supplies furnished at City's instance or request upon or to the Water System prior to the commencement of the Term of this Agreement.

#### **Section 19. Indemnity.**

Lessee agrees to hold City, and its officers, agents and employees, free and harmless of and from, and to defend, indemnify, and protect City, and its officers, agents and employees, against all liability, loss, claims, demands, damage, expense, costs (including, without limitation, reasonable attorneys' fees and all costs and fees of litigation and its threat) of any kind or nature arising out of or in any way connected with the Lease or Lessee's performance or obligations under this Lease to the maximum extent permitted by Law. The expiration or termination of this Lease and/or the termination of Lessee's right to possession shall not relieve Lessee from liability under any indemnity provisions of this Lease as to matters occurring or accruing during the Term hereof or by reason of Lessee's occupancy of the Water System. Without in any way limiting the

foregoing, Lessee shall be solely responsible for, and agrees to defend and indemnify City and hold City harmless for any third party claim or action challenging the validity of this Lease. In the event this Lease is declared invalid, Lessee waives any claim it may have against City in connection therewith.

City agrees to hold Lessee, and its officers, agents and employees, free and harmless of and from, and to defend and indemnify Lessee, and its officers, agents and employees, against all liability, loss, claims, demands, damage, expense, costs (including, without limitation, all costs and fees of litigation and its threat) of any kind or nature arising from claims by third parties or governmental agencies and resulting from negligence, gross negligence, recklessness or willful misconduct by City in connection with City's ownership or operation of the Water System occurring or accruing prior to the Closing Date.

**Section 20. California Law.**

This Lease shall be governed by the laws of the State of California and the Santa Clara County Superior Court shall have exclusive and mandatory jurisdiction over any and all controversies arising from, related to or connected with this Lease and all Parties hereby submit to such jurisdiction and any and all proceedings involving such a controversy shall be brought in these courts, and not elsewhere.

**Section 21. Notices.**

All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments or designations hereunder by either party to the other shall be in writing and shall be sufficiently given and served upon the other party; if sent by United States registered mail, return receipt requested, postage prepaid and addressed as follows:

City: City of Cupertino, City Clerk  
10300 Torre Avenue  
Cupertino, CA 95014

Lessee: San Jose Water Company  
Attention: Legal Department  
110 W. Taylor Street  
San Jose, CA 95110-2131

or at such other address as either party shall later designate for such purpose by written notice to the other party. Mailed notice shall be deemed given on the date of delivery shown on the receipt card.

**Section 22. Waiver.**

The waiver by City of any breach by Lessee of any term, covenant or condition hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant or condition hereof. The waiver by Lessee of any breach by City of any term, covenant or condition

hereof shall not operate as a waiver of any subsequent breach of the same or any other term, covenant or condition hereof.

**Section 23. Representation.**

City hereby represents and warrants to Lessee that the City owns the Water System free and clear of any and all liens, security interests and encumbrances.

**Section 24. Nondiscrimination.**

Lessee covenants by and for itself, its officers and assigns, and all persons claiming under or through it, and this Lease is made and accepted upon and subject to the following conditions: that there shall be no discrimination against or segregation of any person or group of persons, on account of sex, race, color, creed, national origin, ancestry, religion, citizenship status, age, marital status, medical condition, mental or physical disability, sexual orientation, veteran status or any other characteristic protected by federal or state law or local ordinance in the leasing, transferring, use, or enjoyment of the Water System nor shall Lessee itself, or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation.

**Section 25. Counterparts.**

This Lease may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, but all together shall constitute but one and the same Lease.

**Section 26. Merger and Modification.**

This Lease, including the recitals and attachments thereto, which are incorporated by this reference, set forth the entire agreement between the parties with respect to the subject matter hereof, and supersedes all other oral or written provisions. This Lease may be modified or terminated only in a writing signed by all Parties.

**Section 27. Taxes and Assessments: Possessory Interest.**

Lessee shall pay all taxes, assessments, fees, levies, charges, license or permit fees and other governmental charges of any kind or nature which are or may be at any time or from time to time during the Term of this Lease levied, charged, assessed or imposed upon or against the Water System or the groundwater or the leasehold estate created hereby or which may be imposed upon any taxable interest of Lessee acquired pursuant to the Lease. Without limiting the generality of the foregoing, Lessee acknowledges that this Lease may create a possessory interest which may be subject to property taxation and that Lessee may be subject to the payment of property taxes levied on such interest. Any such tax shall be the sole responsibility of Lessee.



**Section 28. Franchise Fees**

As partial consideration for the property, rights, and privileges granted under this Lease (along with the consideration provided for in Section 5 and Section 6), Lessee shall pay City during the term of this Lease a franchise fee similar to the franchise fee charged to Lessee by the City for its other water system existing within the City (and which is not part of this Lease) as prescribed by Chapter 6.20 of the City's Municipal Code. City and Lessee considered various methods of compensating City for the value of the Water System concession and determined a certain formula for computing complementary franchise fees based on receipts attributable to the use, operation and possession of the franchise is equally applicable to the concession granted here and represents a fair and reasonable form of compensation that provides for practical and accountable administration. The franchise fee is not a levy imposed by City on Lessee in its governmental capacity; it is voluntarily paid as fair and reasonable compensation for the use of City's property and resources related to the Water System. The franchise fee shall be legally incident on Lessee and the legal duty to pay shall remain with Lessee regardless of how Lessee opts, in its sole discretion, to fund the franchise fee.

**Section 29. Attorneys' Fees.**

If any party to this Lease commences legal proceedings or arbitration to interpret this Lease, to enforce any of its terms or for damages for its breach, the prevailing party shall be entitled to recover reasonable attorneys' fees.

**Section 30. Net Lease.**

This Lease shall be deemed and construed to be a "net lease" and Lessee hereby agrees that the rental provided for herein shall be an absolute net return to City free and clear of any expenses, charges or setoffs.

**Section 31. Lessee's Compliance with Law.**

Except as otherwise provided in this Lease, Lessee shall, at Lessee's sole cost and expense, diligently and in a timely manner, comply in all material respects with all "**Applicable Law**," which term is used in this Lease to include all laws, rules, regulations, ordinance, directives, covenants, easements and restrictions of record, permits, and requirements of any applicable fire insurance underwriter or rating bureau, relating in any manner to the Water System or the groundwater (including but not limited to matters pertaining to: (i) industrial hygiene, (ii) environmental conditions on, in, under or about the Water System or the groundwater, including soil and groundwater conditions, and (iii) the use, generation, manufacture, production, installation, maintenance, removal, transportation, storage, spill or release of any Hazardous Substance (as defined below) or storage tank, now in effect or which may hereafter come into effect, and whether or not reflecting a change in policy from any previously existing policy. Lessee shall notify City in writing (with copies of any documents involved) of any threatened or actual claim, notice, inquiry, citation, warning, complaint or report pertaining to or involving failure by Lessee, the Water System or the groundwater to comply with any Applicable Law.

**Section 32. Hazardous Substances.**

A. Lessee will not cause or permit to occur any release, generation, manufacture, storage, treatment, transportation, or disposal of Hazardous Substance (defined below) on, in, under, or from the Water System or the groundwater or any portion of it in violation of Applicable Law. If Lessee does cause or permit any release or disposal of any Hazardous Substance on, in, or under the Water System or any portion of it, Lessee, at its own cost and expense, will immediately take such action as is necessary to detain the spread of and remove the Hazardous Substance to the complete satisfaction of City and other appropriate governmental authorities. Lessee shall promptly notify City of any release or disposal (of which Lessee has knowledge or becomes aware) of any Hazardous Substance on, in, under or from the Water System or the groundwater.

B. Lessee agrees to indemnify, defend (with counsel reasonably acceptable to City) and hold City and City's officers, agents and employees free and harmless from and against, all losses, liabilities, obligations, penalties, claims, litigation, demands, defenses, costs, judgments, suits, proceedings, damages (including consequential damages), disbursements or expenses of any kind (including attorneys' and experts' fees and expenses and fees and expenses incurred in investigating, defending, or prosecuting any litigation, claims, or proceeding) that may at any time be imposed upon, incurred by, asserted, or awarded against City in connection with or arising from or out of:

(1) any Hazardous Substance, on, in, under, or affecting all or any portion of the Water System or the groundwater, excluding any Hazardous Substance released, generated or disposed by City;

(2) any breach of any covenant or agreement of Lessee contained or referred to in this section;

(3) any violation or claim of violation by Lessee of any Applicable Law; or

(4) the imposition of any lien for the recovery of any costs for environmental cleanup or other response costs relating to the release or threatened release of Hazardous Substance, excluding any Hazardous Substance released, generated or disposed by City.

The expiration or termination of this Lease and/or the termination of Lessee's right to possession shall not relieve Lessee from liability under any indemnity provisions of this Lease as to matters occurring or accruing during the Term hereof or by reason of Lessee's occupancy of the Water System and the groundwater.

C. For purposes of this Lease, "**Hazardous Substance**" means any solid, liquid, gas, odor, heat, sound, vibration, radiation or other substance, material or waste which is defined as contaminant, pollutant, dangerous substance, toxic substance, hazardous waste, hazardous material, hazardous substance, extremely hazardous waste, restricted hazardous waste, residual waste, solid waste or similar term which is or becomes regulated by applicable Environmental Laws (as defined herein) or which is classified as hazardous or toxic under applicable Environmental Laws (including, without limitation, hydrocarbons, petroleum, gasoline, diesel

fuel, crude oil or any products, other petroleum hydrocarbons, polychlorinated biphenyls, asbestos, and urea formaldehyde foam insulation, or their by-products or fractions thereof). "Environmental Laws" means any Federal, state or local laws or any regulations promulgated pursuant to such laws, as such laws or regulations may from time to time be amended, applicable to the Water System, groundwater or the utility services regulating or imposing liability or standards of conduct concerning or relating to (i) the protection of human health or the environment, (ii) the regulation, use or exposure to Hazardous Substances or (iii) the operation, maintenance, construction, repair or rehabilitation of the Water System.

**Section 33. City's Access.**

City and City's agents shall have the right to enter the Water System at any time in the case of an emergency, and otherwise at reasonable times and on reasonable prior notice for the following purposes: (i) to determine whether the Water System is in good condition as required by this Lease and whether Lessee is complying with its obligations under this Lease, (ii) to serve, post or keep posted any notices required or allowed by law or under this Lease, and (iii) as City may otherwise reasonably deem necessary.

**Section 34. Execution.**

This Lease is effective upon full execution. It is the product of negotiation and therefore shall not be construed against any Party.

**Section 35. General Provisions.**

**A. Recitals.**

The recitals to this Lease are true and correct and are hereby made part of this Lease as if fully set forth in their entirety.

**B. Integration.**

This Lease, including the exhibits incorporated herein, constitutes the entire understanding and agreement of the Parties and supersedes all negotiations or previous agreements between the Parties with respect to all or any part of the terms discussed in this Lease.

**C. Interpretation and Severability.**

The terms of this Lease have been negotiated by the Parties hereto and the language used in this Lease shall be deemed to be the language chosen by the Parties hereto to express their mutual intent. This Lease shall be construed without regard to any presumption or rule requiring construction against the Party causing such instrument or any portion thereof to be drafted, or in favor of the Party receiving a particular benefit under this Lease. If one or more provisions of this Lease are held to be unenforceable or invalid under any laws, rules, or regulations applicable to this Lease, such provision, or such portion of such provision as may be necessary, shall be excluded from

this Lease and the balance of the Lease shall be interpreted as if such provision were so excluded and shall be thereafter enforceable in accordance with its terms

D. General Compliance with Law.

Each Party hereto shall comply with all laws, rules, and regulations applicable to this Lease including, but not limited to, prevailing wage payments, payroll records, working hours and workers compensation insurance, unemployment insurance benefits, FICA laws, and City's ordinances, including business license requirements.

E. Effective Date.

Upon approval by the City Council and full execution by the Parties, this Lease shall govern the rights and obligations of the Parties from and after the date of this Lease, and the Original Lease shall govern such rights and obligations prior to the date of this Lease.

IN WITNESS WHEREOF, the parties hereto have caused this Lease to be executed and attested by their proper officers thereunto duly authorized, and their official seals to be hereto affixed, as of the day and year first above written.

/s/

[Signature page follows]

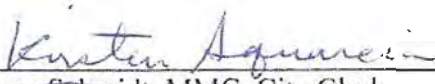
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**CITY OF CUPERTINO**

By:   
Steven Scharf, Mayor

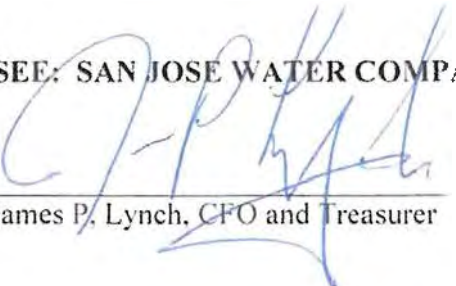
ATTEST:

By:   
Grace Schmidt, MMC, City Clerk  
Acting

APPROVED AS TO FORM:

By:   
Heather M. Minner, City Attorney

**LESSEE: SAN JOSE WATER COMPANY**

By:   
James P. Lynch, CFO and Treasurer

List of Exhibits:

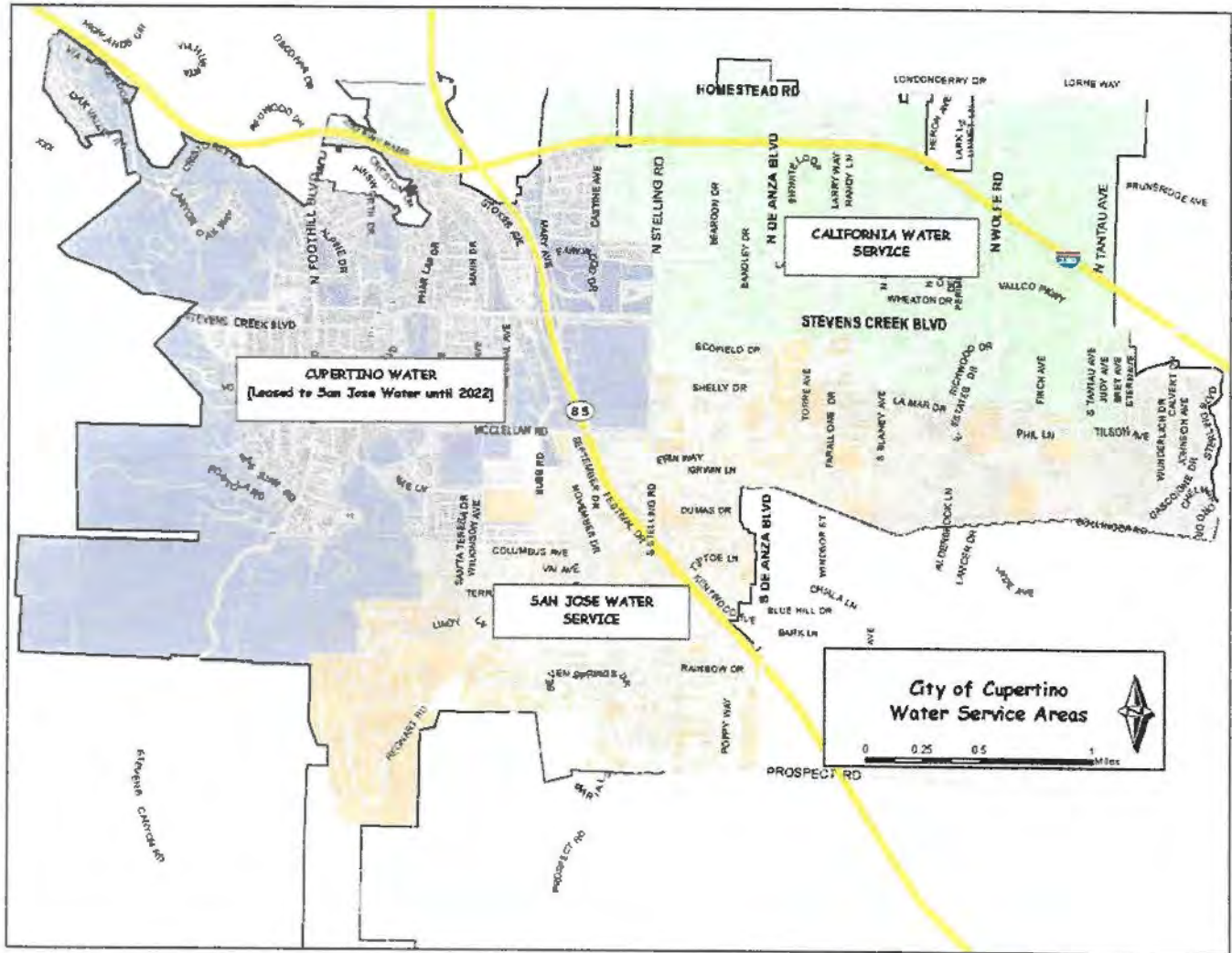
Exhibit A – Service Area  
Exhibit B – Water System

## EXHIBIT A Service Area

This document certifies that a true and complete map detailing the boundaries of the service area for Cupertino Water, California Water, and San Jose Water (Revised June 1991 and September 1997) and listed as Exhibit A in this *Agreement for Lease of Real Property* is on file in the Office of the City Clerk.

Date: 8 Jan 2020

Kirsten Spurrin  
Deputy City Clerk  
Acting





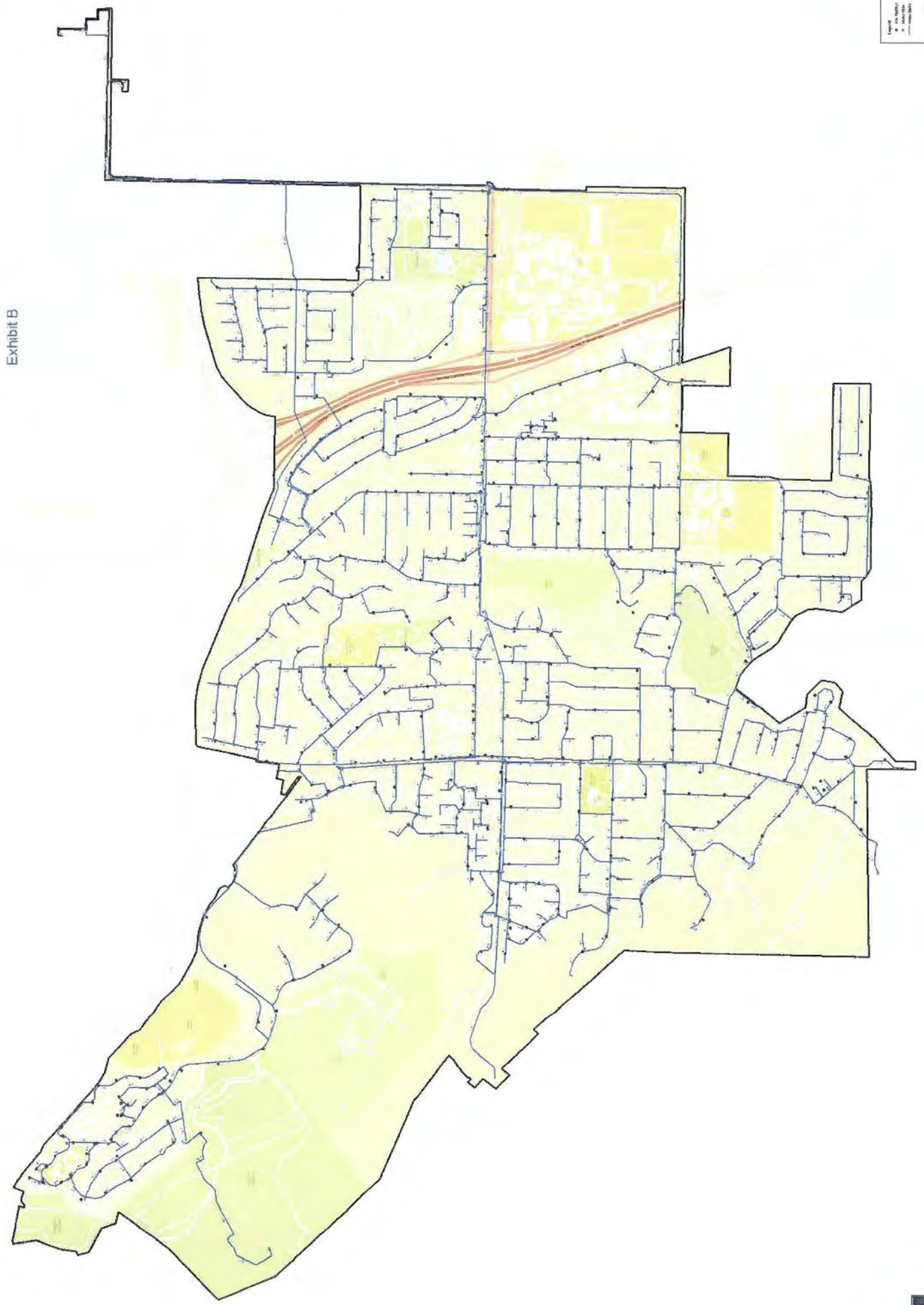


Exhibit B






# First Amendment of Amended Restated Lease

Final Audit Report

2021-10-22

|                 |  |
|-----------------|--|
| Created:        | 2021-10-22                                   |
| By:             | Julia Kinst (juliak@cupertino.org)           |
| Status:         | Signed                                       |
| Transaction ID: | CBJCHBCAABAACH7CHcYHwx1MkSHRVnZVomA0JvhqctV3 |

## "First Amendment of Amended Restated Lease" History

-  Document created by Julia Kinst (juliak@cupertino.org)  
2021-10-22 - 8:42:59 PM GMT- IP address: 216.198.111.214
-  Document emailed to Andrew R. Gere (andy.gere@sjwater.com) for signature  
2021-10-22 - 8:44:22 PM GMT
-  Email viewed by Andrew R. Gere (andy.gere@sjwater.com)  
2021-10-22 - 9:00:50 PM GMT- IP address: 104.28.123.70
-  Document e-signed by Andrew R. Gere (andy.gere@sjwater.com)  
Signature Date: 2021-10-22 - 11:56:46 PM GMT - Time Source: server- IP address: 134.238.196.28
-  Agreement completed.  
2021-10-22 - 11:56:46 PM GMT