

# PORT COMMISSION LEASE AGREEMENT

Summary of Lease Terms

**DATE**                      **July 1, 2023**

**LANDLORD:**            City of Port Lavaca, Texas, a Texas home rule municipality  
202 N. Virginia  
Port Lavaca, TX 77979

## **TENANT**

Company name & address    BIG BEAR SHRIMP AND SEAFOOD, LLC  
C/O TERRI AND MARK DIETZEL  
2241 HIGHWAY 35 N  
PORT LAVACA, TX 77979

Home office address        SAME

Contact #s                    Mark Dietzel 361-648-4512 cell

Local responsible party    Mark Dietzel

Contact #, email            \_\_\_\_\_

Emergency contact         \_\_\_\_\_

## **PREMISES**

TRACT #'s CITY HARBOR: SLIP CH1 with 923 sf adjacent land

## **TERM**

Commencement Date    July 01, 2023

Termination Date        June 30, 2025

Monthly Rate             \$401.53

Option: With 60 days advance notice, Tenant shall have option to extend the lease agreement at the end of the current lease for two (2) each one (1) year terms; City has preferential right with 90 days notice to terminate the lease at the end of the current lease.

Rent Increase for each extension: per Municipal Cost Index

TARIFFS SHALL BE CHARGED ON ALL GOODS AND DOCKAGE ACCORDING TO CITY ORDINANCE.  
NO SEAFOOD TARIFFS SHALL BE CHARGED UNDER THESE LEASE AGREEMENT

THIS LEASE AGREEMENT (hereinafter referred to as “Lease”) is effective as of July 1, 2023 (the “Effective Date”) between the City of Port Lavaca, Texas, a Home Rule Municipality and a governmental subdivision of the State of Texas, (hereinafter referred to as “City”), and BIG BEAR SHRIMP AND SEAFOOD (hereinafter referred to as “Tenant”).

## **RECITALS**

**WHEREAS**, Tenant desires to lease a portion of land owned by City, such land being more fully described in Exhibit “A”, which is attached hereto and incorporated herein for any and all purposes; and

**WHEREAS**, City intends to lease to Tenant a tract of land located at the CITY HARBOR, City of Port Lavaca, Texas, identified as Tract SLIP CH1 AND 923 SF of Adjacent Land, as fully described in Exhibit “A;”

**WHEREAS**, the City has determined that this lease to Tenant is authorized by law and constitutes a valid public use; and

**WHEREAS**, the parties desire to set forth the terms and conditions under which the Lease can be acquired by Tenant from the City;

**NOW, THEREFORE**, the parties hereto, in consideration of the premises and covenants herein set forth, and for other good and valuable consideration, receipt of which is hereby acknowledged, each intending to be legally bound, agree as follows:

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

## **AGREEMENTS**

In consideration of the mutual agreements herein set forth, City and Tenant agree as follows:

**Article 1. Definitions.** As used in this Lease, the following terms (in addition to the terms defined elsewhere herein), and whether singular or plural thereof, shall have the following meanings when used herein with initial capital letters:

“**Award**” shall mean any payment or other compensation received or receivable from or on behalf of any governmental authority or any person or entity vested with the power of eminent domain for or as a consequence of any Taking.

“**Bulkhead**” shall mean the dockage facilities located adjacent to the Leased Premises that may or may not be leased by separate agreement or by special agreement herein.

**“Business Day”** shall mean a day other than Saturday, Sunday or legal holiday recognized in City’s Tariffs.

**“City”** shall mean the City of Port Lavaca, Texas, a home rule municipality and governmental subdivision identified in the opening recital of this Lease, including its duly appointed and authorized Port Commission, and its successors and assigns and subsequent owners of the Leased Premises.

**“City Facilities”** shall mean all channels, railways, waterways, docks, slips and other facilities and improvements owned, operated or controlled by City (other than the Leased Premises) which are necessary for access to, or the use and operation of, the Leased Premises as contemplated hereunder.

**“City’s Tariffs”** shall mean the rates, rules, regulations, policies and tariffs issued, adopted, amended and reissued by City, as recommended by its duly appointed and authorized Port Commission, from time to time (including, without limitation, Tariff No. 1-A, as it may be amended)

**“Dockage Charges”** are those amounts charged to Tenant pursuant to the City’s Tariff, as amended from time to time as recommended by its duly appointed and authorized Port Commission.

**“Event of Default”** shall have the meaning set forth in Section 16.01 hereof.

**“Fiscal Year”** shall mean the twelve-month period beginning October 1<sup>st</sup> of any given year and ending September 30<sup>th</sup> of the following year.

**“Force Majeure”** shall mean acts of God;

**“Hazardous Materials”** shall have the meaning ascribed to it in Section 4.04 hereof.

**“Impositions”** shall mean (a) all real estate, personal property, rental, water, sewer, transit, use, occupancy and other taxes, assessments, charges, excises and levies which are imposed upon or with respect to (1) the Leased Premises or any portion thereof, or the sidewalks, streets or alley ways adjacent thereto, or the ownership, use, occupancy or enjoyment thereof or (2) this Lease and the Rent payable hereunder; and (b) all charges for any easement, license, permit or agreement maintained for the benefit of the Leased Premises.

**“Improvements”** shall mean all improvements constructed on the Leased Premises during the term of this Lease.

**“Leased Premises”** shall mean (a) the property leased by Tenant pursuant to this Lease, and further described in Exhibit “A” hereto, and (b) all Improvements thereon or

hereafter added to the property described in Exhibit “A” which shall not include the bulkhead adjacent to the property.

**“Legal Requirements”** shall mean any and all (a) judicial decisions, orders, injunctions, writs, statutes, rulings, rules, regulations, promulgations, directives, permits, certificates or ordinances of any governmental authority in any way applicable to Tenant or the Leased Premises, including zoning, environmental and utility conservation matters, (b) City’s Tariffs, (c) insurance requirements and (d) other documents, instruments or agreements (written or oral) relating to the Leased Premises or to which the Leased Premises may be bound or encumbered.

**“Permitted Use”** shall mean the operation of Tenant’s business, Big Bear Shrimp and Seafood, LLC as a seafood business which involves loading, unloading and dockage of one seafood boat, storage and the wholesale of seafood and aquatic products; use of the transportation infrastructure access via the access easement across Scully’s parking lot; the storage of equipment; and including blending, mixing, storage, and related handling of such materials and components in both bulk and non-bulk forms, and including use of the transportation infrastructure access to any other easements, privately owned or leased docks or terminals, or public highways.

**“Taking”** shall mean the taking, damaging or destroying of all or any portion of the Leased Premises by or on behalf of any governmental authority or any other person or entity pursuant to its power of eminent domain.

**“Total Taking”** shall mean any Taking of all or substantially all of the Leased Premises, or of so much of the Leased Premises that the portion remaining cannot, in Tenant’s good faith judgment reasonably exercised, be economically restored so as to permit economically sound operation.

**“Partial Taking”** shall mean any Taking of less than all of the Leased Premises such that the portion remaining can, in Tenant’s good faith judgment reasonably exercised, be economically restored so as to permit economically sound operation.

**“Transfer”** shall mean **an assignment of this lease to another entity, whether related or unrelated.**

## **Article 2.    Leased Premises.**

**Section 2.01. Description of the Leased Premises.** Subject to the provisions of this Lease, City hereby leases, demises and lets to Tenant and Tenant hereby leases from City, the Leased Premises. Both parties acknowledge that City shall have the right to use the Leased Premises in any manner that will not, in City’s discretion, reasonably exercised, interfere with Tenant’s Permitted Use thereof.

### **Article 3. Term.**

**Section 3.01.** This lease is for a term of 24 MONTHS commencing on the first day of July 2023 and continuing until June 30, 2025. Tenant shall have the right with sixty (60) days advance written notice to City to exercise two (2) each one (1) year options to extend this Lease. City shall have preferential right with ninety (90) days advance written notice to terminate the lease at the end of the current lease term. There shall be no holdover. If Tenant holds over, Tenant shall be responsible for amounts described in Section 5.08 and Article 17 Below.

### **Article 4. Use.**

**Section 4.01. Permitted Use.** Tenant shall use the Leased Premises for the development and operation of any Permitted Uses under this Lease and in accordance with the City Tariff as it may be amended.

**Section 4.02. Continuous Operation.** Tenant will occupy and continually use the Leased Premises solely for any or all of the Permitted Uses and in strict compliance with all Legal Requirements. This Lease shall terminate in the event Tenant abandons the use of the Leased Premises for a continuous period of 60 days unless excused by Force Majeure. Violation of this provision shall be considered an event of default under Article 16 below.

**Section 4.03. Specifically Prohibited Use.** Tenant will not (a) use, occupy or permit the use or occupancy of the Leased Premises or use City's other property for any purpose or in any manner which is or may be, directly or indirectly, (1) inconsistent with the requirements of this Lease, (2) violative of any of the Legal Requirements, (3) dangerous to life, health, the environment or property, or a public or private nuisance or (4) disruptive to the activities of any other Tenant or occupant of property adjacent to the Leased Premises, (b) commit or permit to remain any waste to the Leased Premises or (c) commit, or permit to be committed, any action or circumstance in or about the Leased Premises which, directly or indirectly, would or might justify any insurance carrier in canceling the insurance policies maintained by Tenant on the Leased Premises and Improvements thereon. City hereby confirms to Tenant that the use of the Leased Premises for the Permitted Use shall not constitute a prohibited use hereunder so long as the same is conducted in compliance with applicable Legal Requirements.

**Section 4.04. Environmental Restrictions.** Tenant shall not cause or permit any Hazardous Materials or industrial solid wastes to be generated, treated, stored, manufactured, disposed or released on or about the Leased Premises or transferred or transported to the Leased Premises, in contravention of any Legal Requirements. Any use of Hazardous Materials by any person on the Leased Premises shall be in strict conformance with all Legal Requirements and shall not cause the Leased Premises to be subject to remedial obligations to protect health or the environment. The terms "Hazardous

Materials” shall mean any flammables, explosives, radioactive materials, hazardous waste and hazardous constituents, toxic substances or related materials, including substances defined as “hazardous substances,” “hazardous materials,” “toxic substances” or “solid wastes” in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C.A. Sec. 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C.A. Sec. 5101, et seq.; the Resources Conservation and Recovery Act, 42 U.S.C.A. Sec. 6901, et seq.; the Toxic Substance Control Act, as amended, 15 U.S.C.A. Sec. 2601 et seq.; City’s Tariffs; the Solid Waste Disposal Act, Chapter 361 of the Health and Safety Code of Texas; or any other Legal Requirement.

**Section 4.05. Notification of Potential Liability Triggering Event.** Within two (2) Business Days following receipt thereof, Tenant shall notify and provide City with all copies of written notices, demands, lawsuits, or other correspondence from any federal, state or local governmental agency or private party including, but not limited to, the following:

- (a) The violation of any federal, state, or local statute or regulation;
- (b) The loss of any operating permit;
- (c) Any enforcement action undertaken by any federal, state or local governmental agency, or any private party;
- (d) The institution of any lawsuit by any governmental entity or any private party; or
- (e) The service of a potentially responsible party demand letter from any private or governmental party.

**Section 4.06. Consequences of Tenant’s Violation of Environmental Legal Requirements.** In the event Tenant’s violation of environmental Legal Requirements expose City to fines or penalties as the owner of the Leased Premises, Tenant shall provide the defense of the City with respect to such fines and penalties under the appropriate regulatory, administrative, or judicial procedures, and will pay any such fines or penalties timely and promptly after completion of any such defensive or mitigative proceedings, including appeals, if any. In the event of Tenant’s unreasonably repeated conviction of the same violation of environmental Legal Requirements within any twelve-month period, City may re-open negotiations regarding the Term and Land Rent under this Lease.

**Section 4.07. INDEMNIFICATION.** IT IS EXPRESSLY AGREED AND UNDERSTOOD THAT TENANT SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS CITY, ITS EMPLOYEES, AGENTS, OFFICERS, DIRECTORS, COMMISSIONERS, AND BOARD MEMBERS, WHETHER ELECTED OR APPOINTED, FROM ANY AND ALL CLAIMS, CAUSES OF ACTION, DEMANDS, DAMAGES (INCLUDING WITHOUT LIMITATION REASONABLE LEGAL FEES,

COSTS AND EXPENSES), ENFORCEMENT ACTIONS, OR PENALTIES, ARISING OUT OF ANY ACCIDENT OR OTHER OCCURRENCE IN OR ABOUT THE LEASED PREMISES RESULTING FROM THE NEGLIGENT ACTS, ERRORS OR OMISSIONS OF THE TENANT, ITS AGENTS, SERVANTS, AND EMPLOYEES, INCLUDING, WITHOUT LIMITATION, ANY NEGLIGENT ACTS, ERRORS OR OMISSIONS OF THE TENANT THAT RESULT IN THE LEASED PREMISES BEING CONTAMINATED BY CHEMICALS OR OTHER SUBSTANCES, EXCEPT TO THE EXTENT ARISING OUT OF ANY NEGLIGENT ACT OR OMISSION BY THE CITY OR ITS AGENTS.

**Section 4.08. Liability for Environmental Cleanup.** Tenant shall be responsible for the cleanup and removal of any environmental damages caused by its operations. In the event Tenant fails to immediately clean up and remove any environmental condition or damage resulting from Tenant's operations, Landlord may, at its option, clean up and remove such condition and/or damage and take such action as may be required to comply with applicable rules and regulations relating thereto, at Tenant's expense, and bill Tenant for same on the basis of cost plus twenty percent (20%).

**Section 4.09. Compliance with City Code of Ordinances related to Smoking.** Tenant shall comply with Article 2 of Chapter 20 of the City's Code of Ordinances related to Smoking.

## **Article 5. Rent.**

**Section 5.01 Land Rent.** Tenant shall pay to City monthly rent of **\$401.53** per month, beginning July 1, 2023 and on the first (1<sup>st</sup>) day of each month thereafter during the term of this Lease. If one or both of the one-year extensions are exercised under this lease agreement, each such extension shall include a rent adjustment based upon the most recently published Municipal Cost Index (MCI) at the time of the increase compared with the MCI published for July 2023, with a minimum increase of 2% and a maximum increase of 5%. Rent shall be prorated for any partial month.

**Section 5.02. Wharfage Rates and Charges/Monthly Reporting Requirement.** All applicable provisions of City's Tariff and/or applicable wharfage rates shall apply to the activities of Tenant undertaken on the Leased Premises, unless otherwise excepted herein. Tenant shall install and at all times properly maintain all suitable equipment and instrumentation for determining the quantity of the products and commodities moved over, through or across any facility located at the City's Facilities. **NO SEAFOOD TARIFFS SHALL BE ASSESSED DURING THE TERM OF THIS LEASE.**

**Section 5.03. Place of Payment.** Rental and all other payments due hereunder shall be paid to City at its address for notice hereunder or to such other person or at such other address in Calhoun County, Texas, as City may from time to time designate in writing. Rent shall be paid in legal tender of the United States of America without notice, demand, abatement, deduction or offset except as herein provided.

**Section 5.04. Delinquent Payments.** All Rent and other payments required of Tenant hereunder which are not paid by the 10TH of the month shall be assessed a charge of ten percent (10%) of the rent then due per month of delinquency. In no event, however, shall the charges permitted under this Section or elsewhere in this Lease, to the extent any or all of the same are considered to be interest under applicable law, exceed the maximum rate of interest allowable under applicable law.

**Section 5.05. Other Charges:** Tenant shall comply with and shall pay all local, state and federal taxes (including without limitation, income, franchise, gross receipts, sales, use, excise and real and personal property taxes), governmental charges of any kind whatsoever, payments in lieu of taxes, assessments, special assessments, licenses, registration fees, freight, and transportation charges and any other charges imposed, assessed, levied or liabilities incurred with respect to the ownership, the possession or the use of the Leased Premises or pipelines, any payment of the Lease payments or any other payments by Tenant and any penalties, fines or interest imposed on any of the foregoing (collectively, the “Charges”) during the Lease term.

**Section 5.06. Tenant to Control Charges.** City shall, to the maximum extent permitted by law, permit Tenant to pay directly to the relevant taxing or other authorities or third parties all charges due under this Article 5, if Tenant so requests.

a. Tenant may, at Tenant’s expense and in Tenant’s or City’s name, in good faith contest any charges (and City shall cooperate fully in any such contest) and, in the event of any such contest, may permit such charges so contested to remain unpaid during the period of such contest and any appeal therefrom unless City shall notify Tenant that, in the reasonable opinion of City, by nonpayment of any such charges the interest of City in the Lease will be materially endangered or any part thereof will be subject to loss or forfeiture, in which event Tenant shall promptly pay any such charges.

b. Tenant agrees to conduct any such contest or appeal in a reasonable manner and further agrees that it will not enter into any settlement or compromise that would obligate City to make any payment or to take or refrain from taking any action, other than ministerial acts.

c. All rebates, refunds or other return of charges shall be paid directly to Tenant, or if received by the City, shall be promptly paid over to Tenant.

**Section 5.07. Land Rent upon Holdover.** If Tenant shall holdover following expiration of this lease, Tenant shall pay the sum of one hundred fifty percent (150%) of Land Rent defined in Paragraph 5.01, including any increases that have occurred during the lease term. This holdover rent shall be due beginning the 1<sup>st</sup> day of the month following the expiration of this Lease.



## **Article 6. Construction, Ownership and Operation of Improvements.**

**Section 6.01. Title to Improvements.** All non-permanent Improvements are the property of Tenant. At the expiration of the Term of this Lease and with prior written notice to City, Tenant shall remove such non-permanent Improvements upon the expiration or earlier termination of this Lease; and Tenant shall repair all damage to the Leased Premises caused by such removal at Tenant's cost, expense and liability. City may prevent and disapprove removal if Tenant is in default under Article 16 below. At the time of removal Tenant shall be required to restore the Leased Premises to reasonably unimproved condition. In the event that Tenant fails to remove its Improvements within **Sixty (60)** days of the expiration or earlier termination of the Lease, then, at City's election (i) Tenant's rights, title and interest in and to such Improvements shall be vested in City without the necessity of executing any conveyance instruments, or (ii) City shall be entitled to remove and dispose of such Improvements, in a commercially reasonable manner, at Tenant's cost, expense and liability. All permanent leasehold improvements are the property of City and may not be removed by Tenant at any time.

**Section 6.02. Permits.** Tenant shall obtain and maintain in effect at all times during the Term all permits, licenses and consents required or necessary for the construction, installation, maintenance, use and operation of the Improvements and Tenant's use and occupancy of and operations at the Leased Premises.

**Section 6.03. Alterations & Improvements.** Tenant shall not make, or permit to be made, any alterations, improvements or additions to, or install, or permit to be installed, any fixture or equipment in or on the Leased Premises, without the written approval of City. Such written approval must be obtained prior to commencement of construction. City shall not unreasonably withhold or delay such approval. All improvements made, placed, or constructed on the Leased Premises by Tenant shall be maintained at the sole cost and expense of Tenant. Tenant shall construct and install its improvements in a good and workmanlike manner. All permanent improvements become the property of the City and shall not be removed. Any improvements made shall be in accordance with the Americans with Disabilities Act.

**Section 6.04 Condition of Leased Premises.** Tenant acknowledges that it has independently and personally inspected the Leased Premises and that it has entered into this Lease based upon such examination and inspection. Tenant accepts the Leased Premises in its present condition, **"AS IS, WITH ALL FAULTS, IF ANY, AND WITHOUT ANY WARRANTY WHATSOEVER, EXPRESS OR IMPLIED,"** other than the warranty of quiet enjoyment; specifically, without limiting the generality of the foregoing, without any warranty of (a) the nature or quality of any construction, structural design or engineering of any Improvements currently located at or constituting a portion of the Leased Premises, (b) the quality of the labor and materials included in any such Improvements, or (c) the soil and environmental conditions existing at the Leased Premises and the suitability of the Leased Premises for any particular purpose or developmental

potential. City shall not be required to make any Improvements to the Leased Premises or to repair any damages to the Leased Premises.

**Section 6.05. Repair and Maintenance.** Tenant shall maintain the Leased Premises at all times during the Term in a good, clean, safe, operable and well-kept condition, and will not commit or allow to remain any waste or damage to any portion of the Leased Premises. In the event the Premises is contiguous to docks and wharfs, said duty of repair and maintenance shall apply to the docks and wharfs. Further, said maintenance requires that there be no accumulation of debris on the docks and wharfs and they shall remain without obstruction at all times.

**Section 6.06. Laborers and Mechanics.** Tenant shall pay for all labor and services performed for, materials used by or furnished to Tenant, or used by or furnished to any contractor employed by Tenant with respect to the Leased Premises and hold City and the Leased Premises harmless and free from any liens, claims, encumbrances or judgments created or suffered by Tenant. If Tenant elects to post a payment or performance bond or is required to post an improvement bond with a public agency in connection with the above, Tenant agrees to include City as an additional obligee thereunder.

**Section 6.07. Damages to property and facilities.** Tenant shall be responsible for all damages to the property and facilities of Landlord occasioned by its use of the Leased Premises. In the event Tenant fails to repair any damaged property and/or facility to its previously undamaged condition within thirty (30) days of the date the damage occurred, Landlord may, at its option, order the property or facilities repaired at Tenant's expense and bill Tenant on the basis of cost plus twenty percent (20%) for such repairs. Tenant shall not be responsible for damage occurring as a result of normal wear and tear.

**Article 7. Utilities.** Tenant shall, at its sole cost and expense, provide for whatever additional services and utilities it may desire, including but not limited to water, both potable and non-potable, fire water, gas, electricity, telephone, internet, sewage treatment, waste water collection and drainage and any other utilities or similar services used in or on the Leased Premises, but shall have no obligation to provide such services or utilities except as needed by Tenant. Tenant shall be responsible for all costs and charges in connection therewith and agrees to pay the same promptly as such charges accrue, and to protect, indemnify and hold City harmless from and against any and all liability for any such costs or charges.

**Article 8. Impositions.** During the Term, Tenant shall pay or cause to be paid as and when the same shall become due, all Impositions. Impositions that are payable by Tenant for the tax year in which Commencement Date occurs as well as during the year in which the Term ends shall be apportioned so that Tenant shall pay its proportionate share of the Impositions payable for such periods of time. Where any Imposition that Tenant is obligated to pay may be paid pursuant to law in installments, Tenant may pay such Imposition in installments as and when such installments become due. Upon request by

City, Tenant shall deliver to City evidence of payment of any Imposition Tenant is obligated to pay hereunder.

#### **Article 9. Transfer by Tenant.**

**Section 9.01. General.** Tenant shall not affect or suffer any Transfer without the prior written consent of City. Any attempted Transfer without such consent shall be void and of no effect. If City does consent to a Transfer, Tenant herein shall not be relieved of any responsibility, including, but not limited to the duty to pay rent and guarantees of performance under this Lease.

**Section 9.02. Liens.** Without in any way limiting the generality of the foregoing, Tenant shall not grant, place or suffer, or permit to be granted, placed or suffered, against all or any part of the Leased Premises or Tenant's leasehold estate created hereby, any lien, security interest, pledge, conditional sale contract, claim, charge or encumbrance (whether constitutional, contractual or otherwise) and if any of the aforesaid does arise or is asserted, Tenant will, promptly upon demand by City and at Tenant's expense, cause same to be released.

**Article 10. Access by City/exercise of Self-Help.** City, its employees, contractors, agents and representatives, shall have the right (and City, for itself and such persons and firms, hereby reserves the right) to enter the Leased Premises during reasonable business hours and upon reasonable notice (a) to inspect the Leased Premises, (b) to show the Leased Premises to prospective purchasers or tenants, (c) to determine whether Tenant is performing its obligations hereunder and, if it is not, to perform same at City's option and Tenant's expense or (d) for any other reasonable purpose. In an emergency, City (and such persons and firms) may use any means to open any door into or in the Leased Premises without any liability therefor. Entry into the Leased Premises by City or any other person or firm named in the first sentence of this Article for any purpose permitted herein shall not constitute a trespass or an eviction (constructive or otherwise), or entitle Tenant to any abatement or reduction of Rent, or constitute grounds for any claim for damages for any injury to or interference with Tenant's business, for loss of occupancy or for consequential damages, but City shall not unreasonably interfere with Tenant's use or quiet enjoyment of the Leased Premises.

#### **Article 11. Insurance.**

**Section 11.01. Liability Insurance.** The Tenant shall, during the term of this Lease and any subsequent renewals thereof, at its expense, maintain in effect Commercial General Liability insurance and Environmental Impairment Liability Insurance. Each policy shall be in an amount not less than Two Million (\$2,000,000.00) general aggregate for bodily injury and property damage. City shall be included on the Tenant's Commercial General Liability policy as an additional insured and furnished a Certificate of Insurance evidencing such coverage. The coverage shall also provide for a waiver of all rights of subrogation.

**Section 11.02. Property Insurance.** Tenant shall, during the term of this Lease and any subsequent renewals thereof, at its expense, maintain in effect Commercial Property insurance covering City's buildings, fixtures, equipment, and tenant improvements and betterments at actual cash value as defined as replacement cost. Tenant shall procure and maintain Commercial Property insurance to cover its personal property.

## **ARTICLE 12. INDEMNITY.**

**TENANT HEREBY RELEASES AND DISCHARGES CITY, ITS SUCCESSORS AND ASSIGNS, AND ALL OF ITS RESPECTIVE OFFICERS, DIRECTORS, BOARD MEMBERS AND COMMISSIONERS, ELECTED OR APPOINTED, , AND THEIR SUCCESSORS IN OFFICE, EMPLOYEES, ATTORNEYS, DESIGNEES, REPRESENTATIVES AND AGENTS, HEREINAFTER COLLECTIVELY AND SEVERALLY REFERRED TO AS "INDEMNITEES" FROM AND AGAINST ALL LIABILITY FOR, AND ASSUMES THE RISK OF ALL LOSSES, EXPENSES, LIENS, CLAIMS, DEMANDS, DAMAGES AND CAUSES OF ACTION OF EVERY KIND AND CHARACTER WHATSOEVER FOR DAMAGE TO THE PROPERTY OF INDEMNITEE AND OF TENANT, AND FOR THE PERSONAL INJURY TO OR DEATH OF ANY PERSONS (INCLUDING BUT NOT LIMITED TO CITY, ITS OFFICERS, DIRECTORS, ELECTED OR APPOINTED OFFICERS, EMPLOYEES, ATTORNEYS, DESIGNEES, REPRESENTATIVES, TENANTS, SUBCONTRACTORS, SUPPLIERS, INVITEES OR LICENSEES AND AGENTS OF CITY) AND/OR DAMAGE TO ANY PROPERTY (INCLUDING BUT NOT LIMITED TO PROPERTY BELONGING TO CITY, ITS OFFICERS, DIRECTORS, ELECTED OR APPOINTED OFFICERS, EMPLOYEES, ATTORNEYS, DESIGNEES, REPRESENTATIVES, TENANTS, SUBCONTRACTORS, SUPPLIERS, INVITEES OR LICENSEES AND AGENTS) AND FOR ANY OTHER LIABILITY, DAMAGES, FINES OR PENALTIES (EXCEPT WHERE REIMBURSEMENT FOR FINES OR PENALTIES IS PROHIBITED BY APPLICABLE LAW), INCLUDING COSTS, EXPENSES, PENALTIES AND INTEREST, ATTORNEY FEES AND SETTLEMENTS HEREINAFTER REFERRED TO COLLECTIVELY AND SEVERALLY AS "CLAIMS", ARISING OUT OF OR IN ANY WAY CONNECTED WITH TENANT'S USE OF THE LEASED PREMISES OR TENANT'S PERFORMANCE OR FAILURE TO PERFORM THE COVENANTS OF THIS LEASE AGREEMENT, EXCEPT FOR SUCH INCIDENTS RESULTING FROM THE NEGLIGENCE OR WILFUL MISCONDUCT OF THE INDEMNITEES. THIS INDEMNITY SHALL INCLUDE CLAIMS ARISING OUT OF, BROUGHT BY OR CAUSED, IN WHOLE OR IN PART BY TENANT, ITS OFFICERS, DIRECTORS, EMPLOYEES, TENANTS, SUBCONTRACTORS, SUPPLIERS, INVITEES OR LICENSEES AND AGENTS OF TENANT, AND TENANT EXPRESSLY AGREES TO DEFEND, INDEMNIFY, REIMBURSE AND HOLD CITY, ITS OFFICERS, DIRECTORS, ELECTED OR APPOINTED**

**OFFICERS, EMPLOYEES, ATTORNEYS, DESIGNEES, REPRESENTATIVES, TENANTS, SUBCONTRACTORS, SUPPLIERS, INVITEES OR LICENSEES AND AGENTS, HARMLESS FROM ALL "CLAIMS" OF ANY KIND OR CHARACTER RESULTING FROM, ARISING OUT OF OR CAUSED, IN WHOLE OR IN PART, BY TENANT'S, (INCLUDING ITS OFFICERS, DIRECTORS, ELECTED OR APPOINTED OFFICERS, EMPLOYEES, TENANTS, SUBCONTRACTORS, SUPPLIERS, INVITEES OR LICENSEES AND AGENTS) WILLFUL MISCONDUCT, NEGLIGENCE, GROSS NEGLIGENCE, DELIBERATE ACTS, STRICT LIABILITY IN TORT OR BREACH OF WARRANTY, EXPRESSED OR IMPLIED.**

**THE FOREGOING INDEMNIFICATION SHALL NOT BE APPLICABLE TOWARD OR ENFORCEABLE IN FAVOR OF ANY INDIVIDUAL INDEMNITEE FOR A PARTICULAR CLAIM, INsofar AS THAT PARTICULAR CLAIM IS ADJUDICATED BY A COURT OF COMPETENT JURISDICTION, RESULTING EXCLUSIVELY FROM THE GROSS NEGLIGENCE OR WILLFUL CONDUCT OF THAT INDEMNITEE SEEKING TO ENFORCE THE INDEMNIFICATION.**

**CITY AND TENANT ACKNOWLEDGE THAT THIS STATEMENT AND THE FOREGOING INDEMNIFICATION UNDER THIS ARTICLE 12 COMPLIES WITH THE EXPRESS NEGLIGENCE RULE AND IS CONSPICUOUS AND HAS BEEN REVIEWED AND APPROVED BY EACH PARTY'S OWN RESPECTIVE INDEPENDENT LEGAL COUNSEL. THE INDEMNIFICATION ARISING HEREIN SHALL SURVIVE THE TERMINATION OF THIS LEASE.**

### **Article 13. Casualty Loss.**

#### **Section 13.01. Obligation to Restore.**

(a) If all or any part of the improvements located on (or constituting a part of) the Leased Premises are destroyed or damaged by any casualty during the Term, Tenant shall promptly commence and thereafter prosecute diligently to completion the restoration of the same to the condition in which the destroyed or damaged portion existed prior to the casualty. Tenant will perform such restoration with at least as good workmanship and quality as the improvements being restored, and in compliance with the provisions of Article 6 hereof. Notwithstanding the foregoing provisions of this subparagraph (a) to the contrary, if all such improvements are wholly destroyed by any casualty, or are so damaged or destroyed that, the City determine in its sole discretion that it would be uneconomic to cause the same to be restored, then Tenant shall not be obligated to restore such improvements and this Lease shall terminate as of the date the Improvements are removed and the property is restored in accordance with §6.01.

(b) If a casualty loss affecting the Leased Premises occurs, all insurance proceeds arising from policies maintained by Tenant for the damages arising from such

casualty shall be distributed and paid directly to the Party actually performing the restoration of the Leased Premises under Sections 6.01 and 13.01(a), as interest may appear, for all damages to the Leased Premises or for costs incurred for the restoration of the Leased Premises to its unimproved condition as provided in Section 6.01.

**Section 13.02. Notice of Damage.** Tenant shall immediately notify City of any destruction of or damage to the Leased Premises.

#### **Article 14. Condemnation.**

**Section 14.01. Total Taking.** If a Total Taking of the Leased Premises occurs, then this Lease shall terminate as of the date the condemning authority takes lawful possession of the Leased Premises and the parties shall be entitled to receive and retain the Award for the Taking of the Leased Premises as interest may appear. [For example, it is anticipated under the present terms of this Lease that the award in respect of the real property would inure to the City, the award with respect to value of the Leasehold estate would inure to Tenant, and the award with respect to the value of the Improvements would inure to the respective parties as interest might then appear, in accordance with the provisions of Section 6.01 above.]

**Section 14.02. Partial Taking.** If a Partial Taking of the Leased Premises occurs, as defined in Article 1 above, (a) this Lease shall continue in effect as to the portion of the Leased Premises not taken, and (b) Tenant shall promptly commence and thereafter prosecute diligently to completion the restoration of the remainder of Improvements located in (or constituting a part of) the Leased Premises to an economically viable unit with at least as good workmanship and quality as existed prior to the Taking. In the event of a Partial Taking of the Leased Premises, the parties shall be entitled to receive and retain the Award for the portion of the Leased Premises taken, as interest may appear. [For example, it is anticipated under the present terms of this Lease that the award in respect of the real property would inure to the City, the award with respect to value of the Leasehold estate would inure to Tenant, and the award with respect to the value of the Improvements would inure to the respective parties as interest might then appear, in accordance with the provisions of Section 6.01 above.] In addition, upon a Partial Taking, the Land Rent payable during the remainder of the Term (after the condemning authority takes lawful possession of the portion taken) shall be reduced proportionally giving due regard to the relative value of the portion of the Leased Premises taken as compared to the remainder thereof.

**Section 14.03. Notice of Proposed Taking.** Tenant and City shall immediately notify the other of any proposed Taking of any portion of the Leased Premises.

**Article 15. Quiet Enjoyment.** Tenant, on paying the Rent and all other sums called for herein and performing all of Tenant's other obligations contained herein, shall and may

peaceably and quietly have, hold, occupy, use and enjoy the Leased Premises during the Term subject to the provisions of this Lease. City agrees to warrant and forever defend Tenant's right to occupancy of the Leased Premises against the claims of any and all persons whomsoever lawfully claiming the same or any part thereof, by, through or under City (but not otherwise), subject to the provisions of this Lease, all matters of record in the Official Records of Calhoun County, Texas, and any unrecorded easements or licenses executed by City to the extent the foregoing are validly existing and applicable to the Leased Premises.

## **Article 16. Default.**

**Section 16.01. Events of Default.** Each of the following occurrences shall constitute an Event of Default by a party under this Lease:

- (a) The failure of **Tenant** to pay any amount due under this Lease on or before the 10<sup>th</sup> day of the month.
- (b) The failure by a Tenant to perform, comply with or observe any other agreement, obligation or undertaking of such Tenant, and the continuance of such failure for a period of thirty (30) days after receipt of notice from the non-defaulting party specifying such failure, except that if cure is not reasonably possible within such thirty (30) day period, Tenant shall not be in default if it promptly commences cure within such period and thereafter diligently pursues cure until completion;
- (c) The filing of a petition by or against Tenant in any bankruptcy or other insolvency proceeding, or seeking any relief under the federal Bankruptcy Code or any similar debtor relief laws; or
- (d) Use of the Leased Premises by Tenant or its successors or assigns for any purpose other than a Permitted Use, as defined in Article 1, and Tenant's failure to cease such impermissible use within thirty (30) days of receipt of notice of such violation from City.

**Section 16.02. Remedies.** Other than the default of 16.01(a) which shall allow for City to take immediate action as allowed by law, upon the occurrence of an Event of Default by Tenant, the Landlord may, in addition to its other remedies, terminate this Lease upon thirty (30) days notice to the other party; however, such notice shall not be effective if the Tenant cures the Event of Default within the meaning of Section 16.01(b) above. Further, Landlord may declare all Land Rent for the entire balance of the then current Lease Term immediately due and payable, together with all other charges, payments, costs, and expenses payable by Tenant as though such amounts were payable in advance on the date the Event of Default occurred.

**Section 16.03. No Waiver; No Implied Surrender.** Provisions of this Lease may not be waived orally or impliedly, but only by the party entitled to the benefit of the provision evidencing the waiver in writing. No waiver of any breach by a party shall constitute a waiver of any subsequent breach.

**Section 16.04. City's Right of Reentry Upon Default.** At any time after the occurrence of an Event of Default, Landlord shall have the right, but shall not be obligated, to enter upon the Premises and to perform such obligation notwithstanding the fact that no specific provision for such substituted performance by Landlord is made in this Lease with respect to such default. In performing such obligation, Landlord may make any payment of money or perform any other act. All sums so paid by Landlord (together with interest added at the maximum rate allowed by law (or, if there is no maximum rate, at ten percent (10%) per annum) and all costs and expenses in connection with the performance of any such act by Landlord, shall be deemed to be Additional Rent under this Lease and shall be payable to Landlord immediately on demand. Landlord may exercise the foregoing rights without waiving any other of its rights or releasing Tenant from any of its obligations under this Lease.

#### **Article 17. Right of Reentry.**

Upon the expiration or termination of the Term for whatever cause, or upon the exercise by City of its right to re-enter the Leased Premises without terminating this Lease, Tenant shall immediately, quietly and peaceably surrender to City possession of the Leased Premises in the condition and state of repair required under the Lease and Tenant shall remove the non-permanent Improvements in accordance with Section 6.01 hereof. If Tenant fails to surrender possession as herein required, City may initiate any and all legal action as City may elect to dispossess Tenant and all persons or firms claiming by, through or under Tenant of its non-permanent Improvements from the Leased Premises, and may remove from the Leased Premises and store (without any liability for loss, theft, damage or destruction thereto) any such non-permanent Improvements at Tenant's cost and expense. For so long as Tenant remains in possession of the Leased Premises after such expiration, termination or exercise by City of its re-entry right, Tenant shall be deemed to be occupying the Leased Premises as a tenant-at-sufferance, subject to all of the obligations of Tenant under this Lease, except that the Land Rent shall be twice the per day Land Rent in effect immediately prior to such expiration, termination or exercise by City. No such holding over shall extend the Term. If Tenant fails to surrender possession of the Leased Premises in the condition herein required, City may, at Tenant's expense, restore the Leased Premises to such condition.

#### **Article 18. Miscellaneous.**

**Section 18.01. Independent Obligations; No Offset.** The obligations of Tenant to pay Rent and to perform the other undertakings of Tenant hereunder constitute



independent unconditional obligations to be performed at the times specified hereunder, regardless of any breach or default by City hereunder. Tenant shall have no right to claim any nature of lien against the Leased Premises or to withhold, deduct from or offset against any Rent or other sums to be paid to City by Tenant.

**Section 18.02. Applicable Law.** This Lease shall be governed by, construed and shall be enforceable in accordance with the laws of the State of Texas without giving effect to the principles of conflict of laws. Venue for any action brought hereunder shall lie in the State District Courts of Calhoun County, Texas.

**Section 18.03. Assignment by City.** City shall have the right to assign, in whole or in part, any or all of its rights, titles or interests in and to the Leased Premises or this Lease and, upon any such assignment, City shall be relieved of all unaccrued liabilities and obligations hereunder to the extent of the interest so assigned.

**Section 18.04. Estoppel Certificates.** From time to time at the request of City, Tenant will promptly and without compensation or consideration execute, have acknowledged and deliver a certificate stating (a) the rights (if any) of Tenant to extend the Term or to expand the Leased Premises, (b) the Rent (or any components of the Rent) currently payable hereunder, (c) whether this lease has been amended in any respect and, if so, submitting copies of or otherwise identifying the amendments, (d) whether, within the knowledge of Tenant after due investigation, there are any existing breaches or defaults by City hereunder and, if so, stating the defaults with reasonable particularity and (e) such other information pertaining to this Lease as City may reasonably request.

**Section 18.05. Signs.** Tenant shall not install any signs, placards or other advertising or identifying marks upon the Leased Premises or upon the exterior of any Improvements to or constituting a part of the Leased Premises without the prior written consent of City, which shall not be unreasonably withheld. Tenant agrees to remove promptly and to the satisfaction of City (at Tenant's sole cost and expense) upon the expiration or earlier termination of the Term any and all such signs, placards or other advertising or identifying marks.

**Section 18.06. Relation of the Parties.** It is the intention of the parties to create hereby the relationship of City and Tenant, and no other relation is hereby created. Nothing in this Lease shall be construed to make the parties partners or joint venturers or to render either party liable for any obligation of the other.

**Section 18.07. Public Disclosure.** City is a governmental authority subject to the requirements of the Texas Open Meetings Act and the Texas Public Information Act (Texas Government Code Chapters 551 and 552), and as such City is required to disclose to the public (upon request) this Lease and certain other information and documents relating to the consummation of the transactions contemplated hereby. In this regard, Tenant agrees that the disclosure of this Lease or any other information or materials related to the consummation of the transactions contemplated hereby to the public by City as required

by the Texas Open Meetings Act, Texas Public Information Act, or any other Legal Requirement will not expose City (or any party acting by, through or under City) to any claim, liability or action by Tenant.

**Section 18.08. Notices and Billing Address.** All notices and other communications given pursuant to this Lease shall be in writing and shall either be mailed by first class United States mail, postage prepaid, registered or certified with return receipt requested, and addressed as set forth in this Lease, or sent by prepaid telegram, cable or telex followed by a confirmatory letter. Notice mailed in the aforesaid manner shall become effective three (3) Business Days after deposit; notice given in any other manner shall be effective only upon receipt by the intended addressee. For the purposes of notice and/or billing, the address of

- (a) City shall be:  
City of Port Lavaca  
202 N. Virginia  
Port Lavaca, Texas 77979  
Attention: City Manager (payments – Finance Director)

and

- (b) Tenant shall be:  
BIG BEAR SHRIMP AND SEAFOOD  
C/O TERRI AND MARK DIETZEL  
2241 HIGHWAY 35 N  
PORT LAVACA, TX 77979

Each party shall have the continuing right to change its address for notice hereunder by the giving of fifteen (15) days prior written notice to the other party; provided however, if Tenant vacates the location that constitutes its address for notice hereunder without changing its address for notice pursuant to this Lease, then Tenant's address for notice shall be deemed to be the Leased Premises.

**Section 18.09. Entire Agreement, Amendment and Binding Effect.** This Lease constitutes the entire agreement between City and Tenant relating to the subject matter hereof and all prior agreements relative hereto which are not contained herein are terminated. This Lease may be amended only by a written document duly executed by City and Tenant, and any alleged amendment which is not so documented shall not be effective as to either party. The provisions of this Lease shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors and assigns.

**Section 18.10. Severability.** This Lease is intended to be performed in accordance with and only to the extent permitted by all Legal Requirements. If any provision of this Lease or the application thereof to any person or circumstance shall, for any reason and to

any extent, be invalid or unenforceable, but the extent of the invalidity or unenforceability does not destroy the basis of the bargain between the parties as contained herein, the remainder of this Lease and the application of such provision to other persons or circumstances shall not be affected thereby, but rather shall be enforced to the greatest extent permitted by law.

**Section 18.11. Construction.** Unless the context of this Lease clearly requires otherwise, (a) pronouns, wherever used herein, and of whatever gender, shall include natural persons and corporations and associations of every kind and character; (b) the singular shall include the plural wherever and as often as may be appropriate; (c) the term “includes” or “including” shall mean “including without limitation”; (d) the word “or” has the inclusive meaning represented by the phrase “and/or”; and (e) the words “hereof” or “herein” refer to this entire Lease and not merely the Section or Article number in which such words appear. Article and Section headings in this Lease are for convenience of reference and shall not affect the construction or interpretation of this Lease. Any reference to a particular “Article” or “Section” shall be construed as referring to the indicated article or section of this Lease.

**Section 18.12. Authority.** The person executing this Lease on behalf of Tenant personally warrants and represents unto City that (a) (if applicable) Tenant is a duly organized and existing legal entity, in good standing in the State of Texas (b) Tenant has full right and authority to execute, deliver and perform this Lease, (c) the person executing this Lease on behalf of Tenant was authorized to do so and (d) upon request of City, such person will deliver to City satisfactory evidence of his or her authority to execute this Lease on behalf of Tenant.

**Section 18.13. Incorporation by Reference.** Exhibits “A” and “B” hereto is incorporated herein for any and all purposes.

**Section 18.14. Force Majeure.** City and Tenant shall be entitled to rely upon Force Majeure as an excuse for timely performance hereunder only as expressly provided herein and shall not be entitled to rely upon Force Majeure as an excuse for timely performance unless the party seeking to rely on Force Majeure (a) uses its best efforts to overcome the effects of the event of Force Majeure, (b) gives written notice to the other party within five (5) days after the occurrence of the event describing with reasonable particularity the nature thereof or as soon thereafter as reasonable communications will permit, (c) commences performance of its obligation hereunder immediately upon the cessation of the event or restoration of use of the Leased Premises, and (d) gives written notice to the other party within five (5) days after the cessation of the event advising the other party of the date upon which the event ceased to constitute an event of Force Majeure.

**Section 18.15. Interpretation.** Both City and Tenant and their respective legal counsel have reviewed and have participated in the preparation of this Lease. Accordingly, no presumption will apply in favor of either City or Tenant in the interpretation of this Lease or in the resolution of the ambiguity of any provision hereof.

**Section 18.16. Multiple Counterparts.** This Lease may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute but one instrument.

[Signatures follow on Next Page]

**EFFECTIVE JULY 1, 2023** and **EXECUTED** this \_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_.

**CITY OF PORT LAVACA:**

\_\_\_\_\_  
John D. Whitlow, Mayor

**ATTEST:**

\_\_\_\_\_  
Mandy Grant, City Secretary

TENANT

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

Name: \_\_\_\_\_

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



