

OPERATING COVENANT AGREEMENT

between

**THE CITY OF DINUBA,
a California municipal corporation,**

and

**BestBuy.com, LLC
a Virginia LLC**

December 8, 2015

RECITALS

WHEREAS, BestBuy.com, LLC (“Best Buy”) is a retailer of consumer electronic products, which distributes products throughout the United States and Puerto Rico from a distribution center and warehouse within the City of Dinuba (“City”); and

WHEREAS, the terms provided in this Agreement are intended to ensure that Best Buy, directly, or through its affiliates, continues to operate a warehouse and regional distribution center, within the City for not less than 40 years so long as continued operation is commercially reasonable for Best Buy; and

WHEREAS, entering into this Agreement will ensure that the City continues to generate substantial revenue, as a result of Best Buy adding and/or retaining approximately 285 temporary and permanent jobs, as well as continuing to maintain and expand, directly, or through its affiliates, a regional distribution center and warehouse space in the City, so long as continued and expanded operations are commercially reasonable for Best Buy.

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

ARTICLE 1. EFFECTIVE DATE; PARTIES; DEFINITIONS

1.1 Effective Date of Covenant Agreement. This Operating Covenant Agreement (“Covenant Agreement”) is dated November 4, 2015, for reference purposes only. This Covenant Agreement will not become effective until the date (“Effective Date”) on which all of the following are true:

1.1.1 This Covenant Agreement has been approved and executed by the appropriate authorities of Best Buy, and delivered to the City;

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

1.1.3 This Covenant Agreement has been executed by the appropriate authorities of the City and delivered to Best Buy; and

If all of the foregoing conditions precedent have not been satisfied, then this Covenant Agreement may not thereafter become effective and any prior signatures and approvals of the Parties will be deemed void and of no force or effect.

1.2 Parties to Covenant Agreement.

1.2.1 The City. The address of the City is 405 E. El Monte Way, Dinuba, CA 93618 Attention: Luis Patlan, City Manager; telephone (559)591-5900; email Lpatlan@dinuba.ca.gov; with copies to Daniel T. McCloskey, Tuttle & McCloskey, 750 East Bullard Avenue, Suite 101, Fresno, CA 93710; telephone (559)437-1770 business, -0150 fax; email danm@t-m-law.com.

The City represents and warrants to Best Buy that, to the City’s actual current knowledge:

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

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

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

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

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

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

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

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

As used in this Covenant Agreement, the term "City's actual current knowledge" shall mean, and shall include, the actual current knowledge of the City Manager as of the Effective Date, with the assumption that the City Manager has undertaken independent inquiry and investigation for the purpose of making such representation or warranty.

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

1.2.2 Best Buy. The address of Best Buy for purposes of this Covenant Agreement is 777 Monte Vista Drive, Dinuba, CA 93618.

Best Buy represents and warrants to the City that, to its actual current knowledge:

(a) Best Buy is a duly formed limited liability company, qualified and in good standing to do business under the laws of the State of California;

(b) The individual(s) executing this Covenant Agreement is/are authorized to execute this Covenant Agreement on behalf of Best Buy;

(c) Best Buy has taken all actions required by law to approve the execution of this Covenant Agreement;

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

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

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

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

(h) Best Buy and its managerial personnel possess sufficient experience and qualifications necessary to conduct Best Buy's Sales Activities (hereinafter defined) as required by this Covenant Agreement.

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

As used in this Covenant Agreement, the term "actual current knowledge of Best Buy" shall mean, and shall be limited to, the actual current knowledge of Best Buy Enterprise Services, Inc., Vice President of Finance and Tax, as of the Effective Date, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

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

The qualifications and identity of Best Buy are of particular concern to the City, and it is because of such qualifications and identity that the City has entered into this Covenant Agreement with Best Buy. Any successor-in-interest of Best Buy shall acquire rights and powers under this Covenant Agreement except as expressly set forth herein.

1.2.3 The City and Best Buy are sometimes individually referred to as “Party” and collectively as “Parties.”

1.3 Definitions.

1.3.1 “Best Buy” means and refers to BestBuy.com, LLC, a Virginia limited liability company, and its successors and assigns, and any subsidiary, parent, or affiliate conducting BestBuy.com Sales Activities within the Property or City. The terms “subsidiary,” “parent” or “affiliate” for purposes of this Section 1.3.1 means any entity which is controlled by, controls, or is under common control with BestBuy.com, LLC,

1.3.2 “Best Buy’s Sales Activities” means the commercially reasonable business practices and activities associated with the sale and shipment of Best Buy’s products. “Best Buy’s Sales Activities” also include any of the above-described activities which are conducted by an affiliate, parent or subsidiary of Best Buy.

1.3.3 “City” means the City of Dinuba, a California municipal corporation, and any nominee, assignee of, or successor to, its rights, powers and responsibilities.

1.3.4 “Computation Quarter” means each calendar quarter beginning on January 1, April 1, July 1, or October 1, as applicable, and ending on the succeeding March 31, June 30, September 30, or December 31, as applicable. The first Computation Quarter within the Eligibility Period shall commence on January 1, 2016 and end March 31, 2016 and is referred to herein as “Prorated Computation Quarter 1,” with each succeeding Computation Quarter within the Eligibility Period being consecutively numbered, concluding with Computation Quarter 160.

1.3.5 “Covenant Payment(s)” means those contingent payments to be made by the City to Best Buy pursuant to Section 3.2 of this Covenant Agreement in consideration of the Covenants and Best Buy’s timely and faithful performance thereunder.

1.3.6 “Covenant Term” means, a period of no less than forty (40) years following the Effective Date (unless terminated sooner pursuant to specific provisions of this Covenant Agreement).

1.3.7 “Covenants” means those five (5) covenants described in Section 3.1 herein.

1.3.8 “Distribution Center and Warehouse” means that certain Best Buy corporate sales/administrative office and fulfillment/distribution center operated on the Property by Best Buy. For purposes of clarification, the Distribution Center and Warehouse shall primarily serve as a warehouse but may include all ancillary uses in support of Best Buy’s warehousing of consumer products for distribution and sales including, but not limited to, office and administrative uses.

1.3.9 “Eligibility Period” means the period commencing as of the first (1st) day of Prorated Computation Quarter 1 and ending the last day of Computation Quarter 160 (i.e., December 31, 2055).

1.3.10 “Penalty Assessments” means and refers to penalties, assessments, collection costs and other costs, fees or charges resulting from late or underpaid payments of Sales Tax and which are levied, assessed or otherwise collected from Best Buy.

1.3.11 “Property” means that certain real property located at 777 Monte Vista Drive, Dinuba, CA 93618, or any other property within the City of Dinuba to which Best Buy may elect to relocate the Distribution Center and Warehouse during the term of this Covenant Agreement.

1.3.12 “Sales Tax” means and refers to all sales and use taxes, levied under the authority of the Sales Tax Law, attributable to the Distribution Center and Warehouse and Best Buy’s Sales Activities, excluding that which is to be refunded to Best Buy because of an overpayment of such tax.

1.3.13 “Sales Tax Law” means and refers to: (a) California Revenue and Taxation Code Section 7200 et seq., and any successor law thereto; (b) any legislation allowing City or other public agency with jurisdiction in the City to levy any form of local Sales Tax on the operations of Best Buy; and (c) regulations of the California State Board of Equalization (“BOE”) and other binding rulings and interpretations relating to (a) and (b) of this Section 1.3.13.

1.3.14 “Sales Tax Revenues” means the net Sales Tax actually received by the City from the BOE pursuant to the application of the Sales Tax Law (as such statutes may hereafter be amended, substituted, replaced, re-numbered, moved or modified by any successor law) in a particular Computation Quarter. Sales Tax Revenues shall not include: (i) Penalty Assessments; (ii) any Sales Tax levied by, collected for or allocated to the State of California, the County of Tulare, or a district or any entity (including an allocation to a statewide or countywide pool); (iii) any administrative fee charged by the BOE; (iv) any Sales Tax subject to any sharing, rebate, offset or other charge imposed pursuant to any applicable provision of federal, state or local (except City’s) law, rule or regulation; (v) any Sales Tax attributable to any transaction not consummated within the Eligibility Period; or (vi) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City’s general fund.

ARTICLE 2. ADDITIONAL RECITALS

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

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

2.3 The Parties acknowledge and agree that this Agreement can be terminate by either party at any time, and the Parties herein will be relieved of their obligations and rights set forth herein if the Parties do not receive a ruling from the California Board of Equalization, deemed favorable by Best Buy, confirming the Sales Tax definition set forth herein or if Best Buy fails to implement required operational changes, by June 30, 2016.

ARTICLE 3. COVENANTS RUNNING WITH THE LAND; COVENANT PAYMENTS; REMEDIES FOR BREACH.

3.1 Covenants Running with the Land.

3.1.1 Operating and Use Covenant. Best Buy covenants and agrees that for the Covenant Term Best Buy shall operate, or cause to be operated upon the Property, the Distribution Center and Warehouse in a commercially reasonable business manner, consistent with all applicable provisions of federal, state and local laws and regulations. Best Buy will operate its business in a commercially reasonable and prudent manner, with the objective of generating revenues. Best Buy's obligations pursuant to the immediately preceding sentence include, without limitation, the obligation to obtain all federal, state and local licenses and permits required for the operation of the business and to advertise, market and promote the business in a commercially reasonable fashion.

3.1.2 Covenant to Designate City as Point of Sale. Best Buy covenants and agrees that, for the Covenant Term, Best Buy shall maintain such licenses and permits as may be required by any governmental agency to conduct Best Buy's Sales Activities related to the Distribution Center and Warehouse. Except as otherwise provided by applicable Law, Best Buy shall use commercially reasonable efforts to designate City as a "point of sale" and consummate at the Distribution Center and Warehouse all Taxable Dinuba Sales. Best Buy shall identify the City as such in its reports to the BOE in accordance with the Bradley-Burns Uniform Local Sales and Use Tax Law (Revenue and Taxation Code 7200, et seq.), as it may be amended or substituted. Best Buy shall use commercially reasonable efforts to fulfill product sales to California residents from the Distribution Center and Warehouse. Best Buy shall consummate all Taxable Dinuba Sales transactions for Best Buy's Sales Activities at the Distribution Center and Warehouse, consistent with all applicable statutory and BOE regulatory requirements applicable to Best Buy's Sales Activities and the designation of the City as the "point of sale" for all such Taxable Dinuba Sales.

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

3.1.4 Covenant Against Solicitation and Acceptance of Economic Incentives During the Term of the Operating Use Covenant. Best Buy covenants and agrees that, for the Covenant Term, Best Buy will not directly or indirectly solicit or accept any "Financial Assistance" from any other public or private person or entity, if such Financial Assistance is given for the purpose of causing or would result in either Best Buy's breach of any of the Covenants. For purposes of this Section 3.1.4 the term "Financial Assistance" means any direct or indirect payment, subsidy, rebate, or other similar or dissimilar monetary or non-monetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, public financings, property or sales tax relief, rebates, exemptions or credits, relief from public improvement obligations, and payment for public improvements to or for the benefit of Best Buy.

3.1.5 Use of Property. Best Buy covenants and agrees that the Property shall be put to no use other than those uses specified in the City's General Plan, the Specific Plan, zoning ordinances, and this Covenant Agreement as the same may be amended from time to time by agreement of the Parties. Nothing in this Section 3.1.5 shall limit, expand, modify or otherwise affect any right of Best Buy to continue any legal nonconforming use upon the Property following changes in the City's General Plan or zoning ordinances.

3.2 Covenant Payments.

3.2.1 Statement of Intent. The City's obligations under this Section 3.2 are contingent on a Computation Quarter-to-Quarter basis and, for each Computation Quarter (hereinafter described), City's obligations to make any payments hereunder are expressly contingent upon Best Buy having, for the entirety of such Computation Quarter, completely fulfilled its material obligations under this Covenant Agreement, including, without limitation, the Covenants. The Parties hereto each acknowledge and agree that the intent of each such Party is that any payment made pursuant to Sections 3.2.2 shall not be a rebate, refund or abatement of the taxes payable by Best Buy. Any reference to percentage of Sales Tax Revenues is for purposes of calculation and not a commitment of a specific revenue source.

3.2.2 Covenant Payment Amount.

The following definitions apply to this Section 3.2.2:

First Computation Year means Computation Quarters 1 through 4;

Second Computation Year means Computation Quarters 5 through 8;

Third Computation Year means Computation Quarters 9 through 12; and

Fourth Computation Year means Computation Quarters 13 through 16.

Floor Years means the Second Computation, Third Computation and Fourth Computation Years collectively.

BBY Sales Tax Revenues means, Sales Tax Revenue attributable to Best Buy's Sales Activities.

The consideration to be paid to Best Buy in exchange for the Covenants and Best Buy's performance of its obligations set forth in this Covenant Agreement, and subject to satisfaction of all conditions precedent thereto, shall consist of City's payment to Best Buy for each Computation Quarter during the Eligibility Period that the City receives Sales Tax Revenue, of the following amounts:

(a) For the First Computation Year, the City shall retain all of the BBY Sales Tax Revenue for each quarter until the BBY Sales Tax Revenue exceeds \$1,900,000. After the BBY Sales Tax Revenue for the First Computation Year exceeds \$1,900,000, Best Buy shall receive the incremental BBY Sales Tax Revenue up to \$1,554,545 in Covenant Payments. Once the total BBY Sales Tax Revenue exceeds \$3,454,545, Best Buy shall receive Covenant Payment equal to 45% of all BBY Sales Tax Revenue above \$3,454,545.

(b) For the Floor Years, Best Buy shall receive Covenant Payments equal to 45% of all BBY Sales Tax Revenue, however, if the total amount of BBY Sales Tax Revenue in any of the Floor Years is less than \$1,900,000, then Best Buy and the City agree to offset Covenant Payment Amounts in the subsequent Computation Quarter(s) as necessary to provide the City with \$1,900,000 in total BBY Sales Tax Revenue in each Floor Year.

(c) For Computation Quarters 17 through 160, Best Buy shall receive the Covenant Payments of 45% of the BBY Sales Tax Revenues.

3.2.3 Computation Quarter Covenant Payments. Within thirty (30) days following the end of each Computation Quarter, Best Buy shall submit to the City copies of its quarterly reports submitted to the California State BOE which sets forth the amount of sales taxes paid to the BOE during the Computation Quarter arising from Best Buy's Sales Activities. Within one hundred twenty (120) days following the end of each Computation Quarter, City shall pay to Best Buy any Covenant Payment due for such Computation Quarter.

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

3.2.5 BOE Determination of Improperly Allocated Local Sales Tax Revenues. If, at any time during or after the Eligibility Period of this Covenant Agreement, the BOE determines that all or any portion of the Sales Tax Revenues received by the City were improperly allocated and/or paid to the City, and if the BOE requires repayment of, offsets against future sales tax payments, or otherwise recaptures from the City those improperly allocated and/or paid Sales Tax Revenues, then Best Buy shall, within sixty (60) calendar days after written demand from the City (including proof of their repayment obligation), repay all Covenant Payments (or applicable portions thereof) theretofore paid to Best Buy which are attributable to such repaid, offset or recaptured Sales Tax Revenues. If Best Buy fails to make such repayment within sixty (60) calendar days after the City's written demand, then Best Buy shall be in breach of this Covenant Agreement and such obligation shall accrue interest from the date of the City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. Additionally, the City may deduct any amount required to be repaid by Best Buy under this Section 3.2.5 from any future Covenant Payments otherwise payable to Best Buy under this Covenant Agreement. This Section 3.2.5 shall survive the expiration or termination of this Covenant Agreement. The City will, within five (5) business days, contact Best Buy regarding any communication from the BOE pertaining to tax allocations associated with Best Buy's business. The City and Best Buy agree that, should the BOE question the correctness of the allocation or otherwise determine that there has been an improper allocation to the City, the City will engage legal counsel to use his or her best efforts to defend such allocation in all BOE administrative proceedings. Any cost or expense associated with such efforts will be borne by Best Buy and the City in proportion to the percentage in Section 3.2.2. For purposes of this paragraph, administrative proceedings include all BOE meetings, conferences and appeals before BOE. Best Buy shall reasonably cooperate with the City and its attorney. Additionally, Best Buy shall have the right, but not the obligation, to participate in any such administrative proceedings and may engage its own legal counsel or consultant, at its own cost.

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

3.3 Default.

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

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

3.4 General Remedies for Default. Upon either a City or an Best Buy Default (as defined in Section 3.3), Best Buy or City (as applicable) shall have the right to seek all available legal and equitable remedies, including, without implied limitation, general and consequential damages, unless otherwise expressly provided to the contrary herein. Unless prohibited by law or otherwise provided by a specific term of this Covenant Agreement, the rights and remedies of the City and Best Buy under this Covenant Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively, and the City may simultaneously pursue inconsistent and/or alternative remedies. Either Party may, upon the Default of the other Party and in addition to pursuing all remedies otherwise available to it, terminate this Covenant Agreement and all of its obligations hereunder without cost, expense or liability to itself.

3.5 Rights to Terminate. The Parties' obligations hereunder shall automatically terminate without cost, expense, or liability, upon the occurrence of any one or more of the following: (i) Best Buy or City Default; (ii) the end of the Eligibility Period; (iii) upon the final determination by a court of competent jurisdiction that any one or more of the Covenants are void, voidable, invalid, or even unenforceable for any reason whatsoever, including, without limitation, legal infirmity, (iv) termination occurs as set forth in Section 2.3 herein, or (iv) if terminated by Best Buy at any time for convenience with one hundred twenty (120) days prior written notice.

ARTICLE 4. GENERAL TERMS

4.1 Tax Consequences. Best Buy acknowledges that it may experience tax consequences as a result of its receipt of the payments provided for in this Covenant Agreement and agrees that it shall bear any and all responsibility, liability, costs, and expenses connected in any way therewith.

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

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

4.4 Notices and Demands. All notices or other communications required or permitted between the City and Best Buy under this Covenant Agreement shall be in writing, and may be (i) personally delivered, (ii) sent by United States registered or certified mail, postage prepaid, return receipt requested, or (iii) sent by nationally recognized overnight courier service (e.g., Federal Express), addressed to the City at the addresses provided in Article 1 and to Best Buy at Best Buy Corporate Campus, 7601 Penn Avenue South, Richfield, MN 55423, subject to the right of either party to designate a different address for itself by notice similarly given. Any notice so given by registered or certified United States mail shall be deemed to have been given on the second business day after the same is deposited in the United States mail. Any notice not so given by registered or certified mail, such as notices delivered by telecopier or courier service (e.g., Federal Express), shall be deemed given upon receipt of the same by the party to whom the notice is given.

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

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

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

counteroffers, memoranda of understanding, proposals and the like are superseded by this Covenant Agreement.

4.8 Amendments to This Covenant Agreement. Any amendments to this Covenant Agreement must be in writing and signed by the appropriate authorities of both the City and Best Buy. The City Manager is authorized on behalf of the City to approve and execute minor amendments to this Covenant Agreement.

4.9 Jurisdiction and Venue. Any legal action or proceeding concerning this Covenant Agreement shall be filed and prosecuted in the appropriate California state court in the County of Tulare, California. Both Parties hereto irrevocably consents to the personal jurisdiction of that court. The City and Best Buy each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between the City and Best Buy, due to the fact that the City is a party to such action or proceeding or due to the fact that a federal question or federal right is involved or alleged to be involved. Without limiting the generality of the foregoing, the City and Best Buy specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Best Buy acknowledges that the provisions of this Section 4.10 are material consideration to the City for its entry into this Covenant Agreement, in that the City will avoid the potential cost, expense and inconvenience of litigating in a distant forum.

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

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

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

4.13 Successors and Assigns. The terms, covenants and conditions of this Covenant Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and assigns. Upon the sale, transfer or conveyance by Best Buy of its interest therein, Best Buy shall thereupon be relieved of its obligations under this Covenant Agreement from and after the date of sale, transfer or conveyance except with respect to any defaults in the performance of its obligations hereunder or thereunder which occurred prior to such sale, transfer

or conveyance, and the transferee shall thereafter be solely responsible for the performance of all of the duties and obligations of Best Buy under this Covenant Agreement.

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

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

4.16 Warranty Against Payment of Consideration for Covenant Agreement. Best Buy warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Covenant Agreement. Third parties, for the purposes of this Section 4.16, shall not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects and the like when such fees are considered necessary by Best Buy.

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

4.18 Further Acts and Releases. The City and Best Buy each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of their obligations hereunder.

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

4.20 Indemnity. Best Buy shall defend (using counsel of Best Buy's choosing, and, subject to the reasonable approval of the City), indemnify and hold harmless the City, its elected officials, officers, employees and agents from and against any and all third party claims, losses, proceedings, damages, causes of action, liability, cost and expense (including reasonable attorney's fees) arising from, in connection with the functions or operations of the Distribution Center and Warehouse (other than to the extent arising as a result of the City's active negligence or willful misconduct). The City shall fully cooperate in the defense of any such actions and upon written request of Best Buy shall provide to Best Buy such documents and records in possession of the City that are relevant to such actions and not otherwise protected by law. Notwithstanding the foregoing, should any third party bring any such action or proceeding Best Buy shall have the right to terminate this Agreement, and as of such date of termination, all un-accrued liabilities of the parties under this Agreement shall cease except for Best Buy's obligation of indemnity owed to the City as provided in this Section 4.20.


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

The foregoing paragraph notwithstanding, City acknowledges that the California legislature may provide for the payment to City of other revenues for the purpose of offsetting any losses in Sales Tax Revenues resulting from the enactment of legislation of the type described in the immediately preceding paragraph. City agrees that, should the California legislature provide for such offsetting revenues, then for purposes of this Covenant Agreement and the computation of any Covenant Payments which may become due to Best Buy hereunder, City will consider any such offsetting revenues which are (i) indexed to Sales Tax and offset the loss of Sales Tax Revenues to the City on a dollar for dollar basis, (ii) actually received by the City, and (iii) not subject to any restrictions on use beyond those which are otherwise generally applicable to sales tax revenues received by California municipalities, to be Sales Tax Revenues within the meaning of this Covenant Agreement.

[Signatures on the following pages]

SIGNATURE PAGE TO THE
BEST BUY.COM, LLC OPERATING COVENANT AGREEMENT

CITY OF DINUBA
a California municipal corporation

By: 
Signature

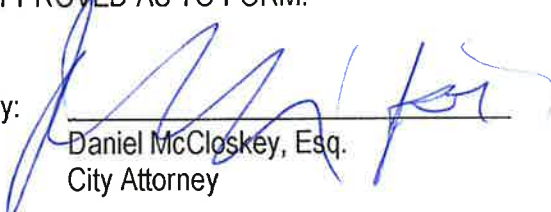
Emilio Morales
Name (Print)

Mayer
Title (Print)


ATTEST:

By: 
Jayne Anderson
City Clerk

APPROVED AS TO FORM:

By: 
Daniel McCloskey, Esq.
City Attorney

BESTBUY.COM, LLC
a Virginia LLC

By: 
Signature

Kristi K. Carlson
Name (Print)

VP - Tax
Title (Print)