

## **POSSIBLE MOTION**

**I MOVE TO** approve a 20-year purchase agreement between the City and Borough of Sitka and Eckert Fine Beverages for the export of bulk water, as recommended by the Gary Paxton Industrial Park Board, and authorize the Municipal Administrator to execute the document.



Thursday, August 31, 2017

**MEMORANDUM**

To: Phillip Messina, CBS Interim Administrator  
From: Garry White, Director  
Subject: Eckert Fine Beverages Water Purchase Agreement

**Introduction**

The Gary Paxton Industrial Park (GPIP) Board of Directors is recommending that the CBS enter into a water purchase agreement with Eckert Fine Beverages (Eckert) for the export of bulk water. The GPIP Board recommends approval of the following terms:

Term

- 20-Year term with four 5-year extension with consent of both parties.

Water Volume

- 100 million gallons annually.
  - Eckert must purchase and export a total of 75,000 gallons within the initial 36-month period of agreement execution or Sitka can terminate agreement.
  - Eckert must purchase and export 50,000 gallons annually after 60 months of agreement execution or Sitka can terminate agreement.
- Eckert will be allocated an addition 50 million gallon annually at the point when 75 million gallons are purchased and export within a 12-month consecutive period.

Additional water loading infrastructure

- Eckert will be responsible for design and construction of new water loading infrastructure for loading of 20' containers and IBC totes with CBS review and approval.
- Infrastructure will become property of the CBS.
- CBS will be responsible for maintenance and repair of infrastructure.
- Documented funds for design and construction by Eckert will be applied toward water export payments for first 60 months of the contract.

Water pricing

- Price will be \$0.01/gallon.
- A minimum charge of \$1,200 annually paid by Eckert at the execution of the contract and annually thereafter.
- \$1,200 annual non-refundable payment that can be used as water credits.
- \$50 minimum annual fee. (this is to cover state fees to export water)
- After 10 years, CPI adjustment added to price based off “All items” figure for Seattle, Washington.

## **Background**

Eckert Fine Beverages is requesting to establish a water purchase agreement with the CBS to export water in containers sizes less than a 40-foot container to be bottled at a facility in the lower 48.

Brian and Michael Eckert are the principal owners of the family run business located in California. Both Brian and Michael attended the March GPIIP Board meeting and presented information on the business vision for bottling Sitka water. Additionally, the Eckerts met telephonically with the GPIIP Board at its April, June, and July meetings to negotiate terms of a raw water purchase agreement.

## **Recent Bulk Raw Water Export Background**

The CBS has permits to export 29,235 Acre-feet (~9.5 billion gallons) of raw water annually.

The CBS has entered into multiple water purchase agreements with multiple entities for bulk export since 1996.

Most recently, the CBS had a water purchase agreement with Alaska Bulk Water Inc. (ABWI), formerly True Alaska Bottling Company, to export bulk water from 2006-2015. ABWI paid the CBS \$1.35 million dollars during that timeframe in refundable payments to secure the water purchase agreements. ABWI was unable to meet the terms of its water purchase agreement, which resulted in termination of the agreement in December 2015.

In the spring of 2016, the GPIIP Board directed the GPIIP Director to release a Request for Proposal (RFP) to solicit proposals for exporting water. The CBS received four proposals. The GPIIP Board recommended that two separate entities be awarded water purchase agreements. Both entities were unable to make the required non-refundable payment to execute the agreements. The CBS is currently not under contract with any entity to export water.

The CBS currently retains its entire 29,235 Acre-feet (~9.5 billion gallons) of raw water allocation.

If the Assembly approves both proposed water purchase contracts, the CBS will still have over 23,096 (~7.4 billion gallons) of raw water allocation.

<u>Permit</u>	<u>Acre Feet</u>	<u>Gallons</u>
LAS 19669	14,000	4,561,914,000
<u>ADL 43826</u>	<u>15,235</u>	<u>4,964,339,985</u>
<b>Total Available</b>	<b>29,235</b>	<b>9,526,253,985</b>
<u>Proposed Eckert Agreement</u>	<u>0.31</u>	<u>100,000,000</u>
<u>Proposed Arctic Agreement</u>	<u>6,138</u>	<u>2,000,073,438</u>
Available for other BW Contracts	23,096.69	7,426,180,547

### **Raw Water Bottling Background**

The CBS has entered into multiple water purchase agreements with multiple entities to bottle raw water since 2000. All of the water bottling contracts have been for bottling raw water locally at the GPIIP site.

Until recently, a non-refundable payment was not required to secure a water purchase agreement as the CBS received property tax and local job creation. All entities were operating out of established facilities and could begin operations relatively soon after executing of the agreement. In 2014, the CBS required a \$15,000 non-refundable payment for an entity to secure a water bottling purchase agreement. The GPIIP Board required the payment due to the lack of an establish facility and equipment to bottle water and uncertainty of when operations would begin.

### **Low Volume Raw Water Export Background**

The Eckert proposal is the first low volume raw water export proposal to the GPIIP Director's knowledge. The export of raw water is limited to export in a container size of a 40-foot container or less. The raw water is intended to be bottled at a location in the lower 48.

An annual non-refundable fee is being recommend to cover administrative cost to establish and monitor the water purchase agreement. The proposed terms require the Eckerts to be responsible for constructing the infrastructure necessary to facilitate the loading of low volume containers at the GPIIP site. The estimate cost for the infrastructure is between \$5-\$15k. The low volume-loading infrastructure will become property of the CBS.

### **Action**

- Assembly approval of water purchase agreement between the CBS and Eckert Fine Beverages.

**PURCHASE AGREEMENT  
FOR RAW WATER FOR EXPORT**

**BETWEEN:** City and Borough of Sitka  
100 Lincoln Street  
Sitka, Alaska 99835

**AND:** Biokare Inc. dba Eckert Fine Beverages  
28871 El Apajo  
Laguna Niguel, CA 92677

**1. Term and Documents Comprising this Agreement.**

1.1 The initial term of this Agreement shall commence on the effective date and shall end 240 months after effective date. The City and Borough of Sitka (hereinafter referred to as Sitka) hereby grants to Biokare Inc. dba Eckert Fine Beverages (hereinafter referred to as ECKERT), the right to purchase raw water in a container size less than a 40' a container van, to be delivered to it by Sitka from the Blue Lake reservoir, a water source within Sitka, on the terms and conditions set forth herein.

1.2 At the conclusion of the initial term of this Agreement, each of four (4) additional term of five (5) years each for extension of this Agreement may be exercised upon the consent of both parties. ECKERT must notify the Administrator in writing no earlier than one (1) year and no later than four (4) months before the end of the initial Agreement period of its desire to add an additional five-year term, and shall thereafter notify the Administrator no earlier than one (1) year and no later than four (4) months prior to the expiration of each exercised additional term of its desire to exercise the next five-year time period. If ECKERT does not timely notify the Administrator in writing, this Agreement shall terminate at the expiration of the then-current contract term. Sitka's raw water price is subject to re-negotiation before the commencement of each additional term. Said re-negotiated price not to exceed an increase of 3%. If said re-negotiated price is not agreed upon, the Agreement shall terminate at the expiration of the then-current contract term. Either party may decide to not implement any additional term for any reason, in its sole discretion.

1.3 The Agreement consists of the 23 sections in this Agreement plus Appendix A (a map) and Appendix B (the "Prospective Purchaser Agreement Between the State of Alaska and the City-Borough of Sitka for the Former Alaska Pulp Corporation Pulp Mill Property" dated April 28, 1999, including all attachments, which specifically includes "Memorandum of Understanding between the State of Alaska and the City and Borough of Sitka [:] Management Plan for Sawmill Cove Property (Former APC Property).").

## 2. Definitions.

In this Agreement, the following terms shall have the definitions stated:

- a) "annually" means 12 consecutive months.
- b) "beneficial use" means the application of water, purchased by ECKERT for export or for use at the point of delivery, to a useful purpose, including domestic, commercial, agricultural, wildlife, and recreational uses.
- c) "bulk water" means untreated non-potable water sold by Sitka to ECKERT under this Agreement, and delivered by Sitka to ECKERT in the measured quantities specified in this Agreement.
- d) "deliver" or "to deliver" or "delivered" means Sitka making a specific quantity of water available to ECKERT at the point of delivery.
- e) "export" means the transportation by ECKERT of raw water to a destination outside the hydrological unit of the Blue Lake drainage.
- f) "gallon" means one US gallon or 3.785 liters.
- g) "loading" means transporting the raw water which is the subject of this Agreement from Blue Lake through pipelines and other conveyances into the ECKERT.
- h) "MGD" means millions of gallons per consecutive 24-hour period.
- i) "per day" means calendar day starting at midnight.
- j) "per week" means during a period of seven (7) consecutive days.
- k) "per year" means during a period of 12 consecutive months.
- l) "point of delivery" means that physical location at which the Sitka-owned physical facilities and equipment, employed in the transportation of Sitka's bulk water for delivery to ECKERT, terminates.
- m) "raw water" means untreated non-potable water delivered by Sitka to the point of delivery from Blue Lake via the Blue Lake penstock, a conduit which transports water from Blue Lake to the Blue Lake Powerhouse as shown on Exhibit A.
- n) "rule curve" means the relationship between the elevation of the water surface of Blue Lake and the volume of water contained in Blue Lake, which regulates the reservation of water for fish, wildlife, and habitat protection.
- o) "unforeseen" means an exceptional event, not contemplated by the parties in negotiating this Agreement. Performance made more difficult or expensive than expected

is not “unforeseen.” The burden of proving that an event is unforeseen is on the party that advances it as a reason for non-performance.

p) “water rights” means those rights to the beneficial use of water which are held by Sitka under certificates of appropriation issued by the State of Alaska pursuant to Alaska law.

### **3. Water Volumes Contracted by ECKERT from Sitka.**

3.1 Sitka will make available to ECKERT annually a total of 100 million gallons of raw water for export in a container size less than a 40-foot container van for a period of 36 months immediately after the effective date of this Agreement (the “36-month period”). At the point when ECKERT exports 75 million gallons of raw water in an annual period during the 36-month period, Sitka will make available to ECKERT an additional 50 million gallons of raw water for export for that annual period. At the conclusion of the 36-month period, ECKERT's allocation of raw water will be governed by subsection 3.2 below, provided that ECKERT has met the minimum export volumes set out in this section. During the 36-month period, ECKERT must take delivery of and export at least 75 thousand gallons of raw water. If ECKERT does not take delivery of and export at least 75 thousand gallons of raw water from Sitka during the 36-month period, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45<sup>th</sup>) day after Sitka's sending of the Administrator's notice to ECKERT, in accordance with section 23 below, that ECKERT has failed to comply with this subpart, unless within said 45-day period ECKERT cures its failure to take delivery of and export at least 75 thousand gallons of raw water from Sitka.

3.2 Notwithstanding any other provision of this Agreement, if raw water delivered by Sitka to ECKERT and exported by ECKERT falls below 50 thousand gallons in any annual period of 12 consecutive months starting immediately after 60 months after the effective date of this Agreement, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45<sup>th</sup>) day after sending of the Administrator's notice to ECKERT, in accordance with section 23 below, that ECKERT has failed to comply with this subpart, unless within said 45-day period ECKERT cures its failure to annually take delivery of and export at least 50 thousand gallons of water from Sitka.

3.3 ECKERT may not take delivery of raw water at a rate greater than 33.6 MGD.

### **4. The Parties' Rights and Obligations Regarding Water Delivered for Export.**

4.1. Sitka is entering into this Agreement to sell raw water pursuant to Sitka's water export authority contained in Water Appropriation Certificates LAS 19669 and ADL 43826. Sitka's obligation to deliver water to ECKERT in the quantities specified in this Agreement is subject to these conditions and limitations:

a) Notwithstanding any other provision of this Agreement, Sitka shall retain first right and priority to water required for its municipal drinking water supply system and its

*Purchase Agreement for Raw Water in Bulk Between the City and Borough of Sitka and Eckert Fine 3 Beverages LLC.*

municipal hydroelectric system, and it may suspend or limit raw water deliveries to ECKERT to meet the requirements of its municipal drinking water and hydroelectric systems. Whether there is a sufficient volume of raw water available for these purposes shall be decided in the sole discretion of the Administrator.

b) Sitka will abide by the 1992 Blue Lake Watershed Control Plan as approved by the U.S. Environmental Protection Agency and described in City and Borough of Sitka Ordinance No. 92-1091.

c) The Administrator may temporarily suspend raw water deliveries in order to perform routine maintenance on its municipal drinking water, hydroelectric and/or water delivery systems, provided that the Administrator shall give not less than 60 days prior written notice to ECKERT of any such planned suspension.

d) Sitka shall be relieved of its obligation to deliver raw water to ECKERT in the event of an interruption in water supply due to circumstances that require repair to or reconstruction of the municipal drinking water, hydroelectric systems, water delivery system, or other of Sitka's facilities. Delivery of raw water to ECKERT may be reduced to the extent necessary to make such repair(s) or reconstruction, and for so long as the Administrator in his/her sole discretion determined is required to make such repairs or reconstruction.

e) The volumes of Sitka's raw water deliveries to ECKERT for export are subject to Sitka's overriding obligation to comply with all of the conditions contained in Water Appropriation Certificates ADL 43826, LAS 19669, and LAS 20526, including compliance with the rule curve and the support of spawning, incubation, and rearing of certain species of fish in Sawmill Creek and Blue Lake. Interpretation of applicable requirements and the means used to achieve compliance with such requirements shall be in the Administrator's sole discretion.

f) In the event Sitka is relieved of its obligation to make agreed quantities of water available to ECKERT for reasons noted in this section or due to Force Majeure or due to unforeseen circumstances, then ECKERT's obligation to take delivery of and to export water shall be reduced to the volumes actually delivered by Sitka during that period of time and the time within which ECKERT is authorized to receive raw water shall be extended for a period equal to the period of time that Sitka has been so relieved of its obligation.

4.2 ECKERT agrees and warrants that the raw water delivered to it by Sitka for export shall be put to one or more beneficial uses by it or by its water purchasers. Breach of this warranty shall be a material breach of this Agreement.

5. **[This section deliberately left blank.]**

6. **No Warranty by Sitka of Water Quality or Fitness for a Particular Purpose.**

6.1 THE WATER CONTRACTED FOR DELIVERY, AND/OR ACTUALLY  
*Purchase Agreement for Raw Water in Bulk Between the City and Borough of Sitka and Eckert Fine 4  
Beverages LLC.*

DELIVERED, TO ECKERT UNDER THIS AGREEMENT IS NON-POTABLE. SITKA DOES NOT WARRANT THE QUALITY OR FITNESS FOR A PARTICULAR PURPOSE OF ANY WATER CONTRACTED FOR DELIVERY, AND/OR ACTUALLY DELIVERED, TO ECKERT UNDER THIS AGREEMENT. ECKERT ACKNOWLEDGES AND AGREES THAT BEFORE ENTERING INTO THIS AGREEMENT, IT HAS EXAMINED SITKA'S WATER SOURCE, SITKA'S METHODS OF DIVERSION, AND SITKA'S MEANS OF DELIVERY TO ECKERT OF THE QUANTITIES OF WATER WHICH ARE CONTRACTED FOR UNDER THIS AGREEMENT, AND THAT IT HAS FOUND ALL SUCH ITEMS ADEQUATE AND SATISFACTORY FOR ECKERT'S PURPOSES.

6.2 ECKERT acknowledges and agrees that Sitka's routine alterations in its hydroelectric operations may produce temporary changes in water quality due to turbidity, and that the occurrence of such events shall not alter or affect ECKERT's obligations under this Agreement.

6.3 ECKERT acknowledges and agrees that the quality of raw water contracted by Sitka to be delivered to ECKERT for export may vary due to natural events over which Sitka has no control, which include, without limitation, rainfall, drought, snowfall, avalanches and landslides, and that the occurrence of such events shall not alter or affect ECKERT's contractual obligations under this Agreement, except that the quantity of water ECKERT is obligated to take delivery of and to export shall be reduced to the quantity Sitka can and does make available for delivery to ECKERT, as a consequence of an occurrence of any of such natural events.

6.4 ECKERT SHALL BE SOLELY RESPONSIBLE AND LIABLE FOR THE QUALITY AND USEFULNESS FOR ANY PARTICULAR PURPOSE, INCLUDING HUMAN CONSUMPTION, OF ALL RAW WATER DELIVERED TO, EXPORTED BY, TRANSPORTED BY, USED BY, SOLD BY, OR DELIVERED BY ECKERT.

## **7. Purchase Price for Raw Water.**

7.1 ECKERT shall pay Sitka One Cent (\$0.01) per gallon for raw water for export from Sitka.

7.2 ECKERT shall pay Sitka a non-refundable annual fee of Fifty Dollars (\$50.00), payable on the effective date of this Agreement and, thereafter, on or before the annual anniversary date of the effective date of this Agreement.

7.3 ECKERT shall pay Sitka a non-refundable monthly fee of One Hundred Dollars (\$100.00), starting on the first of the month immediately following the effective date of this Agreement and on the first of each month thereafter. In lieu of making a payment each month, ECKERT may pay the aggregate of monthly payments on or before, but no later than, the annual anniversary date of the effective date of this Agreement. ECKERT shall receive raw water credits for these payments.

7.4 ECKERT shall pay for each volume of water loaded no later than twenty-five (25) days after the presentation of an invoice by the Administrator to ECKERT for such water. Failure by ECKERT to make timely payment shall be a material breach of this Agreement and be cause for the Administrator to suspend water delivery to ECKERT until payment is made or other action is taken under this Agreement.

7.5 Beginning July 1, 2028 and every calendar year thereafter, the prices charged by Sitka for raw water delivered to ECKERT under this Agreement shall be adjusted by the Administrator based on the "All Items" figure for Seattle, Washington as published in the "Consumer Price Index for All Urban Consumers" (CPI) published most immediately before January 1 of the calendar year for which prices are being calculated. Notwithstanding the previous sentence, in no event will the CPI adjustment described in the previous sentence exceed + 3.0% nor the adjustment be made if the result of such adjustment would be a decrease in any price charged under this Agreement.

7.6 ECKERT shall pay Sitka for the volume of water delivered to ECKERT as measured by flow meters, purchased and installed by ECKERT, and owned and tested by Sitka at or near the point of delivery.

7.7 The cost of infrastructure improvements made by ECKERT to facility raw water loading and metering in section 10.1 will be credited toward export of water payments for the first 60 months of this Agreement.

## **8. Conditions for Maintaining ECKERT's Purchase Right and Obligation; Termination.**

8.1 Notwithstanding any other provision of this Agreement, this Agreement shall, at Sitka's Administrator's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after the Administrator sends notice to ECKERT, as required by section 23 below, that ECKERT has breached or failed to comply with one or more of the conditions or requirements of this Agreement, or become insolvent, or abandoned the project, unless within said 45-day period ECKERT cures the specified default or defaults to Sitka's satisfaction, as determined by Sitka in its sole discretion.

8.2 Upon termination, all legal rights and obligations as between Sitka and ECKERT under this Agreement shall cease, except that ECKERT's obligations to Sitka under Sections 13, 14, 15, 16, and 17 of this Agreement shall survive termination.

## **9. Sitka's Permitting Actions.**

The Administrator shall take any and all actions which he/she determines, in the exercise of his/her sole discretion, to be reasonable, necessary, and economically feasible to maintain in good standing any permit, license, certificate, allocation, appropriation or other authorization required for Sitka to fulfill its obligations under this Agreement.

## **10. Delivery, Loading, and Transportation of Water in Bulk.**

10.1 The parties agree that ECKERT shall be solely responsible for the costs of acquisition, construction, and installation of any structure or facility downstream of the point of delivery, which it determines to be required or convenient for the loading and transportation of raw water delivered to it by Sitka, and for initiating and completing such acquisition, construction and installation. Any structure or facility must include a metering device to measure flow of raw

water. All structures and facilities must comply with all federal, state, and local laws, regulations, and requirements, including zoning.

10.2 Any structure or facility acquired, constructed, and installed pursuant to subpart 10.1 above, shall upon acquisition, construction, and installation become the property of Sitka and shall remain on-site upon termination of this Agreement. ECKERT shall be responsible for maintaining and repairing said structures and facilities, at its own cost, during the term (including any extensions) of this Agreement.

10.3 ECKERT shall be solely responsible for arranging for the transportation of and transporting all raw water delivered to it by Sitka for export.

## **11. Washout Water Discharges.**

ECKERT shall comply with all applicable federal, state and local laws, regulations, and requirements regarding the use and disposal of any raw water or other water delivered to ECKERT by Sitka for the purposes of washout, or any other non-export application.

## **12. Water Loading.**

12.1 Before ECKERT loads any raw water delivered to it by Sitka, ECKERT shall submit to the Administrator a written Water Loading Plan. This Plan shall be deemed approved by the Administrator unless no later than fourteen (14) days after its submission the Administrator, in his or her sole discretion, rejects, or requires ECKERT to resubmit, any portion of the Plan. Such action by the Administrator shall be in a writing to ECKERT that states the deficiency. Sitka shall deliver no raw water to ECKERT and ECKERT shall not load any raw water delivered to it by Sitka as long as any portion of the Plan has been rejected and not approved after re-submittal. ECKERT shall submit a separate Water Loading Plan at least twenty one (21) days before initial loading of raw water under this Agreement.

12.2 APPROVAL BY SITKA'S ADMINISTRATOR OF ANY WATER LOADING PLAN SHALL NOT IMPOSE UPON SITKA THE STATUS OF GUARANTOR OF THE FEASIBILITY, PROPRIETY, OR SAFETY OF ANY ASPECT OF AN APPROVED WATER LOADING PLAN, NOR SHALL SUCH APPROVAL CREATE OR CONFER BENEFITS ON ANY THIRD PARTY.

## **13. Indemnification of Sitka.**

13.1 Notwithstanding anything to the contrary in this Agreement, ECKERT shall defend, indemnify, and hold Sitka harmless from any liability, claim, demand, action, obligation, or proceeding of any kind or nature, based upon, arising out of, or related to:

- a. any defect or flaw in the quality of raw water supplied under this Agreement;
- b. any delays on the part of Sitka in the delivery of raw water under this Agreement as the result of the mechanical or physical breakdown of equipment or facilities owned or operated by Sitka or other unforeseen event;

- c. claims arising from the transportation or shipment of raw water after such water has left Sitka's water delivery system and the point of delivery;
- d. injuries to employees of ECKERT or any of its contractors or their employees;
- e. damages resulting from accidents involving cargo loading operations, including but not limited to claims for death, personal injury, property damage, and pollution;
- f. violations and claims of violations related to the water loading plan described in section 12.2;
- g. harm, including illness and death, to persons who consume the raw water caused by the failure of ECKERT to comply with section 6.3 of this Agreement.

13.2 ECKERT shall at all times during this Agreement maintain insurance policies providing umbrella coverage against matters including but not limited to those covered by this Agreement in an amount not less than U.S. \$1,000,000, with Sitka named as an additional insured, and with a waiver of subrogation against Sitka. ECKERT shall provide a copy of the certificate insurance ECKERT to Sitka within sixty (60) days after the effective date of this Agreement.

13.3 ECKERT shall be responsible for ensuring that each of its contractors is qualified to do business in Alaska and refrains from activities for which insurance cannot be obtained. ECKERT shall assure that any contractor for ECKERT which is to perform any task or work within the territorial jurisdiction of Sitka has insurance appropriate to any task to be performed by that contractor, and ECKERT shall deliver a certificate of such insurance to the Administrator within 30 days of such hiring.

#### **14. Assignment.**

This Agreement, which is in the nature of a personal services contract, may not be assigned by either party without the prior written consent of the other party, which shall have full discretion to grant or withhold such approval, in its sole and absolute discretion except as provided below.

Should Sitka form a Port Authority, or similar entity, this Agreement shall be completely transferable to said Port Authority. A transfer of the Agreement to any such entity shall not create any restrictions upon ECKERT to purchase water other than those restrictions set out in this Agreement.

#### **15. Waiver and Integration.**

This Agreement integrates the entire Agreement between the parties regarding the sale and purchase of raw water. This Agreement supersedes all previous agreements, discussions, and negotiations, whether written or oral. Each party specifically acknowledges and represents that it has had ample opportunity to consult with legal counsel regarding this Agreement, and that any rule that an agreement should be construed against its drafter shall not apply to this Agreement.

## **16. Force Majeure.**

Neither party shall be in breach of this Agreement as the result of any failure or delay in performing any of the obligations in this Agreement if such failure to perform or delay in performing is directly and proximately caused by storm, flood, avalanche, landslide, earthquake, tsunami, act of the public enemy, war, rebellion, insurrection, sabotage, epidemic, quarantine restriction, or act of God. Sitka shall not be in breach of this Agreement as the result of any failure or delay in performing any of its obligations in this Agreement if such failure to perform or delay in performing is directly and proximately caused by any order of any United States court of competent jurisdiction, or by any act, rule, regulation, order or directive of any superior governmental unit or any agency thereof, or by any termination, modification, suspension, or revocation of any permit, license, allocation, appropriation, or certificate held by Sitka. In the event Sitka or ECKERT is relieved of an obligation under this Agreement due to Force Majeure, time periods under this Agreement shall be adjusted accordingly. The party asserting a Force Majeure event must demonstrate by clear and convincing evidence that the failure or delay in performance is directly and proximately caused by a Force Majeure event.

## **17. Applicable Law.**

ECKERT shall comply with all provisions of law applicable to its obligations under this Agreement. This Agreement shall be construed in accordance with the laws and procedures of the State of Alaska.

## **18. Dispute Resolution.**

18.1 Good Faith Efforts of the Parties. Upon notice by either party to the other party of any dispute or claim arising out of or related to this Agreement, the parties shall first make a good-faith endeavor to resolve the dispute or claim by meeting informally “face-to-face” within 15 days of such notice to mediate the dispute or claim in good faith without a third-party mediator.

18.2 Jurisdiction and Venue. Should any party hereto institute any action or proceeding to enforce any provision hereof or for damages by reason of any alleged breach of any section of this Agreement or for any other remedy, such an action shall be brought in the Superior Court for the State of Alaska. Venue for any such action or lawsuit shall lie exclusively in Sitka, Alaska. The parties specifically agree not to remove jurisdiction to federal courts on the grounds of diversity of citizenship.

18.3 Attorney’s Fees and Legal Expenses. Should any party hereto institute any action or proceeding to enforce any provision hereof or for damages by reason of any alleged breach of any section of this Agreement or for any other remedy, the party that is successful in such action shall be entitled to receive from the losing party all of its reasonable legal costs and expenses, including without limitation, reasonable attorneys’ fees and all arbitration costs.

## **19. Effective Date.**

This Agreement is effective as of the last date signed below, which shall be deemed the “effective date” for the purpose of any time period which incorporates that term in this Agreement.

**20. Authority.**

The parties represent and warrant to each other that they have the full, complete, and absolute authority to enter into this Agreement; that this Agreement has been duly authorized by the governing body of each party; that the person executing this Agreement on its behalf has the full power and authority to do so; and that this Agreement is binding and enforceable against it in accordance with its terms. ECKERT acknowledges that this Agreement is only effective against Sitka if the City and Borough of Sitka Assembly votes to authorize the Administrator to execute this Agreement on behalf of Sitka. By affixing his signature to this Agreement the Administrator represents and warrants that the Assembly has so voted.

**21. Amendment and Severability.**

This Agreement may not be amended except by written agreement of both parties. If any provision of this Agreement or any application thereof to any person, entity, or circumstance is held invalid, the remainder of this Agreement and application thereof to any person, entity, or circumstances shall not be affected thereby.

**22. Time of Essence.**

Time is of the essence in this Agreement.

**23. Notices.**

Any notices required or authorized to be given by this Agreement shall be in writing and shall be sent by **email and** by either **commercial courier, facsimile, or by certified U.S. mail**, postage prepaid and return receipt requested, addressed to the proper party at the address stated below or such address as the party shall have designated to the other parties in accordance with this section. Such notice shall be effective three (3) days after sending through the mails or after receipt by courier or facsimile by the addressee party, except that any facsimiles received after 5:00 p.m. of the addressee's local time shall be deemed delivered the next day.

If to ECKERT:

Michael Eckert – CEO  
Biokare Inc. dba Eckert Fine Beverages  
28871 El Apajo  
Laguna Niguel, CA 92677

If to Sitka: Administrator  
City and Borough of Sitka  
100 Lincoln St  
Sitka, Alaska, 99835

IN WITNESS THEREOF, the parties have executed this Agreement as of the dates shown below.

**BIOKARE INC.  
DBA ECKERT FINE BEVERAGES**

**THE CITY AND BOROUGH OF SITKA**

\_\_\_\_\_  
DATE  
MICHAEL ECKERT, CEO  
ECKERT FINE BEVERAGES

\_\_\_\_\_  
DATE \_\_\_\_  
KEITH BRADY, ADMINISTRATOR  
THE CITY AND BOROUGH OF SITKA

**ATTEST:**

\_\_\_\_\_  
DATE \_\_\_\_  
SARA PETERSON CMC  
Municipal Clerk  
THE CITY AND BOROUGH OF SITKA

STATE OF ALASKA )  
FIRST JUDICIAL DISTRICT ) ss. **ACKNOWLEDGMENT**

THIS CERTIFIES that on this \_\_\_\_\_ day of \_\_\_\_\_, 2017, before me, a Notary Public in and for the State of Alaska personally appeared **MICHAEL ECKERT** to me known and known to me to be the person whose name is subscribed to the foregoing **PURCHASE AGREEMENT FOR RAW IN BULK FOR EXPORT** and after being first duly sworn according to law, he stated to me under oath that he is the **CEO of BOKARE INC. DBA ECKERT FINE BEVERAGES**, that he has been authorized by said company to execute the foregoing **PURCHASE AGREEMENT FOR BLUE LAKE RAW BULK WATER** on its behalf and he executed the same freely and voluntarily as the free act and deed of said corporation.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

STATE OF ALASKA

)

) ss. *MUNICIPAL ACKNOWLEDGMENT*

FIRST JUDICIAL DISTRICT

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THIS CERTIFIES that on this \_\_\_\_ day of \_\_\_\_\_, 2016 before me, a Notary Public in and for the State of Alaska, personally appeared **KEITH BRADY** to me known and known to me to be the person whose name is subscribed to the foregoing **PURCHASE AGREEMENT FOR RAW IN BULK FOR EXPORT**, and after being first duly sworn according to law, he stated to me under oath that he is the **ADMINISTRATOR** of the City and Borough of Sitka, Alaska, a municipality organized under the laws of the State of Alaska, that he has been authorized by said municipality to execute the foregoing **PURCHASE AGREEMENT FOR BLUE LAKE RAW BULK WATER** on its behalf and he executed the same freely and voluntarily as the free act and deed of said corporation.

WITNESS my hand and official seal the day and year in this certificate first above written.

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Notary Public for Alaska  
My Commission Expires:  
Residing at Sitka, Alaska