

A G E N D A

FORT SMITH PORT AUTHORITY

SPECIAL MEETING

Thursday, May 30, 2019  
Bank of the Ozarks building  
5401 Rogers Avenue  
Fort Smith, Arkansas

TIME: 11:00 a.m.

1. Call to order – Larry Combs, Chair
2. Roll Call
3. New Business:
  - a. Consider a Resolution authorizing the initiation of the Force Majeure provisions of the Lease Agreement with Five Rivers Distribution to abate rental payments due to flood conditions at the Port of Fort Smith through July 31, 2019
4. Next meeting: ~ July 25, 2019
5. Adjourn

# Memo



**To:** Fort Smith Port Authority  
**From:** Jeff Dingman, Deputy City Administrator  
**Date:** 5/29/2019  
**Re:** Abatement of rent due to flood

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On the agenda for the May 30, 2019 Special Meeting is a Resolution authorizing the enactment of the Force Majeure clause of the Lease Agreement with Five Rivers Distribution for the Port of Fort Smith Facility.

The facility is currently under water due to historic flood levels of the Arkansas River and the Poteau River. Five Rivers has requested the abatement of rents due, which is allowable in Section 17(b) of the Lease Agreement (copy of agreement is attached).

The Resolution proposes abating rent due through July 31, 2019, presuming that we will be able to revisit the item at our July 25, 2019 quarterly meeting. At such time, the Port Authority can extend the abatement if appropriate. If it is determined that the Port of Fort Smith property is irreparably damaged or destroyed, the other provisions of Section 17 regarding termination of the Lease Agreement can be considered.

CITY OF FORT SMITH PORT AUTHORITY

RESOLUTION NO. 2019-01

A RESOLUTION OF THE CITY OF FORT SMITH PORT AUTHORITY BOARD OF DIRECTORS AUTHORIZING THE INITIATION OF FORCE MAJEURE PROVISIONS OF THE LEASE AGREEMENT WITH FIVE RIVERS DISTRIBUTION TO ABATE RENTAL PAYMENTS DUE TO FLOOD CONDITIONS AT THE PORT OF FORT SMITH THROUGH JULY 31, 2019

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WHEREAS, the City of Fort Smith Port Authority Board of Directors entered into a Lease Agreement with Five Rivers Distribution, LLC to operate the Port of Fort Smith effective January 1, 2017; and

WHEREAS, such Lease Agreement contains language recognizing events of Force Majeure and authorizing the abatement of rent payments that prevent performance of the Lease Agreement due to events or occurrences not within the reasonable control of either party; and

WHEREAS, the Port of Fort Smith is currently inundated by flood waters from the record flows of the Arkansas River and the Poteau River, thoroughly preventing Five Rivers Distribution from navigating on the rivers or operating at the Port of Fort Smith; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the City of Fort Smith Port Authority that:

Section 1. The Force Majeure provisions of the Lease Agreement with Five Rivers Distribution, LLC for the operation of the Port of Fort Smith are hereby initiated.

Section 2. The requirement for the payment of rent under the Lease Agreement is hereby abated through July 31, 2019.

Section 3. If Force Majeure conditions still exist, such abatement shall be reevaluated at the July 25, 2019 quarterly meeting of the City of Fort Smith Port Authority.

This Resolution adopted in regular session this \_\_\_\_\_ day of May, 2019.

APPROVED:

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Larry Combs, Chair

ATTEST:

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Jeff Dingman, Deputy City Administrator

## LEASE AGREEMENT

THIS LEASE AGREEMENT ("Agreement") is entered into this <sup>17<sup>th</sup></sup> day of November, 2016, to be effective as of January 1, 2017, by and between the **CITY OF FORT SMITH PORT AUTHORITY**, a public body corporate and municipal port authority created by City of Fort Smith Ordinance No. 2736, dated May 19, 1969, hereinafter referred to as the "Port Authority" or "Lessor", and Five Rivers Distribution, LLC, an Arkansas Limited Liability Company, hereinafter referred to as the "Lessee."

### WITNESSETH:

WHEREAS, the Port Authority is the owner of approximately 24.7 acres of real property upon which is located the Fort Smith public port facility, a river terminal located on the Poteau River, in close proximity to the Arkansas River, and part of the McClellan Kerr Arkansas River Navigation System (MKARNS), located at 200 Navy Road in Fort Smith and more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference (the "Leased Premises"); and

WHEREAS, in 2008, the Port Authority sought proposals from Port Operators for the operation of the Fort Smith port facilities; and,

WHEREAS, on June 16, 2008, the Port Authority entered into the "Poteau River Port Lease and Operating Agreement" with Lessee whereby Lessee agreed to operate the Leased Premises for an initial term of five years, with options to extend the term subject to stated conditions including the obligation to remain in good standing under the terms of the Agreement; and,

WHEREAS, ON April 22, 2013, the Agreement was extended through June 30, 2018 by action of the Port Authority; and,

WHEREAS, the City of Fort Smith Port Authority and Five Rivers Distribution, LLC acknowledge the Port of Fort Smith facility is in need of capital infrastructure upgrades in order to remain a viable port facility as part of the MKARNS; and,

WHEREAS, Five Rivers Distribution, LLC has expressed interest and willingness to make capital investment in the Port of Fort Smith facility, provided that the terms and conditions of the Agreement are such that allow long-term financing of such capital investment; and,

WHEREAS, the Port Authority is satisfied with the performance of Five Rivers Distribution, LLC, and the parties hereby mutually agree that the terms and conditions set forth in this Lease Agreement are intended to and do replace the Agreement and all subsequent amendments thereto.

NOW, THEREFORE, in consideration of these premises and the mutual promises, covenants and agreements of the respective parties hereto, the receipt and sufficiency of which is hereby acknowledged, it is hereby agreed as follows:

1. **Premises Demised.** The Port Authority hereby leases, lets and demises to Lessee, commencing on January 1, 2017 (the "Effective Date"), and Lessee hereby leases from the Port Authority, the Leased Premises.
2. **Term and Option to Renew.** The initial term of this Lease shall be for a period of thirty (30) years, beginning on the Effective Date, and ending on December 31, 2046 (the "Initial

**Term**”). If Lessee shall have duly performed each and every one of the covenants herein contained and shall not be in default hereunder as of the date of exercise of this option and the expiration of the Initial Term hereof (or the then current Extended Term), Lessee shall have the option to renew this Lease upon the same terms, except the amount of rental, for two (2) consecutive periods of five (5) years each by providing Lessor at least one hundred eighty (180) days prior written notice of its desire to exercise this option (each additional term, the “**Extended Term**”).

3. **Port Authority’s Warranty.** The Port Authority makes no warranty as to the suitability of the Leased Premises. The Leased Premises and all existing improvements thereon are provided in “as is” condition, without warranty for suitability for any purpose. The Port Authority states that it believes it owns or has the right as a lessee from the City of Fort Smith, subject to the City of Fort Smith’s recorded easements and the rights of ingress and egress to the City’s property utilized for utility purposes immediately north of the northernmost warehouse on the Leased Premises, to lease the premises to the Lessee for the purposes of this Operating Agreement. The Port Authority makes no warranty of title with reference to the Leased Premises. The Lessee acknowledges the easement and access rights of the City of Fort Smith to the described properties. Lessee may, at its expense, make any improvements, repairs, or additions to existing facilities to ensure suitability with the operation of a public port. Lessee may, at its expense, add additional facilities to the property. Lessee shall not mortgage any portion of the Leased Premises except for any new facility Lessee causes to be constructed subsequent to the Effective Date, and the mortgage amount shall not exceed 80% of the actual cost to Lessee of the new facility. Any mortgage shall be limited to that portion of the Leased Premises on which the new facility is located. Any improvements to existing facilities or additional facilities added to the Leased Premises by the Lessee shall become the property of the Port Authority upon termination of this lease. The Port Authority warrants that upon Lessee’s satisfaction of the terms and conditions of this Agreement, Lessee shall have the quiet use and enjoyment of the Leased Premises throughout the lease term.

4. **Facilities Included.** The Port Authority leases to and will make available to Lessee all of the Leased Premises, which Leased Premises consists of approximately 24.7 acres of real property, more or less, some of which is undeveloped, including, but not limited to, the following improvements and facilities, which are listed below and more particularly identified in **Exhibit “B”** attached hereto and incorporated herein by this reference:

- a. Two dock facilities on the Poteau River
- b. One 40,000 square foot warehouse building and office facility (commonly 100 Navy Road)
- c. One 40,000 square foot warehouse building (commonly 200 Navy Road)

It is hereby expressly acknowledged and agreed to by the parties that any and all railroad tracks, switches, rail terminals, and related infrastructure, improvements, and equipment, including the right-of-way lying directly thereunder, located on the Leased Premises shall be deemed a part of the Leased Premises subject to this Agreement.

5. **Maintenance, Repairs, and Replacements:**

a. Lessee shall keep and maintain in good order, condition and repair, including repairs and replacements, the Leased Premises and every part thereof and any and all appurtenances thereto wherever located. The repair obligation shall include any repairs or replacements of any nature whatsoever that are necessitated by the willful or negligent acts or omissions of Lessee. Lessee shall be responsible for all repairs and maintenance with respect to the Leased Premises.

b. Lessee shall at all times keep and maintain the Leased Premises in a clean, sanitary and safe condition in accordance with the laws of the State of Arkansas and in accordance with all directions, rule and regulations of the health officer, fire marshal, building inspector or other proper officials of the governmental agencies having jurisdiction and all other Federal, State, and local laws including without limitation the Americans with Disabilities Act of 1990, all acts, rules, regulations, and ordinances of OSHA, and any similar local statute and the Environmental statutes as defined above, and shall comply with all requirements of law, ordinance and otherwise, affecting the Leased Premises, all at the sole cost and expense of Lessee.

c. If Lessee refuses or neglects to commence and to complete repairs and maintenance promptly and adequately, in addition to any other rights and remedies of Port Authority hereunder, the Port Authority may, but shall not be required to, make and complete said repairs or replacements and Lessee shall pay the cost thereof to the Port Authority upon demand as additional rent.

d. At the time of the expiration of the tenancy created herein, Lessee shall surrender the Leased Premises in good condition, reasonable wear and tear and loss by fire or other unavoidable casualty excepted. If Lessee has made unauthorized alterations to the Lease Premises, the Port Authority may, at its option, require Lessee to restore the Leased Premises to their condition upon delivery, at Lessee's cost and expense.

e. Lessee shall keep and maintain the Leased Premises and all other parts of the Leased Premises free from any and all liens arising out of any work performed, materials furnished, or obligations incurred by or for Lessee, and agrees to bond against or discharge any mechanic's or materialman's lien within ten (10) days of the filing of any such liens. Lessee shall reimburse the Port Authority for any and all costs and expenses which may be incurred by the Port Authority by reason of the filing of any such liens and/or the removal of same such reimbursement to be made within ten (10) days after receipt by Lessee from the Port Authority of a statement setting forth the amount of such costs and expenses. The failure of Lessee to pay any such amount to Lessor within said ten (10) Day period shall carry with it the same consequences as failure to pay any installment of rent.

6. **Services Furnished.** Lessee agrees to operate the Leased Premises as a public port facility, to provide adequate equipment and furnish adequate facilities and services as needed, subject to the reasonable capacity of the Leased Premises, for loading, unloading or transferring of freight from barge to car, from car to barge, from barge to warehouse, from warehouse to barge, from dray to warehouse, from warehouse to dray, from truck to storage, from storage to truck, from car to storage, from storage to car, from truck to car or from car to truck or any combination thereof.

7. **Rental Charges.**

a. **Rent:** During the term of this Lease, Lessee agrees to pay to Lessor a monthly rental of Three Thousand Dollars (\$3,000.00) (the "Rent"), subject to Section 7.e. of this Agreement. The monthly rental provided herein shall be payable in advance on the tenth (10th) day of each calendar month.

b. **Rent** shall be evaluated for increase or decrease after each five (5) year period, and made effective for the next five (5) year period, by the cumulative percentage increase in the Consumer Price Index (CPI) for the immediately preceding five (5) years.

c. **Lease Year** as used herein shall mean each twelve (12) month period during the term of this Lease.

d. **Consumer Price Index (CPI)** as used herein shall mean the Consumer Price Index – Seasonally Adjusted U.S. City for All Items For Urban Consumers (1982 – 84 = 100) published monthly in the "Monthly Labor Review" by the Bureau of Labor Statistics of the United States Department of Labor. In the event the base year (1982 – 84 = 100) used in computing CPI is changed, the figures used in making the adjustment above shall accordingly be changed. Likewise, if the CPI is discontinued, the Rent shall be increased in accordance with an industry wide standard for measuring the Cost of Living Increase in use at the time of such discontinuation acceptable to the Port Authority.

e. **Offset of Rent for prior obligation.** As of the effective date of this agreement, the Port authority owes the sum of \$72,000 to the Lessee for various improvements to the Leased Premises under prior agreement between the parties. For the first 48 months of the term of this Agreement, one-half of the monthly rent paid, totaling \$1,500 per month, shall be rebated to the Lessee, with only the net amount due and payable to the Port Authority as rent as prescribed in Section 7.a. of this Agreement for satisfaction of such prior obligation.

f. **Documentation.** Lessee will furnish to the Port Authority quarterly reports regarding net tonnage of material through the Leased Premises not later than ten (10) days after the end of the previous quarter.

8. **Operation of Leased Premises.** Lessee shall operate the Leased Premises as a public port facility in a good and workmanlike manner providing for the prompt and expeditious handling of freight as specified herein.

9. **Lessee and Independent Contractor.** It is understood and agreed that in the maintenance and operation of the Leased Premises, the Port Authority is interested only in the results obtained, and the detailed manner and method of doing such work and maintaining the Leased Premises shall be under the control of Lessee. It is further understood and agreed that Lessee is a lessee and, with respect to all its activities, an independent contractor; and it shall be entirely responsible for its own acts and for the acts of its employees while engaged in this work and that the Port Authority shall not be liable or responsible in any manner or to any extent for any violation by Lessee of any City ordinance or State or Federal law resulting from or arising out of the performance of the work or activity, or for any injury, expenses, loss or damage to the property or person of any individual, partnership, corporation or other business entity or governmental

subdivision; and Lessee hereby covenants and agrees to indemnify, protect and save the Port Authority harmless from any such injury, expense, loss or damage so incurred, including any reasonable attorneys' fees in connection therewith, except to the extent that such injury, expense, loss or damage arises directly from the Port Authority's own gross negligence or willful misconduct.

10. **Insurance.** Lessee agrees to carry, maintain and continue in force at its sole expense, throughout the performance of this Agreement, insurance in duly qualified companies as follows:

a. Worker's Compensation insurance in amounts required by the laws of the State of Arkansas covering all operations in connection with the performance of this Agreement.

b. Automobile Liability insurance covering all operations in connection with the performance of this Agreement (including coverage on owned and non-owned automotive equipment) with bodily injury limits of not less than \$1,000,000.00 for injuries to, or death of, any one person, not less than \$2,000,000.00 for injuries to, or death of, more than any one person resulting from any one accident, property damage limit of not less than \$1,000,000.00, and \$2,000,000.00 aggregate insurance.

c. General liability insurance covering all operations in connection with the performance of this Agreement with bodily injury limits of not less than \$1,000,000.00 for injuries to, or death of, any one person and not less than \$2,000,000.00 for injuries to, or death of, more than one person resulting from any one accident, and property damage limit of not less than \$1,000,000.00, and \$2,000,000.00 aggregate insurance.

d. Hazard insurance covering fire and extended coverage risks in an amount equal to 100% of the replacement cost of all improvements at the Leased Premises. Lessee's interest in the proceeds of hazard insurance shall be limited to actual mortgage indebtedness of any new improvement caused to be constructed subsequent to the Effective Date, and all other proceeds shall be the property of the Port Authority and used for purposes of restoration of the damage or loss.

e. Lessee agrees to furnish a certificate or certificates of insurance under all such policies which certificates shall provide that prior written notice of material change in, or cancellation of, the policies shall be sent to the Port Authority at the address set forth herein. The Port Authority shall be named an "Additional Insured" and/or "Loss Payee" in all such policies. Copies of said certificates are attached hereto and incorporated herein by this reference as **Exhibit "C."**

11. **Taxes.** All taxes assessed against Lessee's operations under this Agreement by any governmental authority, whether Federal, State or Municipal, shall be for the account of Lessee. It is the presumption of this Lease Agreement that the real property encompassing the Leased Premises be and is exempt by virtue of its ownership by the public Port Authority and its operation as a public port providing access to the navigable waterways for businesses and entities in the City of Fort Smith, and others. The previous statement notwithstanding, Lessee agrees to be solely responsible for any taxes on personal property located on, or real property consisting of, the Leased



Premises that are deemed to be properly assessed and payable by an authority with proper jurisdiction.

12. **Port Authority's Rights Upon Default.** In the event Lessee fails to pay any rental or other charges due hereunder, or in the event Lessee fails to perform, or violates, any other of the terms, conditions, or covenants of this Lease Agreement to be observed or performed by Lessee, or if Lessee shall abandon or vacate the Leased Premises for more than thirty (30) days, or permit this Lease to be taken under any writ of execution, or Lessee shall: file a voluntary petition in bankruptcy, make an assignment for the benefit of creditors, be adjudicated as bankrupt, or be judicially declared insolvent, each of said events shall constitute a default of lessee, then Lessee shall have thirty (30) days after delivery of written notice to the terminal Manager or other authorized officer of Lessee of the nature of the claimed default, within which to cure the same or, failing to cure, the Port Authority, in addition to other rights or remedies it may have, shall have any and all of the following rights:

a. To re-enter and remove all persons and property from the Leased Premises, and such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Lessee.

b. To terminate the Lease Agreement and relet the Leased Premises.

13. **Cumulative Remedies.** The rights and remedies given to the Port Authority by this Lease Agreement shall be deemed to be cumulative and in addition to such other rights and remedies as may be prescribed under the laws of the State of Arkansas, and no one of such rights and remedies shall be exclusive at law or in equity of the rights and remedies which the Port Authority might otherwise have by virtue of a default under this Lease Agreement, and the exercise of one such right or remedy by the Port Authority shall not impair the Port Authority's standing to exercise any other right or remedy.

14. **Accord and Satisfaction.** No payment by Lessee or receipt by the Port Authority of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and the Port Authority shall accept such check or payment without prejudice to the Port Authority's right to recover the balance of such rent or pursue any other remedy in this Lease Agreement provided.

15. **Right to Relet.** Should the Port Authority elect to re-enter, as herein provided for in this Lease, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may terminate this Lease Agreement, make such alterations and repairs as may be necessary in order to relet the Leased Premises, and relet said premises or any part thereof for such term or terms (which may be for a term extending beyond the term of this Lease Agreement) and at such rental or rentals and upon such other terms and conditions as the Port Authority in its sole discretion may deem advisable.

16. **Assignment and Subletting.**

a. Lessee shall not assign this Lease Agreement, sublet all or any part of the Leased Premises or otherwise transfer its interest in the Lease Agreement without the prior written

consent of the Port Authority and upon such terms and conditions as may be mutually agreed upon by the parties, except for those existing leases set forth on **Exhibit "D"** attached hereto and incorporated herein by this reference, which the Port Authority acknowledges per the terms of such agreements and this paragraph. Lessee hereby expressly acknowledges and agrees that in considering whether to consent to an assignment or subletting, the Port Authority may consider the management expertise, financial capacity, and any other characteristic deemed necessary by the Port Authority. Lessee also acknowledges and agrees that the Port Authority may require, in conjunction with any such assignment or subletting, that the principals of any assignee or subtenant personally guaranty the assignee's or subtenant's payment and performance of the Lease.

b. In the case of any permitted assignment or sublease, any proposed assignee or subtenant of Lessee shall assume Lessee's obligations hereunder and deliver to the Port Authority an assumption agreement in form satisfactory to the Port Authority at least ten (10) days prior to the effective date of the assignment. Such assignment shall in no way release Lessee from liability under this Lease. The consent by the Port Authority to an assignment or subletting and the assumption of Lessee's obligations by an approved assignee shall not in any way be construed to relieve Lessee or any other occupant of the Leased Premises from obtaining the express written consent of the Port Authority to any further assignment or subletting.

c. Lessee shall pay to the Port Authority, the Port Authority's administrative costs, overhead and attorney's fees incurred in connection with such assignment or subletting. The acceptance of rent from any other person shall not be deemed to be a waiver of any of the provisions of this Lease or to be a consent to the assignment of this Lease or the subletting of the Leased Premises.

17. **Fire or Other Destruction; Force Majeure.** If, during the term of this Lease, the Leased Premises, including the improvements thereon or the waterway, shall be destroyed or partially destroyed from whatever cause so as to render the premises or waterway substantially unfit for the operations contemplated herein, then this Lease shall terminate and become null and void from the date of such damage or destruction, and Lessee shall immediately surrender said premises and all interest therein to the Port Authority.

a. In such case the Port Authority may re-enter and re-possess said premises discharged of this Lease, and may remove all parties therefrom. If, however, said premises are not rendered substantially unfit for the operations contemplated herein, the Port Authority shall use any available insurance proceeds to repair the same with all reasonable speed and this Lease shall continue in force without interruption.

b. It is agreed that fire, flood, earthquake, or other acts of God, as well as labor disturbance or other events or occurrences not within the reasonable control of either party, but which prevent either party from performing hereunder, shall be deemed an event of force majeure which shall excuse the party affected thereby from the performance of its obligations hereunder for so long as the conditions resulting from such force majeure continue in effect; and the rent stipulated herein shall abate during any such period of force majeure.

18. **Compliance with Laws and EDA Regulations.** Lessee shall at all times comply with all Federal, State and local statutes, laws, ordinances, codes, rules, and regulations, including but not

limited to the U.S. Environmental Protection Agency and the Occupational Safety and Health Administration, and Lessee shall specifically comply with the rules and regulations of the U.S. Department of Commerce, Economic Development Administration, as set forth in 13 CFR 314.3(c) and 15 CFR Part 24.

19. **Lessee's Rights Incident to Adjoining Property.** Pursuant to this Lease and the Port Authority's engagement of Lessee as the exclusive stevedore for the Port, the Port Authority agrees that the Port Authority will not allow or designate any other person or firm to perform similar services.

20. **Hazardous Material:**

a. Lessee shall not cause or suffer contamination of the Leased Premises by hazardous waste or toxic substances and shall not handle or permit polychlorinated biphenyls ("PCB's") or asbestos or substances containing PCB's or asbestos on the Leased Premises. Lessee shall immediately provide the Port Authority with notice of any event of an environmental nature, including any spill or other incident which could result in contamination to the Leased Premises.

b. Lessee shall conduct all of its operations at the Leased Premises in compliance with all federal, state, and local statutes, ordinances, regulations, orders and/or requirements, including, but not limited to, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, or any amendments thereto, or in any regulations promulgated thereto, or in any similar state or local law, regulation or ordinance ("**Environmental Statutes**"). Lessee shall obtain all permits, licenses, or approvals and shall make all notifications and registrations required by Environmental Statutes and shall submit to the Port Authority, upon request, for inspecting and copying all documents, permits, licenses, approvals, manifests and records required to be submitted and/or maintained by the provisions of the Environmental Statutes. Lessee shall also provide promptly to the Port Authority copies of any correspondence, notice of violation, summons, order, complaint or other document received by Lessee pertaining to compliance with Environmental Statutes.

c. Lessee shall permit the Port Authority and the Port Authority's agents, servants and employees, including but not limited to legal counsel and environmental consultants and engineers, access to the Leased Premises for the purposes of environmental inspections and sampling during regular business hours, or during other hours after reasonable notice by the Port Authority, or in the event of any environmental emergency. Lessee shall not restrict access to any part of the Leased Premises to conduct such inspections as deemed necessary, and Lessee shall not impose any conditions to access. To the extent any hazardous conditions exist on the Leased Premises, the Port Authority, in its sole discretion may remedy and/or cause to be remedied at the Lessee's sole expense, the defect or contamination, and the Port Authority reserves the right to reinspect the Leased Premises after any remediation, and require Lessee to take appropriate action to remedy and/or cause to be remedied and further defect or contamination resulting from this tenancy.

d. Lessee shall indemnify, defend and hold harmless the Port Authority from and against all claims, liabilities, losses, damages and costs, foreseen or unforeseen, including without limitation, legal counsel, engineering and other professional or expert fees, which the Port

Authority may incur by reason of Lessee's action or non-action with regard to Lessee's obligations under this paragraph. The provisions of this Section shall survive the expiration or early termination of this Lease Agreement.

e. Lessee hereby expressly acknowledges and agrees that Lessee previously leased and/or operated all or part of the Leased Premises from the Port Authority by virtue of one or more leases and/or operating agreements, and such leases and/or operating agreements were terminated early upon the mutual understanding of the Port Authority and the Lessee, however, no event nor the signing of this Lease Agreement shall in any way whatsoever release Lessee from any of its obligations or liabilities under any old leases or operating agreements with the Port Authority with respect to environmental matters thereunder.

21. **Covenant to Hold Harmless.** Lessee will and does indemnify the Port Authority and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with violation of any of the terms hereof, loss of life, personal injury and/or damage to property, whether claimed to be the result of the negligence of the Lessee, the Port Authority or otherwise, arising from or out of any occurrences in, upon or at the Leased Premises. In case the Port Authority shall be made a party to any litigation commenced by or against Lessee, if any, then Lessee shall protect and hold the Port Authority harmless and shall pay all costs, expenses and reasonable attorney fees incurred or paid by the Port Authority in connection with such litigation.

22. **Waiver of Subrogation.** Whenever (a) any loss, cost, damage, or expense resulting from fire, explosion or any other casualty or occurrence is incurred by either of the parties to this Lease, or anyone claiming by, through or under it in connection with the Leased Premises, and (b) such party is then covered in whole or in part by insurance with respect to such loss, cost, damage, or expense or is required under this Lease to be so insured, then the party so insured (or so required) hereby releases the other party from any liability said other party may have on account of such loss, cost, damage or expense to the extent of any amount recovered by reason of such insurance (or which could have been recovered had such insurance been carried as so required) and waives any right of subrogation which might otherwise exist in or accrue to any person on account thereof. All Lessee policies of insurance required under this Lease shall contain a Waiver of Subrogation.

23. **Attorney's Fees.** In case suit shall be brought for recovery of possession of the Leased Premises, for the recovery of rent or any other amount due under the provisions of this Lease, or because of the breach of any other covenant herein contained on the part of Lessee to be kept or performed, and a breach shall be established, Lessee shall pay to the Port Authority all expenses incurred therefor, including attorney's fees. Lessee shall also pay all costs, expenses and attorney's fees that may be incurred or paid by the Port Authority in enforcing the covenants and agreements of this Lease. If either the Port Authority or Lessee institutes any action to enforce the provisions of this Lease or to seek a declaration of rights hereunder, the prevailing party shall be entitled to recover its reasonable attorney's fees and court costs as part of any award to the maximum extent permitted by law. Lessee and any guarantors hereby knowingly, voluntarily and intentionally waive any right they may now or hereafter have to a trial by jury with respect to any suit, action or proceeding arising out of or relating to this Lease, the relationship of the Port Authority and Lessee hereunder, Lessee's use or occupancy of the Leased Premises, and/or claim of jury or damage including but not limited to, an action for possession of the Leased Premises.

24. **Modification**. This Agreement may be modified only by written agreement signed by both parties hereto.

25. **Descriptive Headings**. The descriptive headings of this Lease Agreement are inserted for convenience in reference only and do not constitute part of this Agreement.

26. **On Whom Binding**. The conditions, terms, provisions, covenants and agreements contained herein shall inure to and be binding upon the parties hereto and their respective permitted successors and assigns.

27. **Notice**. Any and all notices herein shall be given by United States First Class Certified Mail, Return Receipt Requested, and sent to the respective address set forth below, which addresses shall be considered as the proper mailing addresses of the Port Authority and Lessee until changed by written notice as herein provided. Each notice shall be effective three (3) days (exclusive of Saturdays, Sundays, and legal holidays under the laws of the State of Arkansas) subsequent to the date on which notice is mailed in said manner addressed to party hereto to be notified. The parties shall have the right to change their respective post office addresses as herein designated at any time and from time to time by giving the other party notice in writing of such change. Any notice shall be addressed as follows:

A. Notice to the Port Authority shall be sent to:

City of Fort Smith Port Authority  
c/o City Administrator  
Post Office Box 1908  
Fort Smith, Arkansas 72902

B. Notice to the Operator shall be sent to:

Five Rivers Distribution LLC  
Post Office Box 5606  
2020 Riverfront Road  
Van Buren, Arkansas 72957

28. **Rights of Others Under Law**. Nothing herein expressed or implied is intended, or shall be construed, to confer upon or give to any person, firm or corporation, other than the respective parties hereto, any rights or remedies by reason of this Agreement.

29. **Construction**. The Parties acknowledge they have each anticipated in the drafting of this Lease Agreement. Therefore the Parties agree that there should be no construction or interpretation preference for or against either Party as to the provisions of this Lease Agreement.

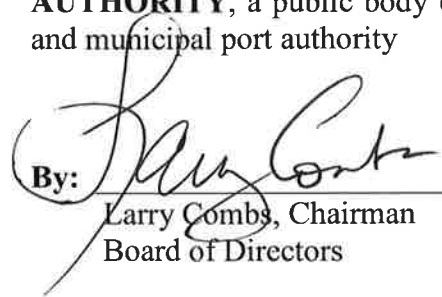
30. **Governing Law**. This Lease Agreement shall be governed by and construed in accordance with the internal laws of the State of Arkansas. The parties hereto hereby recognize and agree and consent to the fact that the courts of Sebastian County, Arkansas shall be the appropriate venue for resolution of any disputes hereunder.

31. **Recording.** Lessee shall not record this Lease without the written consent of the Port Authority.

IN WITNESS WHEREOF, the parties hereto have duly executed this Lease Agreement as of the date first written above.

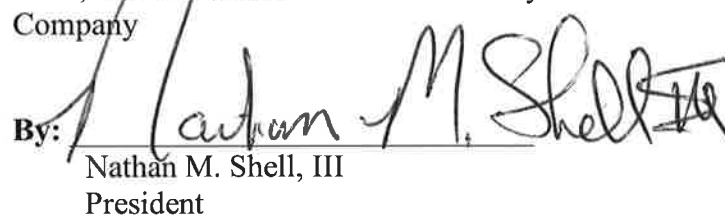
**LESSOR:**

**CITY OF FORT SMITH PORT AUTHORITY**, a public body corporate and municipal port authority

By:  \_\_\_\_\_  
Larry Combs, Chairman  
Board of Directors

**LESSEE:**

**FIVE RIVERS DISTRIBUTION, LLC**, an Arkansas Limited Liability Company

By:  \_\_\_\_\_  
Nathan M. Shell, III  
President

STATE OF ARKANSAS )  
 ) ss.  
COUNTY OF SEBASTIAN )

ACKNOWLEDGMENT

On this day the 17<sup>th</sup> day of NOVEMBER, 2016, before me, Amber Jones the undersigned officer, personally appeared LARRY COMBS, who acknowledged himself to be the CHAIRMAN of the City of Fort Smith Port Authority Board of Directors, a public body corporate and municipal authority of the City of Fort Smith, and that he, as such CHAIRMAN, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as CHAIRMAN.

In witness whereof, I hereunto set my hand and official seal.



Amber Jones  
NOTARY PUBLIC

My commission expires:

4/13/2025

STATE OF ARKANSAS )  
 ) ss.  
COUNTY OF SEBASTIAN )

ACKNOWLEDGMENT

On this day the 17 day of NOVEMBER 2016 before me, Amber Jones the undersigned officer, personally appeared NATHAN SHELL, who acknowledged himself to be the PRESIDENT of Five Rivers Distribution, LLC, a Limited Liability Company in the State of Arkansas, and that he, as such PRESIDENT, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as PRESIDENT.

In witness whereof, I hereunto set my hand and official seal.



Amber Jones  
NOTARY PUBLIC

My commission expires:

4/13/2025

**City of Fort Smith Port Authority**  
**Lease to Five Rivers Distribution**

**Exhibit “A”**

All of that part of 20-8-32W, FS Dist of Seb Co City of Ft. Smith, Ark. Known as Lot 23 of the T.H.R. Johnson Survey of 20-8-32 filed for record 26 August 1891 except that part of Lot 23 desc as fols; Beg at the SE corn of said Lot 23, th W 398.1' to the NW corn of Lot 7, Brawner Place, th N 200', th E 404.6' to the E line of Lot 23, th S to the pt of beg.; commonly referred to as 200 Navy Road, Fort Smith, Ark. and consisting of 24.71 acres, more or less.



# 200 Navy Rd Property

Exhibit "B"



4.a.

4.b.

4.a.

4.c.

18564-0007-00013-00

18883-0000-00760-00

10707-0004-00000-00

S 6TH ST

NAVY RD

SR ST

S 7TH ST

S U ST

STATE LINE RD



Austin Collins  
PHOTOGRAPHY