

**HSNi
OPERATING COVENANT AGREEMENT**

Between

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

and

**HSN, Inc.
a Delaware corporation**

Dated as of December 15, 2015, for reference purposes only

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D/S*

RECITALS

WHEREAS, HSN, Inc. (“HSN”), a Delaware corporation, a retailer of consumer products with distribution in the United States of America and its territories currently operates a distribution center in the City of Fontana; and

WHEREAS, HSN and the Redevelopment Agency of the City of Fontana had previously entered into an Owner Participate Agreement (“OPA”) which expired in 2011; and

WHEREAS, following the expiration of that OPA, HSN could consider relocating the existing distribution center away from the City of Fontana, California; and

WHEREAS, the incentives provided in this Agreement are intended to ensure HSN remains within the City and expands its operations within the City for not less than 20 years and to provide HSN with the option to continue such incentives for an additional 20 year period as defined in Section 1.3.5 and 1.3.9; and

WHEREAS, the City has determined that the retention of the HSN distribution center within the City will generate substantial revenue for the City, allow for the retention of and the creation of new jobs, revitalize an area of the City which has suffered a loss of jobs and businesses during the economic downturn of the mid-2000’s, and result in community and public improvements that might not otherwise be available to the community for many years.

WHEREAS, HSN intends to merge HSN Fulfillment, LLC into HSNi, LLC as of the end of business December 31, 2015 at least in part to facilitate the execution of this Operating Covenant Agreement.

WHEREAS, HSN intends to use commercially reasonable efforts to maintain its current level of operations in the City of Fontana.

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 of Fontana and HSN agree as follows:

ARTICLE 1. EFFECTIVE DATE; PARTIES; DEFINITIONS

1.1 Effective Date of Covenant Agreement. This HSN Operating Covenant Agreement (“Covenant Agreement”) is dated December 15, 2015, for reference purposes only. This Covenant Agreement will not become effective (the “Effective Date”) until the 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 Owner, as defined herein, 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; and

1.1.3 This Covenant Agreement has been executed by the appropriate authorities of the City and delivered to Owner.

If all of the foregoing conditions precedent have not been satisfied by January 1, 2016, then this Covenant Agreement shall 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 8353 Sierra Hall, Fontana, California 92335, Attention: Kenneth R. Hunt, City Manager; telephone (909) 350-7600; with copies to Jeff Ballinger, City Attorney, 655 W Broadway, 10th Floor, San Diego, CA 92101, Telephone: (619) 525-1300.

The City represents and warrants to Owner that:

- (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 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 Owner and the City acknowledges that Owner is relying upon the representations set forth above in undertaking Owner'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 be limited to, the actual current knowledge of Kenneth R. Hunt, City Manager, 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 the City and its nominees, successors and assigns.

1.2.2 Owner. The address of HSN ("Owner") for purposes of this Covenant Agreement is 1 HSN Drive, Saint Petersburg, Florida 33729; telephone (727) 872-1000; facsimile (727) 872-6127.

Owner represents and warrants to the City that:

- (a) Owner is a duly formed Delaware corporation, 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 Owner;
- (c) Owner has taken all actions required by law to approve the execution of this Covenant Agreement;
- (d) Owner'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 Owner;
- (e) Owner'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 Owner is subject;
- (f) There are no pending lawsuits or other actions or proceedings which would prevent or impair the timely performance of Owner's obligations under this Covenant Agreement; and
- (g) Owner 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 Owner is requisite to the valid and binding execution, delivery and performance of this Covenant Agreement, except as otherwise expressly set forth herein.

The representations and warranties set forth herein are material consideration to the City and Owner 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

Owner" shall mean, and shall be limited to, the actual current knowledge of Joseph Purvis, 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 Owner and its permitted nominees, successors and assigns. Wherever the term "Owner" is used herein, such term shall include any permitted nominee, assignee or successor of Owner.

The qualifications and identity of Owner 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 Owner. No voluntary or involuntary successor-in-interest of Owner shall acquire any rights or powers under this Covenant Agreement except as expressly set forth herein. Notwithstanding the foregoing, Owner may voluntarily assign the rights, duties, and obligations under this Agreement subject to the consent of the City, which said consent shall not be unreasonably withheld.

1.2.3 The City and Owner are sometimes individually referred to as "Party" and collectively as "Parties."

1.3 Definitions.

1.3.1 "**BOE**" means the California State Board of Equalization.

1.3.2 "**City**" means the City of Fontana, a California municipal corporation, and any nominee, assignee of, or successor to, its rights, powers and responsibilities.

1.3.3 "**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, expected to commence on July 1, 2016, shall be referred to herein as "Computation Quarter 1," with each succeeding Computation Quarter within the Eligibility Period being consecutively numbered, concluding with Computation Quarter 80. If Owner elects to extend the Covenant Term of the Covenant Agreement to include Extended Eligibility Period, the first Computation Quarter within the Extended Eligibility Period, expected to commence on July 1, 2036, shall be referred to herein as "Computation Quarter 81," with each succeeding Computation Quarter within the Eligibility Period being consecutively numbered, concluding with Computation Quarter 160.

1.3.4 "**Covenant Payment(s)**" means those contingent payments to be made by the City to the Owner pursuant to Section 3.2 of this Covenant Agreement in consideration of the Covenants and Owner's timely and faithful performance thereunder.

1.3.5 "**Covenant Term**" means, a period of twenty (20) years beginning July 1, 2016 (unless terminated sooner pursuant to specific provisions of this Covenant Agreement). Owner may elect, with approval by the City not to be unreasonably withheld, to extend the Covenant Term of this Covenant Agreement for a period of twenty (20) additional years, with

such additional period beginning on the day following the last day of Computation Quarter 80 (i.e., June 30, 2036). Such 20 year period will be referred to as the “Extended Eligibility Period” as defined below. The extension of the Eligibility Period referred to herein, may be exercised provided that:

- (a) Owner is not in breach of the Covenants in this Agreement; and
- (b) Owner provides City with written notice of Owner’s intent to extend the term not less than one hundred eighty (180) days prior to the expiration of the original Covenant Term.

1.3.6 “Covenants” means those covenants described in Section 3.1 herein.

1.3.7 “Distribution Center” means that certain HSN corporate fulfillment/distribution center operated on the Property by Owner.

1.3.8 “Eligibility Period” means the period commencing as of the first (1st) day of Computation Quarter 1, July 1, 2016, and ending the last day of Computation Quarter 80 (i.e., June 30, 2036).

1.3.9 “Extended Eligibility Period” means the period commencing as of the first (1st) day of Computation Quarter 81, July 1, 2036, and ending the last day of Computation Quarter 160 (i.e., June 30, 2056).

1.3.10 “Governmental Authority” means any nation or government, any federal, state, local, municipal or other political subdivision thereof or any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

1.3.11 “Law” means any law (including common law), constitution, statute, treaty, regulation, rule, ordinance, opinion, release, ruling, order, injunction, writ, decree, bond, judgment, authorization or approval, lien or award by or settlement agreement with any Governmental Authority.

1.3.12 “Liquidated Damages” means, for purposes of Section 3.7, that if the breach occurs during Computation Quarters 1 through 40, an amount equal to the previous four (4) Computation Quarter Covenant Payments paid to Owner prior to the Computation Quarter in which the breach occurs.

1.3.13 “Owner” means and refers to HSN, Inc., a Delaware corporation, and any subsidiary or affiliate conducting Owner Sales Activities within the Property. The term “affiliate” for purposes of this Section 1.3.13 means any entity included or accounted for in the Owner’s financial statements, and any successors and assigns, cumulatively.

1.3.14 “Owner’s Sales Activities” means the commercially reasonable business practices and activities associated with Owner’s retail and wholesale sale of consumer products.

1.3.15 “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 Owner.

1.3.16 "Property" means that certain real property commonly known as 13423 Santa Ana Avenue, Fontana, California 92337 or any other property within the City of Fontana to which Owner may elect to relocate the Distribution Center during the term of this Covenant Agreement.

1.3.17 "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/or Owner's Sales Activities excluding that which is to be refunded to Owner because of an overpayment of such tax.

1.3.18 "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 City to levy any form of local Sales Tax on the operations of Owner; and (c) regulations of the BOE and other binding rulings and interpretations relating to (a) and (b) of this Section 1.3.18.

1.3.19 "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) attributable to Owner's Sales Activities and/or the Distribution Center in a particular Computation Quarter, inclusive of any offsetting revenues described in the last paragraph of Section 4.24 hereof. 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 San Bernardino, or a district or any entity (including an allocation to a statewide or countywide pool) other than City; (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. Sales Tax Revenue includes Sales Tax actually received by the City even if the City has committed to set those funds aside or has pledged those funds to a specific project, expense or fund.

ARTICLE 2. ADDITIONAL RECITALS; CITY COVENANTS

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 will result in substantial benefits to the City, and its citizens including, without limitation, the creation of significant 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 the purchase of the Covenants herein serve a significant public purpose, while providing only incidental benefits to a private party.

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

3.1 Covenants Running with the Land.

3.1.1 Operating and Use Covenant. Subject to Section 4.9, Owner covenants and agrees that for the Covenant Term Owner shall operate, or cause to be operated upon the Property, the Distribution Center in a commercially reasonable business manner, consistent with all applicable provisions of federal, state and local laws and regulations. Owner will operate its business in a commercially reasonable and prudent manner. Owner'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 a Point of Sale. Owner covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 3.1.1, Owner shall maintain such licenses and permits as may be required by any governmental agency to conduct Owner's Sales Activities related to the Distribution Center and, except as otherwise provided by applicable provisions of federal, state and local laws and regulations, shall use commercially reasonable efforts to designate City as a point of sale and 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. Owner shall use commercially reasonable efforts to fulfill product sales to California residents from the Distribution Center. To the extent permitted by law, Owner shall designate City as a point of sale for Owners taxable California sales transactions resulting from Owner's Sales Activities conducted remotely, including by phone or through an internet website. Owner shall maintain the appropriate master sales permits applicable to and required for the operation of the Distribution Center. The Owner shall consummate taxable sales transactions for Owner's Sales Activities conducted at the Distribution Center, consistent with all applicable statutory and BOE regulatory requirements applicable to Owner's Sales Activities and the designation of the City as a "point of sale" for Owner's taxable sales occurring as a result of Owner's Sales Activities conducted at the Distribution Center.

3.1.3 Owner's Additional Obligations Regarding Repairs and Alterations to Distribution Center. Owner covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 3.1.1, the Owner shall maintain, or cause to be maintained, the Distribution Center 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. Owner 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. Owner covenants and agrees that, for the term of the Operating and Use Covenant as described in Section 3.1.1, Owner 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 Owner’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 Owner. City and Owner acknowledged that Owner is currently fulfilling remote sales, including phone and internet sales, from the Distribution Center and Owner’s covenant pursuant to this Section is intended to provide, using commercially reasonable efforts, during the term of the agreement, for the continuation of activities similar to current activities conducted by Owner from the Distribution Center.

3.1.5 Use of Property. Owner 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. Nothing in this Section 3.1.5 shall limit, expand, modify or otherwise affect any right of the Owner to continue any legal nonconforming use upon the Property following changes in the City’s General Plan or zoning ordinances. For the term of this Operating Covenant, the Owner may use the Property only for the purposes of the operation of the Distribution Center and conducting Owner’s Sales Activities in accordance with this Covenant Agreement.

3.2 Covenant Payments.

3.2.1 Statement of Intent; Covenant Payment Amount. The City's obligations under this Section 3.2 are contingent on a Computation Quarter-to-Quarter basis and, for each Computation Quarter, City's obligations to make any payments hereunder are expressly contingent upon the Owner having, for the entirety of such Computation Quarter, completely fulfilled its material obligations under this Covenant Agreement, including, without limitation, the Covenants.

3.2.2 The consideration to be paid to the Owner in exchange for the Covenants and Owner’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 the Owner for each Computation Quarter during the Eligibility Period that the City receives Sales Tax Revenue, an amount equal to fifty percent (50%) of the Sales Tax Revenues attributable to taxable sales for such Computation Quarter above the first Fifty Thousand Dollars (\$50,000) in quarterly Sales Tax Revenue received by the City for such Computation Quarter, provided Owner has completely fulfilled its material obligations under this Covenant Agreement, including, without limitation, the Covenants. Should such condition precedent not be satisfied for a Computation Quarter, then City shall have no obligation under this Section 3.2 to make any Covenant Payments to Owner in such Computation Quarter.

3.2.3 Computation Quarter Covenant Payments. Within thirty (30) days following the end of each Computation Quarter, Owner shall submit to City certified copies of its quarterly reports to the BOE for the applicable Computation Quarter which sets forth the amount of Sales Taxes paid to the BOE during the Computation Quarter arising from Owner’s Sales

Activities and/or attributable to the Distribution Center. Within one hundred twenty (120) days following the end of each Computation Quarter, City shall pay to Owner any Computation Quarter 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 3.2.5 or 3.2.6, 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 Adjustments to Covenant Payment Amounts. If after City makes a Covenant Payment to Owner hereunder City or Owner determines that the Covenant Payment has been overpaid or underpaid and that an adjustment to a prior payment amount is warranted, City or Owner, as the case may be, shall have the right to provide a written notice to the other Party itemizing the information supporting the adjustment and either (a) requiring the City or Owner to pay the amount of the underpayment or overpayment, as applicable, within thirty (30) days from the date such notice is delivered or (b) deduct the amount of the overpayment from the next Covenant Payment otherwise owing to Owner. The Parties shall cooperate with one another and share such information as may be reasonably required to ensure that any required adjustments (either an additional payment to Owner or a refund or credit to City) can be promptly made.

3.2.6 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 Owner shall, within thirty (30) calendar days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to Owner which are attributable to such repaid, offset or recaptured Sales Tax Revenues. If Owner fails to make such repayment within thirty (30) calendar days after the City's written demand, then Owner 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 Owner under this Section 3.2.6 from any future Covenant Payments otherwise payable to Owner under this Covenant Agreement. This Section 3.2.6 shall survive the expiration or termination of this Covenant Agreement. The City immediately will contact Owner regarding any communication from the BOE pertaining to tax allocations associated with Owner's business. Should the BOE question the correctness of the allocation or otherwise determine that there has been an improper allocation to the City, the Owner and the City may at each party's sole discretion choose to accept the BOE determination, separately engage legal counsel or consultant, or jointly engage legal counsel or consultant to defend such allocation in all BOE administrative proceedings. Any jointly agreed to cost or expense associated with such efforts will be borne equally by the Parties. Any cost or expense associated with such efforts not jointly agreed to will be borne by the party incurring the cost or expense.

For purposes of this paragraph, administrative proceedings include all BOE meetings, conferences and appeals before BOE Board Members. Regardless of joint legal counsel, the Owner and the City will reasonably cooperate with the other party and the other party's counsel. Additionally, Owner shall have the right, but not the obligation, to participate in any such administrative proceedings. Notwithstanding the foregoing, Owner shall fully cooperate in any administrative proceeding related to this Agreement or the Sales Tax allocation.

3.2.7 Not a Pledge of Sales Tax. Owner 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 payment due hereunder and as means of computing the City's payment in consideration for the Covenants. It is acknowledged by Owner that the City's obligation to make payments is specifically contingent upon receipt by the City of the Sales Tax Revenues derived from operation of the Distribution Center.

3.3 Default.

3.3.1 Owner Default. City shall provide Owner with written notice of Owner's failure ("Owner Default") to strictly abide by any material provision of this Covenant Agreement, including, without limitation, the Covenants. Owner shall have thirty (30) days from the date of such notice to either cure such Owner Default, or, if such Owner 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. Owner 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 Default, after expiration of all applicable notice and grace periods, or an Owner Default, after expiration of all applicable notice and grace periods (as defined in Section 3.3), Owner or City (as applicable) shall have the right to seek all available legal and equitable remedies, unless otherwise expressly provided to the contrary herein. Notwithstanding anything in this Covenant Agreement to the contrary, (a) neither Party shall be liable to the other Party for consequential damages and (b) in no event shall the City have the right of specific performance or other mandatory injunctive relief to compel the Owner to operate the Distribution Center. Unless prohibited by law or otherwise provided by a specific term of this Covenant Agreement, the rights and remedies of the City and the Owner under this Covenant Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively, and the Owner or the City may simultaneously pursue inconsistent and/or alternative remedies. Either Party may, upon the Default of the other Party, after expiration of all applicable notice and grace periods, 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 The Owner's Rights to Terminate its Obligations under Section 3.1. The Owner's obligations under Section 3.1 shall automatically terminate without cost, expense, or liability to Owner, upon the occurrence of any one or more of the following: (a) City Default, as to which any applicable cure period provided for herein has expired; or (b) the end of the Eligibility Period, or (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.

3.6 The City's Rights to Terminate its Obligations under Section 3.2. The City's obligations under Section 3.2 shall automatically terminate without cost, expense, or liability to City, upon the occurrence of any one or more of the following: (a) Owner Default, as to which any applicable cure period provided for herein has expired; or (b) the end of the Eligibility Period, or (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.

3.7 Liquidated Damages.

3.7.1 Owner Default With Respect to Obligations Under Sections 3.1.1 and 3.1.2. The Parties acknowledge that the consideration to the City for its entry into this Covenant Agreement and the performance of its obligations hereunder include the City's receipt of Sales Tax Revenues, employment and other payroll taxes, property taxes, and other direct and indirect financial and non-financial benefits arising from the operation Owner's Sales Activities and the location of the Distribution Center in the City in accordance with Article 3 of this Covenant Agreement. Owner agrees that the City will suffer damages if Owner commits any Owner Default with respect to any of its obligations arising under Sections 3.1.1 and 3.1.2. The Parties agree that the exact determination of such damages would be impracticable and extremely difficult to quantify. Accordingly, the Parties have determined that Liquidated Damages (as determined pursuant to Section 1.3.12) represents a reasonable estimate of the damages which would be suffered by the City if Owner commits any Owner Default with respect to any of its obligations set forth in Sections 3.1.1 and 3.1.2. Accordingly, as its sole and exclusive monetary remedy for an Owner Default with respect to any of its covenants and obligations set forth in Sections 3.1.1 and 3.1.2, the City shall be entitled to (1) terminate this Covenant Agreement and the entirety of its obligations hereunder, including any accrued and unpaid Covenant Payments, and (2) receive from Owner the applicable amount of Liquidated Damages as provided by Section 1.3.12.

3.7.2 ACKNOWLEDGEMENT OF REASONABLENESS OF LIQUIDATED DAMAGES. UPON AN OWNER DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 3.1.1 AND 3.1.2, FOLLOWING NOTICE AND OPPORTUNITY TO CURE PURSUANT TO SECTION 3.3.1, THE CITY AND OWNER ACKNOWLEDGE AND AGREE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE AMOUNT OF DAMAGES THAT WOULD BE SUFFERED BY THE CITY WITH RESPECT TO SUCH DEFAULT. HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES THE CITY WOULD SUFFER, THE PARTIES AGREE THAT THE LIQUIDATED DAMAGES AMOUNT AS DETERMINED IN ACCORDANCE WITH

SECTION 1.3.12 REPRESENTS A REASONABLE ESTIMATION OF THOSE DAMAGES. THEREFORE, UPON AN OWNER DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 3.1.1 AND 3.1.2, AS ITS SOLE AND EXCLUSIVE REMEDY FOR SUCH DEFAULT, THE CITY SHALL BE ENTITLED TO (1) RECEIPT OF THE LIQUIDATED DAMAGES AMOUNT CALCULATED IN ACCORDANCE WITH SUBSECTION 1.3.12, WHICH OWNER SHALL PAY WITHIN TEN (10) DAYS FOLLOWING WRITTEN DEMAND FROM THE CITY, AND (2) TERMINATE THIS AGREEMENT AND THE ENTIRETY OF ITS OBLIGATIONS HEREUNDER, INCLUDING ANY ACCRUED BUT YET UNPAID COVENANT PAYMENTS.

Initials of Authorized
City Representative

Initials of Authorized
Owner Representative

ARTICLE 4. GENERAL TERMS

4.1 Tax Consequences. Owner 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.* 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, Owner's Sales Activities or any other project, development, or construction by the Owner in the City. This Covenant Agreement does not, and shall not be construed to, exempt Owner 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 Owner 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, (iii) sent by telecopier, or (iv) sent by nationally recognized overnight courier service (e.g., Federal Express), addressed to the Parties at the addresses provided in Article 1, 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 of Officials and Employees. No board member, official, contractor, consultant, attorney or employee of the City shall be personally liable to Owner, 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 the Owner or to its successors or assignees, or on any obligations arising under this Covenant Agreement. No board member, officer, contractor, consultant, attorney or employee of the Owner shall be personally liable to the City, 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 Owner, or for any amount which may become due to the City or to its successors or assignees, or on 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 Pledge or Hypothecation of Covenant Payments. Owner may assign any Covenant Payment(s) due in accordance with the terms of this Covenant Agreement (but not any other right or obligation of this Covenant Agreement) upon thirty (30) days' prior written notice to City as collateral for any loan or financing obtained by the Owner in connection with the Distribution Center; provided that nothing in this Section 4.7 shall be deemed to limit the operation of Section 4.16. Without limiting the general applicability of the foregoing, Owner acknowledges that Owner's lender and any transferee of Owner's lender shall be subject to the transfer restrictions of Section 4.16.

4.8 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.

The Parties acknowledge that this Covenant Agreement is the product of mutual arms-length negotiations and that each party has been, or has had the opportunity to have been, represented by legal counsel in the negotiation and drafting of this Covenant Agreement. Accordingly, the rule of judicial construction which provides that ambiguities in a document are to be construed against the drafter of that document shall have no application to the interpretation or enforcement of this Covenant Agreement. In any action or proceeding to interpret and/or enforce this Covenant Agreement, the trier of fact may refer to extrinsic evidence not in conflict with any specific provision of this Covenant Agreement to ascertain and give effect to the intent of the Parties hereto.

4.9 Time Deadlines Critical; Extensions and Delays; No Excuse Due to Economic Changes. Time is of the essence in the performance of the City's and Owner's obligations under

this Covenant Agreement. In addition to specific provisions of this Covenant Agreement providing for extensions of time, times for performance hereunder shall be extended where delays or defaults are due to war; insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation; acts of a public enemy; initiative or referenda; acts of governmental authorities (except that the failure of the City to act as required hereunder shall not excuse its performance); moratoria (except those imposed or enacted by the City); epidemics; quarantine restrictions; and freight embargoes (collectively, "**Enforced Delays**") provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the default; and, provided further, that the extension of time shall be only for the period of the Enforced Delays. However, deadlines for performance may not be extended as provided above due to any inability of the Owner to obtain or maintain acceptable financing for the operation of the Distribution Center.

ANYTHING IN THIS COVENANT AGREEMENT TO THE CONTRARY NOTWITHSTANDING, OWNER EXPRESSLY ASSUMES THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES AND/OR MARKET DEMAND/CONDITIONS AND WAIVES, TO THE GREATEST LEGAL EXTENT, ANY DEFENSE, CLAIM, OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, FRUSTRATION OF PURPOSE, CHANGED ECONOMIC CIRCUMSTANCES OR SIMILAR THEORIES.

OWNER EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF OWNER SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN THE MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF EACH AND EVERY OF THE OBLIGATIONS, COVENANTS, CONDITIONS AND REQUIREMENTS OF THIS COVENANT AGREEMENT. OWNER EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF OWNER'S EXECUTION OF THIS COVENANT AGREEMENT.

OWNER'S INITIALS _____

4.10 Attorneys' Fees. In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Covenant Agreement or any other dispute between the Parties concerning this Covenant Agreement or the Property, then, in that event, the prevailing party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to have and recover of and from the other Party all costs and expenses of suit or claim, including actual attorneys' fees. Any judgment, order or award entered in any final judgment or award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including actual attorneys' fees (collectively, the "**Costs**") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 4.10, "**Costs**" shall include, without implied limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii)

garnishment, levy and debtor and third party examination, (iv) discovery; and (v) bankruptcy litigation. This Section 4.10 shall survive any termination of this Covenant Agreement.

4.11 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 Owner. The City Manager is authorized on behalf of the City to approve and execute minor amendments to this Covenant Agreement, including, but not limited to, the granting of extensions of time to Owner, not to exceed ninety (90) days in the aggregate.

4.12 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 San Bernardino, California. Both Parties hereto irrevocably consents to the personal jurisdiction of that court. The City and Owner 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 Owner, 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 Owner specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Owner acknowledges that the provisions of this Section 4.12 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.

4.13 Interpretation. The City and Owner 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.

4.14 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.

4.15 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.

4.16 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. Except as provided in this Section 4.16, Owner shall neither transfer nor convey Owner's interest in the Property or the Distribution Center without the express written consent of the City, which shall not be unreasonably withheld, conditioned or delayed. In determining whether to approve of such a sale, transfer, conveyance or assignment of the Owner's interest in the Property, the City shall evaluate: (i) the financial ability of the proposed transferee to own and operate the Distribution Center, or portion so transferred, and to meet the Owner's obligations under this Covenant Agreement; (ii) the fitness and experience of the proposed transferee and its managerial personnel to own and operate the Distribution Center or portion so transferred thereof; and (iii) the ability of the proposed transferee to maintain a level of quality and service comparable to that maintained by the Owner for the Distribution Center. Upon the permitted sale, transfer or conveyance by Owner of its interest therein, such owner 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 Owner under this Covenant Agreement.

4.17 No Third Party Beneficiaries. The performance of the respective obligations of the City and Owner under this Covenant Agreement are not intended to benefit any party other than the City or Owner, 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.

4.18 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, or any other property owned by Distribution Center.

4.19 Warranty Against Payment of Consideration for Covenant Agreement. Owner 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 4.19, shall not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects or similar professionals when such fees are considered necessary by Owner.

4.20 Severability. The City and Owner 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.

4.21 Further Acts and Releases. The City and Owner 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.

4.22 Estoppels. At the request of Owner 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 Owner or such holder a written statement of the City as to any of the following matters as to which Owner 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 Owner pursuant to this Covenant Agreement, if such be the case; (ii) the total amount of Covenant Payments made by the City to Owner 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 Owner 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 Owner is in default or breach hereunder, the nature of such default and the action or actions required to be taken by Owner to cure such default or breach; and (vi) any other matter affecting the rights or obligations of Owner hereunder as to which Owner or such holder may reasonably inquire. The form of any estoppel letter shall be prepared by Owner or such holder at its sole cost and expense and shall be reasonably acceptable in form and content to the City and Owner. The City may make any of the representations described above based on the actual current knowledge of the then-current City Manager.

4.23 Indemnity. Owner shall defend (using counsel of City's choosing with approval by Owner which will not be unreasonably withheld), 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 or related to this Agreement or the functions or operations of the Distribution Center (other than to the extent arising as a result of the City's negligence or willful misconduct). The indemnity provided by Owner in this Section 4.23 does not include allocation disputes by the BOE as described in Section 3.2.6 or claims disputing the City's authority to enter into this Covenant Agreement. Notwithstanding the foregoing sentence, Owner shall indemnify the City for disputes regarding allocation of sales tax based upon Owners business structure. It is intended that Owner will indemnify and defend the City for BOE matters if the matter relates to the City's right to receive the sales tax based upon the structure or nature of Owner's operations ("BOE Matters"). Owner's financial exposure related to the indemnity for BOE matters shall not exceed an amount equal to the funds Owner has received pursuant to Section 3.2. The City shall fully cooperate in the defense of any such actions and upon written request of Owner shall provide to Owner 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 Owner shall have the right to terminate this Agreement, and as of such date of termination, all unaccrued liabilities of the parties under this Agreement shall cease except for Owner's obligation of indemnity owned to the City as provided in this Section 4.23. For purposes of clarification, should Owner exercise its termination right as provided in this Section 4.23, the same shall not be considered a Default and the City shall have no claims against Owner for liquidated damages.

4.24 State of California Legislation Impact on Covenant Payment. Owner 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. Owner 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 Owner a corresponding reduction and/or delay in the payment of the Covenant Payments due to Owner during such time as such legislation is in effect. Furthermore, Owner 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. Owner 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 Owner 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.

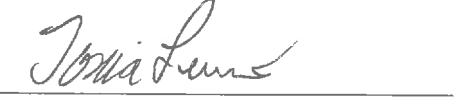
[Signatures on the following pages]

**SIGNATURE PAGE TO THE
HSN, Inc.
OPERATING COVENANT AGREEMENT**

**CITY OF FONTANA
a California municipal corporation**

By: 

ATTEST:

By: 

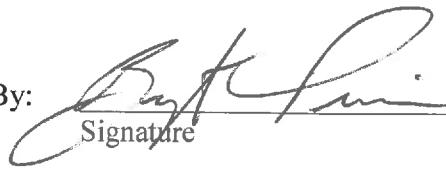
APPROVED AS TO FORM:

By: 
Jeff Ballinger
City Attorney

**SIGNATURE PAGE TO THE
HSNi
OPERATING COVENANT AGREEMENT**

HSN, Inc.
a Delaware Corporation

By:



Signature

Bryant Purvis
Vice President of Tax