

[Section 5.2 starting on Page 26. These edits have been reviewed by another attorney in Kent's office but not yet reviewed by Kent]

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## 5.2 Indemnification and Liability Cap

### 5.2.1 Liability Indemnification to be Provided to the District

Company shall indemnify, defend at Company's expense with counsel reasonably acceptable to the District, and hold harmless the District and its officials, commissioners, officers, employees, agents, and volunteers ("District Indemnitees") from and against any and all losses, liability, claims, injuries, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct or negligent acts or omissions of Company or its employees, Subcontractors, or agents, provided, however, that Company shall be liable only for that percentage of total damages that corresponds to its percentage of total negligence or fault. The foregoing obligation of Company shall not apply when: (1) the injury, loss of life, damage to property, or violation of law arises from the active negligence or willful misconduct of the District Indemnitees and (2) the actions of Company or its employees, Subcontractor, or agents have contributed in no part to the injury, loss of life, damage to property, or violation of law. **penalties, and costs (including, without limitation, District staff costs, costs and fees of litigation, including reasonable attorneys' and expert witness fees incurred in connection with defending against any of the foregoing or in enforcing this indemnity) of every nature arising out of or in connection with caused by: Company's (including Company's officers, employees, agents, and/or contractors) (a) material breach of this Agreement, (b) Company's negligence or (c) Company's willful misconduct. Company shall have no obligation to indemnify the District to the extent the District's purported losses arise out of the District's, or District Indemnitees', material breach of this Agreement, active negligence or willful misconduct. performance (including Company's officers, employees, agents and/or Subcontractors' performance) under this Agreement, or Company's failure to comply with any of its obligations contained in this Agreement, except to the extent caused by the active negligence or willful misconduct of District Indemnitees.**—It is understood that the duty of Company to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by District of insurance certificates and endorsements required under this Agreement does not relieve Company from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Company acknowledges and agrees to the provisions of this Section and that it is a material element of consideration, **and that Company's duty to indemnify and defend shall survive the expiration or earlier termination of this Agreement.**

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The Company shall reimburse District Indemnitees for all expenditures, including reasonable attorney's fees, incurred by District Indemnitees to enforce its right to indemnification pursuant to the terms hereunder.

The Company is responsible for safety related to its operation of the Facility and other responsibilities under this Agreement. The Company shall prepare and provide an annual

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safety plan to the District **for the District's review**. The District will have the plan reviewed by a certified safety engineer and have the safety engineer conduct an annual safety audit. Except for any capital expenses and / or Facility Modifications and / or additions identified by the **District** review, the Company will be responsible for all operational costs and expenses for all corrective actions to achieve a satisfactory review and audit. The District shall remain responsible for all Capital Expenditures as a required result of a safety audit. As set forth in Section 5.2.1, the Company shall defend and indemnify the District for any and all claims related to any worker's compensation type injury, however pleaded against the District, brought by Company employees or others (excepting District employees) related to the Company's performance of this Agreement.

A District Indemnitee shall promptly notify the Company of the assertion of any claim against it for which it is entitled to be indemnified hereunder, shall give the Company the opportunity to defend such claim, and shall not settle the claim without the approval of the Company. These indemnification provisions are for the protection of the District Indemnitees only and shall not establish, of themselves, any liability to third parties.

#### 5.2.2 Liability Cap

Notwithstanding anything contained in Section 5.2.1 hereof to the contrary, the liability of the Company pursuant to Section 5.2.1 hereof or under this Agreement shall not exceed ~~thirty fifteen fifteen ten~~ million dollars (~~\$30,000,000~~) (~~\$15,000,000~~) (~~\$15,000,000~~) (the "Liability Cap") cumulatively for the Contract Term; provided, however, that the foregoing limitation shall be reduced by any amounts paid to the District by or on behalf of the Company, Guarantor or its insurers with respect to claims of the District under Section 5.2.1 hereof or under this Agreement, and provided, further, however, that in no event shall any fines or penalties caused in whole or in part by Company's actions count toward the Liability Cap. The provisions of this Section shall survive termination of this Agreement.

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#### 5.2.3 Liability Indemnification to be Provided to the Company

**Novato Sanitary** The District agrees that, to the extent permitted by Applicable Law, it shall protect, indemnify, defend and hold harmless the Company and its Affiliates and their respective officers, directors, shareholders, agents and employees (the "Company Indemnitees") from and against all claims for Loss and Expense in any lawsuit, including appeals, for personal injury to, or death of, any person, or loss or damage to property arising out of (1) the active negligence, wrongful conduct or other fault of the District or any of its, officers, employees, agents, representatives, contractors or subcontractors in connection with its obligations or rights under this Agreement, or (2) the performance or nonperformance of the District's obligations under this Agreement.

The District shall not, however, be required to reimburse or indemnify any Company Indemnitee for any Loss-and-Expense due to (a) the negligence or other wrongful conduct of any Company Indemnitee or (b) due to any Uncontrollable Circumstance or any act or omission of any Company Indemnitee judicially determined to be responsible for or contributing to the Loss-and-Expense, and the Company Indemnitee whose

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negligence or other wrongful conduct, act or omission is adjudged to have caused such Loss-and-Expense shall be responsible therefore in the proportion that its negligence or wrongful conduct caused or contributed to the Loss-and-Expense.

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