

SECOND AMENDMENT TO TEMPORARY CONSTRUCTION ACCESS AGREEMENT

THIS SECOND AMENDMENT TO TEMPORARY CONSTRUCTION ACCESS AGREEMENT (this “2nd Amendment”) is dated as of December __, 2019 (the “Effective Date”), by and among BRE-BMR 53rd LP, a Delaware limited partnership, as successor in interest to Novartis Vaccines and Diagnostics, Inc. (“Grantor”), and the City of Emeryville, a California municipal corporation (“City”).

RECITALS

WHEREAS Grantor and City are parties to that certain Temporary Construction Access Agreement dated as of May 10, 2017 (the “Original Agreement”), as amended by that certain First Amendment to Temporary Construction Access Agreement dated as of February 7, 2018 (together with the Original Agreement, the “Agreement”), which grants to City Temporary Construction Access to enter upon, exit from, traverse and otherwise use the Access Areas on a portion of Grantor’s Property for the Work;

WHEREAS Owner and City desire to extend the term of the Agreement;

WHEREAS City has selected City’s contractor to perform the Work and to have the right to exercise the Access Rights as contemplated under the Agreement;

WHEREAS City desires and Grantor is willing to provide certain additional rights to City to use certain facilities and utilities on Grantor’s Property in connection with the Project; and

WHEREAS Owner and City desire to further amend the terms of the Agreement as detailed below.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, each intending to be legally bound, covenant and agree as follows:

1. Defined Terms. Capitalized terms not otherwise defined herein shall have the meanings given them in the Agreement.
2. Term. In Section 1(b)(iii) of the Original Agreement, “December 31, 2019” is hereby replaced with “December 31, 2021”.
3. Hazardous Materials. The following is added as a new Section 2(e) of the Original Agreement:

(e) City shall immediately notify Grantor of any hazardous materials encountered as part of the Work. No City Party (as defined below) shall use Grantor’s Property or any portion thereof for staging, storing, stockpiling or

otherwise placing soils or hazardous materials. City shall promptly provide Grantor with copies of any manifests related to the transporting of soils or hazardous materials that travel across or over Grantor's Property. Upon at least thirty (30) days' prior notice, City shall permit Grantor and Grantor's contractors and agents (collectively, the "**Grantor Parties**") and Shell Development Company and its affiliates (collectively, "**Shell**") reasonable access over, across and under Grantor's Property for purposes of performing environmental testing and remediation, at the testing/remediating party's sole cost and expense. Grantor shall use commercially reasonable efforts to prevent Shell's access to Grantor's Property from unreasonably interfering with City's enjoyment of the Access Rights.

4. Indemnification. The following is added at the end of Section 3(a) of the Original Agreement:

Notwithstanding anything in this Agreement to the contrary, however, City shall indemnify, hold harmless and defend Grantor from and against any and all suits, damages, costs, fees, claims, demands, causes of action, losses, liabilities and expenses (including attorneys' fees and other defense costs or liabilities) (collectively, "**Claims**") with respect to any hazardous materials or hazardous materials conditions (i) on or originating from property other than Grantor's Property that affects Grantor's Property because of a City Party's (as defined below) exercise of the Access Rights or performance of the Work or (ii) on Grantor's property to the extent (A) placed on, under or about Grantor's Property or (B) exacerbated by a City Party (collectively, "**City Liabilities**"). Grantor shall not, however, hold City Parties liable for Claims related to Hazardous Materials on or about Grantor's Property related to the Access Rights other than the City Liabilities. Grantor will use commercially reasonable efforts, if negotiating an agreement with Shell related to Shell's access to the Access Areas during the term of this Agreement, to include in such agreement a requirement that Shell defend and indemnify City Parties from Claims with respect to any hazardous materials or hazardous materials conditions that affect Grantor's Property arising from the performance of environmental testing and remediation by Shell in the Access Areas during the term of this Agreement.

5. Insurance. In Section 4(f)(3) of the Agreement, "Grantor as an additional insured" is hereby replaced with "Grantor, BioMed Realty, L.P., and BioMed Realty II LP, and each of their respective lenders, affiliates, subsidiaries, directors, officers, representatives and employees as additional insureds".

6. Conditions to Exercise. Any Work performed pursuant to the Access Rights shall be performed in accordance with that certain Site Cleanup Plan, EPA Project No. BF-96921301 dated as of March 2010; those certain Remedial Specifications – South Bayfront Pedestrian Bicycle Bridge – Project No. EPW17-112, CIP Project Nos. 16475006 & 17237003 dated as of January 2019; and any other risk management plans approved or required by the San Francisco Bay Regional Water Quality Control Board. City shall give Grantor at least thirty (30) days' prior

notice of any Work that will be performed that may impact or come into contact with the water table underlying Grantor's Property.

7. Notices. Grantor's notice address shall be amended to be as follows:

<u>If to Grantor:</u>	BRE-BMR 53 rd LP 17190 Bernardo Center Drive San Diego, California 92128 Attention: Legal Department Telephone: (858) 485-9840 Email: legalreview@biomedrealty.com
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8. Counterparts. This 2nd Amendment may be executed in counterparts and, upon execution by the parties, each executed counterpart shall have the same force and effect as an original instrument and as if the parties had signed the same instrument.

9. Effect on Agreement. Except as stated herein, the Agreement shall remain unmodified and in full force and effect. Any reference to the "Agreement" in the Agreement shall hereafter be deemed to refer to the Agreement, as amended by this 2nd Amendment.

10. Signatures. A facsimile, electronic or portable document format (PDF) signature on this 2nd Amendment shall be equivalent to and have the same force and effect as an original signature.

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IN WITNESS WHEREOF, the parties hereto have executed this 2nd Amendment as of the Effective Date.

OWNER:

BRE-BMR 53rd LP,
a Delaware limited partnership


By: _____
Name: _____
Title: _____

CITY:

CITY OF EMERYVILLE,
a California municipal corporation

By: _____
Name: _____
Title: _____

Approved As To Form:

By: 
Name: Michael Guina
Title: City Attorney